BILLS OF LADING AND BANKERS DOCUMENTARY CREDITS

FOURTH EDITION

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BY

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PREFACE

When the first edition of this book was published in 1990, international trade seemed to be in a crisis, and there was a sense that things had to change. New forms of trade, and associated documentation, were being forced on the trading parties and the banks, with which the law had not developed adequately to cope. In particular, the contractual relationships with carriers, being based on law that had originated nearly 150 years earlier, were outdated and inadequate.[1]

Now we are almost 20 years on. There has, of course, been much development of the law since then, and two further revisions of the UCP, the latest just last year. From a legal viewpoint, probably the most important single change is that carriage contract issues have been largely resolved by the Carriage of Goods by Sea Act 1992. This has had a knock-on effect on the usefulness of newer forms of documentation, making it possible for waybills in particular to be used far more securely than before.

The problems are not the same now as they were in 1990. Today, it may be that the documentary credit itself is in crisis, as it seems to be declining in popularity, as against other forms of payment. This may reflect no more than that it is best suited to a particular type of market, the type of market for which it originally developed, and has not adapted well to some of the different types of market that exist today. Maybe it cannot adapt. Maybe there is also a case for saying that different forms of finance suit different types of trade, and that there is little point in using documentary credits in trades for which they are not well suited.

It is now over nine years since the third edition of this book was published in 1998. Nine years is old for a law text, and I have taken the opportunity to revise the text fairly substantially. The most important recent development of course is the new UCP (UCP 600). Though this is very much an evolution, rather than a revolution, its new approach to original documents is significant, as also is its encouragement of deferred payment credits other than by use of bills of exchange. Of course it also reflects a modern view of credits, that they should be irrevocable, and that drafts should not be drawn on the applicant for the credit. It is structured more logically than its predecessor, with less repetition and tighter drafting.

This is, however, a law book, and the principles discussed here are legal principles (mostly of the common law of England and Wales, for there is relatively little statutory intervention in bills of lading and bankers' documentary credits, and European law has, as yet, had virtually no influence). Though the UCP is of great importance to documentary credits, I have not attempted to write a handbook for the UCP, still less a line-by-line analysis. There are other publications which do this. Not every Article of

1. This is discussed in chapter 5.

the UCP is covered in the text (though the most important are, and in particular those which relate to documentation and to the main obligations of the parties). Nor do I claim any particular expertise in banking or maritime trading practice, except to the extent that this is necessarily encompassed within a study of the law.

Apart from the new UCP, there have been important legal developments since 1998, including the treatment of the straight bill of lading as a document of title in *The Rafaela S*, further elaboration of the nature of documents of title, and developments to the fraud rule (discussed in chapter 9). There have also been disappointments. Since 1998 we have had both Bolero and the eUCP, but neither has been a success. Electronic documentation has not taken off, though there are signs that single-carrier based schemes are now beginning to develop. Surely the role of electronic documentation in international trade will increase, but maybe not in documentary credits.

All publishers and authors know that successive editions of textbooks have a tendency to expand. For this edition I tried to take a lesson from UCP 600, to tighten up the work, and ruthlessly to remove material that was not strictly necessary (the last edition had, on reflection, become rather bloated). For the reasons in the last paragraph, there is far less on electronic documentation than there was in the old book. I have removed nearly all the long quotations from judgments, and placed the full text of the UCP as a whole, and some relevant statutory material, into appendices, rather than setting them out *extenso* in the text. I have also restructured the entire book. It is a book about documentary credits *and the documentation*, and I have tried not to stray too far from the main theme. Nevertheless, despite the extensive pruning, I am disappointed to discover that this edition is actually longer than the old. Perhaps it is simply the nature of law to expand.

On an issue of language, I have adopted what I perceive to be the usual practice of referring to sellers, buyers and carriers as "he" and banks as "it". Nothing should be read into this convention, any more than into the convention in French that a cat is male and a car is female. It is not even a very logical convention, but that is a criticism that can be made of the English language in general. But I see no point in bucking conventional usage, nor in resorting to the ugly and (because companies do not come in two varieties) inappropriate "he or she".

University of Plymouth,
August 2007

PAUL TODD

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CHAPTER 1

INTRODUCTION TO BILLS OF LADING AND BANKERS' DOCUMENTARY CREDITS

INTRODUCTION

1.1 The aim of this book is primarily to describe the law applicable to, and workings of bankers' documentary credits, as they are used in international sales and carriage of goods carried by sea. Particular emphasis will be placed on the role of the bill of lading, and other shipping documents, in the documentary credit.

1.2 It will become clear as this chapter progresses that without the traditional shipped bill of lading, neither international sales contracts nor the bankers' documentary credit could ever have developed into anything like their present form. Even today, the bill of lading retains a central role in both international sales and documentary credits. However, it is no longer entirely suited to many modern trading conditions, and there has been a retreat from traditional shipping documentation over the last 30 or 40 years. This retreat, the extent to which banks and trading parties have provided for replacement, and the problems of replacement documentation, are important themes in this book. It will become apparent that the present situation is not wholly satisfactory, but also that there are measures the parties can take to improve it.

1.3 This chapter will trace the development of international sales over the last two centuries or so, and explain the pivotal role played by the bill of lading. It will account the development of documentary credits, which might be seen as the logical culmination of this process. The fundamental principles of the documentary credit will be examined. The chapter will end with an account of the diminishing role of the traditional bill of lading, the problems this poses, and the challenges for the future.

DEVELOPMENT OF MODERN INTERNATIONAL SALES OF GOODS AND PROTECTION OF THE PARTIES

1.4 Two hundred years ago, international trade was utterly different from what we know today, but by the latter half of the nineteenth century it had evolved into something at least remotely like its modern form. The driving force was undoubtedly the convenience of the trading parties, but the evolution was probably slower than trading parties would have ideally liked; it required not only technological advances, and new forms of contract, but also legal changes. It also required the bill of lading to take on the pivotal role as a document of title that it retains today.

1.5 The new forms of trading brought with them increased risks to the trading parties, which were, to some extent, alleviated by the use of the bill of lading and the

new contracts. But the logical development of this process, probably early in the twentieth century, was the documentary credit that we know today. The legal framework that these provided spawned the development of more complex forms of trade, probably unforeseen when the framework was originally developed. These, as well as new technological developments, have placed great strain on the framework, and in particular on the use of the traditional bill of lading. The last 20 or 30 years have seen the development of new contracts and documentation, and changes in the legal framework. These have alleviated some, but by no means all of the problems posed.

Birth of the c.i.f. contract

1.6 At the beginning of the nineteenth century, international trade would typically have required the buyer actually to call at foreign ports, either in person or via an agent, probably chartering a vessel for the purpose.[1] Sellers would have brought their goods alongside or on board the buyer's ship and trading would have thereupon been concluded, with the buyer paying the price.[2] By contrast, at the end of the century, the c.i.f. contract was well-established. Contracts would have been made in advance, by post or telegraph. The c.i.f. seller would have arranged shipment, and paid freight and insurance, quoting a fixed price, inclusive of both.[3] He would have placed the goods on board a vessel, bound for the buyer's country of business, and there was no need for the buyer to venture from his home port.

1.7 It is obvious that the second type of trade is far more convenient, particularly for buyers, than the first. Even for sellers, the ability to contract ahead, and to take control of the shipment process, was probably an advantage; after all, it would have been the seller who would have had the local knowledge required to do this. The trading system up to the start of the nineteenth century was no doubt forced on the parties by the primitive trading conditions of the time, before the establishment of regular shipping lines, efficient telegraph and postal services, and reliable marine insurance facilities.[4] By the end of the nineteenth century, these technological and infrastructural issues had been largely resolved. Probably safer and more reliable shipping, with the gradual predominance of steam against sail, also helped.

1.8 It is also obvious, however, that the second type of trade is a very different creature from the first, posing problems which are more than simply technological and infrastructural. In the early transaction, delivery by the seller (to the buyer's ship), inspection of the goods by the buyer or his agent, and payment to the seller, would all have occurred in the seller's country of business, before the buyer's ship sailed. It was not really an international sale at all, rather a sale in the seller's country of business to

1. David M. Sassoon, *The Origin of f.o.b. and c.i.f. Terms and the Factors Influencing their Choice* [1967] J.B.L. 32; see also Sassoon, *C.i.f. and f.o.b. Contracts*, 4th ed., Sweet & Maxwell (1995), paras 431–433.

2. It is probable that free alongside ship (f.a.s.) and free on board (f.o.b.) contracts would have had their origin in this way and some facets of this early transaction remain in the modern f.o.b. contract. For example, the buyer would have been considered shipper (originally on board his own ship) and the bill of lading (receipt of the carrier) would have been issued to him, not to the seller: *Cowas-Jee* v. *Thompson* (1845) 3 Moore Ind. App. 422, 430; 18 E.R. 560, 563.

3. This is probably the defining characteristic of the c.i.f. contract, compared with a variety of the f.o.b.: *The Parchim* [1918] A.C. 157.

4. Sassoon, *The Origin of f.o.b. and c.i.f. Terms and the Factors Influencing their Choice* [1967] J.B.L. 32. Even quite early in the nineteenth century, traders were attempting to move towards the more modern type of transaction if they could, for example in *Dunlop* v. *Lambert* below, para. 1.17ff., where the voyage was short, and communication problems presumably easier.

the buyer's premises, albeit that these premises were a "floating warehouse".[5] No doubt the seller should be very careful to secure payment prior to the ship's sailing,[6] but in general, this type of sale posed no particular legal or security issues. The buyer would have been entirely responsible for the sea transit, would have arranged his own insurance, and if the vessel were chartered, would have had recourse against the shipowner in the event of loss caused by any breaches of the charterparty. Again, no particular legal problems would have been posed.

1.9 By contrast, the later transaction poses problems both of security and legal infrastructure, which had (in addition to the technical problems) to be resolved before the c.i.f. contract could enjoy general use. Most obviously, the seller can no longer ensure payment before the ship and goods sail. If the buyer does not pay, the seller cannot easily get the goods back, and is faced (at best) with the uncertain prospect of suing in a foreign jurisdiction (not something to be relished, even today). Moreover, though the seller is assumed to have taken care to choose an honest buyer,[7] he may know nothing of his solvency, especially given that the parties are trading in different jurisdictions. From the buyer's viewpoint, he is no longer present, either personally or through an agent, at the point of delivery of the goods, and cannot inspect the goods before they sail. Essentially similar difficulties, the prospect of suing a seller of uncertain solvency in a foreign jurisdiction, would make buyers most reluctant to pay for the goods prior to shipment,[8] quite apart from the liquidity issues of so doing.

Role of the bill of lading

1.10 Even well before the nineteenth century, ships' masters issued bills of lading for goods loaded on board. They constituted a receipt for the goods, and contained statements as to their description and apparent order and condition. Later they were made negotiable, for example by being issued to seller's order, or to bearer,[9] and it came to be recognised, by custom of merchants, that transfer of a negotiable bill of lading could operate as a symbolic transfer of the goods themselves (i.e. that it is a document of title). In *Lickbarrow* v. *Mason* the courts recognised that transfer of the shipped bill of lading could transfer the property in the goods.[10] If the goods were sold, the current holder of the bill of lading could, by producing it, prove his title to the goods, and the shipowner who delivered only against production of an original bill could be assured that he was delivering to the right person. Conversely, the shipowner

5. See, e.g., comments in *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632, 106 E.R. 1321.

6. This clearly was a problem. In *Cowas-Jee* v. *Thompson*, note 2 above, mate's receipts were issued to, and retained by the sellers, and in *Ruck* v. *Hatfield* (1822) 5 B. & Ald. 632, 106 E.R. 1321 and *Craven* v. *Ryder* (1816) Taunt. 433, 128 E.R. 1103, transferred to the buyers against payment, the idea being that the buyers could only obtain bills of lading by exchanging the mate's receipts for them. *Cowas-Jee* showed that the device did not generally work, since the shipowner was normally entitled, and indeed obliged, to issue bills of lading to the buyer as shipper, to whom property had passed on shipment. On mate's receipts generally see para. 3.65ff.

7. *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327.

8. Interesting, the manner in which Internet sales are usually conducted, which pose similar problems of security, and additionally a significant fraud risk. Consumer protection legislation often places the ultimate risks in Internet sales on credit card providers.

9. See further para. 3.17ff.

10. See para. 6.3ff., at any rate if (as was almost always the case at that time) the bill of lading was made negotiable.

who delivered without production had no such assurance, and risked an action in conversion from the true owner.[11]

1.11 As we shall see in chapter 6, property in the goods does not always pass on transfer of the bill of lading. By the end of the nineteenth century, however, the courts had recognised that a shipowner who delivered against its production would normally be protected from an action, even if property were actually vested elsewhere.[12] Though the courts came to accept that the bill of lading could be treated as the symbol of the goods,[13] it was never clearly established, at common law, that a shipowner who delivered without production would be liable, without more, to the holder of a bill of lading who did not also have property in the goods.[14] However, it was (and remains) an implied term of the carriage contract that the shipowner will deliver only against production of an original bill,[15] and bill of lading holders usually could (and can) sue shipowners in contract.[16] As a result of these legal developments, whereas a shipowner who delivered against production of an original bill of lading would usually be protected from action, to deliver without production would be to risk action from the holder of the bill of lading, for the full value of the goods. That remains the position today.

1.12 It follows, therefore, that a seller who, even after delivering the goods to the vessel, retained the bill of lading, transferring it only against payment, could protect himself to some extent against non-payment, since the buyer would need to obtain the bill of lading to obtain the goods from the vessel. Today, the mechanics of this transfer might be carried out by a collection arrangement arranged through the seller's bank, either via its overseas branch or through a correspondent bank in the buyer's country of business. The buyer will be able to obtain the bill of lading only against payment, or acceptance of a bill of exchange.[17] It may be that in the nineteenth century the exchange of documents against payment might have been more risky, since unless the seller or his agent can accompany the bill of lading, he as surely loses control of the bill of lading by indorsing it and posting it to the overseas buyer, as he loses control of the goods themselves by shipping them. What is to prevent the buyer from taking the bill of lading without paying for the goods? We will see in chapter 6 that dealings with the bill of lading can, even in this situation, protect the seller against the bankruptcy of a buyer who is honest,[18] but that mercantile practices revolving around the use of bills of lading do not protect the parties against the fraud of those with whom they deal. The parties are expected to look to their own expertise to guard against dealing with fraudsters.

1.13 The bill of lading also contains a description of the goods, statements by the ship's master that they have been loaded on board the vessel, and as to their apparent

11. The basis of liability is considered further in chapter 7.

12. *Glyn Mills Currie & Co.* v. *East and West India Dock Co.* (1882) 7 App. Cas. 591, discussed in para. 7.26ff.

13. *Sanders* v. *Maclean*, note 7 above.

14. This somewhat academic issue is further considered in paras 7.43 and 7.72ff.

15. *Kuwait Petroleum Corp.* v. *I & D Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep. 541. See further para. 7.26ff.

16. See next section; also para. 7.14ff.

17. Details of collection arrangements are beyond the scope of this book, by see, e.g., *Schmitthoff's Export Trade*, 10th ed., Stevens, 2000, ch. 10. See also *Uniform Rules for Collections* (1995 Revision), ICC Publication No. 522. On bills of exchange, see further para. 2.4ff.

18. Para. 6.86ff.

order and condition.[19] These statements are disinterested, but in any case the law developed principles of liability in the event that they were incorrect, and relied upon by a buyer to his detriment, by taking up the bill and paying for the goods.[20] It followed that a buyer, who paid against tender by the seller of a bill of lading, obtained some assurance that the seller had shipped goods conforming to the contractual description.

1.14 The c.i.f. contract, and some other forms of modern international sales contract, combine physical delivery of goods to the vessel with constructive delivery, by tender of documents, against which payment is to be made. Obviously, this assumes that the documents can be sent faster than the goods themselves. Though this was usually true in the later part of the nineteenth century, once efficient postal systems had developed, it is sadly no longer always true today. This is the main reason why, in some trades, the bill of lading no longer retains the role that it enjoyed a century or so ago.[21]

Contractual issues

1.15 Under the early type of transaction, the buyer would have been entirely responsible for carriage of the goods (either on board his own ship, or a vessel chartered by him). The buyer would have been the shipper of the goods, and if a bill of lading were issued, it would have been issued to him, not to the seller; in the early case of *Cowas-Jee* v. *Thompson*, Lord Brougham observed that[22]:

> "It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London, 'free on board,' the cost of shipping then falls on the seller, but the buyer is considered as shipper."

1.16 Delivery was to the ship, and risk and property would typically pass on shipment.[23]

1.17 The later type of transaction is very different, especially if, as with a c.i.f. contract, the seller makes the contract of carriage in his own name. The delivery point remains the ship, however, and risk of loss or damage to the goods passes to the buyer on shipment. The issue, then, which had to be resolved before the c.i.f. contract could come into common usage, is to the carrier's liability if loss occurs due to a breach by him of the carriage contract. The seller, as shipper, could sue, but at least until the House of Lords decision in *Dunlop* v. *Lambert*,[24] it was by no means clear that he would have been able to recover only nominal damages, property and risk having passed to

19. The master cannot state that the goods were loaded in *actual* good order and condition, since he cannot know what is hidden from him, and he is not assumed to have any expertise in the quality of the merchandise: *Cox* v. *Bruce* (1886) 18 Q.B.D. 147. The best assurance he can give is that they were shipped in apparent good order and condition. In modern sales, a quality certificate on loading is also often required, providing additional assurance.

20. See, further, para. 5.69ff. The shipowner should ideally be liable for false statements made in the bill, relied upon by the buyer who takes it up. This aspect of the law is not entirely satisfactory, but liability will attach in most situations.

21. See para. 1.109ff., and further consideration in chapters 3 and 8.

22. Above, note 2.

23. Comments in *Ruck* v. *Hatfield*, note 5 above, suggest that in f.o.b. sales the ship was considered to be the warehouse of the buyer, the contract providing for delivery thereto.

24. (1839) 6 Cl. & Fin. 600, (1839) 7 E.R. 824. This was not truly an international sale, the voyage being from Leith (Scotland) to Newcastle (England); presumably, communication between these ports was good enough for it to be practicable to entrust shipping arrangements, including making the carriage contract, to the seller.

the buyer. This problem was probably resolved in *Dunlop* v. *Lambert*, where substantial damages were recovered. Though the *ratio* of the case was actually far from clear,[25] it was later treated as authority for the broad proposition that the consignor (or shipper) could recover substantial damages against the shipowner on the carriage contract between them although, if the goods were no longer his property or at his risk, he would be accountable to their true owner for the proceeds of his judgment.[26]

1.18 Whatever the *ratio* of *Dunlop* v. *Lambert*, it would usually be the buyer, not the seller, who had an interest in suing, and it is clearly much more satisfactory to allow him to sue in his own name than to rely on action being taken by a seller in a foreign jurisdiction. But the buyer has no contract with the carrier, and a much more important (and inconvenient) decision was that of *Thompson* v. *Dominy*,[27] where the Exchequer Division refused to allow the buyer to sue at all, the contract of carriage having been made by the seller. It was only after this case was overturned by the Bills of Lading Act 1855, s. 1, that contracts could develop with the seller as principal.[28] It is not surprising, therefore, that there are no reported cases on c.i.f. contracts until after 1855.[29]

1.19 In the event of the goods being lost or damaged at sea, equally important as the carriage contract was the contract of marine insurance. Again, it is clearly desirable that buyers can claim on the policy in their own name, rather than having to rely on the good nature of overseas sellers. The necessary reforms were accomplished by the Policies of Marine Insurance Act 1868, which entitled assignees to sue in their own name, later consolidated into the Marine Insurance Act 1906, s. 50. It is important to appreciate that without the resolution of these contractual issues, modern forms of international trade transaction could not easily have developed, whatever technological advances had occurred.

The c.i.f. and other modern international sales contracts

1.20 The c.i.f. contract that had come to predominate by the end of the nineteenth century was much more convenient, especially for buyers, than the earlier type of transaction. Under the modern c.i.f. contract, there is no need for the buyer, or his

25. See, e.g., Cashmore, *Parties to a Contract of Carriage*, Lloyd's of London Press (1990), pp. 66–69.

26. The past tense is used because the case was distinguished in *The Albazero* [1977] A.C. 774, where all relevant authorities are also cited, as being inapplicable in most of the situations considered in this book. On title to sue generally, see chapter 5.

27. (1845) 14 M. & W. 403. This was at the time when the courts were developing the privity of contract doctrine, one aspect of which is that only parties to a contract can generally sue on it. See further para. 5.10ff.

28. See now the Carriage of Goods by Sea Act 1992, considered in detail in chapter 5. In *The Albazero* [1977] A.C. 774, Roskill L.J. noted that:

> "[The] limitation on the rights of suit of the consignee or indorsee before 1855 obstructed the development of the c.i.f. contract since its purpose in anything like its modern form could not be achieved so long as the c.i.f. seller could not effectively transfer to the c.i.f. buyer 'all rights created by the contract of carriage between the shipper and the shipowner'." (The quotation was from the judgment of Bowen L.J. in *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327, at 341.)

29. *Tregelles* v. *Sewell* (1862) 7 H. & N. 574, 158 E.R. 600 is cited by Sassoon, above, note 1, at 34, as the first reported c.i.f. case, or as it was called at the time cost, freight and insurance. The case is an early authority for the now well-established proposition that under a c.i.f. contract the seller needs to do more than deliver the goods to the vessel, and that from then onwards they are at the risk of the purchaser (see further below, para. 1.20ff.). Sassoon also explains, *ibid.*, that there were a number of reasons why the older form of f.o.b. contract survived, and indeed still survives, although a far greater proportion of the world's tonnage is today carried c.i.f.

agent, to be physically present at the delivery point, and the seller is required to make all the arrangements for carriage, and the seller is shipper. Moreover, the price is fixed, inclusive of freight and insurance to the destination. Effectively, therefore, the buyer pays a price covering costs up to discharge from the ship, in his own country of business.

1.21 Nevertheless, the c.i.f. contract should be seen as a development away from the earlier type, and much of its original heritage remains. Delivery is still to the ship. The idea, in early international sales, of the ship as the buyer's floating warehouse implied that the risk of loss ought to pass when delivery was made to it, and risk continues to pass on shipment in c.i.f. contracts, even though the seller had contracted to pay the cost of carriage to the destination.[30] As far as the goods are concerned, therefore, the seller's obligations generally end on shipment. By contrast, under the *ex ship* contract, which seems to have developed entirely independently, the seller undertakes to ensure that the goods arrive at their destination.[31] For the majority of the world's tonnage, however, the c.i.f. contract has proved to be far more popular than the *ex ship*.

1.22 Under the c.i.f. contract, then, the seller's obligations remain to deliver the goods on board a ship in his own country of business. He is responsible for arranging shipment, and also making a contract of carriage. Physical delivery of the goods is to the ship, at which point the risk of loss or damage passes to the buyer, but the seller is also required to tender shipping documents to the buyer, against which payment is made. This is the constructive delivery of the goods,[32] transferring to the buyer the right to collect them from the vessel on discharge, and also in general rights under the carriage and insurance contracts.[33] There is scope to stipulate the shipping documents in the sale contract, but in the absence of express stipulation the common law requires a clean, shipped bill of lading, an assignable policy of insurance, and an invoice for the price.[34]

1.23 For reasons that will become clearer later, today a far greater proportion of the world's tonnage is shipped c.i.f. than *ex ship*. In the last half of the nineteenth century the c.i.f. contract also eclipsed the f.o.b., since it was usually so much better suited to modern trading conditions, and today the overwhelming majority of tonnage is shipped c.i.f. However, the f.o.b. contract has also developed since the early nineteenth century, primarily by evolving varieties where the seller contracts with the

30. *Tregelles* v. *Sewell*, note 29 above, where risk (c.i.f.) passed on shipment, and the buyer could therefore be required to pay as long only as the goods were shipped. The doctrine was later extended to allow a c.i.f. seller even to appropriate to the contract goods which had been lost by the time of appropriation: *C. Groom Ltd.* v. *Barber* [1915] 1 K.B. 316. Property also originally was probably presumed to pass on shipment, but it is now clear that it can (and normally does) pass later: see para. 6.50ff.

31. *Comptoir D'Achat et de Vente du Boerenbond Belge SA* v. *Luis de Ridder, Limitada (The Julia)* [1949] A.C. 293.

32. On the distinct obligations to make physical and constructive delivery, see *Johnson* v. *Taylor Brothers & Co. Ltd.* [1920] A.C. 144, *Kwei Tek Chao (t/a Zung Fu Co.)* v. *British Traders & Shippers Ltd.* [1954] 2 Q.B. 459, [1954] 1 Lloyd's Rep. 16, and *Eddie* v. *Alpa Srl* [2000] S.L.T. 1062.

33. See chapter 5.

34. *Ireland* v. *Livingstone* (1872) L.R. 5 H.L. 395. Detailed documentary requirements are discussed in para. 4.68ff. Note that the insurance policy also protects the seller, in the event that the buyer does not take up the documents; it is for this reason that under the c. & f. contract, the buyer is under an obligation to take out insurance, the seller not merely being relieved from that obligation: e.g., *Reinhart Co.* v. *Joshua Hoyle & Sons* [1961] 1 Lloyd's Rep. 346 (C.A.).

carrier as principal, and obtains a bill of lading in his own name.[35] These contracts are similar in many respects to c.i.f., and the shipping documents take on a similar role. However, in all f.o.b. contracts, even where the seller pays the freight and insurance as principal, the amount is for buyer's account, so that the f.o.b. cost is not a fixed cost, inclusive of transit to the port of discharge. Under the c.i.f. contract, by contrast, the freight and insurance is actually included in the price. An all-inclusive cost can be quoted, which was (from the buyer's viewpoint) one of the main advantages of the c.i.f. contract.[36]

1.24 No doubt the flexibility of the modern f.o.b. contract accounts in part for its continued use.[37] Varieties where the buyer remains shipper are particularly useful in the bulk oil trade, where it is common for the buyer to charter a vessel for the cargo.[38] Where shipping space is short (as occurred after both World Wars), sellers may be reluctant to undertake to arrange carriage, in which case f.o.b. again retains a role. Also, since f.o.b. prices are generally cheaper than c.i.f., foreign currency restrictions can compel importers to use f.o.b. contracts, especially if carriage and insurance can be arranged through nationals of the importer's country, and paid for in his own currency.

Re-sales and pledges

1.25 Once the legal and technological structure was in place for the bill of lading to be used as a symbol for the goods, and on the assumption that it could be sent and negotiated more quickly than the goods themselves, there was no reason why it could not be pledged, for example to a bank. The bank thereby obtains the rights of a bill of lading holder,[39] and the bill of lading effectively secures the loan. The pledge of documents remains the basis of the modern documentary credit.

1.26 There was also no reason why the same document could not be used to effect a re-sale. As will appear below,[40] re-sales, indeed often multiple re-sales are common today in both bulk dry cargo and bulk oil sales, though they remain uncommon for manufactured goods, and particularly goods which are shipped in containers. Two features of the c.i.f. contract in particular made it particularly suitable for re-sales.

35. For a (rather over-simplified) description of the varieties of modern f.o.b. contract, see Devlin J.'s judgment in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, at 424, where he distinguishes three categories: the classic type, where the buyer nominates the vessel but the seller is shipper, the additional duties variety, where the seller also pays freight and insurance, for buyer's account, and the third variety, where the buyer is shipper.

The seller certainly contracted as principal, rather than merely as buyer's agent, in *Wimble, Sons* v. *Rosenburg & Sons* [1913] 3 K.B. 743, *The El Amria and El Minia* [1982] 2 Lloyd's Rep. 28 (where the buyer cannot have contracted as principal), and *Carlos Federspiel & Co., SA* v. *Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240 (where the seller actually undertook to contract as principal).

36. Indeed, though other views have been expressed, I would suggest that the difference between the f.o.b. and the c.i.f. contract comes down to whether the freight is included in the price or not. If so, it is c.i.f. If not, it is f.o.b. (for although with the additional duties variant the seller may pay the freight and insurance, it is for buyer's account). See *The Parchim*, note 3 above.

It is also possible to contract c.i.f. afloat, whereas this does not seem to be the case f.o.b.

37. Sassoon, note 1 above, at note 17.

38. It seems to be quite common for the initial sale to be f.o.b., and re-sales to be c.i.f., as in *The Albazero* [1977] A.C. 774. See also *Trafigura* v. *MSC* [2007] E.W.C.A. 794, in chapter 7 and also para. 1.109ff., below, and *Kwei Tek Chao* v. *British Traders and Shippers*, above, note 32.

39. Although, as will become clear in chapter 5, it is only relatively recently that the law has given adequate protection in this regard.

40. Para. 1.109ff.

First, and this probably explains, at least in part, its popularity over the ex ship contract, risk passes on shipment.[41] Because the buyer is required to take up the documents and pay for the goods, whatever their condition at the time of tender, there is no need to inspect the goods before taking up the documents (difficult even with today's communications, if they are at sea). The buyer in a chain takes no risk by accepting conforming documents, since he also knows that they must be accepted by the sub-buyer. The ultimate buyer is protected by the insurance policy and contract of carriage, the benefit of both of which will have been transferred to him.

1.27 Secondly, it is possible for a c.i.f. seller to tender documents for goods already afloat,[42] taking a transfer of the carriage contract (from a previous seller) rather than arranging it himself. Risk then passes retrospectively, as from shipment. This is probably another difference between the c.i.f. and any variety of f.o.b. contract.

1.28 The existence of multiple re-sales has had a significant effect on the development of documentary credits, because of the recognition that the same documents will necessarily be used in back-to-back transactions. It has also influenced development of the law, regarding both sale contracts and documentary credits.

DOCUMENTARY CREDITS

Introduction

1.29 The use of the bill of lading as a document of title, and for its evidential value that contractual goods had been shipped, made possible the development of c.i.f. and other modern international sale contracts. Without more, however, the system of trading so far described protects the parties only to a limited extent. This was greatly improved by the later development of the bankers' documentary credit.

1.30 Even before the modern commercial credit was developed, the ability to retain the bill of lading gave the seller some protection against non-payment by the buyer. However, it is surely unlikely that he will wish to use it to retain property and claim the goods himself, especially as they will be in a foreign country, once the ship has arrived. He is more likely to wish to use the bill of lading to re-sell. This is fine as long as the market, for goods of that description in the country of discharge,[43] remains buoyant, the problem, for example, being simply the buyer's inability to pay. It is a very different situation on a falling market. If the buyer claims (as he will be tempted to do) real or imaginary defects in the documentation to avoid taking them up, and paying for the goods, the seller may be faced with precisely the problem that the bill of lading can be used to avoid, that of suing in a foreign jurisdiction to protect his entitlement to the contract price. If it becomes clear that the buyer cannot or will not pay, the seller, being forced to re-sell on a falling market, will be unable to obtain the originally agreed contract price. Ideally, then, he needs to be assured of payment, preferably in his own country, by a "reliable and solvent paymaster".[44] It is also important that the payment

41. The use of the c.i.f. contract for multiple sales was a major justification for the decision in *C. Groom Ltd.* v. *Barber* [1915] 1 K.B. 316, above, note 30.

42. UCP 600, Art. 14(i) allows for a document to be issued prior to the issuance date of the credit. This would be necessary to cater for a bill of lading issued on shipment, especially if the sale contract was entered into later.

43. There could be problems with very particular goods, for example a part for a power station, for which there would probably be no ready alternative market. Perishable goods could also be problematic.

44. See further para. 4.44ff.

obligation does not depend on the whim of the buyer, or on real or imagined disputes under the sale contract.

1.31 Under a c.i.f. contract the buyer is typically required to pay against tender of documents, and indeed, the seller's security depends upon this. The time of tender is not normally fixed, the seller being required to do no more than tender within a reasonable time of shipment.[45] This requires the buyer to retain in hand, for an uncertain time of payment, cash which otherwise could obviously be used elsewhere in his business. Once the bill of lading has been obtained it can be pledged, but upfront payment is needed to obtain the bill of lading in the first place. A seller who is protected against the buyer's bankruptcy, by retention of the property in the goods, might be prepared to extend him credit,[46] but that would create cashflow problems for him. Ideally the buyer would like to be able to pledge or re-sell the goods, using the proceeds to reimburse the seller, but the property necessarily retained by the seller as his own security prevents him from doing this. There is therefore some point at which the buyer simply has to find cash.

1.32 The interests of sellers and buyers can only be reconciled by the intervention of a third party, which is usually, but not necessarily, a bank. The bank undertakes its own obligation to pay the seller, that obligation being entirely independent of the buyer's obligation to pay under the sale contract, and irrespective of any real or imagined disputes under that contract. Theoretically the buyer could put the bank in funds in advance, but in modern documentary credits the bank claims later reimbursement from the buyer; indeed, it may even allow payment to be deferred until the buyer has himself re-sold, and been paid for the goods. In a modern irrevocable documentary credit, the bank also takes the risk of the buyer's insolvency, otherwise a major worry for sellers. The intervention of the third party thus resolves many of the worries necessarily experienced by sellers dispatching (and losing control of) expensive cargo bound for foreign parts, before being paid, while at the same time financing the transaction, and resolving buyers' cashflow difficulties.

1.33 The modern form of documentary credit does not seem to have developed until about 50 years after the c.i.f. contract, perhaps because of the unwillingness of banks to undertake direct obligations to an unknown foreign seller, perhaps because of the unwillingness of buyers to lose control over the payment process. In *Re Agra and Masterman's Bank* in 1867,[47] for example, a bank was willing to write what it described as a "letter of credit", authorising its customer to draw bills of exchange drawn on it, up to a limited amount, and undertaking to honour them on presentation. No doubt the bank was aware that the bills of exchange would be negotiated, and the "letter of credit" shown to third parties to obtain an advance of money, or in principle at least, as a guarantee of payment for goods purchased,[48] thereby resolving its customer's cashflow problems. However, it undertook no direct obligation, to anyone other than its own customer, to honour the bills on presentation.[49] If its customer's financial

45. *Sanders* v. *Maclean*, above, note 7. See further chapter 7.

46. For example, above, note 16, and by the documentary bill described in para. 6.86ff. See also, e.g., the credit in *Morgan* v. *Larivière* (1875) L.R. 7 H.L. 423, where the seller had to wait until the goods were delivered before being paid.

47. (1867) L.R. 2 Q.B. 391.

48. The case itself concerned the first not the second situation.

49. In the event the Court of Appeal held that a third party, who had seen the letter, and in whose favour the bill of exchange had been negotiated, had a cause of action against the bank, but whatever the legal basis of this decision, it was certainly not a direct undertaking.

position worsened, it could probably reconsider the obligation made to it, whereas that would be impossible in the case of a direct undertaking (especially if irrevocable) in favour of a third party. The bank is risking far more in the latter case than the former.

1.34 Eight years later, in *Morgan* v. *Larivière*,[50] the bank was prepared to accept an undertaking directly to a seller, but payment was triggered only by receipt of certificates of reception from the buyers. Thus the buyer could effectively control the payment process, and indeed in the case itself, there was a dispute under the sale contract about whether the goods had been delivered in time. Other early developments were the revocable credit, where though the bank gave an undertaking directly to the seller, because it was revocable it was of no value,[51] and the negotiation credit, where the bank undertook to negotiate bills of exchange drawn on the buyer. Unless it was prepared to negotiate without recourse, such a credit gave the seller no protection against the insolvency of the buyer, after the credit had been negotiated, but before the bank was reimbursed.

1.35 None of these credits was satisfactory from the seller's viewpoint. He needs a direct and irrevocable undertaking from a reputable paymaster. The obligation to pay must not be dependent on the wishes or the solvency of the buyer, and it needs to be legally enforceable against the bank.[52] The bank, in short, is being asked to insure against the whims and insolvency of its customer, the buyer.[53] It is easy to see why banks were initially reluctant to do this, and why it took so long for the true commercial credit to develop. However, the bill of lading, whose role was so important in the development of the c.i.f. contract, also provides protection for the bank. The bank pays the seller only against tender of the bill of lading, and assignable marine insurance policy, to it, and the bank can retain these documents as security for its own reimbursement. The bank, as holder of the bill of lading, has constructive possession of, and also possibly property in the cargo.[54] This provides protection in the event of the buyer's insolvency before the bank is reimbursed; the documentary credit can ensure that the bank is a secured creditor.

1.36 The requirement that the bank pay only against tender of shipping documents also provides the buyer with protection against the default of the seller. At any rate in the absence of fraud, against which as we have seen mercantile usages are assumed to provide no protection, it should not be possible for the seller to obtain and tender a clean shipped bill of lading, without shipping goods that conform to the terms of the sale contract.[55]

50. Above, note 46.
51. See para. 2.24ff.
52. See para. 1.67ff. One of the main difficulties of the earliest forms of credit was the lack of a clear legal basis for the relationship between the seller and the bank. The modern form of credit is somewhat different, and the correct analysis of this relationship is now clear, although by no means entirely without problems. See further para. 1.67ff.
53. It will be protected against other non-payment by legal action, as long as the buyer remains solvent.
54. The property issues, which are quite complicated, form the subject matter of chapter 6.
55. This was one of the problems with the early form of negotiation credit, where the buyer would draw bills of exchange on his bank, and send these bills to the seller to guarantee payment. If the bank was prepared to advance credit to the buyer, then there would be no cashflow difficulty, but what was to stop a seller in breach of contract from claiming payment? Note that under section 3 of the Bills of Exchange Act 1882, bills of exchange cannot be made conditional, so that there is no way to prevent a defaulting seller from claiming payment. On bills of exchange see further para. 2.4ff.

The irrevocable documentary credit

1.37 The irrevocable documentary credit provides the seller with an undertaking from a reliable and solvent paymaster, "a bargain between the banker and the vendor of goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not".[56] The bank takes the risk of the buyer's insolvency, but the risks to the bank are reduced by the requirement that the shipping documents are tendered to the bank, and can be retained by the bank as security for its reimbursement.

1.38 The underlying basis of any documentary credit is the sale contract. There will be a term in the sale contract that payment is to be by irrevocable documentary credit, and the identity of the issuing bank may also be stipulated in the sale contract. The buyer is required to instruct the bank which is to issue the credit to open a credit in the seller's favour.[57] It is important, in terms of analysing the legal relationships between the parties, that the issuing bank acts as agent for the buyer, not the seller, and that the terms of the credit are as specified by him (the buyer). If the bank has already been put in funds, or (as is more likely) is sufficiently satisfied as to the credit-worthiness of its customer (the buyer, and applicant for the credit), it will notify the beneficiary (seller) that it has opened an irrevocable credit in his favour, and advise him of the terms of the credit (e.g., time limit for presentation, documents to be tendered, etc.).

1.39 Under an irrevocable documentary credit the bank makes an express undertaking directly to the beneficiary, that it will pay the price as he tenders to the bank the shipping documents stipulated in the credit.[58] The undertaking is legally enforceable, and contractual in nature,[59] the contract between bank and beneficiary depending on the terms of the credit as notified, and not on sale contract terms.[60] There will also be a contract between the bank and the applicant for the credit (the buyer), setting out the bank's mandate, and also providing for reimbursement.

1.40 From the viewpoint of the beneficiary, he can arrange shipment in the confidence that the bank is guaranteeing payment for the goods, come what may, against tender of the shipping documents. Payment does not depend on the acceptance of the documents or the goods by the buyer,[61] nor on the continued solvency of the buyer. The seller ships the goods and thereby obtains the shipping documents, which he forwards to the bank against payment.[62] In place of a buyer whose financial standing may be unknown, the seller knows that he can look to a reputable bank for payment, "a reliable and solvent paymaster". The bank thus takes over the risk of the buyer's insolvency, and takes upon itself the problem of eventual recovery of the money from the buyer (its customer).

56. *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2 Q.B. 127, 129.

57. Terminologically, the buyer is the applicant for the credit, the bank which is to issue the credit is the issuing bank, and the seller is the beneficiary under the credit.

58. In the traditional form of documentary credit, the shipping documents will be a shipped bill of lading, certificate of insurance for the goods, and commercial invoice. For variations, see chapters 3 and 8. Early letters of credit were conceptually very different: see above, para. 1.29ff.

59. See further below, para. 1.67ff.

60. Though the buyer will be required, under the sale contract, to ensure that the terms of the credit are consistent with sale contract terms: see further para. 4.5ff.

61. See further the discussion of the bank's duty to accept and pay against tender of documents, including the extent to which communications are permissible with the buyer, in para. 9.23ff.

62. Payment need not be immediate, provision sometimes being made for deferral. See the discussion of methods of payment in para. 2.2ff.

1.41 The beneficiary's security is further strengthened in that the opening of the credit is normally a condition precedent to his performance under the sale contract.[63] Only once he has been notified of the opening of the credit is he required to make arrangements to ship the goods, to procure the necessary bills of lading, or indeed to do anything at all.

1.42 The bank's security is that the shipping documents are tendered to it, and are only released to the buyer against either payment, or (more usually) some alternative form of security.[64] As we have seen, possession by the bank of the bill of lading, as a document of title, gives it the right to demand the goods on discharge in the event of the buyer's failure to reimburse. Moreover, if the buyer goes into liquidation before reimbursement is made, the bank may be able to claim the goods in preference to the general creditors by virtue of obtaining a special property as pledgee.[65] This depends on a document of title being specified, however, rather than some other form of documentation.

Cashflow considerations: credit offers mutual benefits to both parties

1.43 Because payment is guaranteed by a reliable paymaster the seller may accept deferral of payment, since he may be able to use the guarantee itself, as security for an advance from his own bank to cover the costs up to shipment, and indeed beyond.[66] This is not ideal because any loan will be unsecured on the goods. If the seller is not prepared to accept a deferred payment, the bank as a secured creditor will usually be prepared to finance the transaction by making payment to the seller before claiming reimbursement from the buyer. Thus the problems of the buyer needing cash in hand at an uncertain time, to pay against tender of documents, are resolved. It may be objected that the problem is simply postponed, since the buyer must eventually secure the bills to re-sell or otherwise deal with the goods, whereas the bank's security lies in their retention. Unlike sellers, however, banks are familiar with the financial standing of their customers, and will often release the bill of lading for this purpose, relying on alternative security to secure their reimbursement.[67]

1.44 In principle, therefore, a documentary credit can be used to finance the entire transaction from the buyer's viewpoint, resolving his cashflow problems entirely. Furthermore, sellers can use the credit as security to raise further capital, which may be required to ship or manufacture the goods in the first place.

1.45 The advantages of documentary credits to the seller have already been explained, but the advantages of documentary credits are mutual, since the buyer can use the credit to raise funds. One consequence of this mutuality is that it is not generally open to either party unilaterally to withdraw from the credit.[68] Were the

63. See further the discussion in para. 4.11ff. In addition, of course, a failure to ensure the opening of the credit will put the buyer in breach of the sale contract.

64. See in particular the discussion of trusts receipts in para. 6.39ff.

65. Again, because the bill of lading is a document of title, its tender to the bank may also operate to transfer special property as pledgee. This will not always be the case, however: see further, the discussion of passing of property in para. 6.14ff. On the relevance of the distinction between special and general property, at any rate prior to 1992, see further para. 6.14ff.

66. This indeed appears to have been the only reason why the seller required a documentary credit (in spite of the additional expense) in *Maran Road Saw Mill* v. *Austin Taylor & Co. Ltd.* [1975] 1 Lloyd's Rep. 156, 157 (col. 2): see further para. 2.37ff.

67. See further the discussion in paras 2.93ff. and 6.39ff.

68. See further the discussion in para. 4.46ff.

credit to be regarded as being solely for the benefit of the seller, he would be able unilaterally to short-circuit the credit, and demand payment directly from the buyer.

Addition of confirming bank

1.46 Although the beneficiary under an irrevocable credit is protected against the buyer's insolvency (or other default), as long as only one bank (the issuing bank) is involved, acting as agent of the buyer and typically situated in the buyer's country of business, the seller can still be faced with the possibility of having to settle disputes in a foreign country should any problem arise (for example, as to whether the documents conform to the terms of the credit).[69] So he may still be faced with the daunting prospect of litigating abroad, or at best entering a lengthy process of negotiations with a bank in a foreign jurisdiction. Quite apart from the uncertainties of litigating abroad, the expense in terms of witnesses etc, can be considerable.

1.47 It is common for there to be a second, correspondent bank in the seller's country of business, which might advise or negotiate the credit. While this no doubt provides a valuable service, unless the credit is confirmed, it will still be for the issuing bank to determine ultimately whether to accept the documents, in which case the seller's only recourse remains against the issuing bank.[70] It is therefore common to stipulate the irrevocable credit should also be confirmed by a bank in the seller's country of business, in which case the confirming bank adds its own, additional and independent undertaking to that of the issuing bank. This creates a separate and additional contract between the confirming bank and beneficiary, giving the seller recourse directly against a bank in his own country, in the event of any issue arising. The documents are tendered to the confirming bank, and it is the confirming bank which undertakes the responsibility of paying the seller. The undertaking of the confirming bank is enforceable independently of the position taken by the issuing bank, so that the confirming bank's obligation to pay does not, for example, depend on whether it can obtain reimbursement from the issuing bank. If the issuing bank defaults, the confirming bank can sue it, but cannot sue the seller for return of the money paid.[71] If the issuing bank goes into liquidation before reimbursing the issuing bank, again the confirming bank has no recourse against the seller.

1.48 The advantages to the seller are therefore that not only is he protected against the insolvency of the buyer, but also against the prospect of having to settle disputes with a foreign bank in a foreign country, with all the attendant expense and inconvenience. Any disputes now are likely to arise in the seller's own jurisdiction, and the likelihood of being faced with litigation abroad is significantly reduced. He is also protected against the insolvency of the issuing bank, but this is less likely to be a major consideration. Confirmed credits are sometimes used as a matter of course, but an additional commission will now be involved. If the issuing bank is itself reputable and reliable, and unlikely therefore to default, sellers may well be paying for a security they do not really need.

69. Such disputes are by no means rare. The evidence in *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443 (on which see further para. 9.23ff.) was that discrepancies are found in nearly half of all credits.

70. See further para. 2.36ff.

71. See further the discussion of the nature of irrevocable credits in para. 2.24ff.

Multiple sales

1.49 While an international sale may involve only a single seller and single buyer, it is very common, particularly with bulk liquid and dry cargoes, for the goods to be re-sold afloat, often many times before they arrive at their destination.[72] Furthermore, each re-sale may itself be financed by documentary credit. A logical extension of this is the back-to-back credit described in the next chapter.

1.50 While in terms of legal analysis each sale, with its associated documentary credits, creates its own legal relationships, independently of the sales on either side, the courts recognise that each sale is often part of a larger transaction, and this realisation has informed the development of the law.[73] Furthermore, any delays in processing documentation will have more serious repercussions where there are multiple re-sales, in particular if (as is common for bulk oil cargoes) they prevent the bill of lading reaching the ultimate receiver before the cargo itself is discharged.[74]

CONTRACTUAL RELATIONSHIPS AND DOCUMENTARY CREDITS

1.51 The House of Lords decision in *United City Merchants* v. *Royal Bank of Canada* is a case of fundamental importance on the juristic basis of documentary credits.[75] Since that decision, it has been impossible to argue that documentary credits have other than a contractual basis, and that the contracts in a confirmed irrevocable credit are autonomous though interconnected.[76] This section considers briefly the contracts that are created, the consequences of their being autonomous though interconnected, and the nature of the contract between the beneficiary and the banks.

The contracts

1.52 The underlying transaction is always the contract of sale between seller and buyer, under which the buyer contracts to make payment by documentary credit. As applicant for the credit, there will be a second contract between him and the issuing bank. In an irrevocable credit the issuing bank gives an irrevocable undertaking to the beneficiary. Though the nature of the relationship between issuing bank and beneficiary has been the subject of debate in the past,[77] it is now clear that this is also contractual. There will therefore be, at a minimum, three contracts in an irrevocable documentary credit.

1.53 Where the credit is confirmed the confirming bank adds its own independent undertaking, creating an additional contract between the confirming bank and beneficiary. There will also be a contract between issuing and confirming banks, providing for reimbursement. In *United City Merchants*,[78] the leading House of Lords authority

72. See further below, para. 1.77ff.
73. See, i.e., para. 9.67ff.
74. See further below, para. 1.77ff.
75. *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)* [1983] 1 A.C. 168, [1982] 2 Lloyd's Rep. 1. Further ramifications of this decision are considered in chapter 9, and in particular para. 9.67ff.
76. *Ibid.*, at 182–183.
77. See below, para. 1.67ff.
78. Above, note 77. See further para. 9.67ff.

on the juristic basis of documentary credits, Lord Diplock analysed an irrevocable confirmed credit in terms of four contractual relationships. This passage is sufficiently well-known and oft-quoted to be worth setting out in full[79]:

"It is trite law that there are four autonomous though interconnected contractual relationships involved: (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank; (3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents."

1.54 It is clear from this well-known passage that contracts (3) and (4) arise only where the credit is confirmed: an irrevocable credit, where there is no confirming bank, creates only three contractual relationships: the contract of sale, the contract between buyer and issuing bank, and the contract between issuing bank and beneficiary.

1.55 *United City Merchants* concerned an action brought by the seller against the confirming bank, to use the terminology from the above passage, on contract (4). The only relevant contracts were the four set out in this passage. Nevertheless, it should be remembered that the confirming bank's undertaking is additional to that of the issuing bank, and so there remains a contract between beneficiary and issuing bank, even where the credit is confirmed. In *Bank of Baroda* v. *Vysya Bank Ltd.*,[80] Mance J. observed that these "two relationships co-exist, giving a beneficiary two banks which he may hold responsible for payment". Normally this contract will be of theoretical interest only, but it would provide the beneficiary with additional recourse, for example, in the event of the insolvency of the confirming bank.

1.56 Where there are re-sales, also financed by confirmed irrevocable credit, each simply creates a fresh set of similar contractual relations. It follows that though for some purposes the courts recognise the reality of the situation, analytically each individual sale can be considered in isolation.

Contracts autonomous but interconnected

1.57 From the beginning of the development of documentary credits, there emerged the principles that the credit is autonomous, that in determining whether to make payment to the beneficiary, a bank is unconcerned with disputes under the sale contract, and that the bank deals in documents not in goods.[81] Where the Uniform

79. [1983] 1 A.C. 168, 182H–183C. On negotiation without recourse, see further para. 2.8ff.

80. [1994] 2 Lloyd's Rep. 87, 90 (col. 2), and see also the discussion at 92 (col. 2)–93 (col. 1). See also para. 2.94ff. Mance J. also observes, at 90 (col. 2), that the contract between issuing bank and beneficiary is made through the agency of the confirming bank.

81. See further para. 9.6ff.

Customs and Practice applies to a documentary credit,[82] these principles date right back to the original version of the code, promulgated in 1933.[83] Today, they are encapsulated in UCP 600, Arts 4(a) and 5.

1.58 The independence of the credit from the underlying transaction is in part merely an application of the privity of contract doctrine, but were it otherwise the banks would be in an impossible position. They have no awareness of the original terms of the sale contract, nor of any subsequent variations to, or repudiation of it by the trading parties. Moreover, whereas banks claim expertise in the handling of documents, a dispute under the sale contract could well relate to the goods themselves, about which the bank will have no knowledge. The autonomy of the credit from the underlying transaction is a fundamental principle of documentary credits.[84]

1.59 To the 1993 revision of the UCP was added the provision that the payment obligation is not subject to claims or defences by the applicant resulting from his relationships with the issuing bank or the beneficiary, this provision also now being encapsulated in UCP 600, Art. 4(a). This was added primarily to deter applicants for credits from claiming that payment should be stopped because of the beneficiary's breach of his contractual obligations to the applicant,[85] and to this extent is a reiteration of the independence of the credit from the underlying transaction. However, it also emphasises its independence from the contract between the applicant and the issuing bank, and UCP 600, Art. 4(a) continues[86]:

"A beneficiary can in no case avail himself of the contractual relationship existing between the banks or between the applicant and the issuing bank."

1.60 The overall result is therefore to emphasise the independence of the contract with the beneficiary from all the other contracts making up the credit. It is clear from *United City Merchants* that this is also the position at common law.

1.61 So far we have emphasised the independence of the contract with the beneficiary from the other contracts making up the credit. It is also clear that the banks should not be concerned with the underlying transaction, and therefore that none of the contracts involving the banks should be dependent, directly at any rate, upon the sale contract.[87] Lord Diplock goes further, emphasising the autonomy of all the contracts making up the credit. In principle, therefore, even contracts (2) and (3) (from the above quote) do not necessarily depend on each other. However, the contracts are said also to be interconnected, and clearly it is sensible for there to be a relationship between contracts (2), (3) and (4), in that one would expect a bank's liability to pay to be tied in with its right to be reimbursed. Were it otherwise, the confirming bank may, for example, be required to pay the beneficiary but unable to reclaim the money from the issuing bank, or the issuing bank required to reimburse the confirming bank but be unable itself to claim reimbursement from its customer. Indeed, Lord Diplock recognised the undesirability of this solution, continuing[88]:

82. See below, para. 1.77ff.
83. Ellinger, *The UCP–500: considering a new revision* [2004] L.M.C.L.Q. 30, 31.
84. It is elaborated on, and indeed forms the basis for the discussion in chapter 9.
85. *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), pp. 7–8. Only banks and not applicants were mentioned in earlier versions of the UCP.
86. This is identical to Art. 3(b) of UCP 500, and Art. 6 of UCP 400 (the 1983 Revision). See further para. 9.2ff.
87. The indirect relationships between the credit and the sale contract are the subject of paras 4.5ff. and 4.44ff., and the autonomy principle is further elaborated in chapter 9.
88. [1983] 1 A.C. 168, 184–185.

"It would be strange from the commercial point of view, although not theoretically impossible in law, if the contractual duty owed by confirming and issuing banks to the buyer to honour the credit on presentation . . . were not matched by a corresponding contractual liability of the confirming bank to the seller/beneficiary . . . to pay the sum stipulated in the credit upon presentation of apparently confirming documents."

1.62 This recognises the commercial sense of an inter-relationship between contracts (4) and (2). In *Bankers Trust Co.* v. *State Bank of India*, a case considered in detail in chapter 9, Megaw L.J. made the following observation[89]:

"The metaphor 'autonomous' means only that one does not read into any one of the four contracts the terms of any one of the other three contracts. But the 'genesis and the aim of the transaction' . . . are not to be ignored where they may be relevant to assist in the interpretation of the terms of the contract."

1.63 In interpreting the terms of one of the contracts, therefore, the terms of one of the others might be relevant.

1.64 In reality there is a strong interdependence between the contracts involving the banks, and normally one would expect the terms themselves, and the legal principles applying to these obligations, to be the same.[90] The payment obligation usually matches the right to reimbursement. Nonetheless discrepancies could occur, for example if a bank exceeded its mandate in the terms in which it issued the credit. Then the bank's relations with the beneficiary would be governed by the terms of the credit, whereas the relationship between issuing bank and customer would be governed by the customer's mandate.

1.65 There is also a connection between the contracts involving the banks and the sale contract, since the latter places on the buyer the obligation to provide the documentary credit. If the credit terms do not comply with the obligation under the sale contract the buyer will be in breach of the latter. In such a case, however, the credit remains autonomous, and the seller/beneficiary's only recourse is against the buyer under the sale contract.[91]

1.66 A particular application of the principles in this section can be found in disputes about the law of which state governs each of the contracts. In principle, since each contract is autonomous, they could each be governed by the law of a different state, and indeed the courts have taken the view that the state whose law governs the credit need not be the same as that governing the underlying transaction. However, the interconnection between the contracts is also clearly recognised, and the courts have demonstrated reluctance to hold that different laws apply to each contract, apart from the underlying transaction.[92]

Nature of relationship with beneficiary

1.67 It is clear from the passage set out in the previous section, from *United City Merchants*, that the relationship between confirming bank and seller is contractual, and that the contract is autonomous (i.e., independent of the contract of sale, and the

89. [1991] 2 Lloyd's Rep. 443, 456 (col. 1). See further on this case para. 9.27ff.

90. See further chapter 9.

91. See further para. 4.38ff. The connection between the sale contract and the other contracts making up the credit is the subject of the beginning of chapter 4, up to para. 4.67.

92. Para. 2.119ff.

contracts involving the banks). Clearly also, the same must be true of the relationship between issuing bank and beneficiary, where the credit is unconfirmed.

1.68 In the past, the nature of these relationships has been the subject of hot debate, partly in an attempt to resolve the issues considered here. However, the analysis in *United City Merchants* renders obsolete old theories as to the nature of the relationship.[93]

1.69 The problem with a contractual relationship, that does not depend upon the other contracts making up the credit, is that whether the credit be confirmed or merely irrevocable, it is of the essence that the undertaking of the issuing and/or confirming bank is irrevocable once made. Quite apart from the fact that he will rely upon it, receipt of the notification of an irrevocable credit normally has immediate consequences for the seller, his liability to perform under the sale contract being contingent on that receipt. Also, after that time he is usually obliged to seek payment in the first instance from the confirming bank, and cannot sue the buyer directly.[94] Ideally, the bank should be unable to revoke from that time onwards.[95]

1.70 The problem is that since the relationship is contractual, any obligations under it, including an obligation to be irrevocably bound, can only arise once the contract has been made, once there has been an offer and acceptance, and consideration. But the seller does not normally make any promise to the bank that it will perform. Usually he is merely notified of the opening of the credit, and need not communicate with the bank at all, prior to tender of the shipping documents. On a contractual analysis, therefore, the offer must come from the bank, and it must be constituted in the opening of the credit. Since the seller makes no promise to do anything at this stage it must be a unilateral offer (i.e., binding only one party, the bank). By tendering the documents the seller clearly accepts the unilateral offer, and provides consideration (the requested performance), so there are no problems in cases such as *United City Merchants* itself, where the seller who had tendered documents successfully sued the confirming bank.[96] The problem arises if the bank revokes its offer at an earlier stage, i.e., if it purports to revoke an irrevocable credit. The problem is merely a specific example of the more general problem, well known to first-year students of the law of contract: when does a unilateral offer become irrevocable? Whatever view you take of the general problem, the answer might be starting to perform, or maybe completion of performance, but it will not be simple receipt of the offer.[97]

1.71 A number of writers have taken the view that a bank which revokes an irrevocable undertaking is clearly liable.[98] But the cases cited are not very convincing,[99] and it is very difficult to take this view unless documentary credits constitute an

93. Such as are now consigned to Appendix 5 of Gutteridge and Megrah's *Law of Bankers' Commercial Credits*, 8th ed. (Europa, 2001), by Richard King.

94. See para. 4.46ff.

95. This is also clearly the assumption behind Arts. 7(b) and 8(b) of UCP 600.

96. See further chapter 9.

97. See, e.g., Todd, *Sellers and Documentary Credits* [1983] J.B.L. 468.

98. E.g., Atiyah, *Sale of Goods*, 11th ed. (2005), at 440, citing *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2 Q.B. 127, 129, *Urquhart Lindsay & Co.* v. *Eastern Bank Ltd.* [1922] 1 K.B. 318, and *United City Merchants* itself; Gutteridge and Megrah, above, note 93, at 77.

99. In *United City Merchants* there was obviously a contract, because the documents had been tendered by the seller, and in the other cases there had been a tender, which had been accepted by the bank, albeit that the sales were by instalments, the issue arising on later instalments. *Hamzeh Malas* in any case concerned the bank's relationship with the applicant, not the beneficiary.

exception to the ordinary rules of contractual formation,[100] and the entire logic of *United City Merchants* seems to be that the law of documentary credits is merely an application of the ordinary law of contract. Moreover, it is difficult to see why they should be accorded some special status.

1.72 It might be argued that the problem is academic, because a reputable bank would never revoke an irrevocable undertaking, but the law has to cater for the abnormal as well as the normal situation. In any case, to a greater extent today credits are being issued by institutions other than banks, and in principle, there is no reason why anyone should not issue a documentary credit. In *United City Merchants*,[101] Lord Diplock observed that " . . . the argument that a seller should be content to rely on the exercise by banks of business expediency, unbacked by any legal liability, to ensure prompt payment by a foreign buyer does not impress me . . . ". The context was admittedly different, but the point is surely valid; the system depends on the availability of legal sanction, not on the reputation claimed by the parties.

1.73 Elsewhere I have suggested that a bank, by revoking an irrevocable credit, could put the buyer in breach of his contractual obligation to provide a "reliable and solvent paymaster",[102] and hence that the bank could itself incur liability for interference with contract.[103] While this may be correct as a matter of law, the difficulty with it as a solution to this problem is that the liability of the banker depends on the terms of the contract of sale; this does not sit well with the principle of the autonomy of the credit. A similar problem would arise were the trading parties to take matters into their own hands (as undoubtedly they could, if they so wished), and provide in the sale contract for the buyer to contract with the bank on the seller's behalf.[104]

1.74 Richard King observes that the problem may have been solved by the Contracts (Rights of Third Parties) Act 1999,[105] since it would allow the seller to enforce a term of the contract between the bank and the applicant, conferring a benefit on him. No doubt this is in principle correct, but it means that the seller is enforcing that contract, not the contract between himself and the bank. Again, this solution does not sit well with the autonomy of the contracts making up the credit.

1.75 The present revision of the UCP (described below), UCP 600, provides in Art. 7(b) that an issuing bank is irrevocably bound to honour as of the time it issues the credit.[106] Article 8(b) is the equivalent provision for the confirming bank, providing that it is irrevocably bound as of the time it adds its confirmation to the credit.[107] The UCP therefore codifies the ideal position. Unfortunately (from this viewpoint at least), the UCP operates in the UK by incorporation into a contract, and the problem here is precisely that there is no contract from this time. The issue therefore cannot be resolved by application of the UCP.

1.76 What is clear from this section is that a contractual analysis of the relationship between bank and beneficiary is problematic, at any rate with an irrevocable credit. The contract must be unilateral, since (typically at least) no undertaking is entered into by

100. The view taken tentatively in Treitel, *Law of Contract*, 11th ed. (2003), at 40 and 153.
101. [1983] 1 A.C. 168, 185.
102. On which see para. 4.44ff.
103. Todd, *Sellers and Documentary Credits* [1983] J.B.L. 468.
104. Thereby expressly providing for a seller's offer solution, through the agency of the buyer, one of the models considered prior to *United City Merchants*.
105. Above, note 93, at 78.
106. See further para. 2.25ff.
107. *Ibid.*

the beneficiary, and on any view of the revocation of a unilateral offer, something has to be done before there is an acceptance by the beneficiary, creating a contract capable of binding the bank. There is, no doubt, a commercial case for arguing that the offer to open the credit should be irrevocable once issued, but since *United City Merchants* it has no longer been possible to argue trust theories for, or (because the contracts are autonomous) theories based on the buyer making an offer to the bank, as agent, on the seller's behalf, or based on the assignment or novation of the applicant's contract with the bank. If documentary credits are to be governed by the ordinary law of contract, and if the contract with the beneficiary is to be independent of the other contracts making up the credit, it is simply not possible to arrive at the ideal solution, or irrevocability from the time the credit is issued. The problem lies with the law of formation of contracts, and if there is to be any reconsideration of this issue, it is at that level that it needs to be done. If, on the other hand, there are good reasons why offers remain revocable until they are accepted, it would be wrong for those reasons to give way to the convenience of a particular industry.

UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS

An introduction to the Uniform Customs and Practice

1.77 Today, nearly all credits throughout the world are issued subject to the *Uniform Customs and Practice for Documentary Credits* (UCP), and discussion of both law and practice demands reference to the UCP, if it is to be comprehensive. Attempts at global unification of law and practice have generally met with mixed success at best, but documentary credits constitute a notable exception to this observation, an achievement perhaps more remarkable given that these are a private set of rules.

1.78 The UCP was originally issued by the International Chamber of Commerce (ICC) in 1933, in an attempt to bring uniformity into the laws and practice of documentary credits. It was revised in 1951, 1962, 1974 (UCP 290), 1983 (UCP 400), 1993 (UCP 500) and most recently in 2006 (UCP 600),[108] as a result of the deliberations of the ICC Banking Commission. It was after the 1962 revision that the code became truly global, when it was adopted by the banks of the UK and of the Commonwealth of Nations. Revisions have therefore averaged about once a decade, and have usually been in response to changing trade and banking practices. We will see in chapter 8, for example,[109] how the 1974 revision responded to new forms of documentation, particularly for combined transport operations, and this process was taken further in the 1983 and 1993 revisions, when sea waybills were also catered for. The 2007 revisions are less radical, and at least in part are a tidying up exercise.[110] The new rules are simpler than the old, and there is now a definition section (surely a useful counter to differing interpretations of words by courts in different jurisdictions). There

108. Though the revisions were completed in October 2006, UCP 600 did not come into force until July 2007. It refers to itself as the 2007 revision. Previous revisions have tended later to be referred to by their year of publication, however. For example, the revision which came into force in 1963 is always referred to as the 1962 revision, that which came into force in 1994 as the 1993 revision. Probably, therefore, UCP 600 will end up being generally described as the 2006 revision.

109. Para. 8.1ff.

110. Perhaps long overdue; both 1983 and 1993 revisions could be criticised for being both disorganised and repetitive.

is also reaction to changing trade practices,[111] and perhaps to developments in case law.[112]

1.79 In the UK, only since the 1962 revisions have banks adopted the UCP; before then "the banking world was split between what became known as the British practice and the UCP".[113] Since 1962 the UCP has predominated, and nearly all credits issued today are on its terms. Even in China, the UCP 500 (i.e., 1993 revision) has been widely used by banks as guidelines.[114]

1.80 UCP 600 will be referred to extensively in this book, and is fully set out in Appendix A.

Application of UCP

1.81 Professor Ellinger states that[115]:

"Right from the start, the UCP were drafted as a set of contractual terms to be incorporated into letter of credit documentation."

1.82 While this is no doubt true, in earlier revisions of the UCP, the ICC appears to have been more ambitious, attempting almost to legislate for their application. Thus, for example, Art. 1 of the 1974 revision was in the following terms[116]:

"These provisions and definitions and the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed."

1.83 Such a provision would have been, and remains wholly ineffective in UK law. The courts have often observed that the UCP does not have the force of law.[117] The UK does not allow private commercial bodies to legislate, and consequently the UCP applies only where it is incorporated into the relevant contracts. In fact the ICC always intended that banks should incorporate the UCP expressly.[118] Since 1983, provision has been made for the code to be expressly incorporated into documentary credits as contractual terms, and Art. 1 of the present-day UCP 600 provides for incorporation into credits, "(including to the extent to which they may be applicable standby letters of credit)"[119] only "when the text of the credit expressly indicates that it is subject to these rules".[120]

111. For example all credits now being irrevocable: see para. 2.21ff.

112. See further generally para. 1.102ff.

113. Banks in the US had already adopted the 1951 revision, but the UK stayed out for a number of reasons, "London Practice" not being wholly consistent with the UCP as was: Ellinger, above, note 83, at 31.

114. ICC News, 8 January 2004; Documentary Credit Insight, 25 January 2004.

115. Above, note 83, at 33.

116. UCP 290.

117. E.g., *M. Golodetz & Co. Inc.* v. *Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495; *Royal Bank of Scotland plc* v. *Cassa di Risparmio delle Provincie Lombard*, Financial Times, 21 January 1992. Both cases are further considered in this section.

118. ICC Publication No. 411, at 11.

119. On which see para. 8.8ff. These were brought within the UCP for the first time in 1983, by Article 2 of UCP 400. As Article 1 implies, however, not all provisions of the UCP are capable of applying to the standby letter of credit. For example, the articles dealing with transport documents, considered in paras 8.8–8.33ff., are clearly inapplicable.

120. In *Harlow and Jones Ltd.* v. *American Express Co. Ltd.* [1990] 2 Lloyd's Rep. 343, Gatehouse J. held that the Uniform Rules for Collection did not need to be specifically incorporated since all the banks operating in England subscribed to the rules. By contrast, in spite of the UCP's notoriety, clause 1 requires it to be expressly incorporated.

1.84 In UCP 400 the incorporation provision was additional to the 1974 provision considered above. The ICC must still have hoped that the rules would apply by default anyway. By 1993 it seems to have been realised that this was not going to happen, and from UCP 500 onwards there has been no suggestion that they might apply in the absence of express incorporation into the contracts which form the basis of the credit.[121] The ICC had rightly recognised by 1993 that "legal issues [as to the jurisdiction of the UCP] cannot be addressed in the rules and the UCP cannot legislate national laws".[122] Though Art. 1 of UCP 600 continues to stipulate that the rules " . . . are binding on all parties thereto unless otherwise expressly stipulated in the credit", this is clearly subject to the first part of the article, requiring their express incorporation.

1.85 It is not necessary for the wording to be incorporated into the text of the credit. In *Forestal Mimosa Ltd.* v. *Oriental Credit Ltd.*,[123] an insertion in appropriate words in the left-hand margin of the document was held by the Court of Appeal to be sufficient to incorporate the provisions of the UCP (in this case the 1983 revision,[124] though the reasoning would equally apply to UCP 600).

1.86 Professor Ellinger has suggested that there is an English decision which supports the view that the Code has become so well known that it applies to letter of credit transactions even in the absence of an express clause adopting it.[125] He cites Gatehouse J.'s decision in *Harlow and Jones Ltd.* v. *American Express Co. Ltd.*[126] This argument in the case actually related to the Uniform Rules for Collection, not to the UCP. It is effectively an argument based on customary usage, in principle no doubt a ground for incorporating terms into contracts. The Uniform Rules for Collection were expressed to apply "unless prevented by local regulations".[127] While this would not, of itself, incorporate them, it would also not negate any argument based on customary usage. However, while a customary usage argument might also have worked with earlier versions of the UCP, the wording of UCP 600, Art. 1, is to apply the rules only "when the text of the credit expressly indicates that it is subject to [them]." Whatever the wording in earlier revisions, this new wording is surely sufficiently explicit to exclude any argument based on custom.

1.87 Where presentation of an electronic record is envisaged, by Article e2(a) of the eUCP[128]: "A credit subject to the eUCP ('eUCP credit' is also subject to the UCP without express incorporation of the UCP."

1.88 As has been already observed, English banks have adopted the UCP since the 1962 revisions, so that their credits should expressly incorporate the UCP provisions. This will apply the UCP provisions to the contracts to which the banks are party, but not to the sale contract, which will be governed by the common law unless it expressly stipulates that any credit opened under it is governed by the UCP.[129] In most situations this will not matter, since the provisions of the UCP do not in general operate in opposition to the common law, but rather elaborate upon it. Their purpose for the

121. On which, see para. 1.109ff.
122. *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), at 2.
123. [1986] 1 W.L.R. 631; [1986] 1 Lloyd's Rep. 329. See further para. 2.27ff.
124. UCP 400.
125. Ellinger, note 83 above, at 33.
126. [1990] 2 Lloyd's Rep. 343.
127. *Ibid.*, at 349.
128. See further para. 8.51ff.
129. Presumably the UCP would also apply if the sale contract required the credit to be opened by a particular bank, which itself had adopted the UCP.

most part is to clarify, rather than alter the law. There are some differences, however, between common law and UCP provisions, for example regarding the requirements for the commercial invoice,[130] in which case the provisions of the sale contract may conflict with those of the other contracts underlying the credit.

The UCP as contractual terms

1.89 In the UK, then, the UCP will be incorporated as contractual terms. As with any other set of standard terms, they will be overridden by any contrary terms expressly agreed between the parties. In *Royal Bank of Scotland plc* v. *Cassa di Risparmio delle Provincie Lombard*,[131] a contract between two banks, into which the 1983 revision of the UCP was incorporated, expressly provided for payment in New York. An argument that this should be read subject to the UCP, which (it was argued) required payment to be made in London, was rejected by the Court of Appeal.[132] Mustill L.J. observed that though the UCP provisions have an important role in the conduct of international trade,[133] it must be recognised they do not constitute a statutory code. As such, it must give way to any express contrary terms, though where the contract is silent, UCP terms can govern. In *Royal Bank of Scotland* the contract made express provision for the place of payment, and this overrode any contrary UCP provision.

1.90 The UCP is itself silent on much that is of importance in documentary credits,[134] in which case (in the absence of an express contractual term) the courts must fill out the necessary details with implied terms.

1.91 Another consequence of the fact that the UCP is only given force in the United Kingdom by incorporation into the contracts which form the basis of the credit, is that its provisions cannot be used to determine whether those contracts have been made in the first place. For this reason, it cannot resolve the issues considered in para. 1.67ff.

1.92 In addition to initiating periodic revisions, the ICC Banking Commission produces a commentary on each revision, for example ICC Publications 411 and 511 respectively on UCP 400 and UCP 500. ICC Publication No. 680, on UCP 600, is expected in November 2007. It also gives opinions on interpretation of the various articles of the code.[135] The ICC states, in its advertising for ICC Publication No. 632,

130. See paras 4.4.9ff. and 5.27ff.

131. Financial Times, 21 January 1992, otherwise unreported. The issue was whether the defendants could be sued in the United Kingdom under Article 5 of Sched. 1 of the Civil Jurisdiction and Judgments Act 1982, which depended on whether the place of performance was the United Kingdom. It was held that the place of performance was New York, by virtue of express stipulation in the contract.

132. This was a jurisdiction case where the UK was unsuccessfully claimed to be the place of payment, and hence performance. The argument was that the UCP provisions on reimbursement (Articles 10 and 16 of the 1983 revision; 9 and 14 of UCP 500 and 13 of the 2006 revision) were silent as to where the obligation was to be performed, but that the general principle should be applied that the debtor should seek out his creditor (in which case reimbursement should be in London). Because the Court held that the place or performance was stipulated expressly, it did not need to consider whether the general principle was applicable in the context of international banking transactions. See further para. 2.97ff.

133. "They expound technical terms; they promote consistency; and they enable the parties to express their intentions briefly, without the need to negotiate and set out all the terms of the relationship at length."

134. See below, para. 1.96ff.

135. Examples include ICC Publications 565, 613, 632 and 660, respectively *Opinions of the ICC Banking Commission (1995–1996)*, *Opinions of the ICC Banking Commission 98–99 Queries & Responses on UCP 500, 400, URC 522, ICC Banking Commission Collected Opinions 1995–2001*, and *Unpublished Opinions of the ICC Banking Commission, 1995–2004.*

ICC Banking Commission Collected Opinions 1995–2001, that "ICC's Banking Commission Opinions, often cited by courts, provides expert interpretation and contains the official analysis of how the rules work in day-to-day practice". These publications are undoubtedly of great assistance in dealing with issues that actually arise, but they are probably of limited value in the actual interpretation of terms which will ultimately be incorporated into contractual documents. They are simply the views of experts, and no more, and UK courts are unlikely to accord them a greater status than that. It is perfectly proper for an expert to give evidence on banking practice, so that for example, expert views on what constituted a reasonable time to inspect documents were accorded considerable weight in *Bankers Trust Co.* v. *State Bank of India*, as also were their views on the desirability of the bank consulting the applicant.[136] It is not proper for them to interpret the legal meaning of a clause, and in *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*, Staughton L.J. observed that[137]:

"It is no part of the function of an expert witness, or for that matter of any other witness, to state his views on the meaning of ordinary English words in a written contract, unless it is sought to prove some custom which is pleaded and can be supported by appropriate evidence."

1.93 In this case the expert had been asked, in effect, to tell the court how a provision of the UCP should be interpreted, not his proper function, in Staughton L.J.'s view. Speaking specifically of ICC Publication No. 411, he said that:

"We were also referred to a commentary on the 1974 and 1983 revisions of the Uniform Customs prepared by Mr Bernard Wheble, chairman of the ICC Banking Commission, at the request of the ICC. This states in terms that the comments and views expressed are made by Mr Wheble in his personal capacity, and do not necessarily reflect those of the ICC Banking Commission. In those circumstances his opinion has the same value as that of any other commentator of comparable wisdom and experience, but no more."

1.94 Similar comments would no doubt apply to ICC Publication No. 511 and, when it becomes available, ICC Publication No. 680.[138] They will represent the expert views of their writers. Nonetheless the documents remain valuable as commentary. Commentary is often cited in the courts, and can at least have persuasive value. They also explain why changes were made, in the successive revisions to the UCP, in effect to the legislative history of the code.

1.95 In interpreting standard terms which are incorporated into contracts, the courts are ultimately concerned to ascertain the intentions of those particular parties to the contract. The intentions of the ICC Banking Commission, for example as to why a particular Article of the code was drafted as it was, will be relevant only to the extent that they shed light on the intentions of the particular parties to the contract. Standard terms in contracts are not treated like legislation, and the courts are reluctant to pay too much regard to legislative history. That is not to say that it is entirely irrelevant. In *The Laura Prima*,[139] where the House of Lords in the end took no account of the drafting lineage of a standard form charterparty, Lord Roskill nevertheless admitted that "sometimes it is possible to detect from an alteration of clauses in standard forms an obvious intention to depart from a particular judicial decision the

136. [1991] 2 Lloyd's Rep. 443. On the substantive issues, see further, para. 9.34ff.
137. [1999] 1 Lloyd's Rep. 36, 39 (col. 1).
138. In ICC Publication No. 511 the commentaries are by the then Chairman, Charles del Busto, also in a personal capacity: Preface, V.
139. *Nereide SpA di Navigazione* v. *Bulk Oil International Ltd. (The Laura Prima)* [1982] 1 Lloyd's Rep. 1.

practical effect of which the parties wish to avoid", though this was not true of the case before him. Some UCP provisions are a reaction to judicial decisions and should perhaps be interpreted in the light of a desire by the parties to avoid their effect. In *Seaconsar* itself, Staughton L.J. considered the views of the framers of UCP 500, but ultimately they did not influence the decision of the court. In *Bankers Trust*, Hirst J. was influenced by the views of the Chairman of the ICC Banking Commission as to why the possibility of consultation with the applicant had been omitted from UCP 400,[140] but the majority of the Court of Appeal differed from him on this issue.[141]

The UCP as a complete code?

1.96 The UCP is intended to regulate the contracts between the parties, but it falls far short of constituting a complete code. There remain a number of areas which continue to be resolved by case law, on which the UCP is silent.

1.97 In the first place, even at a contractual level the UCP is not fully comprehensive. Thus, for example, it could have made express provision for the resolution of the proper law disputes described in chapter 2, but it is silent on choice of law.[142] In *PT Pan Indonesia Bank Limited TBK* v. *Marconi Communications International Ltd.*, Steel J. observed that " . . . the UCP makes no provision as to how the system of law governing the credit is to be determined".[143] The UCP could have spelled out the confidentiality obligations of the parties to a transferable credit, but in *Jackson* v. *Royal Bank of Scotland*, the House of Lords was forced to resort to an implied term, observing that[144]:

> "Article 54 of UCP 400 contained the machinery for credits to be transferred at the request of the first beneficiary. Article 48 of UCP 500, which came into force on Jan. 1, 1994, introduced changes in the machinery, but none of them are relevant to the issues in this appeal."

1.98 Up to now the UCP has also been silent on questions of interpretation, though Articles 2 and 3 of UCP 600 go some way towards resolving this omission.

1.99 Secondly, there are issues which really cannot be resolved by contractual provision alone. Examples of these include the property issues dealt with in chapter 6, the security provided by documents in chapter 7, and the fraud rule in chapter 9.[145] All these issues remain firmly within the province of the common law.

1.100 Thirdly, the UCP does not govern sale or carriage contracts, and the courts have been reluctant to extend UCP terms beyond their ambit. Certainly, they are not willing to accept what amounts to private legislation, by a back door route. In *The Galatia*,[146] considered more fully in chapter 8, the Court of Appeal was concerned with the definition of a claused document, in the case itself a bill of lading which indicated damage to the goods, but only after shipment. At first instance,[147] an argument was

140. [1991] 1 Lloyd's Rep. 587, 599 (col. 1).
141. On the substantive issue, see further para. 9.34ff.
142. See para. 2.94ff.
143. [2004] E.W.H.C. 129, [2004] 1 Lloyd's Rep. 594, at [19], affd. [2005] E.W.C.A. Civ. 422.
144. [2005] U.K.H.L. 3, [2005] 1 W.L.R. 377, [2005] 1 Lloyd's Rep. 366. at [19]. The present provision is UCP 600, Art. 38. See further para. 2.61ff.
145. See para. 9.67ff. Also a general comment by Christopher Hare [2005] L.M.C.L.Q. 467, note 2.
146. *M. Golodetz & Co. Inc.* v. *Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495. See further para. 8.34ff.
147. Also reported at [1980] 1 W.L.R. 495, and discussed further at para. 8.34ff. Donaldson J.'s judgment was upheld in the Court of Appeal, above, but this aspect is not discussed there.

advanced that the legal requirement for a clean bill of lading should be determined by banking practice,[148] and that since "virtually all banks have accepted the" UCP (then the 1962 revision), effectively the UCP should determine the definition. To have accepted this argument would have been to allow the UCP to determine not only the interpretation of the contracts to which the banks are party, but also the content of the sale contract, since the issue in *The Galatia* was on the buyer's obligations under the c. & f. sale contract. Rightly, I would suggest, Donaldson J. was unimpressed with this argument, observing that the "rules do not have the force of law. Furthermore, if there is ambiguity as to the meaning of those rules, that ambiguity should if possible be resolved in a way which will result in the rules reflecting the position under general maritime and commercial law".[149] The UCP definition then (as indeed now) being ambiguous, the UCP was influenced by general maritime and commercial law, rather than determining it.

1.101 In *The Sea Success*,[150] the UCP 500 was held to be irrelevant to whether bills of lading were "subject to clausing". The issue arose on the interpretation of a clause in a time charterparty, but the UCP could not be used to establish any commercial usage for this purpose.

UCP 600

1.102 Though there are changes of significance, such as the entire removal from the code of revocable credits,[151] the latest revision of the UCP, published in 2006, should probably be regarded as evolutionary, rather than revolutionary. Unlike some of the previous revisions, there are no substantial changes relating to the documentation. eUCP and ISBP continue as separate codes, albeit that the latter is revised. There are significant changes of form, the lengthy and repetitive UCP 500 having been long-overdue for simplification. UCP 600 also reflects a desire for greater certainty, vague phrases being mostly removed from the newest version of the code. Thus Janet Ulph observes that[152]:

"The general thrust of the revision was to reduce uncertainty by removing vague or ambiguous phrases."

1.103 Whether a quest for certainty is a realistic aspiration will be considered further in the relevant substantive sections of the book.

1.104 Drafting issues have been addressed by UCP 600. UCP 500 was both lengthy and repetitive. By way of example, the way in which a bank might honour a credit was not defined in the old code, so the methods of making payment were simply repeated, for issuing and confirming banks.[153] Under the new code there is a definition section (Art. 2), obviating the need for such repetition. Other definitions in Art. 2 include complying presentation, and negotiation. Nonetheless, one feels that this process might have been taken further. There remains considerable repetition, for example, in the provisions on transport documents, Arts 19–22, which could certainly

148. The issue arose under a c. & f. sale contract, but financed by documentary credit.
149. [1980] 1 W.L.R. 495, 509.
150. *Sea Success Maritime Inc.* v. *African Maritime Carriers Ltd. (The Sea Success)* [2005] 2 Lloyd's Rep. 692, at [12].
151. See para. 2.24ff.
152. Ulph, *The UCP 600: Documentary Credits in the 21st Century* [2007] J.B.L. 355, 362.
153. UCP 500, Arts. 9(a)–(b).

have been avoided, had those responsible for drafting the new code been so inclined.

1.105 There is also, in UCP 600, a reaction to judicial decisions, and in particular those of the Court of Appeal on *Glencore International AG* v. *Bank of China* and *Banco Santander SA* v. *Bayfern Ltd.*[154] *Glencore* highlighted a problem with the drafting of UCP 500, whereas *Banco Santander* was simply regarded as a very inconvenient decision, given recent changes to payment practices under modern documentary credits. The problems, highlighted in *Glencore* but created by *Banco Santander*, have been substantially addressed in UCP 600.

1.106 Overall, UCP 600 is a conservative and moderate document, which in an established industry is perhaps to be expected. Nonetheless, there are respects in which it disappoints. For example, to an increasing extent documentary credits are being issued by parties other than banks, and there is no reason, in principle, why they should not be issued by any body regarded as financially sound. Yet UCP 600 assumes that the parties, other than beneficiary and applicant, will be banks.[155] Another disappointment is the eUCP, which continues as a supplementary code to UCP 600, virtually unchanged from its previous incarnation. But eUCP has been a failure so far, and one of the reasons might be that its entire *modus operandi* is conservative and misconceived. Electronic documentation, and the eUCP, are discussed fully in chapters 3 and 8.[156]

A multiplicity of objectives

1.107 It is probably fair to observe that the UCP attempts to do a number of things, not all of which are compatible. We saw in para. 1.77ff. that it is an attempt to harmonise and define trade terms, and in para. 1.81ff. that it is also intended to be a contractual document. But it has also attempted to be advice, or even a code of behaviour for banks. Janet Ulph recently remarked that it " . . . is very much a code of rules for bankers, guiding them for example in relation to examination and rejection of documents".[157] Her comment is directed at the latest revision of the UCP, but would have been equally apposite in relation to previous revisions. By way of example, UCP 500, Art. 6(b) states that "The Credit . . . should clearly indicate whether it is revocable or irrevocable".[158] This is exhortation; it cannot possibly be enforceable, as such, as a contractual term. Another example can be found in UCP 500, Art. 9(a)(iv): " . . . A Credit should not be issued available by Draft(s) on the Applicant . . . ".[159] Yet a third example is in UCP 600, Art. 4(b): "An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like".[160] Ulph states that " . . . if the applicant's motive for requiring a copy of the original sale contract to be included in the credit is to protect him or herself from a fraudulent seller, Art. 4(b) sends out the

154. Respectively [1996] 1 Lloyd's Rep. 135 and [2000] Lloyd's Rep. Bank 165. On the substantive issues, see further respectively paras 9.27ff. and 2.45ff.

155. Ellinger, *The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions* [2007] L.M.C.L.Q. 152, 177–178.

156. Paras 3.67ff. and 8.51ff.

157. Ulph, note 152 above, at 368.

158. See also UCP 400, Art. 7(b), which is substantively identical.

159. See further para. 2.14ff. UCP 600, Art. 6(c) is in stronger terms, but continues to be exhortation.

160. This is relevant to the autonomy of the credit. See further para. 9.2ff.

message in a subtle way that there are better ways of doing this, such as by requiring a certificate of inspection of the cargo by an independent expert". This article is therefore intended to send out signals to banks and applicants alike. None of these examples would be of use as an enforceable contractual term, and it might be argued that the objectives of providing a code of behaviour, and sending out signals, are not really appropriate to a contractual document.

1.108 We also saw in para. 1.81ff. that the ICC appears in the past to have had aspirations which are almost legislative in nature. Little more needs to be said of these than that they are extremely unlikely to be successful in the UK.

CHANGES IN DOCUMENTATION

1.109 The custom of merchants in *Lickbarrow* v. *Mason* concerned the shipped, negotiable bill of lading, which will be described further, along with other forms of documentation, in chapter 3. It is probably true to say that 100 years ago, nearly all ocean cargo was carried under such a document. Probably it continues to form the mainstay, outside the container trade, but trade practices have changed radically in the last 30 or 40 years, and the shipped negotiable bill of lading is no longer always suitable.

1.110 One of the main motivations for the 1974 revision to the UCP was to take account of non-traditional documentation, making specific provision for the combined transport document.[161] Succeeding revisions to the UCP have also reacted to the increasing use of non-traditional documentation, and in particular the non-negotiable sea waybill. This was catered for implicitly in the 1983 revision, but expressly included for the first time only in 1993.[162] The negotiable shipped bill of lading, mainstay of international trade for decades, has experienced a decline in popularity, and its replacement in some trades by other documents.

1.111 The issue giving rise to concern in 1974 was the introduction, and later significant growth of container transport. The bill of lading was developed for use with port-to-port shipments, but container shipments are often part of a wider transport operation, typically involving land legs in both loading and destination countries (i.e., a combined transport operation). The 1974 (and subsequent) revisions have allowed for tender of combined transport documents. The ramifications of this are covered in chapters 3 and 8.

1.112 Related, but not confined, to the growth of container transport is the problem of ships arriving before the documents. In order for a bill of lading to operate properly as a document of title, it is essential that delivery of the goods from the ship should only be made to the holder of an original document. Indeed, without this constraint, that only the holder of an original bill of lading can demand the goods from the ship, it would be of little use as a document of title at all.[163] Equally obviously, however, the bill of lading cannot perform this function effectively unless it reaches the receiver before the goods themselves are delivered, and preferably before the ship

161. UCP 290, Art. 23. Documentary provision was also made, in Art. 24, for unimodal carriage other than by sea. The equivalent provisions today are UCP 600, Arts. 19 (combined transport document) and 23–25 (unimodal other than by sea). UCP 290, Art. 23 was far more permissive than today's provision, later problems with combined transport not by then having become apparent. See further para. 8.24ff.

162. UCP 500, Art. 24. See further para. 8.1ff.

163. See further below, and chapter 7.

arrives at the port of discharge.[164] In the early years, with effective overland post and slow sea voyages, this was generally unproblematic. Today, however, the goods often arrive first, and there are two, quite different reasons for this. The use of alternative documentation has resolved many of the difficulties caused by one, but not the other reason for the late arrival of the documentation.

1.113 First, one of the consequences of containerised transport, for example on North Atlantic routes, has been to speed up the sea voyage. The documentation still has to be processed and posted, and speeds of documentary process and transmission have not kept pace. The shipowner's position is difficult if the goods arrive first, and if they have been shipped under bills of lading.[165] In principle, however, the documentary problems associated with this type of transportation are relatively easy to resolve. The identity of the consignee is usually known at the outset, and it is unusual for such cargoes to be re-sold on the voyage. The parties are often well known to each other, and problems of distrust are therefore minimised. There is no need for negotiable documentation to be used in this type of trade. Combined transport documents are usually used for combined transport operations, and non-negotiable waybills, which can be carried aboard the vessel, are commonly used on short container routes, especially in the North Atlantic.[166] To a large extent, these resolve the issues associated with this type of transport operation, or indeed other situations where re-sales in transit are not envisaged: "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".[167]

1.114 The other problem is much more difficult, and it has not really been satisfactorily resolved. In the bulk dry-cargo trade, for example in grains and other foodstuffs, it is common for traders to contract for supplies well ahead, well over a year in some cases.[168] End users obviously like to secure future supplies, but a consequence of trading so far ahead is that market prices can fluctuate significantly between contract and delivery. It is not surprising that as well as traders wishing to secure future supplies, the market also supports hedgers and speculators, who buy cargoes purely to re-sell them again, the former to protect against market fluctuations, the latter at what they hope will be a profit.[169] Indeed, it is not unknown to find the same party

164. Shipowners cannot in practice wait for bills of lading to catch up, since not only will the vessel not be earning freight, but will also be incurring port charges. There is a distinction between delivery and discharge, however. They may *discharge* the cargo into a warehouse from which it is only *delivered* to the receiver against production of an original bill of lading: see, e.g., *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, further considered in para. 7.14ff. There are practical difficulties in respect of some types of cargo, however, for example bulk oil aboard a large tanker, which cannot realistically be stored except in the receiver's cargo tanks. See chapter 4 for authorities and further discussion.

165. See further chapter 7.

166. Lloyd, *The bill of lading: do we really need it?* [1989] L.M.C.L.Q. 47.

167. Schmitthoff, note 17 above, at 15–033, quoted in *JI MacWilliam Company Inc.* v. *Mediterranean Shipping Co. SA (The Rafaela S)* [2005] 2 A.C. 423, [2005] U.K.H.L. 11, at 46.

168. As just one example, in *Bunge Corporation, New York* v. *Tradax Export SA, Panama* [1981] 1 W.L.R. 711, [1981] 2 Lloyd's Rep. 1 the contract, concluded in January 1974, was for 5,000 tons of soya bean meal to be shipped in each of the months May, June, and July 1975, well over a year ahead.

169. A good example of hedging, albeit in lead rather than commodities, can be found in *Trafigura* v. *MSC* [2007] E.W.H.C. 944 (Comm.).

appearing more than once in the chain, hence creating a circle.[170] Some cargoes have even developed fully fledged futures markets, where it is the intention of traders to "close out" transactions, aiming to balance all purchases with corresponding sales, rather than take delivery of the cargo. An example can be found in the London Metal Exchange trade in copper futures, considered in *Trafigura Beheer BV* v. *Mediterranean Shipping Co. SA*.[171]

1.115 The bulk oil market shares some of the features of its dry-cargo counterpart. Until about 35 years ago it was quite stable, but successive wars and crises in the Middle East led to huge price fluctuations and a breakdown in that stability. The general disorganisation of the market since the Yom Kippur war in 1973 attracted independent oil companies as intermediaries. To a large extent these seem to have been necessary for the operation of a disorganised market, but no doubt there were also speculative opportunities. It remains true today that "the purchase and sale of oil products commonly involve traders dealing in string as intermediaries".[172]

1.116 The problem in both bulk dry-cargo and oil markets is that the same cargo may be re-sold many times, and if a bill of lading is used, it will be negotiated several times to effect successive re-sales. Since each transaction takes time, sometimes the bill of lading does not arrive until months or even years after the cargo. The problem is exacerbated where (as is often the case with bulk oil sales) voyages are relatively short, and each transaction is financed by a documentary credit, necessitating checking of the documents by each of the banks involved. In *The Delfini*, a case involving the carriage of oil considered further in chapter 6, Purchas L.J. observed that[173]:

> " . . . in the modern conditions prevailing in the shipment not only of oil cargoes but perhaps also other bulk cargoes, and where there is a string of sellers and buyers and a short journey between loading and delivery it is frequently the case that the ship arrives at the port of discharge before any of the shipping documents, including the original bills of lading, find their way down the chain into the hands of the ultimate purchaser to whom the delivery of the cargo is to be made. Thus it is that the procedure of issuing letters of indemnity of the kind issued in this case has grown up so as to enable the discharge of the cargo to take place with expedition and to avoid delaying the ship until the arrival of the formal documents."

1.117 The non-negotiable documentation that is useful for container goods is totally inappropriate for a cargo which is to be sold and re-sold many times. The consequences of the carrier delivering without production of an original bill of lading, which are considered in chapter 7, can be serious, and to date no very satisfactory solution to this problem has been implemented.[174] A solution that has been commonly adopted is for shipowners to deliver the cargo without waiting for the bill of lading to catch up, relying on a bank indemnity should they deliver the cargo to the wrong

170. E.g., *The Filipinas I* [1973] 1 Lloyd's Rep. 349, *Concordia Trading BV* v. *Richco International Ltd.* [1991] 1 Lloyd's Rep. 475 and *Bunge Corporation, New York* v. *Tradax Export SA, Panama*, note 168 above. In all these cases the parties were commodity traders, rather than manufacturers or end-users of the product. In *Scandinavian Trading Co. A/B* v. *Zodiac Petroleum SA and William Hudson Ltd. (The Al Hofuf)* [1981] 1 Lloyd's Rep. 81, actually a case involving a circle of f.o.b. oil sales, Mocatta J. observed that strings are especially common in sales of soya beans (the cargo in *Bunge* v. *Tradax*).

171. Above, note 164.

172. *Transpetrol Ltd.* v. *Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep. 309, *per* Phillips J. at 310. This consideration affected his interpretation of the contract.

173. *Enichem Anic SpA* v. *Ampelos Shipping Co. Ltd. (The Delfini)* [1990] 1 Lloyds Rep. 252, 257.

174. In *The Delfini* the cargo was delivered against a letter of indemnity. Payment was by standby letter credit, which did not require the bill of lading to be tendered. It is difficult to see that the bill of lading can be performing any of the functions, as a document of title, described above in *The Delfini*, or in a case such as *The Filiatra Legacy*, for example, both discussed further, in another regard, in para. 2.81ff.

person.[175] It may be that (since the industry appears to have no stomach for the development of electronic documentation) this is the best solution that can be adopted for this difficult problem, but it provides the parties with significantly less security than traditional bill of lading usage. As long as the trade depends on indemnities, many of the advantages of the bill of lading are lost.

1.118 The reaction of the UCP to the changes in documentation, forced upon it by the transport community, are considered in detail in chapter 8.

FUTURE OF DOCUMENTARY CREDITS

1.119 Documentary credits appear to be declining in popularity, losing ground to open account sales.[176] To some extent, perhaps, this parallels the decline in use of the traditional bill of lading, as documentary credits are best adapted to the same transactions as the traditional bill of lading. They work well where unfamiliar parties deal with each other at a distance, where the security of a document of title is required, and where re-sales at sea are envisaged. But they are expensive, and can be slow and, where the parties are familiar with each other, perhaps unnecessary. Credit insurers and providers of online alternatives may have a more attractive product for some types of transaction, though documentary credits might be expected to continue to thrive in more difficult markets, where the quest for safety is seen as more crucial.

175. Or an indemnity from charterers, as in *A/S Hansen-Tangens Rederi III* v. *Total Transport Corp. (The Sagona)* [1984] 1 Lloyd's Rep. 194.

176. E.g., Ulph, above, note 152, at 356. See also, e.g., http://www.iccbooks.com/Home/LCUse.aspx (as of July 2007), this reference referring particularly to Hong Kong.

CHAPTER 2

THE DOCUMENTARY CREDIT IN GENERAL TERMS

2.1 The rationale for the documentary credit has already been considered.[1] The purpose of this chapter is to describe the documentary credit in general terms, to outline the various forms of credit in use today and to describe the protection given to each of the parties. It also covers a number of other fundamental documentary credit issues.

PAYMENT UNDER DOCUMENTARY CREDITS

2.2 Because under an irrevocable credit the seller knows that he will eventually be paid by a reliable and solvent paymaster, the seller may not insist upon payment of cash against documents. Though, today, credits often simply provide for deferred cash payment, more commonly, at any rate in Anglo-American practice, an acceptance credit is used, where the bank undertakes to accept bills of exchange drawn on it by the beneficiary. Usually in this form of credit, time drafts (maturing a fixed time, often 90 days, after sight) are used.

2.3 In Anglo-American practice, but not to the same extent elsewhere in the world, bills of exchange are central to the payment mechanism under documentary credits. The chapter begins, therefore, by describing the central features of the bill of exchange.

Bills of exchange

2.4 Obligations under bills of exchange were codified in the Bills of Exchange Act 1882. The bill of exchange (or draft) is defined in s. 3 as:

> "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or bearer."

2.5 A bill of exchange is essentially a *written* instrument. There is no doubt that the writing requirement in electronic documentation has been slow to take off, at least in the UK, where the bill of exchange remains in traditional use. Liabilities under bills of exchange also depend on a signature.[2]

1. Para. 1.29ff.
2. Bills of Exchange Act 1882, s. 23.

Parties

2.6 The original parties are the drawer, drawee and payee, but either drawer or drawee may also be payee. In the above example, of an acceptance credit being used to defer payment, the beneficiary under the credit is both drawer and payee, and the issuing bank is drawee. The payee is the person who can enforce the payment obligations, and the drawee the person liable. The drawer issues the order in writing, requiring the drawee to pay. Primary liability to pay the bill rests with the drawee, but only if he accepts liability; liability cannot be unilaterally imposed on him by the drawer. In the above example of the acceptance credit, the issuing bank undertakes to accept liability, as long as conforming documents are tendered. This is a contractual obligation, enforceable by the beneficiary who tenders conforming documents.[3]

2.7 A bill of exchange is a negotiable instrument. Negotiation transfers the rights of the payee, and enables the payee effectively to sell the bill of exchange. Bearer bills can be negotiated by delivery. Order bills are negotiated by delivery and indorsement. Performance of the obligations in the bill can be claimed by the payee, or if the bill has been negotiated, by the subsequent holder of the bill. Bills of lading can also be negotiated, as we saw in chapter 1,[4] but whereas a bill of exchange is a negotiable instrument, bills of lading are merely documents of title. If the transferor of a bill of lading has no title to the goods, he can transfer no title to the transferee. Bills of exchange are different in this regard. A "holder in due course", who takes a bill which is complete and regular on its face, in good faith and for value, and without notice either of any defect in the title of the person negotiating it to him, or that the bill has been dishonoured, avoids any defects in title, as does any subsequent holder claiming through him. The principle *nemo dat quod non habet* ("no one [can] give what one does not have") does not apply to a bill of exchange, whereas it does to a bill of lading.

Negotiation with and without recourse

2.8 Where the bill of exchange is negotiated with recourse, the indorser may be liable to the subsequent holder if the bill is dishonoured by the drawee, upon notice of such dishonour by the subsequent holder. Where the bill of exchange is negotiated without recourse, the indorser negatives this liability (ie, the subsequent holder bears the loss). This is an important distinction in the operation of documentary credits (see below).

2.9 For a bank to negotiate a bill of exchange, drawn (for example) on the issuing bank, is to purchase that bill of exchange, and hence acquire the rights under it. Such a purchase can be used by a confirming or other advising bank to advance money to the beneficiary, and indeed this is the traditional method of doing this, in Anglo-American practice. The confirming or advising bank thereby acquires the rights accorded by the bill of exchange, against the issuing bank as drawee. As we will see below, a confirming bank should negotiate without recourse.[5] This means that it, rather than the beneficiary, bears the loss of dishonour by the drawee, for example where the issuing bank goes into liquidation, or refuses to accept the documents.

3. Part. 1.51ff. As to precisely when the contract comes into existence, see para. 1.67ff.
4. Para. 1.10ff.
5. See para. 2.37ff.

2.10 In UCP terms, negotiation connotes more than simply negotiating a bill of exchange; it is defined in UCP 600, Art. 2 as the purchase of drafts and/or documents under a complying presentation. The purchase of documents is an alternative device used to advance money to beneficiaries, and is appropriate where the issuing bank has agreed to make payment, otherwise than by accepting liability as drawee. The terms with and without recourse are used in the same way here, as where a bill of exchange proper is negotiated. They connote finality or otherwise of any payment made.

2.11 The definition of negotiation in UCP 600 differs from that in UCP 500, and, indeed, the idea of purchase is a throwback to the old UCP 290 of 1974. Merely to examine documents is not to negotiate them. Purchase suggests both giving value, and taking the drafts and/or documents in return. The changes are probably by way of clarification, however, rather than substance, UCP 500 referring to the giving of value.[6]

Sight or time draft

2.12 A bill of exchange might be a sight bill or a time bill.[7] A sight bill must be paid on presentation. A time bill must be paid upon presentment for acceptance, when the bill matures a fixed time (e.g., 90 days) after sight. It is a time bill which will be used in an acceptance credit, where payment is deferred. Time bills can be sold for cash, but of course their value (sight rate) will be less than the face value of the bill (because of the interest element, and any commission payable).

2.13 Both time bills and sight bills are commonly used in documentary credits. If the credit provides for sight payment, or payment by acceptance of a sight draft, the issuing bank will usually provide the buyer with an advance for the price, against the security of the goods, but the buyer will be liable for interest until the goods are sold and he is able to make reimbursement. Conversely, a seller who obtains a time draft under a credit can usually sell it to his own bank for immediate cash, but the bank will then deduct interest until maturity (and presumably a commission).[8] In economic terms, therefore, the difference between cash payment or sight draft on the one hand, and time draft on the other, comes down to a question of interest.[9]

Deferred payment, acceptance and negotiation credits

2.14 In the UK, deferred payment has traditionally been effected by the issuing bank accepting a time draft. As explained in the last paragraph, a confirming or advising bank can discount the bill of exchange for cash, thereby advancing funds to the beneficiary, even though payment by the issuing bank is deferred until maturity of the time draft. The negotiating bank will obtain good title to the bill of exchange, a title which will be independent of any disputes under the sale contract. Moreover, because the bill of exchange is a negotiable instrument, the negotiating bank will also be

6. See, e.g., Ellinger, *The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions* [2007] L.M.C.L.Q. 152, 160–161. Purchase has the connotation of a property transfer.

7. See Bills of Exchange Act 1882, ss. 10 and 11.

8. But see the discussion of *Maran Road* v. *Austin Taylor*, below, para. 2.37ff., and in particular note 45.

9. E.g., Devlin J.'s observations in *Midland Bank Ltd.* v. *Seymour* [1955] 2 Lloyd's Rep. 147, 165.

unaffected by any defences that the issuing bank could have raised against the beneficiary.

2.15 As we have seen, though, there is no need, in principle, for a bill of exchange to be used. In civil law, the issuing bank may simply promise to pay at a later date, or in other words to make deferred payment, without the need for a bill of exchange.[10] A confirming or advising bank, rather than negotiating a bill of exchange, can pay against an assignment of the beneficiary's rights under the credit.[11] Moreover, as we have seen, under UCP 600, Art. 2, negotiation is defined as including purchasing documents under a complying presentation; it is not necessary to purchase a bill of exchange.

2.16 While the deferred payment credit was uncommon at the time of the 1974 revision of the UCP, it has been provided for since 1983, having become increasingly common.[12] Various reasons have been advanced. Professor Ellinger has observed that "very few modern economies have a market providing discount facilities for the type of bill of exchange here considered".[13] Waller L.J. has another explanation: "that this latter kind of letter of credit may have come into use because if drafts were produced the result was that in many countries stamp duty had to be paid".[14] We might also surmise that pressures for electronic documentation will (in the long term at least) further militate against continued use of a document that has to exist physically, in writing.[15]

2.17 It is also possible, at least in principle, for the issuing bank to undertake to pay, by negotiation, bills of exchange drawn by the beneficiary on a third party. The issuing bank can then itself present those bills to the third party. This type of negotiation credit, where that third party was the applicant for the credit, used to be popular but is now essentially obsolete except in some parts of Asia.[16] (There is apparently a belief that the obligation to accept and pay will thereby fall on the applicant rather than the issuing bank,[17] a belief that is clearly incorrect,[18] at any rate if the issuing bank undertakes to negotiate without recourse.) UCP 500 provided that if the credit was irrevocable the issuing bank should negotiate without recourse against the drawer (ie, the beneficiary under the credit), so that it was the issuing bank and not the drawer who took the risk of default by the applicant, when the bills of exchange were presented.[19] Nonetheless, the type of credit where drafts were drawn on the applicant was discouraged.[20]

10. See further Ellinger, *The UCP 500; considering a new revision* [2004] L.M.C.L.Q. 30, 35.

11. On such assignments, see further below, paras 2.32ff. and 2.37ff.

12. UCP 400, Art. 10(a)(ii); *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411, 23. The deferred payment credit was described as "a creature of relatively new invention" by Waller L.J. as recently as 2000: *Banco Santander SA* v. *Banque Paribas* [2000] Lloyd's Rep. Bank. 165, [2000] C.L.C. 906, [2000] 1 All E.R. (Comm.) 776.

13. Above, note 10, at 35.

14. *Santander* [2000] 1 All E.R. (Comm.) 776, 781. Also Janet Ulph, *The UCP 600: Documentary Credits in the 21st Century*, [2007] J.B.L. 355, 372.

15. See further paras 3.67ff. and 8.51ff. Also Ulph [2007] J.B.L. 355, 372, noting that "the need to write an acceptance on the bill of exchange itself iscumbersome and inappropriate in a world of telecommunication".

16. Ellinger, above, note 6, at 161.

17. Abu Shohid, *Countdown to UCP 600*, (2007) 7 Shipping and Trade Law, 1.

18. See the comments in *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), 23. An old example may, however, be found in *Borthwick* v. *Bank of New Zealand* (1900) Com. Cas. 2, a case considered for other reasons at para. 4.109ff.

19. UCP 500, Art. 9(a)(iv).

20. *Ibid.*

2.18 Article 6(b) of UCP 600 requires that "A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation." Article 7(a) sets out the issuing bank's obligations to honour the credit, in the case of sight payment, deferred payment of acceptance with the issuing bank, and also in a number of situations where obligations are undertaken by other banks, which do not perform them. For the first time, however, no provision is made in UCP 600 for negotiation by the issuing bank itself, and Art. 6(c) provides that "A credit must not be issued available by a draft drawn on the applicant," thereby placing an absolute prohibition on what was formerly discouraged.[21]

2.19 Honour is defined in the definition article, Art. 2, to pay at sight if the credit is available by sight payment, to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment, and to accept a bill of exchange drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

2.20 Negotiation is of greater importance where a second bank is involved, whether or not the credit is confirmed. The confirmed, and the unconfirmed negotiation credit are considered further below.

TYPES OF CREDIT

2.21 The most important distinctions are between revocable and irrevocable, and confirmed and unconfirmed credits, and these distinctions (as explained in Chapter 1) are recognised by the UCP.[22] The UCP also defines transferable credits, but does not define any other type of credit.

2.22 Though they are clear enough in the UCP, the distinctions between revocable and irrevocable, and confirmed and unconfirmed credits, are sometimes confused, at any rate in the older cases. The first relates to the obligations of the issuing bank, the second to those of the correspondent bank.

2.23 Terms are used for other types of credit, but they are rather imprecise, and not universally adopted. However, the main terms used are described in this chapter.

Revocable and irrevocable credits

2.24 Previous versions of the UCP defined both revocable and irrevocable credits, but UCP 600, Art. 2, defines a credit as being irrevocable. Moreover, under Art. 3, a credit is irrevocable even if there is no indication to that effect. Nearly all credits issued in the UK have long been irrevocable in practice, and a revocable credit gives no security to the seller. Revocable credits continue to be possible, of course, but not within UCP 600.

Nature of issuing bank's undertaking under irrevocable credit

2.25 Under Art. 2 of UCP 600, an irrevocable credit "constitutes a definite undertaking of the issuing bank to honour a complying presentation", honour being defined

21. But this remains exhortation, and cannot be enforceable as a contractual term. See para. 1.107ff.
22. See generally paras 1.37ff. and 1.46ff. for irrevocable and confirmed credits.

as described above, and Art. 7 qualifying that undertaking "provided that the stipulated documents are presented to the nominated bank or to the issuing bank . . . ".[23] "Complying presentation" is defined in Art. 2 as "a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice". Article 10(a) provides: "Except as otherwise provided by article 38,[24] a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary".[25] The beneficiary is thus given the benefit of an irrevocable undertaking from the bank itself, under which payment is conditional only upon presentation of the stipulated shipping documents, and compliance with the terms and conditions of the credit.

Nature of issuing bank's undertaking under revocable credit

2.26 Revocable credits can still be issued, but not under UCP 600. They are not in practice used in the UK, and at common law, a revocable credit offers no security at all to the seller.[26] Not only can the issuing bank revoke at any time, but there is no obligation on the bank even to inform the seller that the credit has been revoked.[27] This was also the position adopted by UCP 500,[28] but as we have seen revocable credits are not regarded as credits at all under UCP 600, Art. 2.[29]

Confirmed credits

Nature of confirming bank's undertaking

2.27 As explained in Chapter 1,[30] where an irrevocable credit is confirmed, the confirming bank effectively takes on towards the seller all the obligations taken on by the issuing bank, where the credit is irrevocable but unconfirmed. In other words, the seller need only deal with the confirming bank, and its undertakings may be regarded as irrevocable. At common law, confirmation required that the confirming bank adds its own definite and irrevocable undertaking to pay to that of the issuing bank, and that if for any reason it is not reimbursed by the issuing bank (for example, where the issuing bank has gone into liquidation), it has no recourse against the beneficiary. In *Panoustos* v. *Raymond Hadley Corporation of New York*,[31] it was admitted by all parties that a credit was not confirmed where the "confirming" bank stated: "In advising you that this credit has been opened we are acting merely as agents for our foreign correspondents and cannot assume any responsibility for its continuance". This was not

23. The requirement that stipulated documents be presented was added for the first time in 1983—it would seem to be superfluous, however, given the additional requirement (in UCP 600, Art. 2) that a complying presentation is in accordance with the terms and conditions of the credit.

24. Defining the transferable credit: see below, para. 2.61ff.

25. The precise mechanism for amendment is then detailed in the remainder of Art. 10, the full text of which is set out in Appendix A. Credit here, of course, means irrevocable credit, as defined in Art. 2.

26. Though the buyer can still gain from it. On the advantages of any documentary credit to buyers, see paras 1.43ff. and 4.44ff.

27. *Cape Asbestos Co. Ltd.* v. *Lloyds Bank Ltd.* [1921] W.N. 274, an example of a case where there was confusion between the terms "revocable" and "unconfirmed". Nevertheless, the case clearly concerned a revocable credit in fact.

28. UCP 500, Art. 8(a).

29. Para. 2.24ff.

30. Para. 1.46ff.

31. [1917] 2 K.B. 473.

confirmed because no irrevocable undertaking was entered into by the "confirming" bank.[32]

2.28 The position is effectively codified in UCP 600, Art. 2, which requires a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation, honour and presentation also being defined in Art. 2.[33] The undertaking of a confirming bank is elaborated on in Art. 8, which describing the methods of payment, is in almost identical terms to Art. 7,[34] except that references to the confirming bank are substituted for those of the issuing bank. Also, Arts 8(a)(ii) and 8(b) make provision for negotiation of drafts. Whereas for an issuing bank, under an unconfirmed irrevocable credit, to undertake to negotiate drafts drawn on the applicant is now prohibited, it is quite common (and perfectly acceptable) for a confirming bank to undertake to negotiate (i.e., purchase) drafts drawn by the beneficiary on the issuing bank. It is important that such negotiation is without recourse to drawers, so that it is the confirming bank and not the beneficiary who takes the risk that the issuing bank will not honour the drafts drawn upon it when these are presented by the confirming bank. Negotiation without recourse is expressly required in Art. 8(a)(ii).

2.29 As noted above, UCP 600, Art. 10(a) provides that except as otherwise provided by Art. 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary. This applies to the confirming bank under a confirmed credit, just as it does to an issuing bank under an unconfirmed irrevocable credit. It goes hand in hand with the irrevocability of the undertaking of the confirming bank, additional to that of the issuing bank, implicit in UCP 600, Art. 2 and explicitly stated in Art. 8(b), as of the time it adds its confirmation to the credit.[35]

2.30 In *Forestal Mimosa Ltd* v. *Oriental Credit Ltd*,[36] the Court of Appeal was concerned with an acceptance credit under Art. 10(b)(iii) of the 1983 revision (UCP 400), the equivalent of the present Art. 8 (UCP 600), where the sellers drew 90 day drafts on the confirming bank. The issuing bank, on the instructions of the buyers, later refused to accept the shipping documents because of alleged discrepancies, and the defendants (the confirming bank) refused to pay against the drafts at maturity. The Court of Appeal held that the alleged discrepancies were unarguable, and that once it was clear that the provisions of the UCP applied,[37] the defendants were responsible for the acceptance of the drafts and payment on their maturity, notwithstanding that the buyers had not accepted them. It is the confirming bank itself that makes the undertaking, and that undertaking is enforceable independently of the position taken by the issuing bank or the buyer.

2.31 Obviously the issuing bank cannot, merely by authorising or requesting another bank to confirm a credit, unilaterally impose the obligations of confirmation upon the other bank, and Art. 8(d) of UCP 600 contemplates that the bank so

32. On this case see further below, para. 4.30ff.
33. A presentation is defined as either the delivery of documents or the documents themselves.
34. See para. 2.2ff., above. The 1993 revision provided for the first time that the documents were to be presented to the confirming or other nominated bank (UCP 400 was silent on this issue). The ICC takes the view that the confirming bank's liability is separate from that of the issuing bank, and that it should not be open to the parties, unless authorised in the credit, to bypass the confirming bank by tendering directly to the issuing bank: *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), at 24.
35. See further para. 1.67ff.
36. [1986] 1 W.L.R. 631, [1986] 1 Lloyd's Rep. 329. See also para. 1.81ff.
37. On which see generally para. 1.77ff.

authorised or requested may not be prepared to do so. The provision then requires the bank to inform the issuing bank of its position without delay. This would enable the issuing bank to re-route the credit through another bank which is prepared to confirm it, but since there would not normally be a contract between the two banks in this situation, the provision would seem to be unenforceable.[38] Article 8(d) allows that the bank may decide to advise but not confirm the credit.[39] Under UCP 500 and UCP 400,[40] this was subject to objection by the issuing bank, but in UCP 600 it is sufficient for the issuing bank simply to be informed.

Confirmation of deferred payment credits

2.32 Where the issuing bank has issued an acceptance credit, a confirming bank can discount a bill drawn on it as described above,[41] advancing money immediately to the beneficiary, whether it be a sight or time draft. The confirming bank can then, as holder of the bill, claim from the issuing bank, its claim on the bill being independent of the underlying transaction, and also of any defences that the issuing bank might have had against the beneficiary.[42] This can be regarded as reimbursement, except that it will claim more from the issuing bank than it has paid to the beneficiary, against the discounted bill, to cover its costs, and interest to the maturity date on the bill.

2.33 Where the credit is by deferred payment, the confirming bank can still make a discounted advance to the beneficiary, taking an assignment of the beneficiary's rights under the credit, against the issuing bank.[43] It thus obtains its "reimbursement" by claiming as assignee on the credit itself. However, as assignee, it has no better right than the beneficiary himself, and defences available to the issuing bank against the beneficiary will also be available as against the confirming bank.

2.34 In *Banco Santander SA* v. *Bayfern Ltd.*,[44] the confirming bank (Santander) discounted in this way, but before payment became due from the issuing bank it became clear that though the documents tendered by the beneficiary conformed on their face, they were forged, and that the beneficiary had been fraudulent.[45] The Court of Appeal held that the issuing bank was entitled to raise the beneficiary's fraud as defence, the confirming bank being merely an assignee of the benefit of the credit. Santander also argued that it was entitled to reimbursement under the provisions of UCP 500, which applied to the credit in the case, but it was difficult to describe this as reimbursement, given that the amount claimed from the issuing bank was greater than the amount paid to the beneficiary. Nor, on the facts, had the issuing bank authorised Santander to discount the credit, even though discounting was within its mandate. In consequence, Santander took the risk of the beneficiary's fraud being discovered after they had discounted in the beneficiary's favour, but before payment

38. Ellinger, above, note 6, at 163.
39. See below, para. 2.36ff. What is now Art. 8(d) was originally added in 1983 (as UCP 400, Art. 10(c)).
40. Respectively Arts 9(c) and 10(c), the latter of which was mandatory in form, in the absence of objection by the issuing bank. The word "may" originates in UCP 500, Art. 9(c).
41. See para. 2.14ff.
42. Bills of Exchange Act 1882, s. 38(2).
43. See further below on assignment, para. 2.49ff.
44. [2000] Lloyd's Rep. Bank. 165; [2000] C.L.C. 906.
45. On fraudulent tenders, see para. 9.67ff., and in particular 9.95–9.107.

became due under the credit, whereas had this been the older form of negotiation credit, they would not have taken this risk.[46]

2.35 As observed earlier, deferred payment credits, where a bill of exchange is not used, are quite common today, in spite of their comparative novelty. UCP 600 is therefore drafted to reverse the consequences of *Santander*. The issuing bank's obligation to reimburse in the *Santander* situation is provided for in Art. 9(c), where it is also made clear that the undertaking to reimburse is independent of the relationship between the issuing bank and the beneficiary. Article 12(b) is also relevant, in explicitly authorising prepayment under a deferred payment credit. Thus, under UCP 600, *Santander* would be reversed, and the discounting confirming bank would be in the same position, whether or not it had negotiated a bill of exchange.

Unconfirmed credits

2.36 Confirmed credits are always irrevocable, but irrevocable credits are often unconfirmed, even where a second bank (correspondent or advising bank) is involved, situated in the seller's country of business.

The unconfirmed negotiation credit

2.37 A common variety is the unconfirmed negotiation credit, where the bank undertakes merely to negotiate a bill of exchange drawn on the issuing bank, but does not itself undertake payment on its own behalf, nor does it add its own confirmation to the credit. Any payment made by the correspondent bank for such bills of exchange is subject to recourse against the drawer (i.e., seller or beneficiary) if the issuing bank does not reimburse the negotiating bank. By contrast, a correspondent bank which confirms a credit has no recourse if it is not itself reimbursed.[47]

2.38 The right to recourse under an unconfirmed negotiation credit was central to the reasoning in *Maran Road Saw Mill* v. *Austin Taylor & Co. Ltd.*[48] The plaintiffs were Malaysian sellers of timber, and the defendants acted as their selling agents. The nature of the agency agreement, however, was that the defendants actually purchased the timber, and then arranged a sub-sale; the sub-buyers paid cash against documents to the defendants, and the defendants paid the same, less 4 per cent of the f.o.b. value (representing their commission) to the plaintiffs.

2.39 Apparently it was not the normal practice of the defendants to agree to pay shippers in Malaysia by letters of credit, because of the extra expense involved, but the plaintiffs insisted on payment under an irrevocable commercial credit, because it enabled them to borrow from their own banks.[49] This is an example of a credit being used to resolve cashflow issues, rather than merely as security for the price.[50]

2.40 Accordingly, irrevocable letters of credit were opened in the plaintiffs' favour by the issuing bank (Sale). Payment was to be made 90 days after sight, but the credits also provided that drafts were negotiable by the Bangkok Bank at sight rate. Thus the

46. The importance of the case can perhaps be over-stated. Ulph notes that *Santander* "was quite limited in scope, not least because it is usually very difficult to prove fraud": above, note 14, at 373.

47. See above, para. 2.8ff.

48. *Ng Chee Chong (a firm trading as Maran Road Saw Mill)* v. *Austin Taylor & Co. Ltd.* [1975] 1 Lloyd's Rep. 156. Another aspect of this case is discussed in para. 4.50ff.

49. *Ibid.*, at 157 (col. 2), *per* Ackner J.

50. See further para. 1.43ff.

plaintiffs could look to payment on sight from Bangkok Bank.[51] However, Bangkok Bank did not confirm the credit.

2.41 In accordance with the arrangement the plaintiffs shipped the timber, and obtained payment at sight rate from Bangkok Bank. Bangkok Bank tendered the shipping documents to Sale, who released them to the defendants, against a trust receipt.[52] The defendants later transferred the documents to the sub-buyers, against payment of the purchase price. Before the bills of exchange, providing for payment 90 days after sight, had matured, Sale went into liquidation. Consequently the bills of exchange were dishonoured. Bangkok Bank accordingly called upon the plaintiffs to reimburse them, and the plaintiffs did so. The plaintiffs sued the defendants for recovery of the sum paid by them to the Bangkok Bank, and succeeded. Their claim in effect was that they had not received the purchase price for the goods, the credit having failed.[53]

2.42 One of the arguments advanced by the defendants was that the plaintiffs should not have reimbursed Bangkok Bank, in other words that the credit had not failed and the plaintiffs had occasioned their own loss. Ackner J., in rejecting this contention, noted that a confirming bank would have had no right of recourse against the drawer, and that the beneficiary would have been under no obligation to reimburse it. In this regard he referred to Art. 3 of the UCP (1962 revision), which is substantively similar to Art. 8(a)(ii) of UCP 600, and continued[54]:

> "This Article makes it clear that a confirming bank may not have recourse. It is otherwise in the case of a non-confirming bank. The reason is that whereas the latter is the agent of the issuing bank for the purpose of advising the credit, it acts as principal vis-à-vis the beneficiary. He [negotiating bank] is under no duty to negotiate and if it does so, it may make whatever conditions it likes as to a pre-requisite to doing so. It follows that if the credit is available by 'time' draft, the negotiating bank may have recourse on the draft if this is ultimately unpaid."

2.43 Thus, confirmed and unconfirmed negotiation credits differ in that where the credit is unconfirmed, the negotiating bank can negotiate without recourse. Consequently, the bank can shift the risk of dishonour by the issuing bank back to the beneficiary. By contrast, once a confirming bank has paid, the beneficiary knows that there will be no recourse against him, whatever happens. The risk of dishonour by an issuing bank is probably slight, and so confirmation is by no means always necessary.

2.44 We have already seen that the concept of negotiation in UCP 600, Art. 2 is not limited to the purchase of bills of exchange, but can include instead purchase of other documents under a complying presentation.[55] The concept of recourse is exactly the same, and a non-confirming bank may negotiate such documents also, with recourse. Like a confirming bank, a nominated bank which has negotiated a complying presentation can look to reimbursement from the issuing bank, under UCP 600, Art. 7(c).

51. Curiously, though 90-day time drafts were to be used, there was a provision for interest to be claimed by Bangkok Bank from Sale, when they presented the documents for acceptance: at 157 (col. 2). Usually you would expect Bangkok instead to pay the plaintiffs a discounted rate, to take into account interest.

52. On trust receipts see paras 2.93ff. and 6.39ff.

53. On which see further, para. 4.44ff., and especially 4.50ff.

54. [1975] 1 Lloyd's Rep. 156, 161 (col. 1).

55. Para. 2.26ff.

UCP 600 and advising of credits

2.45 As we saw in the discussion on confirming banks, it is not necessary for a bill of exchange to be used at all. A bank can advise the credit and any amendment without any undertaking to honour or negotiate. It can discount and take an assignment of the benefit of the credit, just as a confirming bank can, and if it is a nominated bank, can claim "reimbursement" from the issuing bank under Art. 7(c).[56] In the event of the issuing bank failing to "reimburse" the advising bank can recover any amounts advanced to the beneficiary. In this last respect, it differs from a bank that has confirmed the credit.

2.46 Under UCP 600, the status of an advising bank is set out in Art. 9, the full text of which is set out in Appendix A. There is naturally no equivalent of Arts 8(a)(ii) and 8(b), which provide respectively for a confirming bank to negotiate without recourse, and for the confirming bank to be irrevocably bound to its undertaking.

Advantages of confirmation

2.47 Unlike the confirmed credit, therefore, the unconfirmed negotiation credit gives the beneficiary no protection against failure or refusal to pay by the issuing bank. It leaves the seller open to the possibility of having to litigate against the issuing bank, if for example the issuing bank rejects the documents, which litigation may of course take place abroad. Clearly it offers protection which is vastly inferior to that offered by the full confirmed credit.

2.48 On the other hand, as long as the issuing bank is reputable, sellers may not consider worthwhile the extra commission payable for confirmation. Indeed, confirmation may in practice add very little when the issuing bank is reputable. In *Enrico Furst & Co.* v. *WE Fischer Ltd.*,[57] a credit which was issued by a reputable bank in Italy should have been confirmed by a London bank, but the Westminster Bank in London was instructed[58]: "Please advise the beneficiaries of the opening of this letter of credit, without adding your confirmation". Hence the credit was not confirmed by a London bank, but the English sellers raised no objection to the lack of confirmation, and indeed were later held to have waived their right to rely on non-confirmation of the credit when an action was brought against them by the buyers for non-delivery of the goods. It did not surprise Diplock J. that they had not taken this point; with a reputable issuing bank, "it made no real commercial difference whether the Westminster Bank . . . added their own confirmation or not".[59] Clearly it is by no means necessary for sellers always to demand confirmation of credits, then. An unconfirmed irrevocable credit will frequently offer all the security that is required.

Transfer of proceeds

2.49 Transfers of credits (dealt with below) and transfers of proceeds are dealt with entirely separately, both at common law and under the UCP.[60]

56. Of course, this is merely a contractual undertaking, and is of no use to the negotiating bank if the issuing bank has gone into liquidation, as in *Maran Road*.
57. [1960] 2 Lloyd's Rep. 340. See further para. 4.30ff.
58. *Ibid.*, at 344 (col. 2).
59. *Ibid.*, at 348 (col. 2).
60. For transfer of credits, see para. 2.52ff.

2.50 Early forms of credit were sometimes addressed to anybody negotiating bills of exchange drawn upon the bank or applicant.[61] Today credits will normally be opened in favour of a named beneficiary—usually the seller under the sale contract. If so, only the beneficiary can tender shipping documents required by the credit, and in the absence of an assignment of the benefit of the credit, only the original beneficiary can require the issuing bank to pay, or accept or negotiate bills drawn on it.[62]

2.51 Assignment of the proceeds is provided for by UCP 600, Art. 39. This (which adds little to the general law, at least in the UK) allows the assignee to require the bank to accept bills drawn upon it by the original beneficiary. On its terms the Article relates "only to the assignment of proceeds and not to the assignment of the right to perform under the credit itself". Hence, the obligation to present correct shipping documents remains with the original beneficiary, only the proceeds being assigned.[63] Additionally, the rights of the assignee are no better than those of the original beneficiary, and so depend upon the terms and validity of the contract between him and the issuing or confirming bank.[64]

Transfer of credit

2.52 Suppose the seller, who is the beneficiary under a documentary credit, is himself a middleman, obtaining the goods from a supplier, or a number of different suppliers. He may transfer all or part of the credit to his suppliers, using a transferable credit. In UCP terminology, the middleman is the first beneficiary under the credit, and the supplier or suppliers to whom he transfers the credit are the second beneficiary or beneficiaries. Let us, for simplicity, assume just one supplier, who is the second beneficiary under the transferred credit. The transferred credit would generally be expected to be in the same terms as the original, requiring, for example, tender of the same documents, but the price would be expected to be different, to reflect the middleman's mark-up. Other terms, such as the expiry and presentation dates, might also be expected to differ. It is of some importance that the middleman (first beneficiary) can hide from his buyer (applicant for the original credit) the name of his supplier (second beneficiary), and vice versa, and that the prices (and hence the amount of his mark-up) can be similarly hidden; otherwise these parties might be expected in the future to see the advantages of dealing with each other directly, cutting out the middleman.

2.53 The transferable credit is defined and provided for by Art. 38 of UCP 600.[65] It must be designated "transferable",[66] but if it is so designated the original (or first) beneficiary (the middleman in the above example) can request the issuing, confirming or negotiating bank to make the credit available to one or more other parties (second

61. See, for example, the discussion of the credit in *Re Agra and Masterman's Bank* (1867) L.R. 2 Q.B. 391: para. 1.29ff.

62. In the analysis of para. 1.67ff., the offer to open the credit is made by the bank to the beneficiary and nobody else.

63. This sentence was added in 1993, in UCP 500, Art. 49. See *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), 130.

64. See *Banco Santander* above, para. 2.32ff. Assignment can be used by a confirming bank instead of negotiation where the credit is otherwise than by acceptance.

65. Though this Article was substantially revised, both in 1993 and in 2006, the changes were essentially to the machinery of transfer, rather than changes of principle.

66. UCP 600, Art. 38(b).

beneficiary or beneficiaries), who are likely to be his suppliers. The credit can thus be used to make payment to one or more suppliers.

2.54 The general requirements are set out in Art. 38. Article 38(b) sets out in general terms what a transferable credit is. Clearly, it is the credit as a whole, rather than merely the proceeds, which are transferred (not assigned). Much of Art. 38 is intended to protect the banks. Thus, since the 1983 revision the bank has been entitled to refuse a transfer request,[67] and this has been retained in UCP 600, Art. 38(a). Moreover, since the second beneficiary or beneficiaries may be unknown to the transferring bank, all charges, fees, etc., incurred in respect of the transfer must be paid by the first beneficiary.[68] The provisions relating to amendments were added in 1993,[69] and what are now Arts 38(e)–(f) are also intended to protect the banks. It must be clear whether or not the first beneficiary waives his right to be consulted on amendments proposed by the second beneficiary or beneficiaries, and the possibility that one but not all second beneficiaries refuse an amendment must be catered for.

2.55 In order to facilitate the use by the first beneficiary of the credit to pay a number of suppliers, the UCP allows fractions of the credit to be transferred separately. However, since the second beneficiary or beneficiaries may be unknown to the transferring bank, they are not given the power further to transfer the credit. Therefore, to protect the banks, a transferable credit can only be transferred once.[70]

2.56 There are also provisions to protect the middleman (first beneficiary). He can substitute his name for that of the applicant for the credit,[71] thereby preventing his suppliers from seeing the identity of his buyer. Article 38(g) also allows for the differences in the price, etc., that you would expect to see in credits for sale and sub-sale.

2.57 The idea behind Art. 38 is that to the extent that the credit has been transferred to the second beneficiary or beneficiaries only they, and not the first beneficiary, can enforce it. However, one would expect the first beneficiary to be able to substitute his own invoice, for a higher price, to secure his mark-up, and this is provided for in Art. 38(h).

2.58 It is obvious from the above discussion that confidentiality is an important aspect of the transferable credit, to protect the middleman. In *Jackson* v. *Royal Bank of Scotland*,[72] the bank, by sending documents in error, disclosed to the applicant the amount of the middleman's mark-up,[73] with the consequence that the applicant decided for the future to deal directly with the supplier (second beneficiary). There was no appeal against the first instance finding that the bank was thereby in breach of confidence to the first beneficiary, the only issue remaining in the House of Lords being as to the amount of damages.[74] However, Lord Hope commented as follows[75]:

"The letter of credit did not contain an undertaking in terms that the Bank would treat the documents provided to it by the beneficiary as confidential. But the Judge's finding that the Bank owed a duty of confidence to [the first beneficiary] was not challenged in the Court of

67. UCP 400, Art. 54, replaced by UCP 500, Art. 48(c), and now UCP 600, Art. 38(a).
68. UCP 600, Art. 38(c).
69. UCP 500, Arts 48(d)–(e), replaced by UCP 600, Arts 38(e)–(f).
70. UCP 600, Art. 38(d).
71. *Ibid.*, Art. 38(g).
72. [2005] U.K.H.L. 3, [2005] 1 W.L.R. 377, [2005] 1 Lloyd's Rep. 366.
73. 19 per cent, clearly regarded as very high by the applicant.
74. This is, for the most part, beyond the scope of this discussion.
75. [2005] U.K.H.L. 3, at [20].

Appeal.[76] As Potter L.J. said . . . ,[77] the duty of confidence arises from the acknowledged need for the issuing bank to protect its customer from disclosure of his level of profit and from the danger that if that level of profit is disclosed his purchaser will go instead direct to the customer's own supplier. . . . [T]he right of the first beneficiary to substitute his own invoice for that of the second beneficiary and draw on the credit according to its pre-transfer terms is an important part of the transfer regime.[78] It enables the first beneficiary to keep confidential from the applicant the amount of his profit from the transaction. For sound commercial reasons he is entitled to keep the amount of that profit secret. The information is confidential to the first beneficiary. It is the duty of the issuing bank to protect that confidentiality."

2.59 In the following paragraphs, the bank's argument was considered that[79]:

" . . . a transferable letter of credit had three functions. These were (1) to provide a secure source of payment, not only for the seller of the goods but also for the first beneficiary as the middleman; (2) to enable the first beneficiary to conceal the identity of the seller of the goods from the applicant; and (3) to enable the first beneficiary to keep confidential from the applicant the profit which he is making on the transaction."

2.60 No doubt seems to have been cast on this analysis. In the particular case the applicant knew all along the identity of the second beneficiary, and the bank argued that disclosure of the mark-up caused no loss, because the applicant could therefore have discovered it in any case. However, it was only the bringing to their attention the amount of the mark-up that prompted them into action. The mere fact that the applicant knew the identity of the supplier did not affect the nature and extent of the bank's implied duty of confidentiality, which was breached by the disclosure of the middleman's mark-up.

Back-to-back credits

2.61 Since a transferable credit can (for the bank's protection) only be transferred once under UCP 600, it is suitable only where there is a single middleman or seller obtaining the goods from one or more suppliers for a single re-sale. It is not suitable for chain sales, where the same goods are sold over and over again through many intermediaries. The back-to-back credit, however, may be used for any number of transactions.

2.62 In a back-to-back credit, a seller's bank, on the security of the credit opened in the seller's favour, opens a similar credit for his supplier (for a smaller sum). The original credit, and the second opened in favour of the supplier, will be in identical terms apart from the price. This is not a transfer of the original credit; rather, there are in reality two separate credits involved here, each with its own set of autonomous contracts. The beneficiary under the first credit becomes the applicant under the second, and since he will be known to the bank under the second credit, the problems associated with multiple transfers of a single credit are obviated. The supplier can use his credit as security for a further credit in favour of his own supplier, and theoretically there is no reason why this should not continue indefinitely. However, to call the two credits back-to-back is simply to describe the situation in which the second and

76. [2000] C.L.C. 1457, at [27].
77. [2005] U.K.H.L. 3, at [27].
78. Now provided for by UCP 600, Art. 38(h). The credit in *Jackson* was subject to UCP 400, but the position would be the same under a modern credit, UCP 500 and 600 having changed only the machinery of transfer.
79. [2005] U.K.H.L. 3, at [21].

subsequent credits are opened. The term has practical but no legal significance, except in the recognition that the same documents will be used in each of the credits, and that a rejection by any one of the banks involved will therefore have ramifications for the entire chain.

2.63 It is clear, though, that where an irrevocable credit is opened, not only is the seller relying on receiving the price whatever happens, subject only to presenting the correct documents, but many others, including for example his suppliers, may well be making similar assumptions. The law to a great extent recognises this.[80]

Revolving credits

2.64 To judge from the reported cases, revolving credits are rare but not unknown.[81] They are also not recognised as a separate category by the UCP.

2.65 Where the sale contract covers a number of shipments, say for a regular supply over a period, the seller will want from the start a documentary credit covering all the shipments. It is no good setting up fresh credits for each shipment, since the seller needs to know from the outset that he is guaranteed payment for the entire period. One possibility is to provide the type of credit that was provided in *Urquhart Lindsay & Co.* v. *Eastern Bank Ltd.*,[82] where the credit required the bank to pay the amounts of the sellers' invoices for each shipment up to a top limit of £70,000, which sum was sufficient to cover all the shipments.

2.66 Under the *Urquhart Lindsay* type of credit, the bank's undertaking extends to the value of the entire contract, and it may be unwilling to take this risk. Under a revolving credit, on the other hand, the seller is guaranteed a maximum credit whose amount will be less than the total value of all the shipments, but the credit will continually be topped up to that amount as the buyer reimburses the bank. Hence the bank can limit its liability to a stated maximum amount, while still providing a credit covering all the shipments.

2.67 The sellers, who were paper exporters, argued that a confirmed revolving credit for £50,000 had been established in their favour in *Nordskog & Co* v. *National Bank*.[83] In the event Bailhache J. rejected this contention on the facts, but there was considerable discussion as to what a revolving credit would have been, had the sellers' contention been correct. Though Bailhache J. claimed even at the end of the case to be still unclear,[84] he appeared to accept the following expert witness testimony[85]:

"It is a little difficult to define, but a revolving credit technically means a credit for a certain sum at any one time outstanding, which is automatically renewed by putting on at the bottom what has been taken off at the top. If you have a revolving credit for £50,000 open for three months, to be operated on by drafts at 30 days' sight as drafts are drawn, they temporarily reduce the amount of the credit below £50,000. As these drafts run off and are presented and paid they are added again to the top of the credit, and restore it again to £50,000. That is what is known technically as a revolving credit, and it is automatic in its operation and does not need any renewal."

80. E.g., paras 9.67ff. and 9.166ff.

81. In recent times, see, e.g., the credit in *The Future Express* [1993] 2 Lloyd's Rep. 542, considered in detail in paras 7.14ff., 7.55ff. and 7.75ff. *Welsh Development Agency* v. *Export Finance Co. Ltd.* [1992] B.C.L.C. 148 also involved a revolving credit.

82. [1922] 1 K.B. 318, (1921) 9 Ll. L. Rep. 572; see para. 4.41ff.

83. (1922) 10 Ll. L. Rep. 652. £50,000 was about one-sixth of the total value of the shipments.

84. *Ibid.*, at 663 (col. 2).

85. *Ibid.*, at 656 (col. 1).

2.68 In effect (had this been a true revolving credit), the £50,000 would have been the maximum sum available at any one time. It was effectively a credit limit, reduced by the amount that the seller claimed as payment on each shipment, or for which he accepted time drafts, but topped up again as the buyer reimbursed the bank. As long as the buyer continued to reimburse the bank, therefore, up to £50,000 would have been available under the credit for each shipment. The seller's protection would not have been as good as in *Urquhart Lindsay*, since the credit would have been available for the entire series of shipments, only as long as the buyer continued to reimburse the bank.

Standby credits

2.69 In terms of legal principle, standby letters of credit are equivalent to performance bond. Functionally, they more closely resemble documentary credits. The essence of both the standby letter of credit and the performance bond, is that a bank guarantees that payment will be made to the beneficiary. Payment can be triggered on demand, or on conditions being met. The bank then claims reimbursement from its customer.

2.70 Standby credits are not true documentary credits at all, but are essentially a form of bank guarantee. Sometimes they are used to guarantee payment where a true documentary credit cannot be used, and sometimes they are used, by way of performance bond, to guarantee performance by a seller or contractor.

2.71 Not only are they not true documentary credits, but they are also conceptually quite distinct from a documentary credit, in that they are triggered by default. If payment is guaranteed by a standby letter of credit, for example, the bank simply acts as a guarantor. The primary obligation remains with the buyer, and the seller can sue the buyer for payment, the bank's obligation only arising on his default. By contrast, under a documentary credit the bank comes under a primary liability to pay, and only if the bank fails to pay may the seller proceed against the buyer directly.[86]

2.72 Another fundamental difference between a documentary and standby letter of credit is that in the latter the bank is dependent for reimbursement on the personal contract with its customer. It does not obtain the security of a document of title, and hence any security in the goods. A far wider range of documentation can be stipulated under a standby letter of credit than under a traditional documentary credit, and indeed one of the reasons for using the standby letter of credit is precisely because it is difficult or impossible to provide traditional documentation. Indeed, it is possible in theory to operate a standby letter of credit without any documentary requirements at all.

2.73 Despite these fundamental differences, this book would be incomplete without some discussion of standby letters of credit. Indeed, they are in a sense central to one of the themes of this book, namely the move away from traditional forms of shipping documentation. Standby letters of credit are often provided by buyers as a guarantee for payment in circumstances where one might have expected to see a documentary credit, but where it is difficult to comply with the usual documentary requirements. Their use is particularly common in sales of oil cargoes, where it is often

86. See para. 4.50ff.

impracticable to negotiate the original bill of lading.[87] Moreover, much of the law relating to documentary credits also applies to guarantees and performance bonds. In particular, quite fundamental statements concerning the law of documentary credits have been derived from cases that were originally authorities on performance bonds.[88] Since 1983, the provisions of the UCP apply, as far as they can be made applicable.

2.74 Both forms of standby credit (payment guarantees and performance bonds) are commonly used in international sales of goods and services.

Varieties of guarantee and performance bond provided by seller

2.75 The purpose (or at any rate, ostensible purpose), of the guarantee or performance bond provided by the seller is to protect the buyer from unsatisfactory performance by the seller. Sometimes the guarantee protects the buyer only against late delivery of the goods, but sometimes it is triggered by any non-performance, or defective performance, whether actual or alleged, on the part of the seller.

2.76 Similar in effect to a performance bond is where the buyer retains a percentage of the agreed payment pending his acceptance of the goods as satisfactory. This type of guarantee may be provided for in a commercial credit, where say 90 per cent of the price is payable on sight and the remaining 10 per cent at a later date, subject to acceptance of the goods as satisfactory by the buyer.[89] Arrangements of this type are in principle enforceable, though arguably offending against a fundamental principle of commercial credits, that payment should be independent of the buyer's whim.

2.77 A more sophisticated variation is where, in the event of an allegation by the buyer of a breach of contract by the seller, the seller is required to pay a sum of money to the buyer. This type is relatively uncommon in English law, since in order for the guarantee to be valid the sum stipulated must represent liquidated damages, and not a penalty. If it is a genuine estimate of the loss that would be caused to the buyer by the seller's breach, it may be regarded as liquidated damages, but if it does not it will be treated as a penalty clause and will be unenforceable under English law. Quite apart from such considerations, enforceability depends on the continued solvency of the seller, who may be an unknown quantity, in a foreign country.

2.78 The performance bond proper is similar to the guarantee described in the previous paragraph, except that here the seller provides a bond whereby, if there is an actual or alleged breach of contract on his part, a sum of money is paid to the buyer by a third party, who will typically be a reputable bank. The performance bond proper appears to avoid the difficulties over penalty clauses, since the seller's obligation to pay derives from the contract it has made with the bank, and not from the contract of sale.[90] Moreover, the intervention of a reputable bank, as guarantor, protects buyers against the difficulties of suing an unknown seller in a foreign jurisdiction. As in the documentary credit, the contract between seller and bank is autonomous, and is

87. See paras 1.109ff. and 2.81ff.
88. As in para. 9.77ff.
89. See, e.g., *The Royan*, para. 9.52ff.
90. There is a discussion of penalty clauses in *Cargill International SA* v. *Bangladesh Sugar and Food Industries Corp.* [1996] 2 Lloyd's Rep. 524, 531–532. A crucial factor is that, in the event of overpayment, there can be an eventual accounting between the parties under the contract of sale (see further para. 9.91ff.).

enforceable on its own terms, regardless of the provisions of the sale contract.[91] There can be a final accounting, however, as we will see in chapter 9.[92]

2.79 Sometimes payment under the performance bond is triggered by nothing more than the buyer's demand. The bank is not required to investigate the merits of the demand; in overseas sales it is common for sellers to accept that the final 10 per cent may (in reality) never be paid, and to take this into account when quoting the original price.[93]

2.80 Performance bonds are also commonly used in construction contracts, ostensibly to protect against unsatisfactory performance by the contractor. These are in principle identical to the performance bonds already described, and the principles derived from cases involving construction contracts are also applicable to performance bonds used in international sale contracts.

Standby letter of credit provided by buyer

2.81 Although performance bonds are usually provided by sellers or contractors to protect the buyer against unsatisfactory performance, standby letters of credit can be provided by the buyer in order to guarantee payment. Generally speaking, the standby letter of credit has no advantage over the documentary credit proper as a guarantee of payment, except where there are practical difficulties in using documentary credits.

2.82 One such situation is the carriage of bulk oil cargoes. As has already been explained in para. 1.109ff., such cargoes are often sold many times on the voyage, and if the voyage is of short duration there is no way for the bill of lading to reach the receiver before the cargo arrives. The cargo is almost invariably discharged without production of an original bill of lading, subject to an indemnity, and bills of lading are then negotiated at leisure.

2.83 Because the bill of lading does not in reality perform the function of being a document of title in such cases, guarantees issued by "first class banks" are sometimes used to secure payment instead of documentary credits. These are the same in principle as the performance bonds considered previously, except that they are provided by the buyer to guarantee payment. Typically, the bank is required to pay on demand by the seller, subject to a statement by the seller that the buyer has failed to pay within a stipulated time. The seller may be required to present documents, but usually tender of an original bill of lading will not be required. In *The Delfini*, for example, the guarantee was triggered by presentation of[94]:

"(a) a copy or photocopy of the commercial invoice,
(b) a copy or photocopy of the bill of lading,
(c) seller's certificate stating that payment has not been made . . . within the due date."

2.84 This provides the bank with none of the security of a document of title, though at least the copy of the bill of lading provides some assurance that the seller has

91. See also below, para. 2.119ff., where Staughton L.J. explains that the parties may deliberately choose a different proper law for the bond, as for the underlying transaction.

92. Para. 9.91ff.

93. See, e.g., *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.* [1978] 1 Q.B. 159, 170F, *per* Lord Denning M.R. In principle, the seller can still enforce the sale contract, as described in para. 9.91ff., but this could involve difficult litigation overseas.

94. *Enichem Anic SpA* v. *Ampelos Shipping Co. Ltd. (The Delfini)* [1990] 1 Lloyd's Rep. 252. See further paras 1.109ff. and 7.84ff. The terms of the guarantee are set out at 256 (col. 1).

performed his contractual obligations. In *The Filiatra Legacy*,[95] the sellers were required to tender a copy of the commercial invoice, and allowed the option to tender "a letter of indemnity by the sellers reciting that the sellers had been unable to provide the full set of bills of lading, and saying (among other things) that the sellers 'expressly warrant title' to the oil", as long as there was also a "statement by the buyers that they had received an original insurance policy or certificate at least five working days before the due date". This provides the bank with security similar to that in *The Delfini*.

2.85 Standby letters of credit are also used where a bill of lading or other document of title could not be used, for example where there is no carriage element. In *Elder Dempster Lines Ltd* v. *Ionic Shipping Agency Inc.*,[96] for example, a standby letter of credit was used to guarantee payment for a ship. Obviously a conventional documentary credit would have been wholly inappropriate in such a transaction.

2.86 No doubt, even where a standby letter of credit is used, the buyer can stipulate tender of documents which provide him with adequate security against the seller's non-performance, and of course the seller can look to a reputable bank for payment. The main difference between this and a commercial credit proper is that the bank does not obtain the security of a document of title. There is no pledge, and hence the bank obtains neither special property in, nor constructive possession of the goods. The bank therefore becomes, in effect, an unsecured creditor of the buyer, unless of course, the buyer places it in funds in advance.

The obligation to pay

2.87 The payment obligation under a performance bond is discussed fully in para. 9.77ff.

Application of the UCP

2.88 Since the 1983 revision, standby letters of credit have been brought within the ambit of the UCP. This remains true in UCP 600, Art. 1 of which accordingly begins: "The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ('UCP') are rules that shall apply to any documentary credit ('credit') (including to the extent to which they may be applicable standby letters of credit) . . . ". The provisions of the UCP only apply to standby letters of credit, however, "to the extent to which they may be applicable", wording which is identical to the 1983 and 1993 revisions. In *UCP 1974/1983 Revisions Compared and Explained*, Bernard Wheble (Chair of the ICC Banking Commission when the UCP was first extended to cover them) noted that[97]:

> "The Type of documentation . . . gives some indication of 'the extent to which they (UCP) may be applicable' to standby credits. Thus, . . . many of the Articles dealing with 'Documents' would seem likely not to be applicable."

2.89 Applying this argument to the present revision, UCP 600, Arts 18–28 would not apply to standby letters of credit.

95. *Anonima Petroli Italiana SpA* v. *Marlucidez Armadora SA (The Filiatra Legacy)* [1991] 2 Lloyd's Rep. 337. The credit requirements are set out by Mustill L.J. at 341 (col. 1).
96. [1968] 1 Lloyd's Rep. 529.
97. ICC Publication No. 411, at 11.

2.90 It can be argued that standby credits should be governed by their own separate code, rather like the eUCP and ISBP.[98] The ICC takes the view that standby letters of credit more closely resemble documentary credits than performance bonds,[99] and in functional terms that is undoubtedly true. Legally, they are closer to performance bonds. It can also be argued that it would have been better to state exactly which UCP provisions apply. Unfortunately, this may not be possible, since there are wide differences between individual standby letters of credit.

REIMBURSEMENT ISSUES

Reimbursement by the issuing bank

2.91 The obligation of the issuing bank to reimburse an advising or confirming bank is derived from Art. 7(c): "An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank". There is an equivalent obligation on a confirming bank, where the documents are forwarded to it, in Art. 8(c), where there is another nominated advising bank, in addition to the confirming bank. Bank-to-Bank-Reimbursement Arrangements are covered by Art. 13, which is set out in full in Appendix A. In terms of principle these provisions are largely unremarkable, except that they do not provide for the place of reimbursement. This may affect the right to sue in the English courts, as in *Royal Bank of Scotland plc* v. *Cassa di Risparmio delle Provincie Lombard*,[100] and may have proper law implications.[101]

2.92 We have already considered the definitions (all from UCP 600, Art. 2) of honour, negotiate and complying presentation.[102]

Reimbursement by buyer

2.93 It may seem self-evident that the right of the issuing bank to reimbursement, and to its commission, depends upon it making payment under the letter of credit, but the bank argued the contrary in *Sale Continuation Ltd* v. *Austin Taylor & Co. Ltd.*[103] The argument was unsuccessful, though it may remain possible for a bank which has released documents to the buyer, against a trust receipt, to enforce the trust, regardless of whether it has itself made payment. *Sale Continuation Ltd.* v. *Austin Taylor & Co. Ltd.* is discussed more fully in chapter 4,[104] where it is contrasted with *Maran Road Saw Mill* v. *Austin Taylor & Co. Ltd.*, a case considered earlier in this chapter.[105]

98. See paras 1.102ff. and, in the case of eUCP, 8.51ff.
99. *UCP 500 & 400 Compared*, ICC publication No. 511 (1993), at 2–3, where the view was taken that the standby letter of credit was functionally dissimilar to the demand guarantee, even though legally equivalent. It was also considered impossible to state exactly which Articles of the UCP applied to the standby letter of credit.
100. See para. 1.89ff.
101. Proper law issues are examined generally in para. 2.94ff.
102. See respectively paras 2.14ff., 2.8ff. and 2.26ff.
103. [1968] 2 Q.B. 849, [1967] 2 Lloyd's Rep. 403.
104. Para. 4.59ff. Trust receipts are considered generally in para. 6.39ff.
105. Para. 2.37ff., but contrasted with *Sale Continuation* in paras 4.50ff. and 4.59ff.

PROPER LAW ISSUES

2.94 This is a book on English law and detailed discussion of the law of other jurisdictions would be beyond the scope of the book, so I assume throughout that English law is the proper law of the relevant contracts. Proper law issues have, however, given rise to quite a substantial body of case law, perhaps partly because this is an issue on which the Uniform Customs and Practice, and indeed most credits themselves, are silent. Proper law issues can arise substantively, for example where it is claimed that performance is illegal under one of the argued systems of law, but can also arise as part of another issue. For example, that a contract is "governed by English law" is one of the grounds for service out of the jurisdiction.[106]

2.95 The proper law of contracts made on or after 1 April 1991 is governed by the Contracts (Applicable Law) Act 1990. Though the purpose of this legislation was to enact the Rome Convention of the law applicable to contractual obligations,[107] the application of the Act is not limited to contracts between states which have ratified the Convention, but by Art. 1(1): "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries". Exclusions from the operation of the Convention are relevant to this book, only to the extent that Art. 1(2)(c) excludes "obligations arising under bills of exchange . . . to the extent that the obligations . . . arise out of their negotiable character". Otherwise, the 1990 Act applies to determine the proper law of the contracts of which documentary credits are comprised, and any contract of sale or carriage.[108]

2.96 To contracts made before 1st April 1991,[109] proper law issues continue to be determined by the common law, which was applicable prior to the 1990 Act. For the purposes of the discussion in this section, the 1990 Act appears in fact to have made little, if any, difference to the earlier common law.

Express choice of law clause

2.97 Performance bonds, sale and carriage contracts (but not usually documentary credits), often stipulate expressly whose law is to govern. Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* thought that the English courts would always give effect to an express choice of law clause,[110] "provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the clause on the ground of public policy". It seems likely that a proper law clause will be contrary to public policy, or not *bona fide* and legal, only if the intention is to avoid a provision of the domestic legislation of the state with the closest connection with the contract.[111] It is not necessary for the transaction to have a close connection with the country chosen,

106. CPR, r. 20(e)(iii).

107. The Rome Convention is set out in full in Sched. 1 of the Act, and relevant parts are also set out in Appendix E.

108. See, e.g., the discussion of the proper law *Brandt* v. *Liverpool* contracts in para. 5.58ff.

109. Contracts of this age still appear to be litigated. E.g., *Habib Bank Ltd.* v. *Central Bank of Sudan* [2006] E.W.H.C. 1767 (Comm.); [2007] 1 W.L.R. 470; [2006] 2 Lloyd's Rep. 412.

110. [1939] A.C. 277, 290.

111. Though some aspects of Lord Wright's speech were criticised by Lord Diplock in *The Hollandia* [1983] 1 A.C. 565, 577G–578A, this aspect of it is almost certainly still good law.

and indeed in *Vita Food* itself Lord Wright applied English law, though the case had only the most tenuous connection with England, and both parties to the action had pleaded that the proper law of the contract was the law of Newfoundland.

2.98 In international sales in general the principles in *Vita Food* are undoubtedly beneficial. Especially where there are a number of re-sales, successive traders may come from different countries, and it would create complications were a different proper law to apply to each transaction in the chain. As we will see, in the absence of an express clause the residence of the contracting parties can affect the proper law. As long as the sale contracts contain the same express choice of law clause, this should not happen, since by virtue of *Vita Food* the domicile of the contracting parties will be irrelevant. *Vita Food* itself concerned a bill of lading contract, for which the principles in the case would also seem to be beneficial, for the same reason, since an express clause will ensure that the same law applies, even where the bill of lading is transferred to successive traders. In reality, where the Carriage of Goods Act 1992 applies, the transferred contracts will probably be governed by the same law as the original bill of lading contract, in any event.[112] In a documentary credit context, it would also be beneficial if all the relevant contracts (and indeed, credits themselves, especially where they are issued back-to-back) were governed by the same law. This could also be achieved by express choice of law clauses, but such clauses are uncommon in documentary credits.

2.99 The freedom of contract principles of *Vita Food* have been retained by the Art. 3 of the Contracts (Applicable Law) Act 1990, which is set out in full in Appendix E. Article 3(1) preserves the right of the parties to choose the applicable law, except to the extent that Art. 3(3) preserves the "mandatory rules" of a country where all the elements of the contract, apart from the choice of law clause, point exclusively to that country. Mandatory rules are those from which the parties are not permitted to contract out. This mirrors the public policy proviso in *Vita Food*. Particularly where rules are intended to protect a weaker party, their purpose could be entirely negated were the parties able to choose the law of a country that did not operate them. It is probable, for example, that Art. 3(3) would prevent the parties to an exclusively English contract from contracting out of the provisions of the Unfair Contract Terms Act 1977, or other statutes which are intended to protect consumers.[113]

No express choice of law clause

2.100 As with any expression of intention, the proper law may be inferred from the express wording of the agreement, or can be implied from all the circumstances. Express choice of law clauses, though common in performance bonds, are uncommon in documentary credits. Professor Ellinger states that: "This lacuna is based on the theory that the law of letters of credit is to be found in [the UCP] and is based on an international *lex mercatoria*", but as he then observes, "there is no separate body of *lex*

112. See chapter 5, but note para. 5.58ff., on *Brandt* v. *Liverpool* contracts.

113. Though the basic freedom of contract provisions are preserved, there are within Art. 3 significant departures from the common law position. These are not, however, relevant to the present discussion.

mercatoria".[114] Whatever the reason, the proper law of the contracts making up documentary credits is usually determined, not by the contracts themselves nor by the UCP, but by the general law.

2.101 In the absence of an express clause, at common law the courts attempted to infer an intention, paying particular regard to factors such as arbitration clauses and choice of forum clauses.[115] In the absence of such indicia of intention, the courts apply the law of the state with which the contract has its closest and most real connection.

2.102 Under the 1990 Act, the general principle of the common law position is preserved by Art. 4(1) of the Rome Convention, which provides that in the absence of an express choice of law clause, the contract shall be governed by the law of the country with which it is most closely connected. Article 4(2) then elaborates on the issue of close connection,[116] stressing the habitual residence, or principal place of business, of the party who is to effect characteristic performance. As will become apparent in the next section, this differs from the common law. However, Art. 4(2) can be displaced by Art. 4(5), if it appears from the circumstances as a whole that the contract is more closely connected with another country.

2.103 The application of Art. 4(2) in a commercial credit context, and its interplay with Art. 4(5), are considered in the following section. However, it is probably a fair summary to say that for present purposes, the courts have not allowed Art. 4(2) significantly to alter the position that obtained at common law.[117]

Application to documentary credits and performance bonds

2.104 At common law, in general, in the absence of an express choice of law clause, in contracts involving the beneficiary, the proper law of a documentary credit is the law of the country in which payment is to be made, and documents to be tendered, because that is the country with which it has the closest connection.

2.105 A good starting point is Ackner J.'s judgment in *Offshore International SA* v. *Banco Central SA*,[118] where the letter of credit, though issued by a Spanish bank, was opened by Chase Manhattan Bank of New York, expressly identified by the issuing bank as their agents. The letter of credit was available by the plaintiffs' drafts on Chase Manhattan at sight. Payment and tender of documents, in other words, were both, as expressly envisaged by the Spanish bank, to take place in New York. Under those

114. Ellinger, note 10 above, at 43, and notes 63–64. See also the observations of Steel J. (who also observed that the UCP is silent on this issue) in *Marconi Communications International Ltd.* v. *PT Pan Indonesia Bank Ltd. Tbk* [2004] 1 Lloyd's Rep. 594, at [19]. Neither source gives an explanation for this phenomenon. Steel J.'s views on the proper law issue were approved in the Court of Appeal: [2005] E.W.C.A. Civ. 422.

115. In *The Elli 2* [1985] 1 Lloyd's Rep. 107, for example, also in para. 5.58ff., bills of lading were held governed by English law because they incorporated a charterparty with an English arbitration clause.

116. Section 3(3) of the Act allows reference to be made to the Giuliano and Lagarde Report, available at http://www.rome-convention.org/instruments/i_rep_lagarde_en.htm, for interpretation of the Convention. The report states that: "Article 4(2) gives specific form and objectivity to the, in itself, too vague concept of 'closest connection' ". See also *Bank of Baroda* v. *Vysya Bank Ltd.* [1994] 2 Lloyd's Rep. 87, 91 (col. 2), *per* Mance L.J.

117. *Ibid.* Also, e.g., *Habib Bank Ltd.* v. *Central Bank of Sudan*, note 107 above, at [43] (a case that was governed by the common law).

118. [1977] 1 W.L.R. 399; [1976] 2 Lloyd's Rep. 402.

circumstances, Ackner J. had no doubt that the contract between beneficiary and issuing bank was governed by the law of New York[119]:

"The contest here is between New York law and Spanish law. What are the relevant factors in favour of each? As regards New York, the credit was opened through a New York bank; payment was to be made in US dollars. Further, such payment was only to be made against documents presented in New York. In favour of Spanish law being the proper law is the fact that the letter of credit was opened by a Spanish bank, the first defendants. Thus, on the side of New York law are all matters of performance, whereas, in relation to Spanish law, Spain and a Spanish bank was the source of the obligation. In my judgment, it is with New York law that the transaction has its closest and most real connection."

2.106 The habitual residence of the paying bank was not, therefore, the country with which the contract had the closest connection.

2.107 Ackner J.'s judgment was approved by the Court of Appeal in *Power Curber International Ltd.* v. *National Bank of Kuwait SAK*,[120] a case involving an irrevocable but unconfirmed credit to finance a c.i.f. sale between sellers in North Carolina and buyers in Kuwait. Under the credit, 25 per cent of the price was to be paid against presentation of documents, the remaining 75 per cent one year after the date of shipment. The credit was issued by the National Bank of Kuwait, but through the North Carolina National Bank, where payment was to be made against presentation of documents. The identity of the advising bank was clearly stated in the credit itself.[121]

2.108 The first 25 per cent was paid, and in accordance with the terms of the credit, a usance (or time) draft was drawn by the buyers on the National Bank of Kuwait for the outstanding 75 per cent, maturing one year after shipment.[122] Before the draft matured, because of a dispute under the sale contract a provisional attachment order was made in the Kuwaiti courts, the effect of which under Kuwaiti law was to prevent any further payment being made under the credit.[123] The buyers' objections would not have justified refusal to pay under UK law, and indeed the attachment order was wholly contrary to the principles set out in chapter 9.[124]

2.109 Power Curber (the sellers) eventually issued a writ against the National Bank of Kuwait in England,[125] where the Court of Appeal held that the proper law of the credit was the law of North Carolina. North Carolina was the country with which the credit had closest connection, because that was where the bank was required, under the terms of the credit, to perform its obligation to pay. It was also the place where documents were to be tendered. Therefore the provisional attachment order of the Kuwaiti courts, which also ran counter to internationally accepted principles that the promise of the issuing bank to pay was wholly independent of any disputes that may arise between buyer and seller, would not be recognised by the English courts.

119. [1977] 1 W.L.R. 399, 401.

120. [1981] 1 W.L.R. 1233; [1981] 2 Lloyd's Rep. 394.

121. For the terms of the credit, see [1981] 1 W.L.R. 1233, 1237.

122. Under this credit, the buyers drew time drafts on the issuing bank, which they were required to give to the sellers.

123. See the comments at [1981] 1 W.L.R. 1233, 1239.

124. Para. 9.67ff.

125. Apart from the fact that the National Bank of Kuwait traded, and had a registered office in London, the case had no other connection with England. It appeared that the bank wished to honour its obligations to Power Curber, and the question at issue was whether the order of the Kuwaiti courts prevented it from doing so: [1981] 1 W.L.R. 1233, 1239. This depended on whether the credit was governed by Kuwaiti law.

2.110 In the absence of an express choice of law clause, then, at common law the proper law of the credit is governed by place of payment.[126] Even identifying the characteristic performance as making payment against tender of documents, this does not appear to tie in well with Art. 4(2) of the Rome Convention, which stresses the habitual residence of the party who is to effect that performance, rather than the performance itself. However, through a wide application of Art. 4(5), the courts have ensured that the 1990 Act has had minimal, if any, effect on the English common law. The Court of Appeal took the same view as in *Power Curber*, in an action by the beneficiary against the confirming bank, in *Marconi Communications International Ltd.* v. *PT Pan Indonesia Bank Ltd.*,[127] on an application of Arts 4(2) and (5) of the Rome Convention. Though the confirming bank (Panin) had its principal place of business in Indonesia, the credit was advised through a bank (Standard Chartered Bank (SCB)) that would negotiate drafts and make payment in London. Article 4(2) would have led to the application of Indonesian law as "the country where the party who is to effect the performance which is characteristic of the contract", i.e., payment, was situated. However, the Court of Appeal held that the contract was governed by English law, Art. 4(5) operating to displace the presumption in Art. 4(2), on the grounds of an overriding connection with England.[128] Indeed, though the reasoning was explicitly based on the previous common law authorities, arguably the case extends them, because neither the identity of the advising bank nor the place of payment were identified in the credit,[129] though they were in the sale contract. Nonetheless, Potter L.J. observed that it was common ground that SCB would negotiate the credit.[130]

2.111 A similar view had previously been taken by Mance J. in *Bank of Baroda* v. *Vysya Bank Ltd.*[131] He thought, as part of his reasoning (though the contract was not directly at issue),[132] that the contract between an Irish beneficiary and an Indian issuing bank was governed by English law, where the contract was confirmed by the English branch of the plaintiff bank (which was also Indian). Though the application of Art. 4(2) would have led to the application of Indian law, it was displaced by Art. 4(5).

2.112 Usually the place of payment is expressly provided for. If it is not then the UCP makes no provision. The principle was advanced in *Royal Bank of Scotland plc* v. *Cassa di Risparmio delle Provincie Lombard*[133] that a debtor seeks out his creditor, in which case the proper law will be governed by the habitual residence of the paying bank, but (because the credit expressly provided for payment in New York, and because the express term prevailed) the Court of Appeal found it unnecessary to decide whether that principle was applicable in the context of international banking transactions.

126. Or at any rate the particular contract being considered. Since the contracts making up the credit are autonomous, they need not be governed by the same proper law. In *Turkiye Is Bankasi AS* v. *Bank of China* [1993] 1 Lloyd's Rep. 132, Phillips J. took the view that the place of payment would not, however, always be conclusive, where very strong factors pointed to a different proper law.

127. [2005] E.W.C.A. Civ. 422, noted by Christopher Hare [2005] L.M.C.L.Q. 417.

128. Article 4(5) allows the courts to disregard the Art. 4(2) presumption "if it appears from the circumstances as a whole that the contract is more closely connected with another country".

129. See Hare's criticisms, note 125 above, at 420.

130. [2005] E.W.C.A. Civ. 422, at [21]. In the event, SCB did not negotiate the credit ([23]), but merely acted as Marconi's agent for collection from Panin Bank. However, the governing law cannot be determined by the operation of the contract, as opposed to the factors known at the time of the agreement.

131. [1994] 2 Lloyd's Rep. 87.

132. See below, para. 2.114ff., on the relationship between the contracts in the credit in that case.

133. *Financial Times*, 21 January 1992. See also para. 1.89ff.

2.113 UCP 600, Art. 6(d)(ii) provides that a credit is always available for presentation at the issuing bank. It seems unlikely that this will affect the principles in this section, since though it is a new provision, it merely restates a principle that had long been regarded as applicable.[134]

Relationship between the autonomous contracts; doctrine of infection[135]

2.114 A commercial credit is made up of a number of contracts which are, in principle at least, autonomous. That being so, it would be possible for each contract to be governed by the law of a different country. This has, however, been recognised as undesirable. At common law, the proper law ultimately depended on the intention of the parties. In *Attock Cement Co. Ltd.* v. *Romanian Bank for Foreign Trade*,[136] Staughton L.J. quoted the following passage from the then-current edition of Dicey & Morris, *Conflict of Laws*[137]:

> "The legal or commercial connection between one contract and another may enable a court to say that the parties must be held implicitly to have submitted both contracts to the same law . . . "

2.115 In a documentary credit context, if it is accepted that, in a contract to which the beneficiary is party, the proper law is the place of payment to him, then the parties might have impliedly agreed to subject all the other contracts in the credit to the same proper law. In that case the reimbursements will be governed by the same law as the contract between the beneficiary and the paying bank. In *Offshore*, immediately after the passage quoted earlier, Ackner J. said:

> "that very great inconvenience would arise, if the law of the issuing bank were to be considered as the proper law. The advising bank would have constantly to be seeking to apply a whole variety of foreign laws."

2.116 In effect then, one starts by determining the proper law of the contract between the beneficiary and the paying bank, and implies that the parties have intended all the contracts to be governed by the same law.

2.117 The Rome Convention is not ultimately dependent on intention, but the English courts have arrived at a similar position through the interplay between Arts 4(2) and 4(5). In *Bank of Baroda* v. *Vysya*, considered in the previous section, the action was for reimbursement by a confirming against an issuing bank. Mance J. held that the performance which was characteristic of the contract was the adding of its confirmation by the confirming bank, and its honouring of the obligations accepted thereby in relation to the beneficiary. Applying Art. 4(2), therefore, the proper law was determined by the habitual residence of the confirming bank, in this case England. The fact that reimbursement by the issuing bank was to be in a different jurisdiction was irrelevant. Since, in his view, the contract between the confirming bank and beneficiary was also clearly governed by English law, he found this result satisfactory, on *Offshore* principles. The issuing bank argued that its contracts with both applicant

134. Byrne, *The Comparison of UCP 600 and UCP 500*, Institute of Banking Law and Practice (2007), at 80.
135. So described by Staughton L.J. in *Wahda Bank* v. *Arab Bank plc* [1996] 1 Lloyd's Rep. 470, 472.
136. [1989] 1 W.L.R. 1147. This case is discussed further below, para. 2.119ff.
137. [1989] 1 W.L.R. 1147, 1158, quoting from Dicey & Morris, *The Conflict of Laws*, 11th ed. (1987), at 1185. Current edition is Dicey, Morris & Collins, 14th ed. (2006).

and beneficiary were determined by Indonesian law,[138] and that therefore there was no particular incongruity in applying different proper laws to different contracts. By applying Art. 4(5) and holding that the contract between issuing bank and beneficiary was also governed by English law, Mance J. was able to avoid the result of having the two contracts governed by different proper laws, a result that he regarded as wholly undesirable.[139]

2.118 A similar approach has been adopted where performance bonds are counter-guaranteed; the law of the counter-guarantee has been held to be the same as that of the performance bonds, by Phillips J. in *Turkiye Is Bankasi AS* v. *Bank of China*,[140] and by the Court of Appeal in *Wahda Bank* v. *Arab Bank plc*.[141] Both these cases, involving old transactions, were decided on the basis of the common law, but no doubt a similar interplay between the sub-articles of the Rome Convention, such as that adopted in *Bank of Baroda* v. *Vysya* and *Marconi Communications International Ltd. v. PT Pan Indonesia Bank Ltd.*,[142] would allow the same result.

Proper law of credit or performance bond independent of proper law of underlying transaction

2.119 In spite of the sentiments expressed in the previous section, the courts have been more prepared to hold that the proper law of a credit or performance bond is independent of the proper law of underlying transaction (the sale contract). The principle that the proper law of the credit or performance bond is the law of the country in which payment is to be made operates even if the underlying contract is expressly governed by a different jurisdiction. The courts have shown less willingness to apply the infection doctrine to the underlying transaction.

2.120 In *Attock Cement Co. Ltd.* v. *Romanian Bank for Foreign Trade*,[143] the underlying transaction, which was a contract for the construction of a cement plant by a Romanian company on behalf of the plaintiffs, was made expressly subject to English law. Under the terms of the underlying contract the Romanian contractors were required to furnish a performance bond of 10 per cent of the contract price, and in pursuance of this the Romanian Bank issued an unconditional and irrevocable bond, payable against simple demand, accompanied by its declaration that the Contractor had failed to fulfil any of its obligations on demand.[144]

2.121 Serious disputes arose under the underlying contract, leading the plaintiffs eventually to give notice of termination, and by the use of armed security guards to prevent the contractors' employees from entering their plant. They then made a

138. It would not, of course, be usual for the beneficiary under a confirmed credit to sue an issuing bank, but the undertaking of the confirming bank is additional rather than substitutional, and it could become an issue in the event of a confirming bank bankruptcy. See the discussion of the autonomous contracts in para. 1.51ff.

139. [1994] 2 Lloyd's Rep. 87, 93 (col. 1), citing *Offshore*.

140. [1993] 1 Lloyd's Rep. 132.

141. [1996] 1 Lloyd's Rep. 470.

142. See para. 2.104ff.

143. [1989] 1 W.L.R. 1147; [1989] 1 Lloyd's Rep. 572. *Attock* was distinguished in *Turkiye Is Bankasi AS* v. *Bank of China*, note 138 above, where, however, there was a direct contractual connection between the performance bond and the underlying transaction, and it could be inferred, as a matter of fact, that the proper law of both transactions was the same. No doubt was cast on the general principle set out in *Attock*.

144. [1989] 1 W.L.R. 1147, 1150. In other words this was a performance bond payable on demand similar to that considered in the *Edward Owen Engineering* case, in para. 9.77ff.

demand on the performance bond, with which the bank did not comply. The plaintiffs then sought leave to serve a writ on the bank out of the jurisdiction, and in order to do so had to show a good arguable case that the performance bond was governed by English law.[145]

2.122 Their main argument rested on an oral collateral agreement which expressly provided that the performance was subject to English law, but this was rejected on the facts. That being so, the fact that the underlying contract was expressly subject to English law was held by the Court of Appeal to be irrelevant. Applying *Power Curber*, Staughton L.J. held that the proper law was the law of the country where payment was to be made, which was presumably Romania.

2.123 In *Wahda Bank* v. *Arab Bank plc*, Staughton L.J. explained that a commercial party "may well wish to have security for the payment that will become due to them, from a bank in a place and governed by a system of law which will assure them of payment, even if they are not able to obtain that system of law to govern their commercial contract".[146] This justified treating the performance bond independently from the underlying transaction. In *Wahda* itself, however, the performance bond and counter-guarantees were intimately connected, and there the doctrine of infection applied.

2.124 In *Bank of Baroda v. Vysya*, Mance J. was relieved to be able to find that the contracts involving the banks were governed by the same law, but appeared to regard the law of the underlying transaction as irrelevant.[147]

CONCLUSION

2.125 In this chapter we have considered the types of documentary credit in use, methods of payment, nature of the banks' undertakings, and various other aspects of documentary credits. Payment under a documentary credit is triggered by tender of *documents*. The documents provide evidence that the seller has performed his contractual obligations, and can also provide all the parties with protection in the event of another party's bankruptcy, or loss of, or damage to the goods. The main types of document in use are the subject of the next chapter.

145. Then under RSC, Order 11. The grounds are the same today.
146. [1996] 1 Lloyd's Rep. 470, 473.
147. [1994] 2 Lloyd's Rep. 87, 92.

CHAPTER 3

DOCUMENTS USED IN INTERNATIONAL TRADE

3.1 This is a book about documentary credits, but with a concentration on documentation. Documentation has evolved to suit changing trade practices, and one of the issues is the extent to which newer forms of documentation provide equivalent protection for the parties.

3.2 We have already seen in chapter 1 how documentary practices have evolved over the last thirty-five years or so.[1] This chapter describes the various forms of documentation now used. It should be seen as an introductory descriptive chapter, a foundation for the more detailed discussion in the following chapters. It is not intended to constitute an exhaustive legal analysis of the documentation described.

We begin with the traditional bill of lading, and move to consider the alternative types of documentation that are partly replacing it, and also those which look likely to evolve in the future. First, however, we should set out the advantages and disadvantages of the traditional shipped bill of lading.

ADVANTAGES AND DISADVANTAGES OF THE TRADITIONAL BILL OF LADING

Advantages

3.3 Where the parties contract on c.i.f. or f.o.b. terms, the buyer needs evidence that the seller has performed his contractual obligations, by shipping goods of the contract description. For such contracts, the document needs to certify actual shipment. A document which states merely that the goods have been received, or taken in charge by the carrier, is not sufficient. Received for shipment bills of lading, and multimodal transport documents can be issued earlier, thereby helping to alleviate documentary delays, but they are not suitable where the sale contract requires the seller actually to ship the goods.

3.4 A non-negotiable document, even a waybill, can certify shipment, but where re-sales of the goods are intended at sea, or even where the seller simply needs security against payment, a negotiable bill of lading has advantages for the commercial parties. A bill of lading must be presented before delivery can be made. In security terms this is its strength; in other terms, as we will see, it is a weakness. Waybills can provide consignees with useful rights,[2] but nothing is gained from the actual possession of a

1. Para. 1.109ff.
2. See paras 3.51ff. and 8.21ff.

waybill. By contrast, a bill of lading concentrates rights on its lawful holder. Its transfer, and also therefore its retention, have legal consequences.

3.5 We will see in chapters 6 and 7 that the bill of lading, as a document of title, can operate to transfer the property in the goods,[3] a matter of some importance in the event of the bankruptcy of one of the parties.[4] It can also transfer constructive possession of the goods to the holder,[5] which is to say that delivery can be made only against its production. Though these functions are not necessarily limited to the shipped bill of lading, it may be that only the shipped bill of lading is always recognised by the courts, without proof of custom or other evidence, as a document of title at common law. The tie-in between dealings with a document of title, passing of property and transfer of constructive possession, are the subject matter of chapters 6 and 7.

3.6 Until recently, the shipped bill of lading was also uniquely capable of performing another function, namely to trigger s. 1 of the Bills of Lading Act 1855, so as to transfer contractual rights under the contract of carriage to the holder for the time being of the bill of lading. The Act also imposed liabilities under the carriage contract. There was authority that only the shipped bill of lading fell within the 1855 Act.[6] In reality, because it tied in the transfer of contractual rights with property, the 1855 Act was only ever a material consideration for a buyer, not for a bank, and moreover only a buyer of identified cargo, not for example, part of an undivided bulk. In 1992, however, the 1855 Act was replaced by the Carriage of Goods by Sea Act 1992, which divorces transfer of contractual rights from property, and hence can also benefit banks under documentary credits. It also applies to other documents, apart from the traditional shipped bill of lading. The 1992 Act therefore accords to other documents at least one of the advantages which previously had been unique to the shipped bill of lading.[7] Actually, it does more than this, because the delivery rights in chapter 7 are also often contractual in nature. The Carriage of Goods by Sea Act 1992 does not directly affect passing of property, however, which, as we will see in chapter 6, is of importance if one of the parties becomes bankrupt.

3.7 The position of the carrier should not be forgotten. Where a sale is financed by documentary credit, the bank may wish to take delivery of the goods in the event of the buyer's bankruptcy, and if there is a problem over payment in the first place, the seller may retain the bill of lading as his security. If the goods are re-sold at sea, the bill of lading will pass successively to effect each re-sale, but again subject to its retention by sellers and banks, should there be a problem over payment. The carrier needs to know

3. That transfer of a shipped bill of lading could, by custom of merchants, also pass property in the goods was originally recognised in *Lickbarrow* v. *Mason* (1794) 5 Term. Rep. 683, below, para. 6.7ff., and see also Bools, *The Bill of Lading: A Document of Title to Goods*, LLP (1997), ch. 1.

4. Note the use of the word "can", as opposed to "must". See chapter 6, and in particular *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, in para. 6.18ff., where the House of Lords took the view that the property does not necessarily pass on transfer of the bill of lading; ultimately, the passing of property depends on the intention of the parties.

5. Note again the word "can", not "must". As with property, a document of title will not necessarily pass constructive possession, it again depending on the intention of the parties. The bill of lading in *The Future Express* [1993] 2 Lloyd's Rep. 542, considered further below, paras 7.14ff., 7.55ff. and 7.84ff., did not transfer constructive possession of the goods to a bank when it was not transferred until long after the goods had been discharged.

6. In *Diamond Alkali Export Corp.* v. *Fl Bourgeois* [1921] 3 K.B. 443, McCardie J. took the view that the received for shipment bill of lading did not trigger the operation of s. 1. On received for shipment bills now, see paras 3.18ff., 5.28ff., 7.95ff. and 8.10ff.

7. See generally chapter 5.

to whom to deliver. It may not be the last person in the chain of sales, if an intermediate purchaser or a bank has not been paid. If the person entitled also possesses the bill of lading, as its lawful holder, then the carrier can be assured of making proper delivery, by delivering only against its production. If the transaction is simpler, for example where it is known from the outset to whom delivery is to be made, then there is no need for a bill of lading, and a waybill can be used instead. But though in principle changes can be made to the identity of the consignee where a waybill is used, thereby allowing the waybill to be used in documentary credit sales and even perhaps for re-sales, the presentation of a waybill does not tell the carrier who is entitled. This is perhaps one reason why waybills are not in fact used to effect re-sales of cargo, and why they are not the preferred option, where even a single sale is financed by documentary credit.[8]

3.8 There remain advantages, then, in the use of a document which must be presented for delivery. The carrier knows to whom he must make delivery, and incidentally is protected if he does make such delivery.[9] Trading parties and banks also benefit, because the document can be retained until payment is made, but then transferred against payment, giving the payer an assurance of title and right to possession. As we will see, in recent years changes in commercial practice have forced banks under documentary credits to accept documentation apart from the traditional shipped bill of lading.[10] While, as we will see in the following section, the use of alternative forms of documentation, *in certain types of trade*, can be of benefit to both carriers and the trading parties, they were not devised in the interests of the banking community. A bank that accepts any document other than a traditional shipped bill of lading is thereby (unless it protects itself by making express provision) accepting a lesser degree of security. If it takes steps to protect itself, for example where a waybill is used,[11] this will be at the expense of the security of the other parties, and will also make it more difficult for carriers to know to whom to deliver.

Disadvantages of using shipped bill of lading

3.9 The features of the bill of lading, described in the last section, are also its Achilles heel. Precisely because it is a document of title, if the carrier delivers without production of an original bill of lading, to someone who is not entitled to the cargo, he takes the risk of liability to the true owner for the full value of the cargo wrongly delivered.[12] While this protects the holder of an original bill of lading, and is indeed one of the reasons why it provides such valuable security, it renders the carrier's position unacceptable if a bill of lading has been issued, but has not arrived by the time the ship is ready to discharge. Yet as we saw in chapter 1,[13] cargoes commonly arrive before documents today. The shipowner cannot wait, not only because a ship is a money-earning asset, but (especially in the case of oil) there will be pressures from port

8. On waybills see further para. 3.51ff.
9. See further para. 7.26ff.
10. For a clear expression of the view that the banking community was responding, even 25 years ago, to what the transport community was producing, and to some extent anticipating expected legal changes, see *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411, at 46. (This document explained the then new approach to documentation adopted in UCP 400: see further para. 8.1ff.)
11. See para. 3.51ff.
12. See the authorities and discussion in para. 7.14ff.
13. Para. 1.109ff.

authorities for a quick turn-round. It is sometimes possible to discharge the cargo into a warehouse, and only to deliver from there on production of an original bill of lading,[14] but this is not possible for all cargoes. For example, it is usually impossible to store bulk liquid cargo other than on the vessel itself, or in the receiver's cargo tanks.

3.10 We saw in chapter 1 that there are two essentially different types of problem here. For some trades, non-negotiable documentation is a solution, at least from the viewpoint of the carrier. In other trades, the parties continue to use negotiable documentation and indemnities. Though this may be the best solution possible, delivery against indemnities largely negates the value provided by the negotiable documentation in the first place. (Where oil cargoes are delivered without production and mixed with other oil or consumed, any property rights enjoyed by the bill of lading holder will be destroyed. They will be replaced by a personal action against the carrier, who might have a personal action on the indemnity. Fine, assuming the indemnity is enforceable, as long as nobody goes bankrupt.)[15]

Non-negotiable documentation

3.11 Manufactured goods are not often re-sold in transit, and so the traditional negotiable bill of lading might not be required. As long as they can be sure of the identity of the consignee, carriers would prefer not to issue a bill of lading, because of the potential consequences of delivering without its production. Unless a negotiable document is required (perhaps for reasons of finance), they would prefer if possible to use non-negotiable waybills. Even some 20 years ago, Lloyd L.J. observed, extra-judicially, that on the North Atlantic route, perhaps 70 per cent of all liner goods were carried on sea waybills.[16] Around the same time, in *The European Enterprise*,[17] Steyn J. observed that: "It is the invariable practice of all English cross channel operators not to issue bills of lading for the cross channel Ro-Ro ferry trade. Instead, they issue commercial non-negotiable receipts". Since the 1993 revision, the UCP has made express provision for tender of non-negotiable sea waybills.[18]

Multimodal transport

3.12 The traditional bill of lading assumes carriage from port to port, and is not well suited to combined transport operations, where the shipment is part of a larger transaction (e.g., container transport from an inland terminal in one country to an inland terminal in another). There will usually be three or more carriers involved in the total operation, which will involve at least one sea and two land legs.

3.13 The development of containerisation has significantly increased the importance of combined transport operations. Indeed, one of the main advantages of containers lies in their ability to be transferred easily from rail or road to ship and vice versa. Multimodal transport gives rise to a number of legal issues, and usually one

14. As in, e.g., *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81.
15. The legal ramifications of indemnities are considered in para. 7.29ff.
16. Sir Anthony Lloyd, "*The bill of lading: do we really need it?*" [1989] L.M.C.L.Q. 47, 49.
17. [1989] 2 Lloyd's Rep. 185, 187 (col. 1).
18. See paras 8.1ff. and 8.21ff.

document (the combined or multimodal transport document) provides cover for all three legs.[19]

Negotiable document still required

3.14 With oil and bulk dry cargo, the problem is not so much increased speed of sea transit, but the number of re-sales of the same cargo on the voyage. If each is financed by a documentary credit (and even if not), there can be huge documentary delays (sometimes running into months). For the reasons explained in para. 3.3ff., non-negotiable documentation cannot be used.

3.15 The shipped bill of lading cannot be issued and negotiated until after the vessel has been loaded. For a single sale on a short voyage, a possible solution is for the document to be issued earlier. A received for shipment bill of lading, or perhaps even a mate's receipt, can be negotiated sooner than a shipped bill of lading.[20] This will make no difference where multiple re-sales are envisaged. For such transactions, there is little alternative for carriers, other than to deliver without production of a bill of lading, and today this is quite a common practice, particularly where the receiver of charterer furnishes the carrier with a bank indemnity.[21] A variation on this theme is for the carrier to carry one original of a set of three on board, so that he is in effect acting as a postal service, and can indeed ensure that delivery is made only against production of an original bill. A bank holding one of the other originals might object to the consequent diminution in its security, and banks generally require tender of all three originals in a set.[22]

3.16 In principle, the computer and the Internet might be capable of resolving these issues, albeit with a significant investment in infrastructure, but at the time of writing (mid-2007), it looks most unlikely that the negotiable bill of lading will be replaced by an electronic document in the near future, except perhaps within closed systems operated by a particular carrier.[23]

BILLS OF LADING

Negotiable and straight bills of lading

3.17 The custom of merchants in *Lickbarrow* v. *Mason* concerned the shipped bill of lading, which was negotiable.[24] A bill of lading has to be made negotiable expressly, the

19. See further paras 3.42ff. and 8.24ff.

20. See, e.g., *Kum* v. *Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439, discussed further in paras 6.14ff. and 7.98ff., where this was found to be a very common practice on the relatively short voyage between Singapore and Sarawak. However, any solution which depends on the non-issuance at all of a bill of lading runs into potential problems with the Hague-Visby Rules: see further para. 3.61ff.

21. E.g., *Hansen-Tangens (A/S) Rederi III* v. *Total Transport Corporation (The Sagona)* [1984] 1 Lloyd's Rep. 194, where in his evidence the master of the vessel (who had been in command of tankers for some 14 years), asked how often an original bill of lading had been presented to him prior to discharge, answered: "I have never seen it!" On indemnities generally, see para. 7.29ff.

22. See para. 8.10ff.

23. See further para. 3.67ff.

24. Note 3 above. The term negotiable, though in common currency, is technically incorrect. Unlike bills of exchange, bills of lading are never negotiable instruments, and a transferor cannot transfer a better title than he has. See, e.g., the observations of Lord Hobhouse in *Homburg Houtimport BV* v. *Agrosin Private Ltd. (The Starsin)* [2004] 1 A.C. 715, [2003] U.K.H.L. 12, at [132]; *Trafigura* v. *MSC* [2007] E.W.H.C. 944 (Comm.), at [65].

choice usually being made by the shipper when drawing up the draft bill. It can be made out to bearer, in which case it can be passed from hand to hand like cash.[25] More commonly, it is made out to order, in which case it passes by delivery and indorsement. Even in the nineteenth century,[26] however, bills of lading were sometimes made out to a named consignee, in which case they were non-negotiable. Only the named consignee could claim delivery of the goods. Non-negotiable, or "straight" bills of lading are commonly used today where a negotiable document is not required, for example where the identity of the consignee is known from the outset, and the goods are not of a type which are likely to be re-sold. It is common today for bills of lading to have a box allowing the shipper to name a consignee or to make the bill out to order.[27] It may be supposed that the risks to carriers are lessened where a straight bill is used, since only the consignee is entitled to claim delivery. The House of Lords has recently held, however, that the document must nevertheless be presented before delivery is made.[28] A straight bill of lading is a document of title at common law, and it is this feature which distinguishes a straight bill of lading from a waybill.[29]

Shipped and received for shipment bills

3.18 With a traditional c.i.f. or f.o.b. contract, where the seller's obligation is to ship the goods, a loaded or on board document is the best evidence that the contractual obligation has been performed. Even for these contracts, these advantages may be outweighed by the practical disadvantages imposed by requiring a shipped bill of lading, and the parties may agree to take received for shipment instead. Container bills of lading, used in combined transport operations, will usually be in received for shipment form because of the nature of the operation, even where they are issued by the shipping line.[30] Combined transport sale contracts should ideally provide for the seller's obligations to end on delivery to the container terminal, rather than on shipment, in which case there is no need to require an on board document.

3.19 A received for shipment bill can later be annotated with the name of the ship and the date of shipment, thereby converting it into a shipped bill.[31] Alternatively, it may be given up against later issue of a shipped bill of lading.[32]

3.20 Where carriage is under a bill of lading, whether shipped or received for shipment, it will be governed by the Hague or Hague-Visby Rules, the latter where shipment is from a contracting state, or the bill of lading is issued in a contracting

25. E.g., *Sewell* v. *Burdick* (1884) 10 App. Cas. 74.

26. E.g., *CP Henderson & Co.* v *Comptoir d'Escompte de Paris* (1873) L.R. 5 P.C. 253. The possibility of a named consignee is also provided for as early as the (now repealed) Bills of Lading Act 1855.

27. See, e.g., *The Rafaela S* [2005] 2 A.C. 423, [2005] U.K.H.L. 11, at [4]; a box provided: "Consignee: (B/L not negotiable unless 'ORDER OF')". The shipper either fills in the name of the consignee (as in the case itself), or writes "order of . . . " to make the bill negotiable.

28. *JI MacWilliam Company Inc.* v. *Mediterranean Shipping Co. SA (The Rafaela S)* [2005] 2 A.C. 423, [2005] U.K.H.L. 11 (technically *obiter dicta*, since the case arose on an interpretation of the Hague-Visby Rules).

29. See further para. 7.123ff.

30. Schmitthoff's *Export Trade*, 10th ed., [16–007].

31. *Ibid.*, at [15–025]. See also the discussion of the Hague-Visby Rules in para. 3.61ff.

32. This should have happened, but did not, in *Ishag* v. *Allied Bank International* [1981] 1 Lloyd's Rep. 92, in para. 7.102ff.

state.[33] Under the Hague-Visby Rules the shipper is entitled to demand a shipped bill of lading,[34] should he so wish.

Through bills of lading

3.21 In chapter 4 we shall see that for f.o.b. and c.i.f. sale contracts, the bill of lading must cover the goods for the entire voyage, from shipment to port of destination.[35] If the goods are to be transhipped during the voyage, for example where a large bulk cargo is shipped from outside Europe to a European port, and transhipped aboard smaller vessels for distribution throughout Europe, a through bill of lading is required.

3.22 The essence of the through bill of lading is that one carrier (probably the ocean carrier in the above example) takes on obligations for the whole voyage, but with a liberty to sub-contract on-carriage from the port of transhipment. There must also be an express liberty to tranship in the carriage contract, for in the absence of an express stipulation transhipment will put the carrier in breach.

3.23 The carrier who undertakes obligations for the entire voyage will be the contracting carrier. The cargo-owner will be able to sue him in contract, if there is a breach of carriage contract, whether or not he is the actual carrier of the goods at the point of the breach. Typically, the contracting carrier will be entitled to an indemnity from the actual carrier.

3.24 The combined, or multimodal transport document, considered in para. 3.42ff., is a development (conceptually at least) of the through bill of lading, though adapted for combined transport operations, the through bill of lading being used for port-to-port shipments only.

3.25 Through bills of lading provide the parties with security equivalent to any other shipped bill of lading, and in principle, a through bill of lading can be tendered under a c.i.f. contract, and also under a documentary credit.[36]

Sets of three originals

3.26 An original bill of lading must also be tendered, but bills of lading are usually issued in sets of three originals "one of which being accomplished, the others stand void". In early days of international trade this probably provided protection against loss, but it can also increase the risk of fraud, where for example each of the three originals is separately negotiated.

3.27 In *Glyn Mills & Co.* v. *East and West India Dock Co.*,[37] the House of Lords held that a shipowner's duties extend no further than to deliver the goods to the first person to present an original bill of lading. He need not require all originals to be tendered, nor need he take further steps to ensure that the presenter of the document is in fact the consignee. A justification advanced by Earl Cairns was that the practice of issuing

33. Article X. There are other situations, but the detailed application of the Hague-Visby Rules is beyond the scope of this book.

34. Article III(3). See further para. 3.61ff.

35. Para. 4.94ff.

36. Para. 8.10ff.

37. (1882) 7 App. Cas. 591. The action was brought against a dock warehouseman, but the principles in the case would clearly also protect a shipowner.

bills in sets of three was for the benefit of either the shipper or consignee, if indeed it was a benefit at all, and was certainly not for the benefit of the shipowner.[38]

DELIVERY ORDERS

3.28 Another traditional form of documentation is the delivery order. It makes economic sense for shippers of bulk dry cargoes, for example in foodstuffs, to collect sufficient cargo to fill an entire vessel; economies of scale, and particularly cargo-handling considerations, make it much cheaper to ship the cargo in much larger quantities.[39] However, many of the traders, especially at the importing end, are relatively small concerns, unable to take large tonnages.[40] The cargo must therefore be split among a number of buyers, but a bill of lading can be issued only for the particular cargo.

3.29 If the shipper knows on shipment how the total bulk is to be split between the various buyers, he can obtain a number of sets of bills of lading from the carrier, each for a part of the total bulk, and these can be sent to various buyers. Since bills of lading are issued on shipment, however, or shortly thereafter, this is only possible if the number of buyers is known then. It also follows that a purchaser of bulk cargo afloat, who has become holder of a single bill of lading (or single set of bills), cannot use that bill of lading (or set) to re-sell the bulk to a number of different sub-buyers. Nor can he at this stage obtain fresh bills for smaller amounts.

3.30 The solution is to use delivery orders. These are directions to the carrier to deliver to the holder the amount of cargo mentioned, so a sub-sale can be effected by sending to each sub-buyer a delivery order in respect of that part of the cargo sold to him. Delivery orders might be issued by the seller to the carrier, to deliver parts of the bulk to each of the respective buyers, the delivery orders then being sent to each buyer. Such a delivery order, without more, confers on its holder no rights against the carrier, and as we will see, it is not acceptable tender under a c.i.f. contract.[41]

3.31 A type of delivery order which can in principle be tendered c.i.f. is the ship's delivery order. These are either issued by the carrier or his agent, or if issued by someone other than the carrier, attorned to by the carrier to the receiver.[42] The point about a ship's delivery order is that it contains some form of undertaking, from the carrier, that the goods will be delivered to the holder of the delivery order, or to the order of a named person, and in principle at least, this undertaking can be enforced against the carrier, in the event of a misdelivery. The use of a ship's delivery order in

38. See further para. 7.26ff. On the tender of one only of the set, see paras 4.85ff. and 8.10ff.

39. Stopford, *Maritime Economics* (2nd ed.), Routledge (1997), at p. 4. An example of collection of large quantities of cargo by an intermediary can be found in *Garnac Grain Co.* v. *Faure & Fairclough Ltd.* [1968] A.C. 1130.

40. Many international sales are therefore of quite small amounts, for example for 2,000 tons of Plate maize in *Agricultores Federados Argentinos Sociedad Cooperativa Limitada* v. *Ampro SA Commerciale* [1965] 2 Lloyd's Rep. 157.

41. *Comptoir d'Achat et de Vente Du Boerenbond Belge SA* v. *Luis de Ridder Limitada (The Julia)* [1949] A.C. 293. See para. 4.97ff.

42. See, e.g., the definition given by the Law Commission and Scottish Law Commission, where the two types are distinguished: Law Com. 196: *Rights of Suit in Respect of Carriage of Goods by Sea* (1991), para. 5.26ff. The Law Commission cite as authority *Cremer* v. *General Carriers SA (The Dona Mari)* [1974] 1 W.L.R. 341, [1973] 2 Lloyd's Rep. 366 and *Waren Import Gesellschaft Krohn* v. *Internationale Graanhandel Thegra NV* [1975] 1 Lloyd's Rep. 146, 153 (col. 2)–154 (col. 1).

a c.i.f. contract was described as follows by Denning L.J. in *Colin & Shields* v. *W Weddel & Co. Ltd.*[43]:

"The contract of sale was a c.i.f. contract—modified [to enable] the sellers to supply a ship's delivery order instead of a bill of lading. This modification is made so as to enable a seller to split up a bulk consignment into smaller parcels and to sell them to different buyers while the goods are still at sea. A seller often only has one bill of lading for the whole consignment, and he cannot deliver that one bill of lading to each of the buyers because it contains more goods than the particular contract of sale, so in each of his contracts of sale the seller stipulates for the right to give a ship's delivery order. The bulk consignment can then be split up into small parcels each covered by a ship's delivery order instead of a bill of lading."

3.32 In the event, the document tendered was held not to be a ship's delivery order,[44] but the passage describes how it can be used in splitting up a bulk cargo.

3.33 Until reforms to the law in 1992 and 1995,[45] the security afforded by even a ship's delivery order was limited, unless the carrier attorned, and even then, attornment would be of no use, unless there was a fresh attornment on each transfer.[46] Details are considered in chapters 4 and 7, and only an outline will be attempted here.[47] In summary, however, until 1995, a ship's delivery order issued in respect of undivided bulk cargo could not normally pass property in the goods,[48] and probably therefore conferred no conversion rights on its holder, in the event of misdelivery.[49] It passed contractual rights only if the *Brandt* v. *Liverpool* doctrine applied,[50] and in the absence of attornment, the only bailment was to the original shipper, not the current holder of the document.[51] That such a document was acceptable tender under a c.i.f. contract may therefore seem surprising, until it is realised that even a bill of lading for part of an undivided bulk cargo would have provided no better rights to its holder, unless possession of the bill of lading was enough, even without property in the goods, to provide its holder with an action in conversion or bailment, in the event of misdelivery.[52]

3.34 Attornment at least creates rights in bailment. Where the carrier attorns, the effect is as described by Lloyd L.J. in *The Future Express*[53]:

"There is an attornment when, in simple terms, a bailee of goods acknowledges that he holds the goods on behalf of a person other than the original bailor. The relationship of bailment then springs up between the bailee and that other person, enabling him to sue in conversion for non-delivery."

3.35 Similar comments were also made on attornment by Staughton L.J. in *The Gudermes*[54]:

43. [1952] 2 Lloyd's Rep. 9, 18–19.
44. See para. 4.97ff.
45. See paras 5.27ff. and 6.110ff. (respectively on the 1992 and 1995 Acts).
46. See also the discussion of *Colin & Shields* v. *W. Weddel & Co. Ltd.* in para. 4.97ff.
47. See paras 4.97ff. and 7.132ff.
48. Indeed, property in an undivided cargo could not pass at all, except in unusual circumstances such as that in *The Elafi*: see further para. 6.110ff. In this regard, the bill of lading was no better than the delivery order.
49. See further para. 7.43ff., on title to sue in conversion.
50. See para. 5.50ff., and in particular *Cremer* v. *General Carriers SA (The Dona Mari)*, above, note 42.
51. See also para. 7.72ff. Again, the position was no better even if a bill of lading were used.
52. Not by any means a certainty: see paras 7.43ff. and 7.72ff.
53. [1993] 2 Lloyd's Rep. 542, 550 (col. 1).
54. [1993] 1 Lloyd's Rep. 311, 324 (col. 1).

"As we understand that doctrine, attornment by a bailee consists in an acknowledgement that someone other than the original bailor now has title to the goods and is entitled to delivery of them. There may be an attornment *sub modo*; in other words, the bailee acknowledges the right to delivery but only on terms. That a bailee will naturally do for his own protection in many instances. And if there is an attornment on terms, the new bailor can also rely on the terms if he wishes to do so."

3.36 The effect of attornment, therefore, is to provide a subsequent holder with a bailment action should the carrier misdeliver, or fail to deliver, or otherwise break the terms of the bailment.

3.37 The position of holders was significantly improved by the reforms in 1992 and 1995. Since 1992 the ship's delivery order has been capable of transferring to its holder contractual rights against the carrier, giving useful protection not only against non-delivery and misdelivery, but also against loss of or damage to the goods.[55] From 1995, property (as a tenant in common) in undivided bulk cargoes can also pass.[56] The effect of all this is that today, the ship's delivery order will normally provide its holder with rights equivalent to those of the holder of a negotiable shipped bill of lading.

3.38 Because the carrier, at any rate since the reforms of the 1990s, is incurring a potential liability by issuing, or attorning to a delivery order, ship's delivery orders are usually given only in exchange for the bill of lading (indeed, the carrier would be foolish indeed to allow bills of lading and ship's delivery orders to remain in circulation simultaneously). If the carrier has a land-based agent a bill of lading can be exchanged for a number of ship's delivery orders in smaller amounts, the delivery orders being used instead of the bills of lading to effect the sub-sale. The delivery orders will typically be in the same terms as the bill of lading, and should state that the cargo was loaded in apparent good order and condition. For example, in *The Dona Mari*,[57] a bill of lading for 486 tons, representing part of a bulk cargo of tapioca, was exchanged with the shipowners' agents in Bremen for two ship's delivery orders, on exactly the same terms as the bill of lading, one for 120 tons, one for 366 tons. One of these was presented to a sub-buyer to effect a re-sale to him of part of that consignment, and incidentally giving him contractual rights against the carrier. If the carrier has no land-based agent nearby this will not usually be possible, and the best the seller can do is to issue his own delivery orders directing the shipowner to deliver a portion of the cargo to the eventual receivers. As we will see in chapter 4, such delivery orders confer no rights against the carrier, and cannot be stipulated as good tender in a c.i.f. contract.[58]

3.39 A number of recent cases involve an entirely different type of delivery order. Container cargoes in particular may be discharged from the ship into a container depot, where they are held to the order of the shipowner. The bill of lading is presented against a delivery order, which amounts to an order by the carrier to the depot to deliver the cargo to the person identified in the delivery order. An issue that can arise here is that misdelivery can occur after the goods are discharged from the ship. This is considered further in chapter 7.[59]

55. See chapter 5.
56. Para. 6.110ff.
57. *Cremer* v. *General Carriers SA (The Dona Mari)* [1974] 1 W.L.R. 341; [1973] 2 Lloyd's Rep. 366. On the rights accorded to the holder against the carrier, see para. 5.50ff.
58. See para. 4.97ff.
59. Para. 7.14ff.

ALTERNATIVES TO THE TRADITIONAL SHIPPED BILL OF LADING

3.40 The last section was concerned essentially with traditional documentation, such as might be required under a c.i.f. contract. The remainder of this chapter looks at alternative documentation, and possible future developments. The documentation considered in this section would not be acceptable tender c.i.f.,[60] but can be used where the traditional bill of lading is unsuitable.

3.41 Banks will accept any of the alternative forms of documentation considered here, the precise requirements being considered in chapter 8. None is a document of title, and therefore may afford inferior security. However, it is possible for the parties to address this issue to some extent, especially since the enactment of the Carriage of Goods by Sea Act 1992, considered in the next chapter. The rights that each document can provide its holder are considered in depth in the next three chapters.

Combined transport documents

3.42 A combined transport operation usually involves at least two land legs in addition to the sea carriage, and obviously the traditional shipped bill of lading, covering only port-to-port shipment, is not ideally suited to this type of transaction. Combined transport operations will usually involve containers.

3.43 Some shipping lines engage in combined transport, in which case a container bill of lading can be issued, usually in received for shipment form.[61] Otherwise, the shipper will typically consign the goods to a forwarding agent at a collection depot inland, and usually the shipper's only direct contact will be with the freight forwarder, who will make the necessary arrangements to cover each stage. Yet although the forwarding agent usually arranges the entire operation, there is likely to be more than one actual carrier, and different carriers will usually be responsible for each section of the combined transport operation.

3.44 One possibility is for the forwarding agent simply to act as shipper's agent in arranging each stage of carriage, the other contracting party being the actual carrier for each stage. Thus there will be three separate carriage contracts with three separate carriers, made through the agency of the freight forwarder. Alternatively, the forwarding agent may contract as principal for the first stage (as carrier), and agent for the shipper in arranging carriage for the on stages. There will still be three separate carriers, and three separate carriage contracts. Any document issued by the forwarding agent is issued as agent for the shipper and not (except insofar that he is himself carrier) for the carrier, and this is not a proper combined transport document. In particular, because it is not issued by or on behalf of the carrier for the successive stages, and is not acceptable under UCP 600.[62]

3.45 The essence of the combined (or multimodal) transport document proper is that one carrier, who might also be the forwarding agent, makes himself responsible for the entire operation. He may sub-contract each stage, or (for example) each stage after the initial land leg, but he contracts with the shipper as principal. He is liable in

60. At any rate at common law. See generally para. 4.68. A non-negotiable sea waybill may, however, be tendered c.i.f. Incoterms.

61. Above, para. 3.18ff.

62. UCP 600, Art. 19. See further para. 8.24ff.

contract to the shipper if the goods are damaged on any of the three stages, although if he is sued for damage caused while the goods are in the custody of another carrier, he should be able to recoup his costs, by way of indemnity, from that other carrier.[63] The only contract of carriage, however, is with the single contracting carrier, often referred to as a Combined Transport Operator (CTO).

3.46 The combined transport document is therefore essentially a development of the through bill of lading,[64] except that the carriage will involve land as well as sea legs, and it will nearly always be in received for shipment form. Combined transport documents should not therefore be seen as an entirely different animal from conventional bills of lading. As with a through bill, one carrier takes on responsibility for the entire enterprise, but may sub-contract each leg. However, whereas the through bill of lading will be issued by a shipowner or charterer, a combined transport document may be issued by a non-vessel operating carrier (NVOC) such as a freight forwarder, but contracting with the shipper as carrier for the operation, rather than merely acting as shipper's agent, as described in the previous paragraph.[65]

3.47 Combined transport documents can be either negotiable or non-negotiable. Because the combined transport document can be issued earlier than the traditional bill of lading, before the goods are shipped, a negotiable document can in theory, in appropriate kinds of transaction, help to resolve the problem of the vessel arriving before the documents can catch up. Because it is conceptually similar to a received for shipment, but not to a shipped bill of lading. it may not be a document of title at common law.[66] However, since the Carriage of Goods by Sea Act 1992 it can pass contractual rights to its holder,[67] including the right to take delivery on presentation.[68] Moreover, the control therefore accorded to its holder over delivery might enable inferences to be drawn about the passing of property, on its transfer or retention, similar to those drawn with a shipped bill of lading.[69] In this respect, therefore, the rights accorded to its holder may not differ significantly from those accorded to the holder of a shipped bill of lading. It is obviously less valuable in evidential terms, if the sale contract requires the seller actually to ship the goods, and is therefore ill-suited for use in c.i.f. and f.o.b. contracts.[70]

3.48 A difficulty with combined transport operations is that different international conventions may govern each part of the operation, so that the carrier's liability varies depending on where damage to the cargo occurs. Road transport, for example, is governed by the CMR Convention, adopted in the UK by the Carriage of Goods by Road Act 1965. The basis of, and limits to liability are different from those under the Hague and Hague-Visby Rules. In other words the basis of liability, limitations and time limits may vary depending on whether damage occurs during the sea carriage, or over land. Further, if the goods are in a container, it may be difficult to ascertain precisely when the loss occurs. A number of solutions have been proposed, including most recently the ideas that are going into the UNCITRAL's *Draft Convention on the*

63. This will depend on the terms of the contract between himself and the actual carrier, and is of no concern to the shipper.
64. Above, para. 3.21ff.
65. See further para. 8.24ff. on the acceptability of these documents under UCP 600, Art. 19.
66. See para. 7.95ff.
67. See para. 5.28ff.
68. See para. 7.14ff.
69. See para. 7.141ff.
70. See para. 4.71ff.

Carriage of Goods [wholly or partly] [by Sea]. However, the problems are quite intractable. Cargo-owners would ideally like to treat the entire carriage as a single operation with a uniform liability regime. However, the contracting carrier would wish to take indemnities from actual carriers for their part of the operation. It would follow that actual carriers operating multimodally might be subject to liability regimes differing from their unimodal counterparts. Clearly this has consequences for the relative economics of unimodal and multimodal operations.[71] No longer is the playing field level, as far as the operators are concerned. In a competitive market, this matters.

3.49 Leaving aside proposals to adapt the international conventions on carriage of goods so as to bring road, sea and rail carriage into line, it would also be necessary, to encourage the use of combined transport documents, to amend the Hague-Visby Rules so that a shipped bill of lading was no longer available on demand.[72] No doubt, in the light of the problems faced by the traditional bill of lading, good arguments could be advanced for such legislation. After all, the only fundamental difference between a through bill of lading, issued by an ocean carrier, and a negotiable combined transport document, issued by a freight forwarder at an inland terminal, is that in the latter case the voyage starts earlier and finishes later. In each case the principal contracting party contracts for the entire voyage, albeit subcontracting one or more legs, and in each case he is certifying that he has received the goods into his custody. In principle, therefore, it is difficult to see why the law must treat them so differently. However, a consequence of Hague-Visby being internationally agreed is that it is more difficult to change the regime, than would be the case with purely domestic legislation.

3.50 Nonetheless, as we will see in chapter 8, the combined transport document has been with us for well over 30 years. It has arguably been forced on the banking community by the transport community, and the response of the banking community is properly to decide what they regard as acceptable in such a document, and what they do not.

Waybills

3.51 As explained in para. 1.109ff., a possible solution to the problem of the vessel arriving before the documentation is to use, instead of a bill of lading, a document which the consignee does not need to present to obtain delivery of the goods. The liner (or sea or ocean) waybill is such a document, and it can be carried on the ship itself. It is similar in principle to an air consignment note, and is not, unlike the traditional bill of lading, a negotiable document, nor need it be presented by the consignee to take delivery of the goods at destination.[73] The carrier delivers to a named consignee, whereas under a bill of lading it is usual only to deliver against production of the original document.

3.52 Whether a waybill is advantageous for carriers depends on the nature of the trade. Where there are many re-sales of the goods while they are at sea, for delivery to be made only against production of a bill of lading can be a protection for carriers.

71. See, e.g., the discussion by David Glass, *Meddling in the multimodal muddle?—a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by Sea]* [2006] L.M.C.L.Q. 307, 316–317.

72. See further para. 3.61ff.

73. Unlike the straight bill of lading discussed in the House of Lords in *The Rafaela S* [2005] 2 A.C. 423; [2005] U.K.H.L. 11, in para. 3.17ff.

They can provide proof of identity of the person entitled, and in any case, delivery against an original document protects the carrier from action, even should the delivery be wrongful. In such trades, quite apart from the merchants' need for a negotiable document, waybills would be quite unsuitable from a carrier's viewpoint. They need to know to whom they should deliver, and a presentation requirement provides the necessary evidence.

3.53 If, however, the identity of the consignee is known, the carrier may prefer to deliver, without waiting for the documentation to catch up. The carrier knows to whom delivery is to be made, and other evidence of identification may suffice. This is only likely to work if the identity of the consignee is unlikely to change, or if it does change the carrier can reliably be informed of the change, and can satisfy himself as to the identity of the person to whom he is to make delivery, without the need for a document of title to be presented. Even if these precautions are taken, because the waybill is not a document of title, the carrier will be unprotected, should he nonetheless deliver to someone not entitled. In reality, waybills are used only where changes in the identity of the person entitled to delivery are likely to be very limited. The shipper's right to alter the name of the consignee can be removed entirely, by a NODISP clause in the carriage contract, or in some cases one change only might be permitted. The advantage of allowing one change is that a bank advancing money under a documentary credit can initially be made consignee, a change to the purchaser being made, once the bank has been reimbursed.

3.54 Subject to these observations, the right to make delivery without the need for production of a document is advantageous for carriers, in eliminating documentary delays. Indeed, if the goods are not carried under bills of lading, waybills can travel with the goods, and lengthy and complex documentary processes can be avoided. Because the carrier is entitled to deliver to the consignee, he risks no liability in delivering without production, at least as long as the person to whom delivery is made really is the consignee. In general, carriers outside the bulk cargo trades would prefer to see a wider use of waybills, and a concomitant reduction in use of bills of lading. The International Maritime Committee has for many years taken the view that in the great majority of cases of general cargo a bill of lading is not necessary, and that its issue should be positively discouraged.[74] There are difficulties for carriers in this regard, in that where the Hague or Hague-Visby Rules apply, shippers are entitled to demand a bill of lading, by virtue of Arts III(3) and (7),[75] so that the carrier does not have the option of refusing to issue a bill of lading where one is demanded by the shipper. However, it has been argued that nothing in Art. III prevents the carrier from charging a considerable amount for its issue. The International Maritime Committee recommended that shipping lines should charge a considerable amount for a bill of lading. The amount charged may operate not only to deter shippers who do not require a document of title from demanding one, but also to compensate carriers for the increased potential liability where a negotiable document is issued.

74. Contribution to United Nations Conference on Trade and Development (UNCTAD) Trade And Development Board *Ad hoc* Intergovernmental Group to Consider Means of Combating All Aspects of Maritime Fraud, including Piracy, Second session, October 1985.

75. See para. 3.61ff. Unlike the Hague-Visby Rules the Hague Rules, where applicable, are brought into force by clause paramount in a bill of lading. If no bill of lading is issued they will not operate at all, unless expressly incorporated into the carriage contract by the parties. Where the Hague Rules apply Art. III can therefore easily be avoided.

3.55 If there is no likelihood of the goods being re-sold during transit, and as long as there is no problem about payment, then a traditional bill of lading is also unnecessary, from the merchants' viewpoint. It seems generally to be accepted that a waybill is suitable for shipments between associated companies or branches of multi-national companies ("House to House" shipments), where the security of a documentary credit transaction is not required, perhaps because of trust stemming from a long trading relationship or an alternative basis of payment being arranged (e.g., sales on an open account basis). Like a bill of lading, a waybill is evidence of the carriage contract (but with the consignor only). It also constitutes a receipt for the goods by the carrier, at least as long as it has been signed by him or on his behalf.[76]

3.56 Waybills are often regarded as unsuitable where a documentary credit transaction is involved.[77] Though the banking community has bowed to pressure and is prepared to accept them,[78] waybills do not, like bills of lading, represent the goods, and are not documents of title. Consequently, a bank which advances money against a non-negotiable waybill will not, merely by virtue of its being holder of the document, obtain the security of either property in or constructive possession of the goods. If the buyer is named as consignee, the carrier may deliver to him whether or not any document is presented, so the possession of a waybill by a bank gives it no lever in the case of non-payment: it cannot enforce payment by withholding the waybill, since the consignee does not need it anyway, in order to obtain delivery.

3.57 Nonetheless, it is possible for banks to obtain reasonable security, even where a waybill is used. They can function as a receipt, and the carrier can be liable for misrepresentations contained therein, for example about the apparent quality of the goods, just as he can with a bill of lading.[79] If the bank is named as consignee then delivery should, in principle, be made to it, and since the Carriage of Goods by Sea Act 1992, the bank will be able to enforce this obligation in contract.[80] Ideally, the carriage contract should preclude the shipper from altering the identity of the consignee, but the bank should be able to do this, on payment by the buyer. There is no reason in principle why the carriage contract should not allow for this, though the carrier needs to know to whom he can safely deliver. The decision in *Kum* v. *Wah Tat Bank*, discussed in detail in chapters 6 and 7,[81] allows the possibility of property passing to the bank on shipment, increasing its security. The decision in *Kum* v. *Wah Tat Bank* seems positively to depend on a document of title not being used, but it might also be relevant that the bank had already paid there, prior to shipment. In that case the bank will obtain no security, between payment and shipment, and its security is also lessened, if it pays before it has the opportunity to inspect the waybill. Nonetheless, it is possible for a waybill to accord the bank considerable security, should such a route be chosen.

3.58 The position might not be so acceptable to the other parties, however. If the shipper is not entitled to alter the identity of the consignee, its own security is lessened, prior to payment, and retention of the waybill will avail it nothing. Nor is it necessarily straightforward for the buyer to reimburse the bank, while at the same time assuring

76. See further para. 8.21ff.
77. See, e.g., *The Merchants Guide* (International edition, 1995), issued by P & O Containers Ltd, section 6. See also *Guide to OCL Bills of Lading*, at 10.
78. See paras 8.1ff. and 8.21ff.
79. See para. 5.69ff.
80. See para. 5.43ff.
81. See in particular para. 6.14ff.

itself of the security of property and constructive possession, as it can where a bill of lading is used. Finally, we have already seen the difficulties a carrier might face, unless he can be certain to whom he is to make delivery. Moreover, in the absence of a document of title, he will have no defence, should he deliver to the wrong person. The security issues around waybills are considered further in chapter 7.[82]

3.59 In summary, in a commercial credit the waybill is not a good substitute, without more, for the traditional bill of lading, though there are devices which can increase the bank's security, should it be prepared to accept one.[83] A bank should only accept a waybill either if reimbursement is unlikely to be a problem, or if some of these devices are employed.[84] Even if a bank can be adequately protected, protecting the other parties is more difficult than with a bill of lading.

3.60 The waybill is ideal where security is not a major issue, and is especially useful where documentary delays would otherwise cause problems. Obviously, the waybill is of no value where the cargo is intended to be sold at sea, not least because the carrier needs reliably to know to whom to make delivery.

Hague-Visby Rules

3.61 Articles III(3) and (7) of the Hague-Visby Rules allow a shipper to demand a shipped bill of lading:

"3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading . . .

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall previously have taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading."

3.62 Article III(7) also defines the shipped bill of lading, as including a document issued earlier, annotated with the name of the ship(s) and the date of shipment. Thus, a received for shipment bill of lading can be converted into a shipped bill of lading by such annotation.[85]

3.63 Obviously Art. III applies only if the Hague-Visby Rules themselves apply. They apply only to contracts of carriage, and only where Art. X is triggered:

"(a) the bill of lading is issued in a Contracting State; or

(b) the carriage is from a Contracting State; or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract."

82. Para. 7.136ff.

83. Discussed above, and in para. 7.136ff.

84. These devices are only possible now that waybills have been brought within the Carriage of Goods by Sea Act 1992. See further para. 5.27ff. While it is possible to provide protection to those entitled to delivery under waybills, the protection of trading parties in general will usually be inferior to that provided by bills of lading.

85. See para. 3.18ff.

3.64 A contract of carriage is then defined in Art. 1(b) as applying "only to contracts of carriage covered by a bill of lading or any similar document of title . . . ", and s. 1(4) of the Carriage of Goods by Sea Act 1971, bringing the Rules into force, does not apply the Rules " . . . to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title". The effect of this would seem to be that if the contract of carriage never contemplates the issue of a bill of lading at all, then the Hague-Visby Rules will not apply, and of course Art. III will not be triggered. It should therefore be possible for carriers to insist on bills of lading not being used at all, though if they are contemplated, they must comply with the requirements in Art. III.[86]

MATE'S RECEIPTS

3.65 No provision is made in the UCP for tender of mate's receipts. If the case law is even remotely representative, however, they are used in quite a number of trades. The mate's receipt is issued at an early stage, when the goods are first received, and in some trades it is negotiated in much the same way as a received for shipment bill of lading, and for similar reasons.[87] Normally, it is merely a preliminary document, which is given up for the later issue of a shipped bill of lading. Of such a document, Mustill L.J. observed in *The Nogar Marin* that "The mate's receipt is simply an acknowledgement to the shippers that the ship has taken delivery of the goods".[88] In *The Nogar Marin* it said nothing about the condition of the goods, and it is the master's responsibility to check this before signing the bill of lading. He must not simply accept any description in the mate's receipt, without qualification.

3.66 The rights that a mate's receipt gives its holder are considered in chapters 6 and 7. The nature of the representation made in the mate's receipt, and when it is given up in exchange for a bill of lading, are discussed in paras 5.69 and 5.136ff.

ELECTRONIC DOCUMENTATION

3.67 The personal computer has been a central feature of office life for well over 20 years. Communication via e-mail and the World Wide Web has been commonplace for at least a decade. The advantages in speed, cost and accuracy in moving, as far as possible, to a system of paperless electronic trading have been known for at least 20 years.[89] Encryption techniques capable of verifying authorship and integrity of documents, preventing unauthorised copying,[90] indeed of proving title, are far from new.

86. See also *Parsons Corp.* v. *CV Scheepvaartonderneming (The Happy Ranger)* [2002] 2 Lloyd's Rep. 357.

87. E.g., *Kum* v. *Wah Tat Bank* in para. 6.14ff.

88. *Naviera Mogor SA* v. *Societe Metallurgique de Normandie (The Nogar Marin)* [1988] 1 Lloyd's Rep. 412, 420.

89. E.g., *UNCID Uniform Rules of Conduct for Interchange of Trade Data by Tele-transmission*, ICC Publication No. 452 (1988), p. 7; "Cutting costs by more-efficient shipping procedures", Ideas in Action (Business International), 14 June 1986, p. 10. These passages were set out in previous editions of this work, and are referenced now, just to show that there is nothing novel about the idea of replacing paper with electronic documentation.

90. Or at least rendering it useless. You can make as many copies of your Windows Vista backup DVD as you like, but only the copy that is registered with Microsoft will work properly.

Models for electronic bills of lading, not just waybills, have been around since 1990,[91] and a perfectly workable scheme was set up in 1999. Paper documents are slow, insecure and costly. Speed of processing and transmission is one of the main problems with the traditional bill of lading. Yet the industry, or at least the documentary credit side of it, remains wedded to paper, so much so that the eUCP, originally published in 2002, remains virtually a dead letter.

3.68 There must be a reason. No doubt, the legal infrastructure has built up around paper documents, but the commercial parties could largely replicate this, should they so wish. Perhaps the real reason is the ubiquitousness of paper documents. A bill of lading can be used by any carrier, trader and bank anywhere in the world, in underdeveloped countries, where communications and financial infrastructures are poor. The same document can be used in chain sales between trading parties anywhere. Everyone knows what a paper bill of lading is, and what it proves, because it has been established by custom over centuries. Today, every feature of a bill of lading can be reproduced electronically, with a far higher level of security than will ever be possible with paper. But let us consider just two of its functions: that of being a receipt, and that of proving the title of the holder. You need to know the identity of the issuer, and that the document has not been altered. You need to be certain that it has not been illicitly copied. A trustworthy carrier, such as (for example) Maersk Lines, or APL, to name but two, can issue an electronic bill of lading, provide secure encryption for its holder, and keep its own register of transfers. A receiver to whom transfer is made in the register can be assured that the carrier will regard him, and only him, as having title. The register will guard against illicit copies, and the secure encryption will prevent alteration of the electronic document. It is, of course, necessary for all involved to be certain that they are logged on to the genuine carrier's site, and not that of an impostor, and in this regard, a similar type of security would have to operate as with electronic bank accounts, for example.

3.69 Such a system could be made to work perfectly well, but it only allows a single carrier to provide bills of lading, and all traders and holders will need to register at the carrier's website. It is not at all an open system, and it would surely be very inconvenient for traders and banks to have to register separately with all of the hundreds of carriers across the world, for this type of system to become as universal as paper bills are today. It is also worth noting that even to replace only a waybill, you could not significantly simplify the system. You would still need to be sure that the carrier had issued the document, that it had not been altered, and that there were not multiple copies in use.[92] You would need, in short, a registry operated by a reputable carrier, with encryption sufficiently secure to prevent intruders from making illicit alterations. The same applies if you wish to transfer just the details contained in a bill of lading, to speed up at least the process of inspection.

91. CMI Rules for *Electronic Bills of Lading*, available from http://www.comitemaritime.org/cmidocs/rulesebla.html.

92. One of the stated reasons for the failure, so far, of the eUCP is a fear that multiple copies of electronic documents can be brought into existence. See further para. 8.51ff. Another stated reason was that bills of exchange must remain in writing (a requirement of s. 3 of the Bills of Exchange Act 1882), and as long as these continue to be the basis of payment, there is little point in dematerialising the other documentation. This is not a very good reason, because bills of exchange are quite unnecessary in documentary credits: see further para. 2.14ff.

3.70 In 1999, Bolero set up a pilot scheme which did all of the things already mentioned, but allowed carriers, as well as traders and banks, to join the scheme, Bolero itself certifying the identities of all the parties.[93] Such a scheme can obviously operate more widely than a single-carrier scheme, but it is still closed to members of Bolero, with all the attendant fears of the power that can be exerted by a single central registry, that bedevilled the SeaDocs project in the 1980s.[94] One advantage of a closed scheme, such as Bolero, is not only that it can be made as secure as the organisation desires, but also that each member of the organisation can be in privity of contract with each other member. All the features of a document of title, considered in chapter 7 of this book, can therefore be replicated contractually.

3.71 To set up a truly open scheme would be possible but a lot more difficult. Without a central registry, such as Bolero, which also certified the identity of signatories, it would be necessary to use public and private key encryption,[95] and certification authorities would need to certify public keys.[96] In short, a PKI, or public key infrastructure, would need to be in place. Though such a scheme is possible, and indeed has been known to be possible for many years in theory, we are probably looking decades into the future in practice, especially if worldwide coverage of all traders and carriers is envisaged, as it has to be if an electronic document is truly to replace the paper bill of lading. Moreover, without the contractual nexus afforded by a closed system, it is much more difficult to transfer the properties of a document of title to successive holders.

3.72 There are other issues with electronic documentation. If it is intended to speed up the documentary process, it ought to be possible not only to transfer but also to check the documentation electronically. Using present-day levels of technology, this would require a considerable degree of standardisation of documentation.[97] It would also be desirable for sale contracts to provide explicitly for electronic documents to transfer property. Art. III(3) of the Hague-Visby Rules allows the shipper to demand a paper bill of lading, but in a closed system it should be possible to contract out of this; the Hague-Visby Rules should not apply at all, as long as it was not contemplated that a bill of lading would be issued,[98] and a closed system could ensure this.

3.73 It is probably safe to conclude that the immediate future lies with single-carrier schemes, such as those being pioneered by APL, Maersk, etc., and that the banking community will respond to the systems that carriers such as these develop. In the meantime, advantage will no doubt continue to be taken of electronic communication, for example in the teletransmission of credits and amendments. This has been

93. The Bolero Rulebook can be downloaded from http://www.boleroassociation.org/downloads/rulebook1.pdf. On Bolero see also Diana Faber, *Electronic Bills of Lading* [1996] L.M.C.L.Q. 223, 242 *et seq.*

94. This was a partial dematerialisation project instigated in 1983 by Intertanko (the International Association of Independent Tanker Owners) and the Chase Manhattan Bank, which failed to get beyond an initial testing stage. See Love, *SeaDocs: The Lessons Learned* [1992] 2 O.G.L.T.R. 53.

95. Probably the only viable encryption method at time of writing, in July 2007.

96. A general description of the workings of public key cryptography can be found at http://www.parliament.uk/documents/upload/postpn270.pdf (October 2006).

97. The 967 pages of documentation in *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443 could probably not be processed any faster electronically than they were by hand. Advances in artificial intelligence may one day allow computers to read and understand even free-format text, but at the time of writing (July 2007) that appears still to be a long way off.

98. See para. 3.61ff.

provided for as long ago as UCP 400 in 1983,[99] and is now provided for by Art. 11 of UCP 600.

99. UCP 400, Art. 12, replaced by UCP 500, Art. 11, and now UCP 600, Art. 11. On the 1993 alterations, see *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), pp. 31–33. The 2006 changes are not changes of substance: see Byrne, *The Comparison of UCP 600 and UCP 500*, Institute of Banking Law and Practice (2007), at 110–113.

CHAPTER 4

THE CONTRACT OF SALE

4.1 The sale contract is often referred to as the underlying transaction, because for documentary credits at least, it is from sale contract obligations that everything else is derived. It determines the nature of the buyer's payment obligations. It also determines the seller's documentary obligations, and the obligation of one or both parties to make appropriate provision for carriage and insurance.

4.2 Performance bonds also guarantee the performance of an underlying transaction, though it need not be a sale contract. The obligation to provide the bond will be derived from the underlying transaction.

4.3 There is a sense in which the documentary credit or performance bond sits on top of the sale contract, or (in the case of a performance bond) other underlying transaction. A documentary credit provides a swift and reliable payment mechanism, independent of the underlying transaction in the sense that payment under the credit is assured, whatever disputes there may be under the sale contract. But payment, or refusal to pay, under the documentary credit is not necessarily the end of the matter. If the credit fails to pay the seller may have an action on the sale contract. Conversely, if it provides payment, the buyer can still pursue the seller for sale contract breaches, or indeed reject the goods and claim repayment of the price, should the breach warrant it. These actions may not be ideal, because the buyer will be suing the seller, or *vice versa*, in a foreign jurisdiction, and the liquidity of the other party may be in doubt. Nonetheless, the actions are there in principle, and with performance bonds in particular, there are a number of cases involving a final adjustment, an action on the underlying contract, long after the performance bond has been paid.[1]

4.4 In this chapter we consider the sale contract, as the underlying transaction for a documentary credit. Though autonomous, it is closely connected with the other contracts constituting the documentary credit.[2] In para. 4.5ff. we consider the nature of the buyer's obligation to provide a credit, an obligation derived from the sale contract. Para. 4.44ff. looks at the consequences for the sale contract, if the credit does not actually provide payment. Para. 4.68ff. looks at documentary requirements, since it is clearly desirable, indeed essential, that those under the sale contract match those under the credit.

GENERAL REQUIREMENTS OF PROVISION OF CREDIT

4.5 Documentary credits, as seen in chapter 2, are of various types, and the type of credit which the buyer must provide is determined by the sale contract.

1. Para. 9.91ff.
2. See para. 1.57ff.

4.6 It is important to appreciate, however, that because the contract of sale is autonomous,[3] it has no direct effect on the obligations of the banks under the credit. The contracts constituting the credit are independent of the underlying contract. If the required form of credit is not provided by the buyer the seller may thereby have an action against the buyer under the sale contract, but his relationship with issuing or confirming bank will be determined by the terms of the credit actually provided, in other words, by the contract between himself and the relevant bank. Therefore, if the credit does not conform to the sale contract requirements the seller may sue the buyer on the contract of sale, but can take no steps to remedy the situation against either bank directly.

Implied requirement for irrevocable credit

4.7 Where the sale contract provides for sale by documentary credit, the courts presume a requirement for an irrevocable credit unless the contrary is expressly stated.[4] An authority for this proposition is *Giddens* v. *Anglo-African Produce Ltd.*,[5] an action by c.i.f. purchasers (under two contracts) of South African yellow maize against the sellers for damages for non-fulfilment of the contracts. The defendant sellers contended that the credit required by the sale contract had not been opened, so that the condition precedent for their performance had not arisen, and Bailhache J. accepted this proposition. In giving judgment for the defendants he said[6]:

"I think this case is quite hopeless. Here is a contract which calls for an established credit and in purported satisfaction of what this contract calls for what they get is this: 'Negotiations of drafts under these credits are subject to the bank's convenience. All drafts hereunder are negotiated with recourse against yourselves.' How that can be called an established credit in any sense of the word absolutely passes my comprehension."

4.8 This was not an irrevocable credit because under an irrevocable negotiation credit the drafts must be negotiated without recourse against the drawer.[7] It appears from the (very short and not very clear) report of the case that the sale contract did not call expressly for an irrevocable credit, but it is usually assumed that a requirement for an irrevocable credit was implied.

4.9 There is no presumption, by contrast, that a credit is required to be confirmed, unless the sale contract expressly so states.

Credit more than simply means of paying the price

4.10 The courts recognise that the credit is more than simply a means of paying the price, because the seller may be relying on it to finance the transaction. Two consequences follow from this principle, that the seller is under no obligation to perform at all until the credit is opened, and that it must be opened within a reasonable time.[8]

3. *Ibid.*
4. Until 1993 the UCP adopted the opposite position, but with the 1993 revisions, the UCP position was brought into line with that of the common law. The latest (2006) revisions allow only for irrevocable credits.
5. (1923) 14 Ll. L. Rep. 230.
6. *Ibid.*, at 230 (col. 2).
7. See paras 2.27ff. and 2.37ff. Although the report is rather inadequate, the credit appears to be an old-fashioned negotiation credit, where drafts are drawn on the applicant (buyer), not the issuing bank, the bank undertaking merely to negotiate the drafts. This form of credit is obsolete except in some parts of Asia, and is disallowed under UCP 600. See para. 2.14ff.
8. A further consequence, affecting measure of damages, is considered below, at para. 4.38ff.

Opening of credit condition precedent of seller's performance under sale contract

4.11 In *Trans Trust SPRL* v. *Danubian Trading Co. Ltd.*,[9] the buyers failed to procure the opening of a credit in accordance with the requirements of sale contract (for the purchase of steel). The sellers were unable to obtain the steel in the absence of the credit, and Denning L.J. categorically stated that they were under no obligation to perform at all, in its absence.[10] Provision of the credit was a condition precedent to the seller's performance, and the buyers were also in breach in failing to provide. The buyers were accordingly liable for damages for breach, on principles discussed below.[11]

Time of opening of credit

4.12 Ideally, the sale contract should stipulate the period within which the credit should be opened.[12] If it does not, or if the term is too vague to be treated as an express stipulation as to time,[13] then the courts have again had regard to the fact that the seller may be relying on the provision of the credit in order to finance the transaction, and require the credit to be opened as soon as the buyer reasonably can.

4.13 The starting point is *Garcia* v. *Page & Co. Ltd.*, where Porter J. said that the credit must be opened immediately, his test being "that the buyer must have such time as is needed by a person of reasonable diligence to get the credit established".[14] There was no express stipulation in the contract itself, and he took the view that three months was an unreasonably long time to establish the credit. What is a reasonable time will depend on all the circumstances, but the courts have adopted Lord Watson's test from *Hick* v. *Raymond & Reid*,[15] that " . . . the party upon whom it is incumbent duly fulfils his obligation, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably".

4.14 In *Etablissements Chainbaux SARL* v. *Harbormaster Ltd.*,[16] the contract of sale required the credit to be "opened in London within a few weeks". Devlin J. treated this as too vague a term to be treated as an express provision as to time,[17] and therefore thought that a reasonable time should be allowed. Applying the test from *Hick* v. *Raymond & Reid*, he thought that one month was about the outside limit. This is far longer than in the normal case, but the test is flexible; here, French buyers had to provide a sterling letter of credit, and there was an inevitable delay in obtaining exchange control permission from the French Government. In *Baltimex Ltd.* v. *Metallo Chemical Refining Ltd.*,[18] Sellers J. took into account the fact that the sellers' knowledge

9. [1952] 2 Q.B. 297, [1952] 1 Lloyd's Rep. 348.
10. [1952] 2 Q.B. 297, 304.
11. Para. 3.14ff.
12. E.g., *Transpetrol Ltd.* v. *Transol Olieprodukten Nederland BV* [1989] 1 Lloyd's Rep. 309, where the buyer's failure to open a credit by the stipulated time was treated as a breach of condition, justifying the sellers in repudiating the contract.
13. E.g., "within a few weeks", as in *Etablissements Chainbaux SARL* v. *Harbormaster Ltd.* [1955] 1 Lloyd's Rep. 303, below.
14. (1936) 55 Ll. L. Rep. 391, 392 (col. 1).
15. [1893] A.C. 22, 32–33. This is not a banking case, but concerns the obligations of a consignee under a carriage contract. However, the test is of general application.
16. [1955] 1 Lloyd's Rep. 303.
17. *Ibid.*, at 306 (col. 1).
18. [1955] 2 Lloyd's Rep. 438.

at the time of the contract that delay was likely, since they were to be paid out of the proceeds of a sub-sale by their buyers to Russian sub-buyers, and they knew that there was likely to be a delay in the establishment of the credit by the Russian sub-buyers.

4.15 Because the seller may be relying on the credit to finance the transaction, the requirement to provide a credit within a reasonable time prevails even where under the contract, delivery is postponed until a considerable time into the future. As Devlin J. observed in *Etablissements Chainbaux SARL* v. *Harbormaster Ltd.*, where delivery was not to take place for eight months[19]:

> "Sometimes a letter of credit is wanted merely because the seller is unwilling to make arrangements for shipment, which may involve him in expense, unless he knows he is going to be paid. . . . [The] seller had to manufacture the goods, and what he desires is to have the letter of credit for it is plainly so that he will have the assurance, within a few weeks and before he begins manufacture, that he is certain to be paid and that the labour of manufacture will not therefore be done in vain."

4.16 In *Etablissements* the sellers had to manufacture the marine engines they had agreed to sell, but even where the seller already has the goods, there will still be expenses involved in shipping them, and the *Etablissements* principle is not limited to cases where the seller must manufacture or otherwise obtain the goods. Indeed, the courts do not seem to enquire into the seller's position, the test of reasonableness being addressed solely to the reasons for the buyer's delay.

4.17 In addition to the reasonable time requirement, the courts have consistently held that if the contract provides for shipment by the seller at any time over a stated period, then in the absence of an express stipulation, the buyer must open the credit and make it available by the beginning of the shipment period. The authority for a c.i.f. contract is the Court of Appeal decision in *Pavia & Co. SpA* v. *Thurmann-Nielsen*.[20] The buyers claimed that since the credit was simply a means of paying the price, there was no reason why the credit should be provided before the price became payable (i.e., in a c.i.f. sale, on tender of shipping documents). The Court of Appeal took the view that this was the wrong approach. The credit was not simply a means of paying the price, but was also intended to provide the seller with security. Denning L.J., echoing the principles already set out, said[21]:

> "The question in this case is this: In a contract which provides for payment by confirmed credit, when must the buyer open the credit? In the absence of an express stipulation, I think the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship; and whenever he does ship the goods, he must be able to draw on the credit. He may ship on the very first day of the shipment period. If, therefore, the buyer is to fulfil his obligations he must make the credit available at the very first date when the goods may be lawfully shipped in compliance with the contract."

4.18 The argument that the provision of the credit is merely another way of paying the price was also rejected in a different context, considered below.[22]

19. [1955] 1 Lloyd's Rep. 303, 305 (col. 2).
20. [1952] 2 Q.B. 84; [1952] 1 Lloyd's Rep. 153.
21. [1952] 2 Q.B. 84, 88.
22. Para. 4.38ff.

4.19 Similar reasoning was applied to an f.o.b. contract by Diplock J. in *Ian Stach Ltd.* v. *Baker Bosley Ltd.*[23] The buyers argued that unlike *Pavia*, it was they rather than the sellers who were entitled to choose the time of shipment, within the stipulated period.[24] Diplock J.'s view was that this made no difference to the principle in *Pavia*, relying again on the principle that the seller needs the assurance given by the credit from as early as possible. The view was stated yet again that a commercial credit is not simply a means of paying the price.[25]

4.20 The requirement that the credit must be available by the beginning of the shipment period is additional to the reasonable time requirement, and does not allow the buyer to delay where the shipment period does not begin until after more than a reasonable time has elapsed.

Terms of credit

4.21 The terms of the credit must comply with any express provisions of the sale contract. If it does not, the seller will be bound by its terms, *vis-à-vis* the bank, but will be entitled to treat the buyer under the sale contract, as not having put in place a proper documentary credit. He will therefore be under no obligation to perform, on the principles discussed above, and will also be entitled to damages.[26]

4.22 The sale contract could, in principle, prescribe precise requirements for the credit. Otherwise the requirements must not be inconsistent, but in determining consistency we must bear in mind that it is the sale contract which is being enforced; there is no justification, therefore, for a doctrine of strict compliance, as described in para. 9.166ff. In *Siporex Trade SA* v. *Banque Indosuez*[27] there were two underlying sale contracts, one for tallow and one for cotton seed oil. The tallow contract required "any origin edible fancy tallow", whereas the letter of credit required a certificate of US origin, and omitted the word "edible". The cotton contract required cotton seed oil "any origin", but the letter of credit prescribed "any origin except Spain and South Africa". On an assumption (for the purposes of argument) that a demand under a performance bond was conditional on proper letters of credit being provided, Hirst J. took the view that the credit terms did not comply.[28] But the action was not on the sale contract; the issue was whether a bank should pay on a performance bond demand, and a bank faced with such a demand should not be required to make investigations, beyond the documents themselves. There was, however, testimony from an expert witness that:

> "that tallow of [the kind required] could not be acquired otherwise than in the United States; at all events in such quantities at competitive prices. He also testified that it was common knowledge that Arab states such as Egypt would not allow imports from either South Africa or Spain,

23. [1958] 2 Q.B. 130; [1958] 1 Lloyd's Rep. 127.
24. The contract was described as "classic" f.o.b., where the ship is nominated by the buyer, who is entitled to call for shipment at any time within the stipulated shipment period: *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co. Ltd.* (1922) 28 Com. Cas. 42. The buyers argued unsuccessfully that this was a ground for distinguishing *Pavia*, where the sale contract was on c.i.f. terms: [1958] 2 Q.B. 130, 142.
25. [1958] 2 Q.B. 130, 139. He also cited the remarks of Jenkins L.J. in *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2 Q.B. 127; [1957] 2 Lloyd's Rep. 549, set out in their context in para. 9.57ff.
26. See respectively para. 4.11ff. above and para. 4.38ff., below.
27. [1986] 2 Lloyd's Rep. 146.
28. *Ibid.*, at 161. In fact, he decided that the performance bond was unconditional, and applied *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.*, in para. 9.77ff.

the former on obvious political grounds, the latter because of an alleged notorious case of contamination. He also testified that a description of tallow as 'edible' was meaningless."

4.23 One would expect a seller, if not a bank, to know this. It would be reasonable, therefore, to take account of such evidence, in determining whether the credit was consistent, *in reality*, with the sale contract.

4.24 If the sale contract is silent the courts will imply terms, but the requirements are not onerous, and the buyer has considerable freedom over the terms of the credit, in the absence of express stipulation to the contrary. In *Soproma SpA* v. *Marine & Animal By-Products Corporation*,[29] the buyer agreed to buy 1,000 tons of Chilean fish fullmeal from the seller c. & f., the sale contract also requiring a 70 per cent protein content. Under the sale contract, payment was to be by irrevocable documentary credit, but apart from stipulating the identity of the advising bank, the sale contract was otherwise silent as to the details of the credit. In fact the operative credit stipulated that the shipping documents must include (among others) a certificate of analysis stating that it had a minimum protein content of 70 per cent, and full set of on board ocean bills of lading, issued to order and blank indorsed, and marked "freight prepaid".

4.25 The sellers tendered a bill of lading marked "freight collect", and naming the confirming bank as consignee, but not issued to order. A quality certificate was also tendered certifying a minimum protein content of only 67 per cent. The bank rejected the documents, as they were entitled to do, since they did not conform to *credit terms*.[30] The sellers, however, claimed against the buyers, one of the issues being whether by procuring credits which stipulated additional documents to those required by the sale contract itself, they were thereby acting in breach of *the contract of sale*. McNair J. held that they were not[31]:

"It may be that [the credits opened by the buyers] were . . . defective in that they called for documents in addition to those specified in the contract itself. . . . But as at present advised, I should not feel disposed to accept this conclusion. It seems to me to be a necessary implication from the use of the words 'payment against letters of credit' that the credit itself should set out in detail the specific conditions under which it can be operated including the period of its availability and that so long as these conditions are fair and reasonable and not inconsistent with the terms of the contract itself no objection can be taken to them by the sellers."

4.26 McNair J.'s view, in other words, was that the terms of the credit are contained in the credit itself, and that objection to them cannot be taken, subject only to the credit terms being fair and reasonable, and not conflicting with the terms of the sale contract.

4.27 McNair J.'s comments were *obiter dicta*; it was not, in the event, necessary to decide the point, since the seller was estopped from relying on the inconsistencies.[32] In any event, the documents must not be inconsistent with the terms of the sale contract. The documents required in *Soproma* were consistent; the 70 per cent protein requirement was the same, and freight prepaid bills would be usual under c. & f. contracts

29. [1966] 1 Lloyd's Rep. 367.
30. On this aspect of the decision, see further para. 9.190ff. Later the sellers attempted to make a second tender, directly to the buyers. This was also rejected. On this aspect of the decision, see further below, para. 4.46ff.
31. [1966] 1 Lloyd's Rep. 367, 386 (col. 1).
32. [1966] 1 Lloyd's Rep. 367, 386 (col. 1). He had applied for two letters of credit to be consolidated, and operated the letters of credit by the tender of a consolidated set of documents. On estoppel see also below, para. 4.30ff.

(although buyers do not normally object to freight collect bills so long as freight is deducted from the invoice price, or a freight receipt tendered by the sellers).[33] A requirement for a certificate of analysis showing (for example) 80 per cent protein would clearly be inconsistent with the sale contract, however.

4.28 Some documents would in any case be inconsistent with any c.i.f. (or c. & f.) contract, and could not be stipulated. It is a fundamental principle, for example, that a c.i.f. seller is required only to ship conforming goods, but is not responsible if they do not arrive at the port of discharge, or arrive damaged. A requirement for a quality certificate issued on discharge, therefore, or at any other time after shipment, could not be stipulated under a c.i.f. contract.[34] Further, if such a document was stipulated in the credit, the terms of the credit would be inconsistent with the sale contract, and the buyer would be in breach.

4.29 If McNair J. is correct, however, the buyer has considerable freedom as to the credit terms, unless those terms are inconsistent with the clear terms of the sale contract.

Waiver and estoppel

General principles

4.30 Even where a sale contract calls for a particular type of credit, it may be open to the seller to accept a different type, providing him with less security. As long as the benefit is wholly for the seller, he may waive that benefit.

4.31 Furthermore, by accepting a credit which provides inferior security to that provided for under the contract, he may by his conduct be taken as having waived his right to demand the greater security, at any rate without giving reasonable notice. In *Panoustos* v. *Raymond Hadley Corp.*,[35] the sale contract (for a number of shipments of flour) provided that payment should be by confirmed bankers' credit. The seller accepted payments for a number of shipments by means of a credit which was not confirmed, and the Court of Appeal held that he was unable to repudiate the contract when the buyer provided an unconfirmed credit for a later shipment. Because the seller had waived for a time the buyer's breach of condition in failing to provide a confirmed credit, he was unable to repudiate the contract on that ground without giving reasonable notice. Viscount Reading C.J. adopted the following test from *Bentsen* v. *Taylor, Sons & Co.*[36]:

> "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?"

4.32 A similar case is *Enrico Furst & Co.* v. *W.E. Fischer Ltd.*[37] As in *Panoustos* the buyers were in breach by providing a credit which was not confirmed by a London bank, but instead of relying on this as a ground to throw up the contract the sellers made no objection to the lack of confirmation, and indeed requested extension of the

33. *Ibid.*, at 387 (col. 1): cf., for f.o.b. contracts, *Glencore Grain Rotterdam BV* v. *LORICO* [1997] 2 Lloyd's Rep. 386, noted [1997] I.T.L.Q. 46.
34. See further para. 4.121ff.
35. [1917] 2 K.B. 473.
36. *Ibid.*, at 478, adopting Bowen L.J.'s test from *Bentsen* v. *Taylor, Sons & Co.* [1893] 2 Q.B. 283, a case on a sale contract.
37. [1960] 2 Lloyd's Rep. 340.

credit.[38] In an action by the buyers for non-delivery of the goods (cast-iron piping), the sellers were held to have waived their right to rely on non-confirmation of the credit as a breach of condition by the buyers.[39]

4.33 Waiver depends on a representation, which leads the other party reasonably to suppose that the representor does not intend to assert his rights. The representation can arise from conduct, but probably not from silence.[40] Another possibility is estoppel, which operates in much the same way as waiver, but requires detrimental reliance. The seller will be estopped from asserting his strict legal rights if he has made a representation to that effect, upon which the buyer has relied to his detriment. There may be limited circumstances where estoppel can arise from silence.[41] Whether the seller has waived his right or is regarded as being estopped from asserting it usually matters little, the nature of the representation being the same. In *Soproma*, considered in para. 4.21ff., the sellers were taken to have waived the inconsistencies (if any) in a credit, or to be estopped from relying on them, and McNair J. regarded it as a matter of indifference whether the matter was put as waiver, variation or estoppel.[42]

Waiver and periodic actions

4.34 In *Panoustos* the sellers made the first of a number of shipments without insisting on the confirmed credit to which they were entitled. The Court of Appeal held that they had waived their right to a confirmed credit not only in respect of that particular shipment, but also in respect of future shipments, since they would be required to give the buyers reasonable notice before again availing themselves of their right to confirmation. It does not necessarily follow that where there are a number of shipments waiver of a right in respect of the first shipment will necessarily preclude the seller from reasserting his right in respect of a subsequent shipment: an act by one party may be held only to operate in respect of each individual shipment, and it may not always be possible to infer a waiver for the future in addition.

4.35 *Cape Asbestos Co. Ltd.* v. *Lloyds Bank Ltd.* is authority for the proposition that at common law, a revocable credit can be revoked by the bank without notice.[43] The bank raised a further defence that the bill of lading tendered did not conform to the terms of the credit, since the bill of lading instead of being to the order of the defendant bank, was made out to the order of the buyers. The sellers claimed, relying on *Panoustos*, that the bank having accepted a bill of lading in similar terms on a previous shipment had waived its right to reject on those grounds for the subsequent shipment. In the event the point did not arise for decision since the credit had been validly revoked, but Bailhache J. said that in any event *Panoustos* was not authority for the proposition claimed.[44] The distinction he made was that:

"The *Panoustos* case had only reference to an act which had to be done once and for all, and not to an act which had to be done periodically."

38. As we saw in chapter 2, Diplock J. commented that since the issuing bank was clearly reputable it made no commercial difference whether or not the credit was confirmed: see para. 2.47ff.

39. [1960] 2 Lloyd's Rep. 340, 349 (col. 2). See also note 30, above.

40. *The Leonidas D* [1985] 1 W.L.R. 925, [1985] 2 Lloyd's Rep. 18. See also *Siporex Trade SA* v. *Banque Indosuez* [1986] 2 Lloyd's Rep. 146, 162.

41. *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] A.C. 890, 903, also cited in *Siporex Trade SA* v. *Banque Indosuez*, *ibid.*

42. [1966] 1 Lloyd's Rep. 367, 386 (col. 2).

43. [1921] W.N. 274. See also para. 2.26ff.

44. [1921] W.N. 274, 275 (col. 2).

4.36 The distinction, then, appears to be between an act which has to be done once and for all, as in the confirmation of the credit in *Panoustos*, and one which has to be done periodically, as in tendering bills of lading for each shipment in *Cape Asbestos*. *Panoustos* is authority only for the former type. Although there were several separate shipments in *Panoustos*, confirmation of the credit should have occurred when the credit was opened. The credit opened in the seller's favour covered all the separate shipments, so that the act of confirmation was a once and for all act. It follows that waiver of the right to insist on confirmation of the credit ought to have operated (and did) not only in respect of the first shipment, but also in respect of future shipments, or at any rate until reasonable notice was given to the contrary. In *Cape Asbestos*, on the other hand, bills of lading were issued separately in respect of each shipment, so that there was no reason to infer from waiver in respect of the first shipment waiver in respect of any subsequent shipments. Essentially, of course, the issue is the nature of the representation that can be inferred from the seller's conduct.

Only unilateral benefits may be waived

4.37 Neither waiver nor estoppel operates unless the stipulation is inserted only for the benefit of the party waiving the right, or being estopped from relying on it; it is clear, for example, that *Panoustos* refers only to this situation.[45] By contrast, the stipulation that payment is to be made by commercial credit benefits both seller and buyer, and it is not generally open to the seller unilaterally to waive it by insisting on making payment directly to the buyer.[46]

Consequences of failure to open credit, or failure to provide reliable and solvent paymaster

Seller can claim loss of profit on transaction

4.38 It has already been explained that the provision of a credit is more than simply a way of paying the price, because the seller may use it as security to raise finance for the transaction, for example by purchasing or manufacturing the goods.[47] In other words, the provision of the credit may be essential to the seller's performance.

4.39 If the buyer fails to open a credit, he is in breach of contract, and the damages will be anything that is recoverable under ordinary principles applicable to contractual damages. In *Trans Trust SPRL* v. *Danubian Trading Co. Ltd.*,[48] the buyers of a quantity of steel failed to procure the opening of a credit in accordance with the sale contract, and the sellers claimed as damages the loss of profit which they would have made on the sale. It has already been explained that the buyers were liable for breach of contract,[49] but they claimed that the credit was no more than a way of paying the price. Since the steel market was rising, they claimed that the sellers could have re-sold at a profit. Therefore they had suffered no loss, so the damages ought to be nominal only. In fact, the sellers had not re-sold the steel at a profit, because in the absence of a credit they were unable to purchase it from the manufacturers in the first place. In other

45. [1917] 2 K.B. 473, 477.
46. See below, para. 4.46ff.
47. Above, para. 3.9ff.
48. See para. 4.11ff.
49. *Ibid.*

words, they were relying on the provision of the credit to finance the transaction. This is, of course, quite normal, and Denning L.J. thought that it was wrong to treat the provision of the credit as simply an alternative way of paying the price[50]:

"This argument reminds me of the argument we heard in *Pavia & Co.* v. *Thurmann-Nielsen*.[51] It treats the obligation to provide a credit as the same thing as the obligation to pay the price. That is, I think, a mistake. A banker's confirmed credit is a different thing from payment. It is an assurance in advance that the seller will be paid. . . . The seller may be relying on it to obtain the goods himself. If it is not provided, the seller may be prevented from obtaining the goods at all. The damages he will then suffer will not in fact be nominal. Even if the market price of the goods has risen, he will not be able to take advantage of the rise because he will not have any goods to re-sell. His loss will be the profit which he would have made if the credit had been provided. Is he entitled to recover that loss? I think he is [subject to the normal rules of remoteness of damage in contract] . . . "

4.40 This reasoning can of course equally apply on a falling market. Diplock J. applied *Trans Trust SPRL* v. *Danubian Trading Co. Ltd.*, on a falling market, in *Ian Stach Ltd.* v. *Baker Bosley Ltd.*[52] The facts of this case have already been set out[53]: the sellers repudiated the sale contract because the credit had not been opened in time. Diplock J. had held that the measure of damages was the difference between the contract price and market price at the time of repudiation. The market price having fallen between the time of entering the contract and the time of its repudiation, the damages included compensation for the market loss suffered by the sellers through having to sell on a falling market.[54] Had the buyers properly performed by opening the credit in time, the sellers would have obtained the contract price under the credit, and would not have suffered any market loss.

Position where there are a number of shipments

4.41 The buyer will also be in breach of the sale contract if the bank, having opened a credit in the required form, later refuses to pay against conforming documents.[55] Even if the credit were regarded as no more than a means of paying the price, it would not follow that damages would necessarily be limited to that amount. In *Urquhart Lindsay & Co.* v. *Eastern Bank Ltd.*,[56] the sale contract was for a number of shipments of machinery by instalments, payment for each instalment to be by irrevocable letter of credit. After two instalments had been shipped and paid for, the buyers disputed the amount of the price payable on the third, and the bank, on the buyers' instructions, refused to pay. The sellers sued the bank, and the main issue was as to the measure of damages.

4.42 The bank argued that they had merely undertaken to pay money, and that the amount of damages for non-payment of money is only the amount of the money itself. The sellers argued that the position was the same as if the buyers had themselves

50. [1952] 2 Q.B. 297, 305.
51. Above, para. 4.11ff.
52. [1958] 2 Q.B. 130; [1958] 1 Lloyd's Rep. 127.
53. See para. 4.12ff.
54. [1958] 2 Q.B. 130, 145. The contract price was 205 dollars per tonne, and the market price was found to be 194 dollars at the time of repudiation. It will not always be easy in practice to ascertain market price, but here evidence was accepted that a Swiss company was prepared to pay 194 dollars for the goods on the relevant date.
55. See para. 4.50ff.
56. [1922] 1 K.B. 318; (1921) 9 Lloyd's Rep. 572.

refused to pay for the goods, and Rowlatt J. was therefore required to consider what would have been the consequences of the buyers' refusing to pay on the instalment. He took the view that in a sale by instalments this would entitle the sellers to cancel the entire transaction. In his view, the sellers were able to treat the non-payment of the one instalment as a ground for throwing up the entire sale contract, so as to release them from any obligations not only under this particular shipment, but under any further shipments as well. Having chosen to do this, their loss was the loss of profit on the entire transaction, not merely non-payment for one shipment. Undoubtedly they could have recovered this in an action against the buyers,[57] and Rowlatt J. thought that the position in an action against the bank was exactly equivalent; the refusal by the defendants to pay on this instalment constituted a repudiatory breach of the entire credit contract, just as surely as a refusal by the buyers to pay on an instalment constituted a repudiatory breach of the entire sale contract. The sellers had accepted this breach as bringing the credit contract to an end, and were entitled to damages on that basis. They could therefore claim loss of profit on the entire transaction.

4.43 It may be said in conclusion that if the buyer fails to open a credit, or if the credit fails to operate, or if the terms of the credit do not conform to those of the sale contract, he is in breach of the sale contract. The breach is not regarded as being simply non-payment of money, because as far as the seller is concerned the credit means much more to him than that. Accordingly, the damages are not limited to the payment of the price, but will be anything that is recoverable under ordinary principles applicable to contractual damages. Further, if the bank fails to pay that puts the buyer into repudiatory breach of contract, and if in a sale by instalments the seller elects to bring the contract to an end, he is relieved of any obligations to perform in respect of future instalments, and can claim as damages loss of profits not only in respect of the present instalment, but also in respect of all remaining instalments due under the sale contract.

PROVISION OF RELIABLE AND SOLVENT PAYMASTER

Mutual advantage of credit to both seller and buyer

4.44 As was explained in chapter 1,[58] both parties to the contract of sale enjoy mutual advantages under an irrevocable documentary credit. The seller can arrange shipment in the sure knowledge that he will be paid by a "reliable paymaster", in his own country in the case of the confirmed credit. The buyer, on the other hand, can use a credit to raise funds. The credit is not, in other words, to be regarded as being solely for the benefit of the seller, which privilege he can therefore waive.

4.45 It ought therefore to follow that, as long as the seller continues to enjoy the benefits he obtains under the credit, he should not be able unilaterally to withdraw from it. If he were able to short-circuit the credit, and demand payment directly from the buyer, he would be able to retain his benefits under the credit, while denying the buyer his.

57. [1922] 1 K.B. 318, 323–324.
58. Para. 1.43ff.

No short-circuiting of credit

4.46 For the reasons advanced in the last paragraph, once it has been agreed that payment is to be by documentary credit, it is not open to the seller to short-circuit the credit, to tender the documents directly to the buyer, and demand payment directly from him.

4.47 The facts of *Soproma SpA* v. *Marine and Animal By-Products Corp.* have already been outlined: a contract for the sale of fishmeal c. & f. included a stipulation for payment to be by irrevocable letter of credit. Two tenders were made. The buyers having validly instructed their bank to reject the first tender of documents, the sellers made a second tender.[59] This was made directly to the buyers, and McNair J. held that the buyers were entitled to reject this tender also. One reason was that the second tender was too late, being outside the time stipulated in the credit.[60] The second reason was of more general application. Even if it had been tendered within the time stipulated in the credit, the tender was invalid because it was made directly to the buyer.

4.48 McNair J. emphasised that payment by documentary credit is to the advantage of both parties. It is not merely a privilege to the seller, which he can therefore unilaterally waive. It is[61]:

> " . . . of advantage to the seller in that by the terms of the contract [of sale] he is given . . . 'a reliable paymaster' generally in his own country whom he can sue, and of advantage to the buyer in that he can make arrangements with his bankers for the provision of the necessary funds, his banker retaining the drafts and the documents as his security for making payment to the seller and the buyer being freed from the necessity of having to keep the funds available to make payment against presentation of documents to him at an uncertain time which is no further defined in the authorities [on c.i.f. contracts] than being at a reasonable time after shipment by the seller of documents covering goods which he has shipped or are already afloat."

4.49 Obviously, to allow the seller to short-circuit the credit would be to deny the buyer his advantages of the credit while allowing the seller to retain his. McNair J. continued:

> "Under this form of contract, as it seems to me, the buyer performs his obligation as to payment if he provides for the sellers a reliable and solvent paymaster from whom he can obtain payment . . . although it may well be that if the banker fails to pay by reason of his insolvency the buyer would be liable; . . . It seems to me to be quite inconsistent with the express terms of a contract such as this to hold that the sellers have an alternative right to obtain payment from the buyers by presenting the documents direct to the buyers. Assuming that a letter of credit has been opened by the buyers . . . , could the seller at his option disregard the contractual letter of credit and present the documents direct to the buyer? As it seems to me, the answer must plainly be in the negative."

Conditional nature of payment: position if bank does not pay

4.50 The position is different if the seller does not obtain the advantages due to him under the credit, for example if the buyer does not provide a "reliable and solvent paymaster". In the above passage, for example, McNair J. was prepared to accept that

59. Para. 4.21ff. for the facts, and the issues on the first tender.

60. Under UCP 600, Art. 6(e), the bank is under no obligation to accept tender of documents after the expiry date. If an unreasonably early expiry date were stipulated, the question whether the buyer was thereby put in breach of the sale contract would presumably be resolved on the basis of the discussion in para. 4.21ff.

61. [1966] 1 Lloyd's Rep. 367, 385 (col. 2).

the position may be different where the bank failed to pay by reason of insolvency. The principle may be of more general application than this, however, and not limited to insolvency. There is authority suggesting that as a general presumption, payment under a letter of credit is conditional and not absolute payment, and that if the bank does not pay when the seller has complied with the requirements of the credit and tendered conforming documents, the buyer has to pay.[62] Alternatively, in this situation the buyer is in breach of the term of the sale contract requiring him to provide a reliable and solvent paymaster, and will be liable for damages, on the principles discussed in para. 3.14ff.

4.51 In *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.*,[63] letters of credit were opened which did not conform in a number of respects to the provisions of the sale contract, and in particular provided for payment in UK sterling rather than Kenyan currency. Sterling was devalued before payment was made, and the Court of Appeal held that in general, where the bank fails to meet its obligations the seller can claim payment from the buyer directly, unless express provision to the contrary is made in the contract of sale. The letter of credit was said to be a conditional, rather than an absolute, payment of the price, so that if the bank failed to meet its obligations the seller could look to the buyer directly.[64] Lord Denning M.R. said[65]:

"In my opinion a letter of credit is not to be regarded as absolute payment, unless the seller stipulates, expressly or impliedly, that it should be so. He may do it impliedly if he stipulates for the credit to be issued by a particular bank in such circumstances that it is to be inferred that the seller looks to that particular banker to the exclusion of the buyer . . .

If the letter of credit is conditional payment of the price, the consequences are these: the seller looks in the first instance to the banker for payment: but if the banker does not meet his obligations when the time comes for him to do so, the seller can have recourse to the buyer. The seller must present the documents to the banker. One of two things may then happen: (1) the banker may fail or refuse to pay or accept drafts in exchange for the documents. The seller then, of course, does not hand over the documents. He retains dominion over the goods. He can re-sell them and claim damages from the buyer. He can also sue the banker for not honouring the credit: see *Urquhart Lindsay & Co. Ltd.* v. *Eastern Bank Ltd.*[66] But he cannot, of course, get damages twice over. (2) The bank may accept time drafts in exchange for the documents, but may fail to honour the drafts when the time comes. In that case the banker will have the documents and will usually have passed them on to the buyer, who will have paid the bank for them. The seller can then sue the banker on the drafts: or if the banker fails or is insolvent, the seller can sue the buyer. The banker's drafts are . . . conditional payment, but not absolute payment. It may mean that the buyer (if he has already paid the bank) will have to pay twice over. So be it. He ought to have made sure that he employed a 'reliable and solvent paymaster'."

4.52 Note that the buyer's liability arises where the bank may "fail or refuse to pay or accept drafts in exchange for the documents", or in the case of dishonoured drafts, if it "fails or is insolvent". It is not limited, as McNair J. thought, to cases of insolvency alone.

4.53 *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.* was applied by Ackner J., as part of the *ratio*, in *Maran Road Saw Mill* v. *Austin Taylor Ltd.*[67] The facts of this

62. The documents did not conform in *Soproma*, of course, and the second tender was too late.
63. [1972] 2 Q.B. 189; [1972] 1 Lloyd's Rep. 313.
64. In the event the seller was held to have waived this right by accepting payment under the sterling letters of credit.
65. [1972] 2 Q.B. 189, 210.
66. See above, para. 4.41ff.
67. [1975] 1 Lloyd's Rep. 156.

case were set out in chapter 2.[68] It will be remembered that the issuing bank failed, and that the seller repaid the purchase money to the Bangkok Bank, which had purchased time drafts drawn on the issuing bank but had not confirmed the credit. The seller then brought an action against its agent, who was in the position of buyer under the commercial credit, and succeeded. The case was a direct application of the principles of *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.*, Ackner J. taking the view that they were equally applicable to an agency agreement as to an ordinary sale by way of commercial credit. He said[69]:

"Can it then be said that [the defendants] have discharged their contractual obligation, when, although they have established a letter of credit, payment has not been made under it? To my mind, the answer is a simple one and is in the negative. I respectfully adopt and slightly adapt the language used by Stephenson L.J. in *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.*[70] The agents promised to pay by letter of credit not to provide by a letter of credit a source of payment which did not pay."

4.54 The principles of *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.* create only a presumption, which is rebuttable, so it is open for the courts in appropriate circumstances to treat payment under a credit as absolute rather than conditional payment. One possibility, mentioned by Lord Denning in the passage set out above, is where the seller "stipulates for the credit to be issued by a particular bank in such circumstances that it is to be inferred that the seller looks to that particular banker to the exclusion of the buyer". Normally, of course, the choice of issuing bank is left to the buyer, and therefore the seller should not be required to take the consequences of its failure. In *Soproma*, by contrast, the banker (the Marine and Midland Trust Co. of New York) was selected by the seller, which may account for McNair J.'s limited view that only in the event of its insolvency might the seller be able to tender documents to the buyer directly.

4.55 The bank was not selected by the plaintiff sellers in *Maran Road Saw Mill* v. *Austin Taylor Ltd.*, where the presumption in *W.J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co.* was not rebutted. Ackner J. observed[71]:

"The principal has not, for example, stipulated for the credit to be issued by a particular banker, in such circumstances that it is to be inferred that he is looking to that particular banker to the exclusion of the agent . . .

The plaintiffs did not expressly or impliedly agree that the liability of the issuing bank should be accepted by them in place of that of the defendants. Thus, the defendants were obliged to employ a reliable and solvent paymaster and if they failed to do so, despite having put him in funds, they like the buyer in the case of the contract for the sale of goods, have to pay twice over."

4.56 Nor is it enough to rebut the *Alan* v. *El Nasr* presumption for the identity of the bank to be merely agreed between the parties. In *E.D. & F. Man Ltd.* v. *Nigerian Sweets & Confectionery Co. Ltd.*,[72] the respondent buyers argued that the opening of the credit should be treated as absolute payment because the sellers had agreed on the identity of the issuing bank. The facts were otherwise similar to those in *Maran Road*: the issuing bank was wound up after the buyers had reimbursed it, but before payment

68. Para. 2.37ff.
69. [1975] 1 Lloyd's Rep. 156, 159 (col. 1).
70. [1972] 2 Q.B. 189, 220.
71. [1975] 1 Lloyd's Rep. 156, 159 (col. 2)–160 (col. 1).
72. [1977] 2 Lloyd's Rep. 50.

had been made to the sellers under 90 day drafts drawn on it. The sellers sued the buyers directly.

4.57 In an appeal from arbitrators on a point of law, Ackner J. held that, on the facts found, the buyers were liable. Applying *Alan* v. *El Nasr* directly, he thought that the seller's agreement as to choice of bank was merely one factor, and not in any way conclusive[73]:

"The fact that the sellers have agreed on the identity of the issuing bank is but one of the factors to be taken into account when considering whether there are circumstances from which it can be properly inferred that the sellers look to that particular bank to the exclusion of the buyer. It is in no way conclusive. In this case . . . , there were other circumstances which clearly supported the presumption that the letters of credit were not given as absolute payment but as conditional payment . . .

The sellers' remedy in such circumstances is to claim from the buyers either the price agreed in the contract of sale or damages for breach of their contractual promise to pay by letter of credit."[74]

4.58 In *E.D. & F. Man Ltd.*, it may be that the buyers chose the identity of the issuing bank and the sellers merely acquiesced. Would the position be different if the sellers had insisted on the identity of the issuing bank? No doubt the presumption of absolute payment would then be stronger, but it would still presumably not be conclusive. There appears to be a strong presumption in favour of construing letters of credit as conditional payment only, in the absence of an express stipulation to the contrary.[75]

Buyer's position if bank not reimbursed

4.59 It is worth contrasting the position in *Maran Road* with the almost identical case of *Sale Continuation Ltd.* v. *Austin Taylor & Co. Ltd.*[76] The facts were almost identical to those in *Maran Road*, and indeed arose from the liquidation of the same issuing bank. The defendants were similarly selling agents for a firm of timber exporters in Malaysia, and as in *Maran Road* were effectively in the position of buyers under an irrevocable credit, opened by Sale Continuation Ltd, the same issuing bank. As in *Maran Road*, the sellers drew 90-day drafts on the bank in exchange for the shipping documents. The documents were released to the defendant agents against trust receipts,[77] the effect of which was to constitute the defendant trustees for Sale of the

73. *Ibid.*, at 56.

74. Not only does the buyer remain liable for the price but he is also be liable in damages for failure to provide a reliable and solvent paymaster. In other words, the failure to pay by the bank also puts the buyer in breach of the contract of sale: see para. 3.14ff., where the consequences of the contract action are discussed.

75. However, the cases considered in this section were distinguished by Millett J., in a different context, in *Re Charge Card Services Ltd.* [1987] Ch. 150, affd. [1989] Ch. 497. Payment for consumer goods under a credit card may be regarded as absolute payment where the charge card company goes into liquidation. Millett J. emphasised, however, that the situation was very different from payment under a commercial credit, and no doubt was cast on the correctness of the decisions considered here. Not only is it the seller who chooses who chooses to do business with the credit card company, but usually the transaction leaves the seller with no record of the buyer's address, so it is reasonable to infer that he does not expect to look to the buyer for the price.

76. [1968] 2 Q.B. 849, [1967] 2 Lloyd's Rep. 403.

77. The terms of the trust receipts are set out at [1968] 2 Q.B. 849, 856G–857A; [1967] 2 Lloyd's Rep. 403, 407 (col. 1). On the property consequences of trust receipts, see further para. 6.39ff., where this case is further discussed.

documents and the goods until sold, and the proceeds of sale thereafter. The goods were in fact sold and the issue in the case concerned the proceeds.

4.60 As in *Maran Road*, Sale went into liquidation before the 90-day drafts matured. The main difference between this case and *Maran Road* is that in this case the defendants had not already reimbursed the bank before winding-up proceedings were commenced. Instead, when the drafts were dishonoured, the defendants forwarded the proceeds of sale directly to the sellers, thereby bypassing the bank altogether.

4.61 The liquidators for the bank claimed also to be entitled to the proceeds of sale, their commission, charges and interest from the defendants. Their argument was that the consideration for the commission, charges and interest was merely opening the credit, and that they were entitled to the proceeds of sale under the terms of the trust receipt. Paull J. rejected both these arguments. If this decision and *Maran Road* are both correct, whether payment must be made twice depends on whether the bank or the seller is paid first, on the insolvency of the bank. This would be a difficult conclusion to justify in principle.

The consideration argument

4.62 As far as the first argument was concerned, on whether the bank had earned its commission, and was entitled to claim charges and interest, Paull J. said that is was not enough merely for the issuing bank to open the credit. The contract contained an additional implied term that the plaintiffs would in fact honour the accepted draft.[78] There were mutual obligations that the bank would meet the draft as long as the defendants put the plaintiffs in funds to do so. Of course, in the actual case the defendants had not put the plaintiffs in funds, but since the obligations were mutual, they were under no obligation to provide funds if it were known in advance that the drafts were not going to be met. Here the bank had (by appointing a receiver and commencing winding-up proceedings) evinced their intention not to fulfil their obligation to honour the draft. This constituted a wrongful repudiation of their contract with the defendants, so that the defendants' obligation to reimburse them did not arise.

The trust receipt argument

4.63 The bank also claimed reimbursement of the proceeds of sale on the basis of the trust receipt, arguing that the defendants had acted in breach of the trust thereby created in paying over the proceeds of sale to the sellers (Nenasi). Paull J. rejected this argument also, the essence of the reasoning being that Nenasi "pledged the documents to the plaintiffs [the bank] who took them as security against not receiving the purchase price before they had to honour the draft, subject to the buyers' right to demand them as soon as they paid for the goods".[79] On dishonour of the drafts (or notice being given of dishonour) by the bank:

"Nenasi are entitled to cancel the contract of pledge by returning the draft for cancellation and claiming the purchase money from their agents, the defendants. It is as though a pawnbroker having received the pledge and given his pawn ticket to the pledgor refused to hand over the sum agreed to be lent. The pledgor can say: 'Very well, here is your pawn ticket. Hand me back my

78. *Ibid.*, respectively at 859 C–E; 408 (col. 2).
79. [1968] 2 Q.B. 849, 861E–862B; [1967] 2 Lloyd's Rep. 403, 410 (col. 1).

goods.' In this case 'the goods' (being the documents of title, or rather the money received for them) were already in the hands of the pledgor [Nenasi]."

4.64 The result of the case was that the defendants, having paid the proceeds of sale to the seller, did not need also to pay them to the bank. By contrast in *Maran Road*, where the sellers' agents had reimbursed the bank first, they had to pay twice over.

4.65 Paull J.'s reasoning is essentially that Nenasi as pledgor were entitled to cancel the pledge on failure of the bank to pay. The problem is that it was the defendants, and not Nenasi who were trustees, by this time of the proceeds of sale. If the defendants were regarded as being simply Nenasi's agents, then the analysis is simply that the pledge was validly cancelled by Nenasi, who (because the bank were no longer in possession of the documents) were therefore entitled to retain the proceeds themselves, into which the documents had been converted. Had the defendants not been Nenasi's agents this reasoning would not have been permissible. The defendants, acting now as principals in their own right, would in paying the proceeds directly to Nenasi, be in breach of their trust obligations to the bank.

4.66 If that analysis is correct, then a buyer who is not acting simply as seller's agent would gain nothing by paying the seller first, rather than the bank. This may be thought unfair on the buyer, who would thereby be required to pay twice over. On the other hand:

1. If the buyer chooses to reimburse the bank first, his position is exactly the same as that of the defendants in the *Maran Road* case. He is still liable to the seller under the sale contract, so has to pay twice over anyway. It is very difficult, as a matter of logic or principle, to justify putting him into a better position merely because he had decided to pay the seller first, rather than the bank.
2. If a buyer chooses to undertake trusteeship of the proceeds of sale for the bank, in the knowledge that the seller has not yet been paid, he is clearly taking the risk that he will come under obligations to both seller and bank. That undertaking of risk being voluntary, it would be difficult to justify the buyers in such a case taking priority over the other creditors.

4.67 The decision in *Sale Continuation* perhaps depends, then, on the unusual relationship between Nenasi and the defendants, allowing Paull J. to regard it as a two-party case. If the defendants are agents for the seller, then it might also follow that if they reimburse the bank first, they are doing so on the seller's behalf, in which case they should incur no liability to the seller, unless they exceed the terms of their agency authority. Again, therefore, it should generally make no difference whether the seller or bank is paid the proceeds of sale first. In *Maran Road*, by contrast, the defendants were treated as independent purchasers. Perhaps there were sufficient factual differences between the two cases in the difference in treatment between the two defendants.

DOCUMENTARY REQUIREMENTS UNDER C.I.F. AND F.O.B. SALE CONTRACTS

4.68 Though commercial credits are used today in a wide range of international sale contracts, historically they were closely tied to the c.i.f. and f.o.b. Where the contract is c.i.f. or f.o.b., it is clearly desirable for the documentary requirements under the sale contract to match those under the commercial credit. The latter depend on the terms

of the credit, which will usually be expressly stated. Requirements for particular types of document are elaborated upon by UCP documentary provisions, which are covered in chapter 8. The bill of lading requirements in para. 8.10ff. largely reflect those considered here, presumably to reflect that where a credit calls for a bill of lading, the underlying contract is likely to be c.i.f. or f.o.b.

4.69 Here we look at the requirements under the two most important sale contracts, under which by far the majority of the world's tonnage (in quantity if not in value) continues to be shipped. Both c.i.f. and f.o.b. contracts permit some flexibility, and there are therefore two issues. First, where the contract is silent, documentary requirements will be implied by the courts. Secondly, trade practices or express terms may permit variation, but only up to a point. Some documentation may be repugnant to the very idea, particularly of the c.i.f. contract. The second issue is therefore how much variation is permitted, before the documentary requirements cease to match the contractual label.

4.70 A c.i.f. sale contract will typically require the tender of a clean shipped (or on board) bill of lading, policy of insurance and invoice. In many f.o.b. contracts, the documents will perform the same function as for c.i.f., in which case the requirements will be the same. In such cases, the documentary credit requirements should match those of the contract of sale.

Shipped bill of lading required

General considerations

4.71 We shall see in chapters 5 to 7 that documents other than the shipped bill of lading can transfer to their holder rights under the carriage contract. Though only the shipped bill of lading is clearly and categorically recognised as a document of title at common law,[80] other documents can share many of its features, particularly where express provision is made, or where there is a trade custom. Moreover, an f.o.b. buyer who is also shipper, and to whom property passes on shipment, may not need a document of title at all, unless he intends to sell the goods on while they are at sea.

4.72 Under a c.i.f. or f.o.b. contract, however, the seller is required to ship the goods, and not merely to deliver them into the charge of the carrier. A c.i.f. buyer needs a document that shows evidence that the seller has performed his contractual obligations, by shipping goods of the contract description. Even an f.o.b. buyer who does not need a document of title still requires evidence that the seller has shipped the goods. The shipped bill of lading does this, the received for shipment bill does not. Hence the usual requirement for a shipped, as opposed to received for shipment bill of lading. An additional requirement that the bill of lading be clean is to provide evidence that the goods, when shipped, conformed with the contractual description.[81]

The traditional c.i.f. position

4.73 In *Diamond Alkali Export Corp.* v. *Fl Bourgeois*,[82] McCardie J. held that a c.i.f. seller was required to tender a shipped bill of lading, and that a received for shipment

80. The received for shipment bill might be, even without proof of custom, but this cannot be stated with certainty; see para. 7.102ff.

81. See para. 4.82ff. The evidential aspect of the bill of lading does not work perfectly, because of limitations on the master's competence, and also because of the immaturity of the law. See para. 5.69ff.

82. [1921] 3 K.B. 443.

bill would not suffice. The three main reasons for the decision were, first, that transfer of the bill of lading is the method by which the goods are delivered,[83] secondly that a received for shipment bill of lading is not a document of title at common law,[84] and thirdly that a received for shipment bill of lading is not a bill of lading within the 1855 Act.[85] McCardie J. reached his decision in spite of strong evidence of a trade custom, "inasmuch as the form of the document before me is of frequent use at American ports",[86] but it does not necessarily follow that a term expressly providing for tender of a received for shipment bill would be repugnant to a c.i.f. contract.

The traditional f.o.b. position

4.74 In *Yelo* v. *S.M. Machado & Co. Ltd.*,[87] f.o.b. sellers of mandarin oranges from a Spanish port claimed that they were entitled to tender received for shipment bills by virtue of a trade custom in the Spanish ports concerned. Sellers J. held that they were not. He was reluctant to imply into an f.o.b. contract, where the seller was required to find the ship, a term allowing them to tender a received for shipment bill of lading, because evidence of shipment was required, and also because the date of shipment was important (shipment date was in December, specifically for the Christmas trade). Evidence of a trade custom was relied upon by the sellers, but Sellers J. thought that strong evidence of an agreement, express or to be implied, would be needed to rebut the requirement of a shipped bill. Such evidence was lacking here because many of the contracts in the trade in question (fruit from Spanish ports) were ex-ship. In any case, as Sellers J. observed[88]:

"The parties were not, in my opinion, contracting on the basis of the custom or practice of the port or trade. It was their first contract together and neither was familiar with the then circumstances of the trade or, as I find, placing any reliance upon it."

4.75 The position might have been different, had the evidence shown that the parties were contracting on the basis of a trade custom.

4.76 Another of Sellers J.'s grounds was the well-known passage from Lord Sumner's speech in *Hansson* v. *Hamel & Horley, Ltd.*[89]:

"These documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they have to be such as can be re-tendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce."

4.77 This is an argument in favour of standardisation of documentation, whether the contract be f.o.b. or c.i.f.

83. McCardie J. cited (at 448) *Ireland* v. *Livingston* (1872) L.R. 5 H.L. 395, 406, and the judgments of Hamilton J. and Kennedy L.J. (the latter dissenting in the C.A.) in *Biddell Bros.* v. *E. Clemens Horst Co.* [1911] 1 K.B. 214, 221 and [1911] 1 K.B. 934, 956, whose views were later upheld in the House of Lords [1912] A.C. 18.

84. See [1921] 3 K.B. 443, 450, citing *Lickbarrow* v. *Mason* (1794) T.R. 685, and the Preamble and s. 3 of the Bills of Lading Act 1855, in support of this view.

85. [1921] 3 K.B. 443, 452–453. *The Marlborough Hill*, in para. 7.102ff., was criticised and not followed.

86. [1921] 3 K.B. 443, 447.

87. [1952] 1 Lloyd's Rep. 183.

88. [1952] 1 Lloyd's Rep. 183, 191 (col. 2)–192 (col. 1).

89. [1922] 2 A.C. 36, 46.

4.78 However, since Sellers J. was prepared to countenance the possibility that strong evidence of an agreement, express or implied, could rebut the usual requirement, we may also presume that an express term would have sufficed, and would not have been repugnant to an f.o.b. contract. Sellers J. also thought that a received for shipment bill, specially indorsed with the date of shipment, might have sufficed—then it would have been the equivalent of a shipped bill.[90]

The present position c.i.f.?

4.79 McCardie J.'s decision in *Diamond Alkali* was based on three grounds, none of which may any longer be valid. The first two grounds presuppose that only a shipped bill of lading is a document of title at common law, whereas it is not clear that this is still the case.[91] The third ground is also no longer valid, since received for shipment bills are now expressly covered by the Carriage of Goods by Sea Act 1992. However, just as much as an f.o.b. buyer, a c.i.f. buyer needs evidence that the seller has shipped the goods, and the date of shipment may be just as important. It is suggested, therefore, that whatever may have been the case when *Diamond Alkali* was decided, there is no longer any reason for distinguishing between the c.i.f. contract and the f.o.b. requirements, where the seller is required to tender a bill of lading. In that case, *Yelo* v. *Machado* tells us that there is a strong presumption that a shipped bill is required, but that this is rebuttable by an express term to the contrary, and perhaps by strong evidence of a trade custom to the contrary.

Negotiable bill of lading required

4.80 As we saw in para. 3.17ff., unlike bills of exchange, bills of lading and other shipping documents are not negotiable unless they are expressly made so by the shipper. A negotiable bill of lading may be made out to the bearer, in which case it is transferred by delivery, but more commonly it will be made out to the order of one of the parties to the sale contract (usually the seller), and transferred by delivery and indorsement. Usually bills of lading are indorsed personally, but they can be indorsed in blank, in which case further transfer is by delivery alone, as with bearer bills. This practice seems to be rare.[92]

4.81 It is important that a c.i.f. or f.o.b. purchaser can use the bill of lading to claim the goods from the vessel, so that it must be made negotiable, unless the purchaser is named as consignee.

Clean and claused bills of lading

4.82 The seller is also required, under both c.i.f. and f.o.b. contracts, to tender bills of lading which are clean. A clean shipped bill of lading states that the goods were loaded on board in apparent good order and condition. If the bill of lading is claused, and those clauses cast doubt on the apparent order and condition of the goods on

90. See para. 3.18ff. The sellers also failed on another ground, relating to the documentary credit. This is of no particular general importance, except that Sellers J. observed that his views on the received for shipment bills were not necessary for the decision: at 187–190.

91. See para. 7.102ff.

92. But not unheard of; see the discussion of *Sewell* v. *Burdick*, para. 7.72ff. Also *The Future Express*, in paras 7.55ff., 7.72ff., and 7.84ff.

loading, then it will not be good tender. Because the seller's obligations regarding the goods end on shipment, however, the bill of lading will still be valid tender f.o.b. or c.i.f. if it is claused by notations indicating that the goods have deteriorated, or been damaged or destroyed *after* shipment.

4.83 *The Galatia*[93] concerned a c. & f. contract of sale for shipment of a quantity of sugar. The sellers shipped the sugar in Kandla according to contract, but after loading 200 tonnes of the cargo was destroyed by fire, or the water used to extinguish the fire, and discharged. The separate bill of lading issued in relation to the part of the cargo that had been discharged acknowledged that it had been shipped in apparent good order and condition, but bore a typewritten notation: "Cargo covered by this Bill of Lading has been discharged Kandla view damaged by fire and/or water used to extinguish fire for which general average declared". The Court of Appeal held that the bill of lading was clean, and that the buyers were therefore bound to accept it. The clausing, relating as it did to damage after shipment, cast no doubt on the apparent condition of the cargo on loading, and thus did not invalidate the bill.[94]

Other requirements

4.84 In addition to the above requirements, to be valid for c.i.f. tender a bill of lading must be procured on shipment or not long afterwards,[95] must cover the contract goods and none other,[96] for the whole voyage,[97] and must show that shipment has occurred within the time stipulated in the sale contract.[98]

One original of set required

4.85 We saw in para. 3.26ff. that bills of lading are usually issued in sets of three originals "one of which being accomplished, the others stand void", and that in *Glyn Mills & Co.* v. *East and West India Dock Co.*,[99] the House of Lords held that a shipowner's duties extend no further than to deliver the goods to the first person to present an original bill of lading. He need not require all originals to be tendered, nor need he take further steps to ensure that the presenter of the document is in fact the person entitled.

4.86 An original bill of lading must be tendered under a c.i.f. contract, and there is no reason why the sale contract should not expressly require tender of all three originals.[100] In an ordinary sale contract, however, in the absence of an express stipulation, tender of one is sufficient. In *Sanders Brothers* v. *MacLean & Co.*,[101] two tenders of documents were made under a c.i.f. contract. The buyers refused the first tender on

93. *Golodetz (M) & Co. Inc.* v. *Czarnikow-Rionda Co. Inc.* [1980] 1 W.L.R. 495.
94. For the UCP position, on acceptable tender under a documentary credit, see para. 8.34ff.
95. See, e.g., Kennedy L.J. in *Biddell Bros.* v. *Horst Co.* [1911] 1 K.B. 934, 958; *Landauer & Co.* v. *Craven & Speeding Bros.* [1912] 2 K.B. 94.
96. *Comptoir d'Achat et de Vente du Boerenbond Belge SA* v. *Luis de Ridder Limitada (The Julia)* [1949] A.C. 293, *per* Lord Porter at 309.
97. *Hansson* v. *Hamel & Horley Ltd.* [1922] 2 A.C. 36, 45.
98. See, e.g., *Kwei Tek Chao* v. *British Traders and Shippers* [1954] 2 Q.B. 459, *per* Devlin J. at 481.
99. (1882) 7 App. Cas. 591. The action was brought against a dock warehouseman, but the principles in the case would clearly also protect a shipowner.
100. Where payment is by bankers' documentary credit, banks usually demand all three sets as security for their advance. See para. 8.10ff.
101. (1883) 11 Q.B.D. 327.

the ground that only two of the three bills were tendered, and the second on the ground that the bills of lading could not have been forwarded in time to arrive before the goods.

4.87 The sellers sued for breach of contract, and the Court of Appeal held that they were entitled to damages for non-acceptance. The first tender was valid because in an ordinary sale contract, where payment is to be made against bills of lading, the buyer must accept and pay on one bill and cannot demand all three originals.[102]

4.88 This exposes a c.i.f. buyer to a fraud risk, if originals are separately negotiated, but we have already seen in para. 1.10ff. that the law, as developed from mercantile usages, has developed to protect the parties against the bankruptcy, rather than the fraud of the other parties to the transaction.[103] The decision in *Sanders* v. *MacLean* is consistent with this principle, Bowen L.J. observing that[104]:

> "The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the shipper or some previous owner of the goods. But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and anyone who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery".

4.89 Similar sentiments can be found in *The Future Express*,[105] and also the judgment of Willes J. in *Barber* v. *Meyerstein*[106]:

> "all arguments founded upon the notion that the Court is to pronounce a judgment in this case which will protect those who deal with fraudulent people, are altogether beside the facts of this case, and foreign from transactions of this nature."

Charterparty bills

4.90 Another function of the bill of lading is that its terms are evidence of those of the contract of carriage.[107] Indeed, if the rights and obligations under the contract of carriage are transferred to a consignee or indorsee,[108] the terms of the relationship between carrier and consignee or indorsee are usually assumed to be those of the bill of lading itself.[109] The bill of lading will determine whether the receiver is to become liable for freight or demurrage, for example, and if so at what rate. The obligation on the seller is to enter into a contract of carriage which is reasonable, and the bill of

102. We are concerned only with the first tender here. The second tender was also valid, Brett M.R. refusing to imply (at 336–337) as a condition of the sale contract that the documents would arrive before the ship, as long as the seller made every reasonable exertion to send them forward as soon as possible. See further para. 4.122ff.

103. See also para. 6.2ff.

104. *Ibid.*, at 343.

105. [1993] 2 Lloyd's Rep. 542, 544 (col. 2), *per* Lloyd L.J.

106. L.R. 2 C.P. 38, 51; Willes J.'s judgment was later affirmed in the House of Lords: (1870) L.R. 4 H.L. 317.

107. *Ardennes (cargo owners)* v. *Ardennes (owners) (The Ardennes)* [1951] 1 K.B. 55; (1950) 84 Ll. L. Rep. 340.

108. See chapter 5.

109. *Leduc & Co.* v. *Ward* (1888) 20 Q.B.D. 475, though this was a case on the Bills of Lading Act 1855, and may not survive the difference in wording in the Carriage of Goods by Sea Act 1992, s. 5(1)(a).

lading should reflect this.[110] Under a c.i.f. contract, the seller is also responsible for payment of the freight, so that if under the bill of lading the receiver becomes liable, either a freight receipt should be provided by the seller, or the invoice and the price should be adjusted accordingly.

4.91 This creates no particular difficulties where all the terms of the contract of carriage are evident from the bill of lading itself, but it is common for a bill of lading to import terms from a charterparty.[111] For example, the bill may state that freight and demurrage is payable as per charterparty. If the charterparty is not tendered along with the bill of lading the terms of the contract of carriage will not be known, but unless the seller is himself charterer of the vessel, the charterparty is unlikely to be available.

4.92 Even where the charterparty is not available, charterparty bills are acceptable tender in an ordinary f.o.b. or c.i.f. sale, at any rate where the charterparty is on a well-known standard form, commonly used in the trade. In *Finska Cellulosaforeningen* v. *Westfield Paper Co. Ltd.*,[112] one of the issues was whether a seller of woodpulp c.i.f. could validly tender a bill of lading containing the clause "All conditions and exceptions as per charterparty . . . " when no charterparty was produced.[113] The sellers tendered the documents and successfully sued for the price. Viscount Caldecote L.C.J. said that[114]:

"In the circumstances of this case, at any rate, the tender of the bill of lading duly indorsed was, in my opinion, a sufficient compliance with the contract of sale to entitle the sellers to payment of the price of the goods . . . "

4.93 Here the charterparty concerned was on the Baltpulp form, as both parties knew from previous dealings, and which was also the standard form used for the particular trade. It does not necessarily follow that a charterparty need never be tendered in a c.i.f. contract, along with a charterparty bill. If the charterparty is not on a known standard form, or has been heavily amended, or differs from that used in past dealings between the parties, the seller is probably under an obligation to tender it in addition to the bill of lading.[115] The problem is, though: how is the buyer to know that, if the charterparty is not tendered?

Through bills of lading

4.94 As we saw in para. 4.84ff., the bill of lading must also cover the goods for the entire voyage, from shipment to port of destination.

4.95 The through bill of lading has already been described.[116] It is of the essence of a through bill that one carrier takes on obligations for the whole voyage, albeit with a liberty to sub-contract parts of it, otherwise the bill of lading would not provide cover

110. On the obligation to enter a reasonable contract of carriage, see, e.g., *Gatoil International Inc.* v. *Tradax Petroleum Ltd. (The Rio Sun)* [1985] 1 Lloyd's Rep. 350.

111. On the position of charterparty bills under the UCP, see para. 8.18ff.

112. [1940] 4 All E.R. 473, (1940) 68 Ll. L. Rep. 75.

113. There was also an insurance issue, which is not relevant to this book.

114. [1940] 4 All E.R. 473, 475H–477A.

115. This is also consistent with the view expressed by Donaldson J. in *SIAT Di Del Ferro* v. *Tradax Overseas SA* [1978] 2 Lloyd's Rep. 470, 492 (col. 2):

"Nor need the charter-party be produced if the bill of lading refers to a known standard form and it is only the printed clauses of that form which are relevant, e.g., 'Centrocon Arbitration clause'. If the decision in *Finska Cellulosaforeningen* v. *Westfield Paper Company Ltd.* is correct, it is justified upon this ground."

116. Para. 3.21ff.

for the entire voyage. Whether a through bill of lading constitutes a valid tender probably depends on what is usual and customary in the particular trade, but in any event it must provide coverage for the cargo for the entire voyage. In principle, however, it can be valid tender under a c.i.f. contract.

4.96 In *Hansson* v. *Hamel & Horley Ltd.*,[117] a cargo of cod guano was to be shipped c.i.f. from Braatvag, Norway to Yokohama, Japan, and it was initially put on board a local vessel, for transhipment at Hamburg on to a Japanese steamer, bound for Japan along with other cargoes from elsewhere. A document called a through bill of lading was issued, but only at Hamburg by the second carrier. The House of Lords held that this was a bad tender, because whatever the document purported to be, it was not in reality a through bill of lading.[118] Because it was not issued until Hamburg, it did not cover the local voyage. Had the goods been damaged at the local stage, the consignee would have had no action against the first carrier. In principle, however, the view was expressed that a tender c.i.f. of a genuine through bill can be valid, as long as each stage is effectively covered, and as long as either they are usual and customary in the trade, or if the contract expressly provides for their tender.

Delivery Orders

4.97 A bill of lading is not acceptable if it mentions other cargo,[119] so only a single set of bills of lading can be issued for a particular consignment. Bills of lading are not therefore always suitable where a single undivided bulk consignment is sold to a number of buyers.

4.98 The different types of delivery order have already been described.[120] Only ship's delivery orders, which can also provide rights against the carrier,[121] are acceptable tender under a c.i.f. contract, and even then only if the contract expressly so stipulates. The ship's delivery order has been described in chapter 3.

4.99 Under a c.i.f. contract, it is not enough that a ship's delivery order be addressed to and accepted by the ship, but this must also happen while the goods are still in the ship's possession. *Colin & Shields* v. *W. Weddel & Co. Ltd.* concerned a c.i.f. contract which allowed the sellers to tender a ship's delivery order in place of a bill of lading.[122] The goods (1,000 ox-hides) were supposed to be shipped to Liverpool, but instead were put on a vessel bound for Manchester, and then transhipped on to a barge to carry them onwards to Liverpool. The sellers tendered a document, signed by the shipowners, directing the master of the hide berth in Liverpool to deliver the goods to the buyers. The buyers rejected this document. The Court of Appeal held that it was not a ship's delivery order, in spite of being signed by the shipowners, because it was addressed to someone who was no longer in physical possession of the goods. Had the goods been lost after their transfer at Manchester to the dumb barge the delivery order

117. [1922] 2 A.C. 36; (1922) 10 Ll. L. Rep. 507 (H.L.).
118. [1922] 2 A.C. 36, (*per* Lord Sumner) at 48.
119. Above, para. 4.84ff.
120. Para. 3.28ff.
121. On the position if the goods are lost or damaged, see para. 5.28ff. Since 1992 there will normally be a contract action against the ship. See also chapter 7 on misdelivery consequences, especially para. 7.72ff. if there is a bailment.
122. [1952] 2 Lloyd's Rep. 9. See para. 3.28ff.

tendered would have conferred no rights on the buyers. As Denning L.J. observed[123]:

"... the sellers did not provide a proper ship's delivery order. The document which they presented was not an order on the ship, but an order to a porter at the docks at Liverpool who had nothing to do with the ship".

4.100 A similar conclusion was reached by Kerr J. in *Waren Import Gesellschaft Krohn* v. *Internationale Graanhandel Thegra NV*, the reasoning in the latter case being that the documents must place the buyers as nearly as possible in the same position as if they had been given bills of lading.[124]

4.101 A buyer of part of an undivided bulk cargo who accepts a ship's delivery order, stating that the cargo has been loaded on board a named vessel, or indeed a bank advancing money against such a document, obtains security which is virtually as good as he would were he to have obtained a bill of lading. A ship's delivery order shares many of the features of the bill of lading. It represents the goods, in giving holders non-delivery and misdelivery actions.[125] It operates as a receipt for the goods by the carrier, and provides evidence of the terms of the contract of carriage.[126] Lord Denning M.R. observed in *Colin & Shields* v. *Weddel* that[127]:

"The ship's delivery order is not as good a protection for the buyer as a separate bill of lading would be, because it gives no cause of action against the ship unless the master attorns to the buyer, and then it gives a different cause of action which may not be as favourable as a bill of lading."

4.102 This is, however, no longer true. Since 1992, the Carriage of Goods by Sea Act provides the holder of a ship's delivery order with a contract action.[128] Though unlike the bill of lading, the ship's delivery order is not expressly mentioned in the property sections of the Sale of Goods Act 1979,[129] there is no obvious reason why its retention and transfer should not have the same consequences as for a shipped bill of lading. It will give the holder a cause of action in bailment against the carrier only if he attorns, but this is not a significant disadvantage given that the 1992 Act provides a cause of action in contract.[130] It may be concluded that the ship's delivery order gives its holder protection comparable to that afforded to the holder of a ship's bill of lading.[131]

4.103 By contrast, a delivery order, other than a ship's delivery order, confers no rights against the carrier, and cannot be stipulated as good tender in a c.i.f. contract. A seller who presents one is doing no more than promise that he will allow the goods to be delivered ex-ship.[132]

123. This passage follows on immediately from that in para. 3.28ff.
124. [1975] 1 Lloyd's Rep. 146, 153 (col. 2)–154 (col. 1).
125. Para. 7.132ff.
126. Para. 5.69ff.
127. [1952] 2 Lloyd's Rep. 9, 19.
128. *Cf.* s. 1 of the Bills of Lading Act 1855.
129. See further chapter 6.
130. In any case, the same is probably true even of a shipped bill of lading. See para. 7.75ff.
131. Subject to the observations in para. 7.132ff.
132. A contract calling for such a document is therefore an ex-ship contract, and cannot be a c.i.f. contract, whatever it is expressed to be: *Comptoir d'Achat et de Vente du Boerenbond Belge SA* v. *Luis de Ridder Limitada (The Julia)* [1949] A.C. 293; 82 Ll. L. Rep. 270.

Commercial invoice

4.104 A c.i.f. seller must also tender an invoice. The form of the invoice, which is not defined in detail in the authorities on c.i.f. contracts, was originally set out by Blackburn J. in *Ireland* v. *Livingston*[133]:

"The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of freight which he will have to pay the shipowner on actual delivery."

4.105 In *Biddell Brothers* v. *E. Clemens Horst Co.*, Hamilton J. said that the invoice must be made out "as described by Blackburn J. in *Ireland* v. *Livingston* or in some similar form".[134]

4.106 Hence the common law requirement is not rigorous, with not even a mention, for example, of any description of the goods. It would be usual for there to be additional express requirements, if not in the sale contract itself then certainly in any documentary credit. Where the credit requires a commercial invoice, it differs from other documents in that it must comply strictly with the terms of the credit, whereas for other documents some leeway is allowed by the UCP.[135]

4.107 In a c.i.f. contract, the invoice would usually debit the buyer with the agreed price, and credit him with any freight or other charges he may have to pay the carrier at discharge (for example, if freight has not been paid in advance and a freight collect bill of lading is used). The possibility of credit for freight to be paid on delivery is alluded to by Blackburn J. above, *Ireland* v. *Livingston* having been decided at a time when advance freight was less common than today.

Insurance requirements

4.108 A c.i.f. seller is under an obligation to insure the goods with reputable insurers against marine risks, and the buyer is entitled to the benefit of the insurance policy, covering the value of the goods for the voyage. The principles elaborated in this section apply to any contract which calls for a policy of insurance, and not just to a c.i.f. sale contract. They also apply only in the absence of any custom, or express stipulation to the contrary.

Extent of cover

4.109 In the absence of express stipulation, the seller is obliged to provide the minimum cover current in the trade. This is simply a specific application of a principle which applies to any contract which simply calls for a policy of insurance, without specifying further details. *Borthwick* v. *Bank of New Zealand*,[136] for example, concerned tender to a bank under a commercial credit which called for bills of lading, invoice and

133. (1872) L.R. 5 (H.L.) 395, 406–407.

134. [1911] 1 K.B. 214. See also note 155.

135. See further para. 9.190ff., the relevant provision now being UCP 600, Art. 18(c) (and compare Art. 14(e)).

136. (1900) 6 Com. Cas. 1. Like *Giddens* v. *Anglo-African Produce Ltd.* (1923) 14 Ll. L. Rep. 230, in para. 4.7ff. (except that the credit here appears to be irrevocable), the bank undertook to negotiate drafts drawn by the shippers on the buyers. As was noted there and in para. 2.14ff., this form of negotiation credit is largely obsolete today, and is not allowed within UCP 600.

insurance policy, but did not specify the exact cover required. The sellers tendered a policy which contained a clause: "To pay a total loss by total loss of vessel only". Mathew J. held that the sellers should have obtained an all risks policy, having satisfied himself that this was "the ordinary policy in business of this kind".[137] The bank should not have accepted the policy tendered, and was liable to the buyer for the consequences of so doing.[138]

4.110 The requirement to provide the minimum cover current in the trade applies equally to a c.i.f. sale contract. The seller is under no obligation, in the absence of any term to the contrary, to provide more than this. If the buyer requires more comprehensive cover he should so stipulate in the sale contract, or alternatively contract on terms whereby he takes on the insurance obligation himself (e.g., c. & f.).

War risk insurance

4.111 Obviously, the terms current in a particular trade will vary between trades and routes, and over time. A common cause of litigation occurs on the outbreak of hostilities, where ships are sunk and it is discovered that the cargo is not insured against war risk. Presumably once hostilities have been under way for a time, it is more likely that the sale contract will address the matter of war risk directly.

4.112 It is unlikely at the outbreak of hostilities that provision of war risk cover will be usual in the trade, especially as the contract itself may well have been made in peacetime. In general, therefore, on the principles set out in the last section, war risk cover must be stipulated expressly in the sale contract, and if it is not the seller is at liberty to insure against marine risks only.

4.113 In *C Groom* v. *Barber*,[139] 100 bales of Hessian cloth were shipped c.i.f., "war risk for buyer's account", on board the *City of Winchester* on 15 July 1914, and the ship was sunk by a German cruiser on 6 August, two days after the outbreak of war. The contract had been made in peacetime (8 June), for shipment in the first two weeks of July, and Atkin J. held that the seller was entitled to tender an f.c. and s. policy[140]:

"I am satisfied that at the time this contract was made the terms current in the trade were terms which excluded war risk; in other words that the policy would contain the f.c. and s. clause, and therefore, apart from the special terms of this contract, a policy in such terms would be in order."

4.114 A clause in the sale contract stating "war risk for buyer's account" did not mean that the seller was to effect war risk at buyer's expense, but that war risk was the concern of the buyer alone. Any other conclusion could lead to very expensive rates even in peacetime.

4.115 Possibly if hostilities on particular routes last long enough, the customary insurance practices may alter so as to place an obligation to take out war risk on the seller. There do not seem to be any cases where this has actually occurred. In any case it may be difficult to define the customary risk, since wars are rarely static and rates can vary significantly even during the period of hostilities.

137. *Ibid.*, at 4.

138. There was a partial loss of the consignment, in respect of which by reason of the clause the plaintiff buyer could not recover.

139. [1915] 1 K.B. 316.

140. *Ibid.*, at 321–322. F.c. & s. (free of capture and seizure) is old terminology for marine risks only, from when the Lloyd's SG form was still in use. It was replaced by the Institute Cargo Clauses in 1982.

Insurance policy required, unless express stipulation to the contrary

4.116 Generally, the c.i.f. seller must tender the policy itself, although it is open to the parties to stipulate a certificate of insurance instead, but this must be done by an express term in the sale contract.

4.117 In *Manbre Saccharine Co. Ltd.* v. *Corn Products Co. Ltd.*,[141] c.i.f. sellers of starch during the first world war tendered documents for cargo which was aboard the *Algonquin*, a vessel which by the time of tender, to the sellers' knowledge, had been sunk by a German submarine, with the loss of all the goods aboard. McCardie J. held that in principle, c.i.f. sellers were entitled to tender documents for goods which had to their knowledge already been lost at sea. However, the buyers were able validly to reject the documents because (among other reasons) although a letter had been tendered which declared that the goods were insured, there was included no policy or certificate of insurance. McCardie J. emphasised the need for an assignable policy[142]:

> " . . . there is a wide difference between an actual policy of insurance transferable to the defendants as contemplated by s. 50(3) of the Marine Insurance Act, 1906, and such a letter as that of the defendants here. The [buyers], I hold, were clearly entitled to a policy and not to a mere assertion by the [sellers] that a policy existed and that the defendants would hold the plaintiffs covered."

4.118 In *Wilson, Holgate & Co. Ltd.* v. *Belgian Grain and Produce Ltd.*,[143] Bailhache J. held that in the absence of any custom or express stipulation in the contract a proper *policy* of insurance must be tendered under a c.i.f. contract, and that even a certificate of insurance was insufficient. Applying the two decisions, McCardie J. took the same view in *Diamond Alkali Export Corp.* v. *Fl Bourgeois*.[144] He went on to explain the main reasons for requiring a policy, rather than merely a certificate. The first was that unless the policy is tendered the buyer cannot tell whether the terms are usual and customary in the trade, as required under a c.i.f. contract.[145] He then went on to say that a certificate is not legally equivalent to a policy, and cannot be assigned under the Marine Insurance Act 1906.[146]

4.119 *Diamond Alkali* was approved by the Court of Appeal in *Donald H. Scott & Co. Ltd.* v. *Barclays Bank Ltd.*,[147] although whereas Bankes L.J. agreed that the document tendered must show all the terms of the policy, he reserved his opinion on whether the policy must comply "with the English law relating to policies of marine insurance."[148]

4.120 There are also two further provisos. First, it may be that some American certificates of insurance may be regarded as equivalent to policies, at any rate if they contain all the terms necessary to constitute a valid policy of insurance according to English law.[149] Secondly, in none of the cases so far discussed was there any custom

141. [1919] 1 K.B. 198.
142. *Ibid.*, at 204–205.
143. [1920] 2 K.B. 1.
144. [1921] 3 K.B. 443, 454–455. For further discussion of this case, see paras 4.71ff. and 7.102ff.
145. *Ibid.*, at 455–456.
146. [1921] 3 K.B. 443, 456–457.
147. [1923] 2 K.B. 1. The issue was not identical, but arose between seller and bank, not on the sale contract. The letter of credit, set out at 3, required tender of an approved policy of insurance, and the question was whether a certificate could be regarded as the equivalent of a policy. The Court of Appeal held that it could not.
148. *Ibid.*, at 13.
149. *Per* Bailhache J.: [1920] 2 K.B. 1, 7, as interpreted by Bankes L.J.: [1923] 2 K.B. 1, 11.

or express stipulation to the contrary. In *The Julia*,[150] Lord Porter thought that a term which expressly allowed substitution of a certificate of insurance for a policy would not be repugnant to a c.i.f. contract. In *John Martin of London Ltd.* v. *A.E. Taylor & Co. Ltd.*,[151] Lord Goddard C.J. held that, because of an express term, even a stamped indemnity could be a sufficient compliance with the contract terms relating to insurance; this suggests that to make express provision for such a document is not repugnant to a c.i.f. contract. As is often the case with c.i.f. (or indeed f.o.b.) contracts, there are two separate issues: the documentary requirements when there is no stipulation, and the range of documents that can validly be stipulated, without striking at the essence of the c.i.f. term.

Additional shipping documents

4.121 There is no reason why additional shipping documents cannot be stipulated, for example a certificate of quality or origin, but in a c.i.f. contract these must be capable of being obtained by the seller not later than shipment, and must not depend on the condition of the cargo at some later time.[152] A certificate of quality on discharge, for example, could not be stipulated under a c.i.f. contract, since the seller is not responsible for the cargo after shipment.[153]

Time of tendering documents

4.122 As we saw earlier in the chapter, in *Sanders* v. *MacLean*,[154] the c.i.f. sellers made two tenders of documents. The first was rejected on the ground that only two of the three bills were tendered, but the second was also rejected, on the ground that the bills of lading could not have been forwarded in time to arrive before the goods. The Court of Appeal refused to imply, as a condition of the contract, that the documents must be tendered in time to arrive before the goods themselves. The seller is merely required to make every reasonable exertion to send the shipping documents forward as soon as possible. In *Concordia Trading BV* v. *Richco International Ltd.*,[155] Evans J. held that where an f.o.b. seller was obliged to tender shipping documents,[156] he had a duty to perform the obligation forthwith, i.e., with all reasonable despatch, subject to there being no express provision or time limit to the contrary in the contract.[157] He equated f.o.b. duties with c.i.f., applying *Sanders* v. *Maclean* and *Sharpe* v. *Nosawa*.[158]

4.123 Where payment is by bankers' documentary credit the common law implications will normally, of course, be overridden by an express expiry date in the credit.

150. *Comptoir d'Achat et de Vente Du Boerenbond Belge SA* v. *Luis de Ridder Limitada (The Julia)* [1949] A.C. 293.

151. [1953] 2 Lloyd's Rep. 589.

152. This is because the risk is transferred to the buyer on shipment. See para. 1.20ff.

153. *Gill & Duffus SA* v. *Berger & Co. Inc.* [1984] A.C. 382; [1984] 1 Lloyd's Rep. 227.

154. Para. 4.85ff.

155. [1991] 1 Lloyd's Rep. 475.

156. This was probably a "classic" f.o.b. contract, where the seller shipped as principal, and the contract provided that the "Bill of Lading shall be considered proof of delivery in the absence of delivery to the contrary". On types of sale contract, including the varieties of f.o.b., see the authorities cited in para. 1.20ff.

157. There was not in this case.

158. [1917] 2 K.B. 814.

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CHAPTER 5

THE DOCUMENTS AS SECURITY I: LOST, DAMAGED OR MISDESCRIBED GOODS

ROLE AND FUNCTION OF TRANSPORT DOCUMENTS

5.1 This book covers documentary credits, but its title is "Bills of Lading and Bankers' Documentary Credits", not simply "Bankers' Documentary Credits". Without the bill of lading, and the development of its present day properties, neither the c.i.f. contract nor the bankers' documentary credit could have developed. Today the bill of lading, for good reason, is being used less universally than once it was. Alternative forms of documentation do not necessarily perform all the same functions, and where they do not, it is important to appreciate what is being lost.

5.2 The bill of lading, and the security that it gives the parties, form the main part of chapters 5, 6 and 7, which are devoted to consideration of the role played by bills of lading in international sales and documentary credits. In these chapters we concentrate on the traditional shipped bill of lading. Chapter 8 considers the documentation that the banking community accepts, in some cases reluctantly, changes having been forced upon it by modern commercial practices. In chapters 5–7 we also compare with the traditional bill of lading the security provided by alternative forms of documentation, some of which are acceptable under UCP 600.

Security provided by the shipping documents

5.3 The security provided by the bill of lading can be divided into three main areas: (i) the relationship created with the carrier (the most important aspect of which is contractual); (ii) property; and (iii) constructive possession. This chapter considers the first of these, and chapters 6 and 7 the other aspects. Chapter 8 looks at UCP requirements, and considers the extent to which other documents provide equivalent security, before drawing some general conclusions.

5.4 It will be clear from chapter 8 that the UCP pays great regard to the statements in the bill of lading, and on whose behalf they are made. If the statements made about the goods in the bill of lading (or other transport document) differ from the goods themselves (if any) that are actually delivered from the ship, then the bank or buyer who has paid against the document is getting less than he paid for. This can occur in essentially two situations. First, the statements may have been wrong. Secondly, something has happened to the goods while they are at sea, so that even if the statements were originally true, they no longer describe the goods (if any) that are delivered.

5.5 For any transport document to be useful as security, the lawful holder (or if a waybill, the person entitled to delivery) must be able to rely on statements made in it (for example that goods of a particular description and apparent quality have been

shipped,[1] on a particular date). If they are incorrect, and consequently he suffers loss, he should ideally be able to sue the person responsible for making the statements. The law in this regard, which is less than perfect in some regards, is considered at the end of this chapter (from para. 5.69 onwards). If the statements when made were true, but the goods are later lost or damaged on the voyage because of a breach of contract by the carrier, it is also desirable that the holder of the bill has a cause of action.[2] That is the subject of the first part of the chapter (up to and including para. 5.68ff.).

5.6 The security of any holder of a transport document is weakened unless he has a cause of action against the sea carrier, if the goods represented by it are lost or damaged on the voyage.[3] There are two main possibilities, an action on the contract of carriage, and if the carrier has been negligent, an action in tort. (Though the carrier might also be liable as a bailee, his liability will usually be limited to the original shipper.)[4] Tort and bailment liability will be modified by any contract between the parties.

Importance of Carriage of Goods by Sea Act 1992

5.7 The Carriage of Goods by Sea Act 1992 is by far the most important legislation to affect the value of shipping documents in recent years. Not only does it allow documents apart from the traditional shipped bill of lading to confer useful rights on their holder (or in the case of waybills, on the person entitled to delivery), but it considerably enhances the value to its holder, of even the shipped bill of lading itself. Not only is it central to the discussion in this chapter, but it also underpins many of the liabilities and defences discussed in chapter 7. Those aspects are left until their proper place. This chapter is about loss of or damage to goods, and carrier misrepresentations.

JURISTIC BASIS OF RELATIONSHIPS WITH CARRIER

5.8 The first concern in this chapter is whether the holder of a bill of lading is in contractual relations with the carrier at all, and the extent to which he can rely on contractual rights and be bound by contractual liabilities. This is relevant if the goods are lost or damaged at sea, and also if the carrier wishes to claim freight, demurrage or other charges from the holder. The second concern is the liability of the carrier, should statements in the bill of lading be incorrect, given that the holder often (though not always)[5] relies on their accuracy in taking up, and paying against the bill.

5.9 Today, contract also underpins most of the actions considered in chapter 7, on possession. The scheme of the Carriage of Goods by Sea Act 1992, which forms the main basis of this chapter, is to provide a contractual framework for liability, but other

1. Note only apparent and not actual quality. The master is assumed not to have the competence to assess actual quality, and statements as to actual quality are not within his actual or ostensible authority. See further *Cox* v. *Bruce* (1886) 18 Q.B.D. 147, in para. 5.119ff.

2. Note also most of the liabilities and defences in the misdelivery actions considered in para. 7.14ff. depend on the existence of a contractual relationship between the holder of the bill of lading (or other document) and the carrier.

3. For the discussion in this chapter it is assumed that the sea carrier is the shipowner. It could alternatively be a charterer, but the identity of the carrier is not relevant to the discussion here.

4. See para. 7.75ff.

5. See para. 5.77ff.

bases of liability nonetheless remain. They have not been abolished or affected by the 1992 Act. Carriers can remain liable in tort, for negligence in the case of accidental loss of, or damage to the goods, for conversion where the cargo-owner's right to possession is compromised. The carrier will also typically be bailee of the goods, though not necessarily to the present cargo-owner or bill of lading holder.[6] The mix of actions can complicate matters, and is also considered in this chapter.[7]

Nonetheless, the dominant regime is contract, which will form the main substance of this chapter. The chapter concentrates on loss and damage to the goods, also misstatements in bills of lading.

CONTRACT: NATURE OF THE PROBLEM

5.10 As far as the contractual action is concerned, a difficulty arises from the fact that in a normal international sale, the buyer will not be party to an express contract with the carrier. In all c.i.f. contracts, and variations thereon, the seller is the shipper, and the seller is also shipper in many f.o.b. contracts.[8] In commercial credit transactions, the bank will not be party. Thus, the contract of carriage is made by the shipper of the goods, who will not usually be the buyer, and will never be the bank. Occasionally, it is possible to imply a contract between the carrier and the holder of the bill of lading, or other document, at common law, but by 1992 it had become obvious that this would often not be the case,[9] and that in the absence of legislation, there would be no contract. An attempt by the legislature as early as 1855 to deal with the problem proved ill-suited to modern trading conditons, and the deficiencies of the 1855 Act had become so obvious by the late 1980s that the legislature was persuaded eventually to replace it with the Carriage of Goods by Sea Act 1992. The 1992 Act affects consignees and indorsees of bills of lading (and the holders of other documents), whether they be buyers, or banks as pledgees. The 1992 Act forms the main basis of the first part of this chapter.

5.11 As was explained in chapter 1,[10] early international trade was typically conducted by the buyer engaging a vessel and calling personally (or sending an agent) at foreign ports of call, there to purchase goods f.o.b. or f.a.s. The buyer was shipper and the goods were clearly at his risk from shipment. This presented no particular problems, since if the goods were lost at sea the buyer would have an action on the carriage contract, assuming that he had not undertaken the adventure with his own vessel. This type of trade raises none of the issues discussed in this chapter. The contract of

6. See para. 7.75ff.
7. Para. 5.59ff.
8. E.g., the so-called "classic" f.o.b. contract described in *Wimble Sons* v. *Rosenburg & Sons* [1913] 3 K.B. 743, also *The El Amria and The El Minia* [1982] 2 Lloyd's Rep. 28, where the seller must have been shipper, and the seller was probably shipper in *Concordia Trading BV* v. *Richco International Ltd.* [1991] 1 Lloyd's Rep. 475 (certainly he had undertaken to obtain and tender a bill of lading: see para. 4.122ff.). The shipper is sometimes the f.o.b. buyer, however, as in Incoterms, and *Pyrene & Co.* v. *Scindia Navigation Co.* [1954] 2 Q.B. 402, [1954] 1 Lloyd's Rep. 321. The problems addressed in this chapter do not apply to contracts where the buyer is shipper (though *Pyrene & Co.* v. *Scindia Navigation Co.* raised privity problems of its own). See further in general on the types of sale contract, para. 1.20ff.
9. See para. 5.50ff., and in particular *The Aramis* [1989] 1 Lloyd's Rep. 213.
10. Para. 1.4ff.

carriage, if any, was made by the buyer, and the buyer was the person who had an interest in suing should loss or damage occur.[11]

5.12 With the development of better communications in the early part of the nineteenth century, it became more convenient for the seller to make arrangements for carriage. Originally he would have been regarded as acting as agent for the buyer, the contract again being considered to be between buyer and carrier,[12] but for the c.i.f. contract to develop, where freight and insurance was included in the price, eventually it became convenient for the seller to be regarded as the contracting party. However, since risk remains on the buyer after shipment in a c.i.f. contract,[13] it was impossible fully to develop this type of contract until contractual rights against the carrier were transferred to the buyer.

5.13 Also around the middle of the nineteenth century the privity of contract doctrine became firmly established. This doctrine states that only a party to a contract may sue, or be sued on it. Third parties can neither sue nor be sued, however closely connected with it they may be. Nor can they benefit directly from any exemption clauses or defences in the contract.[14] In the present context, this means that in the absence of statutory intervention or any of the other devices considered below to avoid the rule, the shipper, and only the shipper, can sue the carrier in contract, and only he can also be sued by the carrier on the contract of carriage. Generally, however, once the goods are sold, the shipper will have no interest in suing the carrier, because goods which are lost or damaged at sea are at the buyer's risk, whether the contract be f.o.b. or c.i.f.[15] Assuming the goods were in apparent good order and condition when loaded, the buyer will therefore have to take up the documents and pay for the goods, and will have no recourse against the seller, whether or not they have been damaged or destroyed at sea. The seller, on the other hand, will either have already been paid for the goods, or he will be entitled to payment from the buyer, so will not be interested in taking any action. If the goods are re-sold, then risk passes to the sub-purchaser in the same way, and in general it can be said that the risk is transferred, as from shipment, to the eventual purchaser of the goods. Therefore the buyer (or eventual purchaser in a chain sale) may well wish to sue the carrier, but he is not party to any express contract with him.

11. F.o.b. contracts where buyer is shipper are still common today. This type of contract where the buyer is shipper is also sometimes described as "strict" f.o.b., "because it entails the performance of a lesser number of responsibilities on behalf of the seller than under any other interpretation or usage": Sassoon, *C.i.f. and F.o.b. Contracts*, 4th ed., Sweet and Maxwell (1995), para. 443ff., but the terminology does not appear to have been universally accepted: cf. Murray, D'Arcy and Cleave, *Schmitthoff's Export Trade (The Law and Practice of International Trade)*, 10th ed., Stevens & Sons (2000), at 18. It would probably be a mistake to treat these terms as terms of art.

12. This also remains fairly common today, with f.o.b. contracts. The seller may also make shipping arrangements where there is already a charterparty in existence, and therefore no need for the seller also to be shipper. In *The Al Hofuf* [1981] 1 Lloyd's Rep. 81, for example, the vessel had been chartered by sub-sub-buyers (i.e., two further down the chain), and this charterparty appears to have been the only contract of carriage made or envisaged.

13. See para. 1.77ff.

14. Generally, the privity doctrine has now been modified by the Contract (Rights of Third Parties) Act 1999, but this does not apply to contracts of carriage: s. 6(5)(a).

15. At any rate if the documents and the goods are accepted by the buyer. If they are not, risk remains with the seller, or re-vests in him. In the usual situation, however, risk passes to the buyer on shipment, or if the sale is of cargo already afloat, as from shipment.

5.14 The problems affecting buyers affect in an identical manner banks advancing funds on a documentary credit. Obviously, they do not make the contract of carriage, but it is not difficult to imagine circumstances where they would have an interest in suing, in the event that the goods are lost or damaged at sea.

5.15 It might be thought that an effective solution to the problem, as an alternative to suing the carrier, would be for the party at risk to claim on the marine insurance policy if the goods are lost or damaged at sea, but this is of no help if the insurance policy does not cover the loss, either through some oversight or accident,[16] or where for example war risk is not covered.[17] But even if (as is usually the case) the policy covers the loss, the insurance company, having paid the party at risk, may itself attempt to recover from the carrier under the subrogation doctrine,[18] in which case exactly the same issues arise but with different parties. A further point is that the marine insurance policy will not compensate for a drop in value due to late delivery, for example, whereas a contract action against the carrier may.[19]

5.16 Much of the value of a bill of lading lies in the contractual actions it gives the holder for the time being against the carrier. It is essential that he can sue the carrier, if bills of lading are to be used as freely negotiable documents, since it is vital for a purchaser who takes up a bill to acquire contractual rights against the carrier should the cargo be lost or damaged at sea. Similarly, if a bank takes a bill of lading as security under a documentary credit, its security is seriously impaired if it does not also acquire contractual rights against the carrier.

5.17 The arguments are not entirely one-sided, since carriers would not willingly carry cargo if they thought that the exemption clauses in the bill of lading contract would not protect them. Since the Hague or Hague-Visby Rules operate only by incorporation into contracts of carriage, the time limits, limits to liability and excepted perils also only protect the carrier if there is a contractual relationship between himself and the cargo-owner. It follows that, if the buyer can sue in tort, he will avoid the bill of lading exemptions unless there is contract between buyer and carrier.[20]

5.18 The carrier may also wish to sue the buyer, or eventual receiver of the cargo, for example for outstanding freight or demurrage. Indeed, he may have no option but to proceed against the receiver of the cargo, for example if the shipper is charterer and there is a cesser clause in the charterparty. But if there is no contract between shipowner and receiver of the cargo, the shipowner will be unable to claim freight or any other payment from him.[21]

16. As in *Couturier* v. *Hastie* (1856) 5 H.L.C. 673.

17. See para. 4.11ff.

18. In *The Aliakmon* at first instance, Staughton J. thought that the issue was in reality between two insurance companies: [1983] 1 Lloyd's Rep. 203, 205 (col. 1). This must commonly be the situation. (*The Aliakmon* went to the House of Lords, and is considered in para. 5.59ff.)

The Law Commission, in recommending the reforms that led to the enactment of the Carriage of Goods by Sea Act 1992, saw no reason why increased premiums should be borne by the cargo owners, while the shipowners were entitled to rely on a legal technicality: Law Commission and the Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea*, Law Com. 196 (1991), para. [2.15ff.].

19. This was the issue, for example, in *Koufos* v. *C. Czarnikow Ltd. (The Heron II)* [1969] 1 A.C. 350.

20. See further para. 7.33ff., and in particular *Cia Portorafti Commericale SA* v. *Ultramar Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310. See also para. 5.60ff.

21. See, for example, *K/S A/S Seateam & Co.* v. *Iraq National Oil Co. (The Sevonia Team)* [1983] 2 Lloyd's Rep. 640 and *Sewell* v. *Burdick* (1884) 10 App. Cas. 74. (In both cases freight was claimed against a party other than the original shipper.)

POSSIBLE SOLUTIONS TO THE PROBLEM

5.19 There are two ways of solving the problems described in the previous section. First, a contract can be implied between the party at risk and the carrier. This is the effect of the common law *Brandt* v. *Liverpool* doctrine, which is outlined below,[22] but which is for practical purposes almost entirely superseded by the Carriage of Goods by Sea Act 1992, at any rate where the documentation used is covered by the 1992 Act. The second is statutory intervention, which now means the 1992 Act.

5.20 In principle, sellers can assign their contractual rights against the carrier along with the bill of lading, and indeed this was suggested as a solution to the problem, before the 1992 law reform.[23] Only rights can be assigned, however, not liabilities, so the freight and demurrage problems in the previous section would not be resolved. There are also practical difficulties in chain sales, since it takes only one break in a chain of assignments to destroy the chain. If, for example, purchaser two in a chain sale neglects to assign his contractual rights to purchaser three, purchaser three and any subsequent purchaser have nothing to assign. Purchaser (N) may think he is being assigned valuable rights by purchaser (N-1), but he is not because purchaser (N-1) has nothing to assign. But there is no way that purchaser (N) can know this. Only if assignments were universal, and could thus be relied upon, could this solution to the problem work.[24]

BILLS OF LADING ACT 1855, SECTION 1

5.21 We have already seen that, even before the nineteenth century began, the shipped bill of lading was recognised as a document of title at common law, and it had been held that transfer of the bill of lading might, given the necessary intention, also transfer the property in the goods.[25] The courts could perhaps have developed this idea further, to hold that transfer of the bill of lading could also transfer contractual rights and liabilities, but in the Exchequer decision of *Thompson* v. *Dominy*,[26] the plaintiff indorsees for value of a bill of lading sued the carrier for alleged short delivery, but failed on the grounds that the transfer of a bill of lading does not enable the transferee to bring an action in his own name on the carriage contract, at any rate as a matter of law. Parke B. observed that[27]:

> "I have never heard it argued that a contract was transferable, except by the law merchant, and there is nothing to shew that a bill of lading is transferable under any custom of merchants. It transfers no more than the property in the goods; it does not transfer the contract."

22. See para. 5.50ff.

23. E.g., by Lord Brandon in *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785, 819 C–F. A similar sentiment was expressed in the Court of Appeal decision in *Enichem Anic SpA* v. *Ampelos Shipping Co. Ltd. (The Delfini)* [1990] 1 Lloyd's Rep. 252, 274 (col. 2)–275 (col. 1), *per* Mustill L.J.

24. E.g., comments made in Law Com. 196 (1991), [2.13]; also Beatson and Cooper, *Rights of suit in respect of carriage of goods by sea* [1991] L.M.C.L.Q. 196, 198.

25. *Lickbarrow* v. *Mason* (1794) 5 Term Rep. 683; 101 E.R. 380. See paras 1.10ff. and 6.3ff.

26. (1845) 14 M. & W. 403; 153 E.R. 532. See also *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 91, *per* Lord Blackburn.

27. (1845) 14 M. & W. 403, 407; 153 E.R. 553, 534.

5.22 A similar view was adopted by Alderson B.[28]:

"Because, in *Lickbarrow* v. *Mason*, a bill of lading was held to be negotiable, it has been contended that that instrument possesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."

5.23 It was possible, even then, for contracts on the terms of the bill of lading to be inferred, as a matter of fact, from the presentation by the consignee of the bill of lading and the delivery of the goods to him by the carrier.[29] This is still the position at common law.[30] But such contracts could not (and cannot) always be inferred, and it was to avoid this problem that the Bills of Lading Act 1855, s. 1 was enacted.

5.24 Section 1 was a legislative reaction to *Thompson* v. *Dominy*, and did little more than directly reverse the reasoning there. *Thompson* v. *Dominy* had held that merely because transfer of the bill of lading could transfer property in the goods, it did not follow that it also transferred contractual rights and liabilities.[31] Section 1 enacted that it would follow. But there was a tie-in with property. Only if transfer of the bill of lading passed property did it also pass contractual rights. Indeed, as became clear in later litigation, not only did the holder of the bill of lading have to have property, but the timing of its passing was also crucial.

5.25 The 1855 Act is now ancient history, at any rate in the UK, having been entirely replaced by the Carriage of Goods by Sea Act 1992. It is necessary only to observe the following restrictions on its operation.

(1) Because of the tie-in with property, the House of Lords held in *Sewell* v. *Burdick*[32] that s. 1 did not affect a bank who held a bill of lading merely as pledgee. In effect, bankers under documentary credits fell entirely outside the section.

(2) Not only was the 1855 Act dependent on the passing of property, but also on the manner of its passing. If property did not pass on the voyage, as with undivided bulk cargoes, then the section would not operate.[33] There were also restrictions on the timing of the passing of property, the manner of its passing, and whether the bill of lading named a consignee or was made out to order.[34]

(3) Apart from the property issues, the range of documentation covered was extremely limited, since s. 1 applied only where a shipped bill of lading was used,[35] this being the form of documentation that was almost universally used in 1855. Even a received for shipment bill of lading would not suffice, still less a delivery order, combined transport document, waybill or electronic document. Section 1 was simply not drafted so as to deal with the

28. *Ibid.*, at pp. 408 and 534.
29. E.g., *Stindt* v. *Roberts* (1848) 5 D. & L. 460.
30. See para. 5.50ff.
31. See above, in this section.
32. (1884) 10 App. Cas. 74.
33. *Aramis (cargo owners)* v. *Aramis (owners) (The Aramis)* [1989] 1 Lloyd's Rep. 213.
34. E.g., *Hispanica de Petroleos SA* v. *Vencedora Oceania Navegacion SA (The Kapetan Markos (No. 2))* [1987] 2 Lloyd's Rep. 321; *Enichem Anic SpA* v. *Ampelos Shipping Co. Ltd. (The Delfini)* [1990] 1 Lloyd's Rep. 252.
35. Or, at least, so it was assumed in *Diamond Alkali Export Corp.* v. *Fl Bourgeois* [1921] 3 K.B. 443, in paras 4.73ff. and 7.102ff.

current evolution in documentation (though it probably covered through bills of lading).

(4) Remaining on documentation, it was arguable that stale bills of lading were outside the 1855 Act. It has already been noted that in the oil trade the documentation may take months or even years to catch up, and bills of lading may well be negotiated after the cargo has been discharged.[36]

(5) Rights and liabilities were dealt with together under the 1855 Act. It was not possible to obtain benefits without being subject to liabilities. Banks under documentary credits would obviously have wanted statutory assignment of rights of action, but would not have been willing to incur liability for freight and demurrage, merely by virtue of holding a bill of lading.

(6) Finally, if the carrier was sued in tort, he was unable to limit his liability, even by invoking the provisions of the Hague-Visby Rules, unless he had a contract with the cargo-owner.[37] Not only did this mean that the amount of liability was unlimited, but also that the common law limitation period applied, of six years, rather than the more favourable one year under the Rules.

5.26 In effect, by 1992 it was clear that the 1855 Act was unsuited to modern trading conditions.

CARRIAGE OF GOODS BY SEA ACT 1992

5.27 With the enactment of the Carriage of Goods by Sea Act 1992, nearly all of the problems addressed above have been resolved.[38] It is intended in this section to comment upon the main provisions of the Act, section by section, except for section 4, which addresses a different issue addressed later in the chapter. The entire text of the Act is set out in Appendix B.

Section 1 (shipping documents)

5.28 We have already observed that the 1855 Act was limited to the shipped bill of lading, and even then probably did not apply to stale bills of lading which were negotiated after the cargo had been discharged. Section 1 of the 1992 Act enumerates and extends the documents to which the Act applies.

5.29 There are three categories set out in s. 1(1), the bill of lading, the sea waybill and the ship's delivery order. Section 1(2)(a) appears to exclude a straight bill of lading, naming a consignee, but this is not in fact the case, since although it does not come within the definition of a bill of lading, it does fall within the definition of the sea

36. Para. 1.109ff.

37. *The Captain Gregos* [1990] 1 Lloyd's Rep. 310, also in para. 5.60ff.

38. The Act was intended to give effect to the recommendations of the report of the Law Commission and the Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea*, Law Com. 196 (1991). For a useful history and explanation, see also *Borealis AB* v. *Stargas Ltd. (The Berge Sisar)* [2002] 2 A.C. 205, [18]–[31].

waybill.[39] By virtue of s. 1(2)(b), the received for shipment bill is expressly included.[40] The sea waybill is defined in s. 1(3) and the ship's delivery order in s. 1(4), the definition of the ship's delivery order being similar to the common law definition. The inclusion of the ship's delivery order is of considerable importance where bulk cargo is shipped, but it is noteworthy that only the ship's delivery order is covered.[41] Merchants' delivery orders are not, but obviously traders use merchants' delivery orders not out of choice but of necessity, since in order to obtain a ship's delivery order it is necessary to contact the carrier. This cannot always be done. For merchants' delivery orders, the position is the same as before.

5.30 There is nothing in s. 1 to exclude stale bills of lading and, subject to the exceptions in s. 2(2), these are covered. Nonetheless, the recipient of a stale bill will not always be able to sue, since he has eventually to obtain the document. If the bill of lading arrives very late this could still give rise to time bar problems, the time bar under Art. III(6) of the Hague-Visby rules being one year from the date of delivery or (if the goods do not arrive) "the date when the goods should have been delivered".[42]

5.31 Provision for electronic documentation is made in s. 1(5), should the Secretary of State choose to make the appropriate regulations, the definition of information technology and telecommunication system being set out in s. 5(1). It is probably unnecessary to dwell on this, since at the time of writing it looks unlikely that regulations will be made, at any rate in the foreseeable future.

5.32 A general criticism that can be made of s. 1 is that it operates by enumeration, rather than setting out more general requirements for documents to satisfy the Act. The problem with enumeration is that it does not easily allow for development, since new documentation could arise which has not yet been conceived. One of the reasons why the 1855 Act was widely regarded as outmoded was that it was incapable of adapting to trade practices and use of documentation which could not have been foreseen in 1855. The Law Commission considered this point and felt that certainty was more important than a long shelf-life.[43] At the time of writing (July 2007) the Act has been in force for nearly 15 years, and no new forms of documentation have arisen, so probably this was the correct call.

Section 2 (rights under shipping documents)

5.33 Section 2(1)(a) transfers rights of suit under the contract of carriage to the lawful holder or a bill of lading.[44] The property requirement of the old Act has entirely disappeared. Section 2(1)(b) transfers contractual rights to the named consignee

39. By contrast, at common law, a straight bill of lading is regarded as equivalent to a negotiable bill of lading, in the sense that it is a document of title, differing from a waybill in requiring presentation before delivery is made. See paras 3.17ff. and 7.123ff.

40. But it is not defined (nor indeed is the bill of lading itself). It is an interesting question, for example, whether the bill of lading in *Ishag* v. *Allied Bank International (The Lycaon)* [1981] 1 Lloyd's Rep. 92, in para. 7.102ff., would be covered by this provision. The Law Commission took the view that multimodal transport documents could fall within the ambit of the Act, at [2.49].

41. See further on ship's delivery orders paras 3.28ff. and 4.97ff.

42. This problem was touched upon at first instance in *The Future Express*, in para. 7.84ff., but because the bank had no cause of action in any event, it was unnecessary for Diamond J. to reach any decision on it. If the bank had established title to sue, it would then have been necessary to decide whether it was time-barred. The Court of Appeal considered only the cause of action issues.

43. Law Com. 196, para. [5.2ff.]. They also point out that the Hague-Visby and Hamburg Rules adopt a similar approach.

44. On who is a holder, see further below, para. 5.43ff.

under a sea waybill, and section 2(1)(c) makes appropriate provision for ship's delivery orders.

5.34 With a bill of lading it is appropriate for rights to be transferred to holders. This is not appropriate where the document is other than a document of title. With a sea waybill, possession of the document as such has no legal significance, its presentation not being required for delivery.[45] For this reason, rights are transferred to "the person to whom delivery of the goods to which the sea waybill relates is to be made by the carrier in accordance with the contract [of carriage]". Because a straight bill of lading is defined, for the purposes of the 1992 Act, as a waybill, transfer of contractual rights will also be transferred to the named consignee, without there being any need for the bill of lading itself to be transferred. This is arguably illogical, given the need for the document to be presented for delivery, and the seller's possible desire to retain the document as security against payment,[46] but it is a consequence of the straight bill being treated as a bill of lading at common law, but a waybill under the 1992 Act.

5.35 For ship's delivery orders, transfer is to the "person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order".

5.36 Section 2(2)(a) deals with the problem of the stale bill of lading. Bills of lading negotiated after delivery are included, as long as the underlying transaction preceded delivery. The Law Commission did not wish to encourage sales of bills of lading which gave nothing more than contractual rights of action.[47] Section 2(2)(b) covers the situation where the buyer rejects the goods on their arrival, after they have been delivered to him. His immediate seller will become lawful holder after the bill of lading has become stale, but will obtain contractual rights under the Act.[48]

5.37 Section 2(3) addresses an obvious problem with delivery orders, where the consignment is part of a larger undivided bulk. The rights transferred relate only to the part of the goods to which the order relates, although the delivery order will often make reference to the entire bulk. Section 2(4) addresses the problem where somebody other than the person with rights under the 1992 Act suffers loss, to deal with the possible argument that only nominal damages should be awarded.[49] Section 2(5) extinguishes rights on re-transfer, including the shipper's rights (but note that the section does not affect the rights of charterers, because of the definition of contract of carriage in section 5(1)). Neither tort nor bailment actions are divested, however.[50]

5.38 As an interesting aside, rights obtained under the new Act do not depend upon the rights, if any, of the transferor of the document. This is one respect, therefore, in which the bill of lading shares some of the features of a negotiable instrument, rather than merely a document of title to goods.[51]

45. See para. 3.51ff.
46. The one being a reason for the other: see *The Rafaela S*, in paras 3.17ff. and 7.123ff.
47. Law Com. 196, at [2.43].
48. It is necessary to re-transfer rights to him, as they would have been divested by s. 2(5).
49. This technical argument, which is probably theoretical only, is beyond the scope of this book. What is important is that the effect of s. 2(4), which is probably clarificatory, is to ensure that the person who has rights under s. 2 can also obtain substantial damages.
50. See further para. 5.59ff., and in particular *East West Corp.* v. *DKBS* [2003] Q.B. 1509.
51. See further Bools, *The Bill of Lading: A Document of Title to Goods*, LLP (1997), chapter 4.

Section 3 (liabilities under shipping documents)

5.39 The 1855 Act transferred rights and liabilities together, so that anyone who obtained contractual rights was also subject to contractual liability. The effect of the decision in *Sewell* v. *Burdick*[52] was to prevent banks as pledgees from becoming automatically liable for bill of lading freight, but also as a necessary consequence deprived them of any right to sue under the Act. An important feature of the new legislation are now dealt with separately from rights.

5.40 The view taken by the Law Commission[53] was that a bank as pledgee should not thereby become automatically liable under the carriage contract, but should be able to sue on it as lawful holder. However, if the bank did sue, or demanded delivery of the goods, it would also become subject to liabilities. This is essentially what is provided for by ss. 3(1)(a)–(c). The idea of the necessity for a voluntary election was emphasised in *The Berge Sisar*,[54] where the House of Lords held that merely taking samples for testing did not bring a holder within s. 3(1)(a). In the same case, the Court of Appeal had held that liabilities were divested on re-indorsement,[55] a view also approved in the House of Lords.

5.41 Only those who come within s. 2(1) can be subjected to liabilities under s. 3. In the case of a bill of lading this requires the person in possession of the bill also to be the holder. Not everyone who is in possession will necessarily be a holder. This issue is dealt with below.[56]

5.42 Section 3(2) addresses an obvious problem where the goods are part of a larger bulk. A buyer of part of a bulk should not become liable for freight or demurrage on the entire cargo. Under s. 3(3), the original contracting party remains liable. This was also the case under the 1855 Act, at any rate as far as freight was concerned, by virtue of s. 2 of that Act, and it may be justified in that a carrier who has contracted with a shipper of substance should not be forced instead to sue the lawful holder who may be less reputable.

Who is holder?

5.43 Where a negotiable bill of lading is used, rights and liabilities can only be transferred to the lawful holder, and it is therefore necessary to identify who this is. A holder is defined in s. 5(2), (a) and (b) dealing respectively with bills of lading naming a consignee and negotiable bills of lading. Section 5(2)(c) addresses the issue of when the cargo has been destroyed or delivered, prior to the transfer of the bill of lading.

5.44 It may be that not everybody who is in possession of a bill of lading should properly be regarded as a holder. With bearer bills in particular, where no formalities are required for transfer, the person in actual possession might well be holding the bill on behalf of someone else. In *The Ythan*,[57] after the loss of the cargo at sea, the bank under the documentary credit sent the bills of lading not to the buyers but to their insurance brokers (Marsh). Hence, Marsh were in physical possession of them, but the

52. See para. 7.72ff.
53. Part III(e).
54. *Borealis AB* v. *Stargas Ltd. (The Berge Sisar)* [2002] 2 A.C. 205, [33]–[36].
55. [1999] Q.B. 863.
56. Para. 5.43ff.
57. *Primetrade AG* v. *Ythan Ltd. (The Ythan)* [2006] 1 Lloyd's Rep. 457; [2005] E.W.H.C. 2399 (Comm.).

current cargo-owners were held by Aikens J. to be the holders at this time, Marsh holding the bills on their behalf.[58] We consider in chapter 7 an argument that the consignees in *The Aliakmon* held the bills of lading, not on their own behalf, but on that of the sellers.[59]

5.45 In principle, it must be possible for someone who is in physical possession of a bill of lading to be holding it on behalf of someone else. Nonetheless, in the context of the 1992 Act, there is a case for saying that the reforms were intended to promote certainty, rather than encourage difficult enquiries as to the precise basis on which someone is in possession of a bill of lading. In *East West Corp.* v. *DKBS*, Thomas J. rejected an argument that the holders of a bill of lading might be other than the persons with actual custody, observing that the 1992 Act was intended to simplify the law, whereas[60]:

> "if the claimants were correct, there would need to be an enquiry into the question as to whether the consignee named on the face of the bill of lading had, as between the shipper and the person named as consignee, an entitlement to delivery. It would in another guise re-open the enquiry into the contractual arrangements that the reform brought about by the 1992 Act sought to remove."

5.46 Bills of lading were indorsed in favour of banks who were appointed by the shipper only for the purpose of collecting the price. Property, and full control of the documents, remained with the shipper,[61] but Thomas J. held that the banks, as named consignees with physical custody of the bills, were holders within the definition in s. 5(2)(a) of the 1992 Act. Taking the same view on this point in the Court of Appeal, Mance L.J. accepted the possibility of a divorce between physical and constructive possession, citing Carver on *Bills of Lading*[62]: "a person receiving a bill in a purely ministerial capacity, e.g., a member of the buyer's staff, will be regarded as acquiring possession for his employer", and "possession" is "a sufficiently flexible concept to allow for the possibility of actual possession being held by one person and constructive possession being held, at least for some purposes, by another". Nevertheless, on the facts he refused to separate physical and constructive possession, on the grounds that the bills of lading transferred bore a personal indorsement.[63] (Carver had drawn a distinction between an agent physically possessing a bearer bill, or one that has been indorsed in blank, and a personal indorsement. The principal could be the holder in the former case, but the agent would be in the latter.)

5.47 No doubt, in the context of transfer of contractual rights of suit, where certainty is important under the Carriage of Goods by Sea Act 1992, a cautious approach is justified, to separating the holder from the person in physical possession of the bills. In chapter 7 it is suggested that a similar caution might not be required at common law, but under the 1992 Act, it seems that fine distinctions are not likely to be made.[64]

58. *Ibid.*, at [77].
59. Para. 7.55ff.
60. [2002] 2 Lloyd's Rep. 182 (first instance), [22].
61. *Ibid.*, at [16]–[18].
62. [2003] Q.B. 1509, *per* Mance L.J. at [16], citing (but not necessarily fully endorsing) Carver on *Bills of Lading*, 2001, [5–017]. The present edition is Carver on *Bills of Lading*, 2nd ed., Sweet & Maxwell (2005), also [5–017].
63. In *East West Corp.* v. *DKBS*, the holders were also the named consignees, so the indorsement was presumably in fact unnecessary.
64. Para. 7.55ff.

Comment on the Act

5.48 One effect of the 1992 Act is considerably to improve the value of shipping documents, whether traditional bill of lading or otherwise. Its most obvious impact is where there is a loss of, or damage to goods at sea. Yet though only contractual issues are resolved by the new Act, and there is no change, for example, to the definition of a document of title, the misdelivery actions in chapter 7 can also be contract-based, and probably have to be, where the holder of the document does not also have property in the goods. Moreover, the 1992 Act can significantly increase the usefulness of, for example, a waybill. Suppose, for example, a sea waybill contains a NODISP clause,[65] but that the shipper changes the identity of the consignee in breach of the clause, and the carrier complies with the seller's new orders. Under the 1855 regime, the original consignee would have had no action against the carrier for misdelivery, the only contract being between the carrier and the shipper. Under the 1992 Act, however, as named consignee to whom delivery should be made, he can sue the carrier. Moreover, the terms of the carriage contract include the NODISP clause, and the benefit of the carriage contract has been transferred to him by the Act. Thus, he can prevent the identity of the consignee being changed. This is an example of where alteration of the contractual regime incidentally enables transfer of constructive possession to occur.

5.49 What is good for merchants might be thought bad for carriers, but as well as imposing on merchants liabilities, where there were none before, the 1992 Act also allows carriers to use contractual defences, where perhaps these were not available before.[66]

THE *BRANDT* V. *LIVERPOOL* DOCTRINE

5.50 Even where (before 1992) the Bills of Lading Act 1855 did not apply, it was sometimes possible to imply a contract between the carrier and the receiver of the cargo at common law. Prior to the Court of Appeal decision in *Brandt* v. *Liverpool, Brazil & River Plate SN Co.*,[67] the implied contract had always been used to enable the carrier to sue the receiver of cargo for freight; by delivering the cargo, the carrier released his lien for freight, and it was reasonable to infer that he would only do this on the basis that he would be paid freight by the receiver of the cargo.[68]

5.51 In *Brandt* v. *Liverpool*, a contract was successfully implied for the first time in favour of a receiver of cargo, a bank which had realised the security of its pledge, but was unable to rely on the 1855 Act.[69] The receiver having paid the freight was able to sue the carrier for damages for delay, and for the return of a reconditioning cost of the cargo (which they had paid to the carrier under protest), where a clean bill of lading had been issued for defective cargo.[70] The Court of Appeal was prepared to imply a new contract between receiver and carrier: on delivery of the cargo against tender of a

65. See the description in para. 3.51ff.

66. See, for example, the discussion of *Cia Portorafti Commericale SA* v. *Ultramar Panama Inc. (The Captain Gregos)*, in paras 5.60ff. and (in particular) 7.33ff.

67. [1924] 1 K.B. 575. The bill of lading, which was issued clean, should have been claused. The basis of liability for the misstatement is discussed in para. 5.105ff.

68. E.g., *Allen* v. *Coltart* (1883) 11 Q.B.D. 782.

69. Because of *Sewell* v. *Burdick*, in paras 5.21ff. and 6.18ff.

70. On the nature of liabilities for misrepresentations in bills of lading, see below, para. 5.105ff.

bill of lading, a contract was implied that delivery would be on the terms of the bill of lading.[71]

5.52 The implied contract did not depend on the passing of property, and therefore (as in *Brandt* v. *Liverpool* itself) could be used in circumstances where the 1855 Act could not. The importance of the doctrine was obviously diminished by the replacement of the 1855 Act with the Carriage of Goods by Sea Act 1992, but there may still be limited circumstances where it applies. The 1992 Act does not apply to all forms of documentation,[72] excluding for example delivery orders which are not ship's delivery orders, but in principle, the *Brandt* v. *Liverpool* doctrine can apply to any document, as long as the inference can be drawn that delivery was to be on the basis of its terms. In *The Dona Mari*,[73] delivery was held to be on the terms of a ship's delivery order. In *The Elli 2*,[74] delivery was not made against bills of lading at all, merely a guarantee that the receiver would produce them later. In *The Captain Gregos (No. 2)*,[75] a cargo of oil was allegedly short-delivered, and the receiver (BP) sued in conversion.[76] The shipowner claimed the benefit of the time bar in the Hague-Visby Rules, but never became lawful holder of the bills of lading at all, so there was no prospect of a statutory contract, under the Bills of Lading Act 1855, s. 1, still at that time in force. Delivery was made against a letter of indemnity, and BP never even undertook to present bills of lading, but even so, a contract was implied that delivery was to be made on bill of lading terms (or at least on the terms of the Hague-Visby Rules, to which BP were taken to have consented). This entitled the shipowner to rely on the time bar in the bill of lading.[77]

5.53 In order to be able to imply a contract, however, it is necessary to be able to infer offer, acceptance and consideration. In *Brandt* v. *Liverpool* itself the payment of freight (and other charges)[78] constituted the consideration, moving from the receiver of the cargo. The consideration moving from the carrier was delivery of the cargo, on the terms of the bill of lading, but it is not always possible to find acceptance by the shipowner of an obligation to deliver on bill of lading terms, and consideration moving from the receiver. If, for example, freight and other charges are paid by the shipper,[79] it will be difficult to find any consideration moving from the receiver, and if delivery is not made, for example if the goods do not arrive, it is difficult to infer acceptance of any contract by the carrier.

5.54 The Court of Appeal made clear twice in recent years that a real (rather than fictitious) contract must be implied, and that the courts will not artificially extend the

71. In *Brandt* v. *Liverpool* itself, the shipowner delivered the goods against presentation of the bill of lading, and the receiver (a bank as pledgee) paid the freight. The Court of Appeal was prepared to imply a fresh contract between receiver and carrier, on the terms of the bill of lading.

72. See para. 5.28ff.

73. *Cremer* v. *General Carriers SA (The Dona Mari)* [1974] 1 W.L.R. 341. A ship's delivery order did not, however, come within the 1855 Act. On *The Dona Mari* see further paras 3.28ff. (on the circumstances in which the delivery order came to be issued) and 5.105ff. (on misrepresentations in the delivery order).

74. *Ilyssia Compania Naviera SA* v. *Ahmed Abdul Oawi Bamadoa (The Elli 2)* [1985] 1 Lloyd's Rep. 107.

75. *Compania Portorafti Commerciale SA* v. *Ultramar Panama Inc. (The Captain Gregos (No. 2))* [1990] 2 Lloyd's Rep. 395. An intermediate purchaser (PEAG) also sued, and was held not to be party to any contract with the shipowner: see further para. 7.47ff. on this claim.

76. Action was also brought by an intermediate purchaser, in respect of whom no contract could be implied. See generally on this case para. 7.47ff.

77. In *The Captain Gregos (No. 2)*, the 1992 Act would not have applied, had the same facts arisen today, since it transfers rights only to lawful holders of documents.

78. Including a reconditioning cost, which they had paid under protest.

79. Freight is commonly prepaid for dry-cargo shipments, but not for tankers.

doctrine in order to reach a commercially just solution. In *The Aramis*, for example, Bingham L.J. said[80]:

> "It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract."

5.55 He continued[81]: "One cannot cast principle aside, and simply opt for a commercially convenient solution". You cannot reason, in other words, from the convenience of an implied contract, that the requirements for a contract must therefore be satisfied. If the requirements for a contract are not satisfied, there is no contract, however commercially convenient it would be. Similar (indeed stronger) statements can be found in *The Gudermes*.[82]

5.56 In effect, the parties must change their position, in a way which is only consistent with the implication of a contract. In *The Gudermes*, Staughton L.J. thought that this was not particularly problematic where, as in *Brandt* v. *Liverpool* itself, or *The Dona Mari*, the receiver paid the freight, or as in the earlier cases, the carrier had, by delivering, released his lien for freight. In *The Elli 2*, the shipowners were under no obligation to deliver without production of the bills of lading, and by so doing also released their lien for demurrage (which was payable by the receiver of the cargo), so again it was not unreasonable to infer a contract. In *The Captain Gregos (No. 2)*, we have seen that delivery was made against an indemnity. The shipowners were under no obligation to deliver to BP without production of the bills of lading, although it was to their advantage to do so, and BP were under no obligation either to provide an indemnity, or to co-operate with the carrier by allowing the cargo to be discharged into their tanks. Again, therefore, though BP neither paid freight nor undertook to pay it, the parties had altered their position, consistently with the implication of a new contract.

5.57 More generally, assuming a document of title has been issued, the carrier is under no obligation to deliver except against its production, and changes his position by so doing. Consideration thus moves from the carrier, and a receiver who provides an indemnity also changes his position, and provides consideration. *Brandt* v. *Liverpool* continues to have relevance, even after the 1992 Act, in this situation, the 1992 Act not being applicable where the bill of lading never reaches the holder. It is difficult to envisage many other situations where *Brandt* v. *Liverpool* continues to have relevance today.

Proper law issues

5.58 Unlike the statutory contract under the 1992 Act, the implied contract is in principle separate from the original bill of lading contract. Although it is on the terms of the bill of lading (or other document), it is made by different parties to the original carriage contract, at a different place (the port of discharge). Only the carrier himself, and the places of loading and (probably) discharge, are necessarily common to both the original bill of lading contract and the *Brandt* v. *Liverpool* contract. Unless there is an express choice of law clause in the bill of lading, it is therefore possible for the

80. *Aramis (cargo owners)* v. *Aramis (owners) (The Aramis)* [1989] 1 Lloyd's Rep. 213, 244.
81. *Ibid.*, at 225 (col. 2).
82. *Mitsui & Co. Ltd.* v. *Novorossiysk Shipping Co. (The Gudermes)* [1993] 1 Lloyd's Rep. 311.

Brandt v. *Liverpool* contract to be governed by a different system of law to that governing the original contract of carriage.[83] It would not to be desirable from the carrier's viewpoint for the proper law of the carriage contract to vary, as the bill of lading is transferred.[84]

This ought not to be the position under the 1992 Act, where the entirety of the rights and (if applicable) liabilities are transferred, and where the same system of law should apply to the transferred contract.

TORT AND OTHER NON-CONTRACTUAL ACTIONS AGAINST CARRIERS

5.59 In 1992 the legislature provided for a comprehensive contractual regime, filling nearly all the gaps that had become apparent in the previous regime. There was really no need for the continued existence, alongside the new regime, of actions in tort or bailment, whether the issue was loss of or damage to the goods, considered in this chapter, or misdelivery, considered in chapter 7. But the 1992 Act left entirely alone the law outside contract. For the most part this does not matter. The comprehensiveness of the contractual regime renders tort and bailment actions largely unnecessary, and they probably cannot be used to improve the position of claimants, where there is an alternative action in contract. Nonetheless, there continue to be problems, on the margins, where tort or bailment actions continue to exist, in the absence of a contract. It is probably regrettable that the legislature did not decide, when it enacted the Carriage of Goods by Sea Act 1992, to provide a regime that was exclusively contractual, and to curtail tort and bailment in this area of activity.

Negligence and conversion

5.60 Whether or not a shipper or subsequent holder of a bill of lading can sue the carrier in contract, any party who has property in goods which are damaged through the fault of the carrier, at the time they are damaged, can sue the carrier in negligence, assuming it can be proved. (If the carrier misdelivers the goods, the owner can sue him in conversion.) These tort actions are independent of any contractual claim. Under the 1855 regime, it was thought for a time that the negligence action might be able to plug some of the gaps in contractual coverage, but the House of Lords decision in *The Aliakmon* removed any hope there might have been in this regard. Today, there will usually be an action in contract, in which case there is no need to sue in tort, and where there is a contract between the parties, the tort action cannot be used to avoid contractual exemptions and limitations.[85] Tort actions today are likely to be of relevance only where there is no contract between the parties, in which case the action will also be unconstrained by any limitations or exemptions in the contract of carriage.

83. *The St Joseph* [1933] P. 119; (1933) 45 Ll. L. Rep. 180. A similar argument was advanced unsuccessfully in *Ilyssia Compania Naviera SA* v. *Ahmed Abdul Oawi Bamadoa (The Elli 2)* [1985] 1 Lloyd's Rep. 107, especially at 117 (col. 1). Where there is an express choice of law clause, the arguments in para. 2.97ff. apply equally here.

84. Note that Art. 4(2) of the Rome Convention (in para. 2.100ff. and Appendix D) does not apply to carriage contracts. Art. 4(4) might, and if it does, will determine the issue, whoever are the parties to the bill of lading contract.

85. The authorities are discussed in para. 7.47ff., in relation to conversion claims for misdelivery.

5.61 In *The Aliakmon*,[86] the House of Lords held that, in order to sue in negligence, it is necessary for the plaintiff to have property in the goods at the time that they were damaged. The House of Lords went further in *The Starsin*, holding that a duty of care in negligence is owed only to the owner of the cargo, or person with an immediate right of possession, at the time of the breach.[87] In *The Starsin*, the cargo had been negligently stowed at the beginning of the voyage, causing progressive damage during the voyage. Property passed at some time during the voyage, but the House held the buyer had no title to sue in tort, not having had property at the time of the breach.[88]

5.62 Property in this context means either legal ownership or a possessory title to the property concerned at the time when the loss or damage occurred. Although Lord Brandon does not elaborate upon this, it would seem that "possessory title" encompasses the special property which the bank obtains as pledgee on the principles of *Sewell* v. *Burdick*.[89] Thus a bank which obtains special property on consignment or indorsement can sue the carrier in tort.[90] If under the sale contract, property passes from seller to buyer before the documents are pledged, the bank will not obtain any legal property, but may later obtain equitable property by virtue of a trust receipt.[91] The possibility is also discussed, in chapter 7, of an equitable pledge, perhaps where a document of title is not used.[92] *The Aliakmon* also decides that equitable ownership on its own does not give the bank a cause of action.[93] It is also clear that merely to have a contractual right to the goods will not found a cause of action in tort, whether in negligence or conversion. The c. & f. buyers had a contractual claim on the goods in *The Aliakmon* itself, but failed to establish title to sue in negligence.

5.63 Before the enactment of the Carriage of Goods by Sea Act 1992 it was hoped that the tort action, like the *Brandt* v. *Liverpool* contract, could ameliorate some of the defects of the 1855 Act. But unless a carrier who was sued in tort could show the existence of a contract between himself and the plaintiff, he would be unable to rely on any exemption clauses in the contract of carriage. One of the reasons for the refusal of the House of Lords to extend recovery in *The Aliakmon* was precisely because since there was no contract between the buyers and the carrier,[94] to allow the tort action would have been to deprive the carrier of the benefit of any exemption clauses, time

86. *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785, [1986] 2 Lloyd's Rep. 1. C. & f. purchasers failed in a negligence action against the carrier, property not having passed to them by the time the damages occurred.

87. *Homburg Houtimport BV* v. *Agrosin Private Ltd. (The Starsin)* [2003] U.K.H.L. 12, [2004] 1 A.C. 715, [2003] 1 Lloyd's Rep. 571. See in particular Lord Bingham at [39], approving Rix L.J. in the C.A.: [2001] E.W.C.A. Civ. 56, [2001] 1 Lloyd's Rep. 437, [96].

88. For the position in conversion see para. 7.55ff.

89. The result in *Kum* v. *Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439. In *Glyn Mills Currie & Co.* v. *East and West India Dock Co.* (1882) 7 App. Cas. 591, 606, in para. 7.26ff., Lord Blackburn did not think it necessary to consider whether the plaintiff bankers had the whole legal property in the goods, or only a special property as pawnees. Either way they had a legal property, and were entitled to maintain a conversion action. See also *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 98 (also Lord Blackburn). *Cf. The Odessa* [1916] 1 A.C. 145, 158–159, where in a Prize context, Lord Mersey denied that special property was really property at all.

90. On the nature of the bank's property interest, see further para. 6.18ff.; it is clear that the bank has a right to possess the goods.

91. See para. 6.39ff.

92. Para. 7.102ff.

93. [1986] A.C. 785, 812 A–E. This is not part of the *ratio*, since the buyers had no property at all.

94. Because property had not passed, the 1855 Act did not apply, and on the facts there was no *Brandt* v. *Liverpool* contract.

bars or limitation clauses in the bill of lading. The contract of carriage incorporated the Hague Rules, which give the carrier the benefit of excepted perils, package limitation and a one-year time bar. There was no sound policy, in Lord Brandon's view, in extending recovery in tort if the effect would be to deprive the carrier of the benefits he would have under the Hague Rules, on the basis of which he had undertaken to carry the cargo. The buyers argued that, in principle, the duty of care in tort could be limited by reference to the Hague Rules, but the House of Lords held that the duty of care in tort could not be limited by clauses contained in a contract to which the plaintiffs were not party.[95] The Hague-Visby Rules are drafted differently, but arguments that they are sufficiently different to enable the carrier to rely on their provisions, even where the plaintiff is not party to the contract of carriage, were dispelled by the Court of Appeal in *The Captain Gregos*.[96]

5.64 The problems alluded to in the previous paragraph largely disappeared with the enactment of the Carriage of Goods by Sea Act 1992, because it is more likely that a cargo-owner will also have a contractual relationship with the carrier. In exceptional cases, however, tort actions can still be used to avoid contractual clauses where there is no contract between the parties.[97] Though such cases are unlikely to arise often, it is perhaps a pity that the legislature in 1992 did not provide for an exclusively contractual regime, and remove tort actions altogether from this area of activity.

Bailment

5.65 When goods are shipped the carrier becomes a bailee for reward from the shipper. In the absence of later attornment it seems likely that bailment duties are only ever owed to the shipper, whatever dealings there might be in the bill of lading or other document.[98] As we have seen,[99] the 1992 Act deprives shippers of contractual rights once they are transferred, but the 1992 Act no more affects bailment actions than it does actions in tort. In *East West Corp.* v. *DKBS*.[100] the shipper with no contractual rights was held entitled to sue a misdelivering carrier in bailment. As we will see in chapter 7,[101] though the most obvious application of bailment is in misdelivery situations, bailment actions can also be used in cases involving loss of or damage to the goods.

5.66 As we shall see in para. 7.82ff., bailment duties will be qualified by the terms of the bailment, which will usually be bill of lading terms. The shipper will certainly be bound by these terms, and if the identity of the bailor is changed by attornment,[102] the attornment will also usually be on similar terms. Even if attornment is not needed when a bill of lading is transferred,[103] the transferee will probably take on bill of lading

95. [1986] A.C. 785, 817H–818C.

96. *Compania Portorafti Commerciale SA* v. *Ultramar Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310, on which see also para. 7.33ff. The case returned to the Court of Appeal, on the issue whether there was a contractual relationship between the parties: *Compania Portorafti Commerciale SA* v. *Ultramar Panama Inc. (The Captain Gregos (No. 2))* [1990] 2 Lloyd's Rep. 395.

97. *The Captain Gregos (No. 2)*, described in para. 7.47ff., would be decided in the same way today. The action (by an intermediate purchaser) was in conversion but could have been in negligence, had the goods been lost or damaged, rather than misdelivered.

98. See para. 7.75ff.

99. Para. 5.33ff.

100. *East West Corp.* v *DKBS AF 1912 A/S* [2003] Q.B. 1509.

101. Para. 7.72ff.

102. Para. 3.28ff.

103. See para. 7.75ff.

terms, these being the terms of the original bailment. There is little possibility, therefore, of bailment actions being used to avoid contractual exemption clauses and other clauses protecting the carrier.

5.67 Only two difficulties are likely to arise from the continued existence of bailment actions, alongside the contractual regime. First, the bailment action subverts the intention of the legislature, if that intention was to remove actions by shippers, once contractual rights have been transferred. After all, the shippers were able to sue in *East West*, even though the contractual action had been divested. Secondly, the bailment action might be better, even where there is a contract between the parties, because of the reversal of the burden of proof.[104]

5.68 As in the previous section, therefore, it is perhaps a pity that the legislature did not remove bailment actions in 1992, providing for a contractual regime alone.

REPRESENTATIONS IN BILLS OF LADING

Introduction

Importance of representations in bills of lading

5.69 A bill of lading, as a document of title, represents the goods. A purchaser cannot inspect the goods while they are at sea, and has to rely instead on representations in the shipping documents, and in particular in the bill of lading. These representations provide him with evidence that the seller has performed the sale contract, by shipping conforming goods. He can therefore confidently pay on the strength of the representations therein. Should any problems arise after negotiation of the bill of lading, he knows that goods of the stated description have been loaded on board. They are his security, very important if an overseas seller, about whose solvency he knows nothing, goes bankrupt. If payment is by documentary credit, the truth of the statements is equally important to the security afforded by the documents by the bank, which is no doubt why great emphasis is placed on the statements by UCP 600.[105]

5.70 Modern international trade therefore depends on the accuracy of these representations. As Colman J. recently observed in *The Starsin*[106]:

> " . . . if an innocent shipper, indorsee or consignee could not rely on statements on the face of a bill of lading as to such matters as the date of shipment and the absence of clausing and was obliged to verify the accuracy of the date and the apparent good order and condition of the goods each time he took a bill of lading, that would represent a most serious impediment to international trade which depends so heavily on the accuracy of bills of lading as negotiable instruments."

5.71 The same reasoning applies to descriptions of the goods, and of the fact of their shipment. If any of these representations are false, the person taking up the bill can suffer loss, for which ideally there should be redress. It has been said that "[the] accuracy of the bill of lading statements is a matter which is generally within the

104. See para. 7.82ff.
105. See chapter 8.
106. [2000] 1 Lloyd's Rep. 85, reversed on other grounds: [2001] 1 Lloyd's Rep. 437 (C.A.). This aspect of the case was not discussed in the House of Lords: [2004] 1 A.C. 715, where Colman J.'s judgment was largely restored.

control of the shipowner",[107] and he is therefore the appropriate person to take responsibility for them. He is the person with deep pockets, who can pay (unlike the master, for example, who actually signs the bill). But the law has never systematically provided a cause of action against the shipowner,[108] and recent decisions do not improve the position of the holder of the bill.

5.72 Though the discussion in this section centres on the bill of lading, around which nearly all the cases have revolved, the issues can be equally important where other documents are used. Documents other than the bill of lading are covered in para. 5.136ff.

Relevance of fraud or negligence

5.73 Misrepresentations in bills of lading do not normally occur without fraud or negligence, at least on somebody's part. If the master has been fraudulent, then there should be no difficulty in suing him for deceit, and if the representation is within the scope of his authority, the shipowner vicariously. If he is negligent, *Hedley Byrne* liability may attach (this is discussed further below).

5.74 However, whereas there will probably be fraud or negligence somewhere,[109] the person who actually made the representation (master or loading broker) may well be innocent.[110] In most cases where the shipping date is altered, fraud is often involved somewhere, as in *Kwei Tek Chao* v. *British Traders and Shippers Ltd.*,[111] where the shipment date on the bill of lading had been forged. However, the fraud was not that of the master who issued the bill, or of the immediate c.i.f. seller, but of forwarding agents acting without the seller's authority, on behalf of earlier sellers on a domestic supply contract, to enable them to claim payment under a documentary credit. The person defrauded was not the bank under that documentary credit, but a c.i.f. purchaser two further down the chain.[112]

5.75 In *V/O Rasnoimport* v. *Guthrie & Co. Ltd.*,[113] a theft occurred of most of the cargo prior to shipment, followed by a misstatement in the bill of lading that all the cargo had been shipped. A bill of lading had been signed and issued by the defendants, who were agents of the shipowners, stating that 225 bales of rubber had been shipped on board the vessel. In reality, unbeknown to the agents, only 90 bales had been shipped. Yet Mocatta J. found, not only that the defendants had not been fraudulent,

107. Carver (1890) 6 L.Q.R. 289, 303–304. The passage continues "although no doubt the shipper has often very much to do with it". The notion that the shipper is the originator of statements in bills of lading has placed a brake on the development of the law: see further below.

108. It is assumed, for the purposes of this discussion, that the master signs bills of lading for the shipowner (substitute charterer in the discussion, if they are charterer bills).

109. In *Gill & Duffus SA* v. *Berger & Co. Inc.* [1984] A.C. 382, for example, Lord Diplock observed at 390, in parenthesis, that " . . . in the case of a c.i.f. contract it is difficult to see how, without fraud upon his part, the seller could ship beans but nevertheless be in a position to tender shipping documents conforming to those called for by a c.i.f. contract to sell peas . . . ", admittedly a rather extreme misrepresentation, but the same could no doubt also be said of less serious representations.

110. Not always of course. In *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)* [1983] A.C. 168, [1982] 2 Lloyd's Rep. 1 (in para. 9.69ff.) it was the loading broker who was fraudulent.

111. [1954] 2 Q.B. 459, [1954] 1 Lloyd's Rep. 16.

112. Another example might be thought to be *Discount Records Ltd.* v. *Barclays Bank Ltd.* [1975] 1 W.L.R. 315 (see also para. 9.160ff.). There, the master had the true facts hidden from him by the shipper, who was alleged to be fraudulent. This is a poor example, however, because there was also no misstatement in the bill of lading. The goods really were in apparent good order and condition.

113. [1966] 1 Lloyd's Rep. 1. See also para. 5.131ff.

but that they had not even been negligent in issuing the bill. The remaining bails had been stolen before loading by employees of the railway company which was supposed to have carried them to lighters, and thence to the vessel. They were not, however, placed aboard the lighters, but left on the wagons and thereafter misappropriated. In consequence of a go-slow movement by the railway union, no railway tally clerks were available to take a tally from the railway wagons into the lighter, and the defendants were unaware that the bales were missing. The defendants were held to have acted "without negligence . . . ".[114] The incorrect bill of lading was issued to the shippers of the cargo, who had contracted to sell the bales of rubber to the plaintiff purchasers.[115] Accordingly, they indorsed the bill of lading and delivered it to the plaintiffs, against which delivery, believing 225 bales to have been shipped, the plaintiffs paid. It was found as a fact that[116]:

"In taking up and paying for the said Bill of Lading the Plaintiffs acted on the faith of the statement contained therein to the effect that bales had been shipped thereunder, believing the said statement to be true."

5.76 Here then, there was a criminal act involving the theft of most of the cargo, and the representee relied to his detriment on a related misstatement in a bill of lading. That statement had, however, been made entirely innocently, so that no tortious liability could attach to the defendants, nor, had the statement been within the scope of their authority, the shipowners.[117]

Relevance of reliance upon misstatement

5.77 As we shall see, representations in bills of lading do not generally give rise to a contractual liability on the part of the carrier. They may give rise to a tort action, based on negligent misstatement, or they may create an estoppel, preventing the carrier from denying the truth of the representation. For either of these, the representee (holder of the bill of lading) must have relied upon the statements made in it.

5.78 Most obviously, he may not have taken up, and paid against, the bill of lading at all, had the truth been known. What has actually been shipped (if anything)[118] may be worthless to him; had he known the truth he would have re-entered the market and purchased elsewhere, perhaps also suing his seller for breach of the sale contract. Statements seriously misrepresenting the quantity, or apparent quality of the goods will nearly always have been relied upon, if the holder is induced to take up a bill of lading which otherwise he would have rejected. Alternatively, on a falling market, he might have decided to reject anyway, even if there was little or nothing wrong with the goods. On a falling market the buyer is entitled to use any breach of condition by the seller as a ground for rejecting the documents, and hence getting out of a bargain that has

114. *Ibid.*, at 3 (col. 2).

115. The sale was f.o.b., and the seller's obligations would have been to load the goods on board the vessel. The bill of lading wrongly implied that they had fully performed this obligation.

116. *Ibid.*, at 4 (col. 1).

117. The defendant agents were, however, liable for breach of contract, for which of course liability is strict. The contractual aspects of this case are discussed in para. 5.131ff.

118. Nothing had been shipped in *Heskell* v. *Continental Express* [1950] 1 All E.R. 1033, (1950) 83 Ll. L. Rep. 438 (below, para. 5.131ff.) or *Hindley & Co. Ltd.* v. *East Indian Produce Co. Ltd.* [1973] 2 Lloyd's Rep. 515. In *Etablissment Esefka International Anstalt* v. *Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445 (in para. 9.160ff.), it was alleged that neither ship nor cargo existed. If so, of course, there would be no shipowner to sue.

turned bad for him. If statements in the bill of lading have hidden that breach of condition, then he has relied on those statements, if he has been induced to take up the bill. In both these cases, the falsity of the representation has led him to take up the bill of lading, where otherwise he would have rejected it.

5.79 On the other hand, on a rising market, the holder might, in order to protect his market gain, have decided to accept the bill of lading anyway, even had he known the truth, relying on a damages action against the seller. This is quite rational to protect a market gain, even if the seller has committed a breach of condition, for example by shipping a few days late. Even if the representation in the bill of lading hides the breach of condition, for example by misstating the shipment date, a holder who would have accepted the bill of lading anyway has not relied on the misstatement contained within it.[119] He might have suffered a loss in the sense that the goods represented by the bill are worth less than those described therein,[120] but whereas such a loss would be recoverable in a contract action, it is not recoverable in tort, and cannot form the basis of an estoppel.

5.80 There might be other reasons why the buyer would have accepted the bill of lading anyway, whatever the state of the market, but it cannot be assumed in all of these cases that there is no reliance. For example, the sale contract might provide for the price to depend on the shipment date.[121] A false shipment date in the bill of lading would not therefore lead the buyer to take up a bill of lading which (had he known the truth) he would otherwise have rejected, although it has induced him to pay more for the cargo. This is detrimental reliance, sufficient for a tort or estoppel.

Viewpoint of holder

5.81 All the above scenarios have in common that the holder (who will typically be a purchaser or bank) has a document which appears to be a document of title to goods, but does not in fact represent the goods it purports to represent. The goods are not as stated therein, and in this sense at least, he has suffered a loss as the result of the misrepresentation. Moreover, the holder has had little prospect of protecting himself, for example by investigating the matter and so rejecting the documents. Banks under documentary credits have little time to make investigations, and unless they can prove fraud by the beneficiary, must take up apparently conforming documents.[122] The position is essentially similar for buyers under c.i.f. contracts.[123]

5.82 Ideally, then, the innocent representee should be able to recover compensation. From his viewpoint the proper defendant is the shipowner,[124] who has deep pockets, whose vessel can be arrested, and who is (in some sense at least) responsible for the representation. A purchaser might also, it is true, be able to sue his immediate seller for breach of the contract of sale, as in *Kwei Tek Chao* v. *British Traders and*

119. For other reasons why there may be no direct reliance, see the discussion of *The Dona Mari*, below (in this section).

120. Not necessarily, in the example, where they are shipped a few days late. The shipment date might make no difference to either the usefulness or the market value of the goods.

121. As in *Rudolf A. Oetker* v. *IFA Internationale Frachagentur AG (The Almak)* [1985] 1 Lloyd's Rep. 557, *Procter & Gamble* v. *Becher GmbH* [1988] 2 Lloyd's Rep. 21, or *The Eurus* [1998] 1 Lloyd's Rep. 351.

122. See further chapter 9.

123. *Gill & Duffus SA* v. *Berger & Co. Inc.* [1984] A.C. 382.

124. Assuming (as we are in this chapter) that the shipowner is the contracting carrier.

Shippers Ltd.,[125] or *Hindley & Co. Ltd.* v. *East Indian Produce Co. Ltd.*,[126] but one of the functions of the bill of lading is to provide buyers with security against the seller's bankruptcy. An action against a foreign seller will in any case not always be satisfactory. If the seller is not only foreign but also party to the fraud, as was alleged (but not proved) in *Discount Records Ltd.* v. *Barclays Bank Ltd.*,[127] then any action against him will almost certainly be worthless. In holding the shipowner liable in *The Saudi Crown*,[128] for a fraudulent representation in a bill of lading, Sheen J. observed that:

"... great injustice may be done to the innocent third party if he is left to pursue whatever remedy he may have against a person of unknown financial means in some distant land."

5.83 Moreover, the defendant should ideally have deep pockets; a bill of lading offers little security if it provides an action only against the master, even though the statement has emanated from him.[129]

Viewpoint of shipowner

5.84 The law cannot revolve solely around the position of the holder. Liability can only be imposed on someone to whom the statement can be attributed, and even then, regard should be had to the capacity in which he made it. The shipowner should be entitled to claim, in his defence, "I did not make the representation", or "I made the representation only as a statement of fact, not as a contractual promise". It is, of course, unlikely that the shipowner will have made any statement directly, bills of lading being issued and signed by masters, or loading brokers or ship or charterers' agents. Even leaving aside the possibility that it might be a charterer's bill,[130] it would be unreasonable to impose liability on the shipowner for statements for which the person making them had neither his actual nor ostensible authority to make. Moreover, the nature of the statements has to be considered; if (for example) they were not made as contractual promises, then they should not be treated as such. Conversely, of course, if the statement, objectively viewed, was a contractual warranty, then the shipowner should be strictly liable for its breach.

5.85 Even viewed in this light, the common law was rather favourable towards shipowners. It seems to have ossified around cases decided 100 or more years ago, when perhaps the assumed authority of masters was less than would be expected today. The courts have also shown remarkable reluctance to treat statements of fact as giving rise to contractual promises. Legislation has since dealt with the worst anomalies, and although the law continues to display its idiosyncratic history, it is probably rare today that it causes serious injustice.

The problems in outline

5.86 Paragraph 5.119ff. addresses a specific (and arguably anomalous) aspect of the law of agency, which limits the authority of the ship's master to make statements on the

125. [1954] 2 Q.B. 459, [1954] 1 Lloyd's Rep. 16.
126. [1973] 2 Lloyd's Rep. 515.
127. [1975] 1 W.L.R. 315, [1975] 1 Lloyd's Rep. 444. See para. 9.160ff.; the seller was French.
128. [1986] 1 Lloyd's Rep. 261.
129. The loading broker may have deep pockets, and was successfully sued in *Rasnoimport*, in para. 5.131ff., where the shipowner would have been able to rely on *Grant* v. *Norway*, also discussed below.
130. We are assuming not, for the present discussion.

shipowners' behalf, and hence make the shipowner liable if they are untrue. To a large extent this problem (which now seems exclusively to be concerned with quantity statements) has been resolved by legislation, but there is an associated problem with such quantity statements that are so qualified as not really to be statements at all.

5.87 For this section, however, we assume the statement in the bill of lading to be one which, in principle, the master has actual or apparent authority to make,[131] such as a description of the apparent condition of the goods, or the date of shipment. The person making the statement might be innocent, as in *Rasnoimport* above, negligent or in an extreme case fraudulent. The well-known case of *Lloyd* v. *Grace Smith & Co.*[132] tells us that merely because an act is performed fraudulently does not take it outside the scope of the agent's authority, and therefore the statement will be attributed to the shipowner, even if the master made the statement fraudulently. It might be thought that such statements should pose no problem, but even if the statement is attributed to the shipowner, the question still needs to be asked: in what context was the statement made? Is it a contractual promise, for example?

5.88 Arguably, the position ought to be straightforward, but the law has been influenced by two factors:

(a) The bill of lading contract is made between carrier and shipper. The common law did not, as was seen earlier in the chapter, recognise that the bill of lading transferred the contract, and although such transfer was later provided by statute, what is transferred is the contract made between carrier and shipper; the terms of the transferred contract are the same as those of the original contract.

(b) Many of the statements made in the bill of lading either originate with information supplied by the shipper, or the information is known to him. It would therefore be surprising if the carrier were to warrant their accuracy, at any rate to him.

Who provides the information?

5.89 One of the reasons for the reluctance of the courts to impose contractual liability on the shipowner, inferring that the statements amount to a contractual warranty as to their truth, is that some of the information at least originates from the shipper, not the carrier. Of course the carrier checks the information, but arguably it would be strange to assume that he warrants its accuracy, in a bill of lading that is after all issued to the shipper, from whom the information came in the first place.

5.90 It is usually the shipper (or his agent) who prepares the information that goes into the bill of lading.[133] At any rate he will usually describe the goods and the quantity. It is the shipper who prepares the draft bill of lading. The master will compare this with the mate's receipt (or in liner trade the shipping note) and sign the bill of lading itself.

5.91 However, the master (or where applicable loading broker) should not simply sign and issue the bill of lading without checking the truth of the statements made by

131. I.e., no *Grant* v. *Norway* problem (see further para. 5.119ff.).

132. [1912] A.C. 716.

133. For descriptions, see, e.g., *Heskell* v. *Continental Express* (1950) 83 Ll. L. Rep. 438, Dockray, *Cases and Materials on the Carriage of Goods by Sea*, 3rd ed., Cavendish (2004), at 12–13.

the shipper. He adds his own confirmation, rather than simply transferring the information. In *The Nogar Marin* the Court of Appeal held,[134] in a dispute under a charterparty on the master's obligation to sign bills of lading as presented, that his obligations were nonetheless to inspect the cargo and clause the bills if necessary. In *The Nogar Marin*, a cargo of coils of wire rods had become rusty by the time they were shipped, because they had been stored in the open, unprotected against the weather, and had suffered from the effects of rain during storage and loading. The Court of Appeal took the view that the master (who acted for the shipowner) should have claused the bills. Consequently the shipowners could not claim that the charterers had caused their loss when they were later sued by the receivers of the cargo, presumably on the principles discussed in this section. The master was not obliged simply to sign the bills of lading as presented, without further enquiry, but claused bills should have been issued.[135]

5.92 Conversely, if the master wrongly clauses the bill, the shipper might have an action against the shipowner.[136] It is clear, then, that the master is to exercise his own judgment in certifying the truth of the statements made by the shipper, and in particular the apparent order and condition of the goods.

5.93 In summary, then, the statements contained in the bill of lading originate from the shipper; all the master does, when issuing the bill of lading, is to certify that the shipper's statements are correct, state that the goods have been shipped, and make associated statements as to shipment date, name of vessel, etc. The master should clause the bill of lading if it does not accurately describe the condition of the goods. He therefore certifies quantity loaded, and apparent order and condition, but these should also be known by the shipper. There is no reason for the master to owe any positive obligation *towards the shippers of goods* to clause the bill of lading, or indeed to ensure the accuracy of any statements therein, of which the shippers should have been aware. There is no basis, therefore, at least *vis-à-vis* the shipper, for implying that the carrier warrants their accuracy.

5.94 There are, however, statements in the bill of lading, such as whether the goods are loaded on or under deck, which originate with the carrier, and are not necessarily within the shipper's knowledge. There is a greater case, therefore, for holding that the carrier warrants the accuracy of these statements.

Legal effect of representations

Evidence of truth

5.95 In *Henry Smith & Co.* v. *Bedouin Steam Navigation Co. Ltd.*,[137] a shipowner was held bound to deliver the full amount of goods signed for by the master in a bill of lading, unless he could prove that the whole or some part of it was in fact not shipped. The case is authority simply that quantity statements in bills of lading are evidence, and in the absence of other evidence will conclude the issue as to the quantity of goods

134. *Naviera Mogor S.A.* v. *Societe Metallurgique de Normandie (The Nogar Marin)* [1988] 1 Lloyd's Rep. 412.

135. In *Stumore, Weston & Co.* v. *Breen* (1886) 12 App. Cas. 698, Lord Fitzgerald had agreed (at 708) with Bowen L.J.'s view in the Court of Appeal, that the master's duty is "to sign the bill of lading for the cargo received, and to use reasonable care and skill in seeing that the bill of lading is properly drawn up which he does sign." In that case the master was held liable to his employer (who had been sued by the receiver of the cargo) for issuing a bill of lading containing a false shipment date.

136. *The David Agmashenebeli* [2002] E.W.H.C. 104, in para. 5.112ff.

137. [1896] A.C. 70 (H.L.).

shipped. Presumably the same reasoning would apply to any other statement of fact in a bill of lading.

Warranty of truth?

5.96 There are advantages for a holder to sue in contract. Liability is strict, so it is unnecessary to examine the master's state of mind. There is no need to show detrimental reliance, and damages are such, in principle, as to put the representee into the position he would have been in, had the statement been true. However, the shipowner will not normally be liable in contract, for false representations in bills of lading.

5.97 In *Compania Naviera Vasconzada* v. *Churchill & Sim*,[138] the master signed a bill of lading containing the clauses "shipped in good order and condition, and to be delivered in the like good order and condition", and "quality and measure unknown". In fact the goods had been clearly damaged prior to shipment. The purchasers paid the contract price to the shippers against tender of the bill of lading, and sued the shipowners, the shippers being a foreign company (although not in liquidation). Channel J. held that:

(1) Statements as to the apparent condition, but not the actual quality of the goods shipped,[139] were within the master's authority. They could therefore be attributed to the shipowner.
(2) However, the clause in the bill of lading: "shipped in good order and condition, and to be delivered in the like good order and condition" did not amount to a contractual warranty, by the shipowner, that the goods would be delivered in good order and condition.
(3) It was, however, a statement of fact, which was reasonably relied upon by the purchasers to their detriment. Accordingly, the shipowners were estopped from denying the truth of the statement. Since they were therefore unable to explain how the damage occurred, they were liable for it.
(4) The qualification "quality and measure unknown" did not protect the shipowners, since "quality and measure" were not the same as "order and condition".[140]

5.98 There were two strands to the reasoning in contract. First, although the action was brought on the contract transferred to the purchaser, this contract was made originally between shipper and shipowner, and "the contract must be construed in the same way between the original parties and the substituted parties". No new contract with the indorsee springs up, on different terms. Secondly, therefore, it is necessary to consider whether "shipped in good order and condition, and to be delivered in the like good order and condition" would sensibly amount to a contractual warranty, in the contract between carrier and shipper. But since the representations as to the goods originated from the shipper himself, it would be absurd to warrant the accuracy of what the shipper already knew:

138. [1906] 1 K.B. 237.

139. Distinguishing *Grant* v. *Norway* (1851) 10 C.B. 665, discussed below, para. 5.119ff., where a bill of lading was issued although no goods were shipped, and *Cox* v. *Bruce* (1886) 18 Q.B.D. 147, where the master misstated the actual quality of the goods. In neither case was the shipowner bound by these statements, which were not made within the master's actual or apparent authority. On *Cox* v. *Bruce* see also para. 5.119ff.

140. See further para. 5.128ff., on the effect of such clauses.

"The words 'shipped in good order and condition' are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods."

5.99 What is crucial here is probably not so much that the words are statements of fact, since contractual warranties (that the statement is true) can be inferred from statements of fact. For example, in *V/O Rasnoimport* v. *Guthrie*,[141] from the factual statement (in the bill of lading) that 225 bales were loaded on board was implied a warranty by the loading broker that he had the shipowner's authority to make the statement. This constituted an offer, at large, accepted by the purchaser (plaintiff) taking up the bill of lading. In fact, only 90 bales had been loaded, and since the loading broker had authority to sign only for goods which had been loaded on board,[142] he was in breach of this warranty, and could be sued in contract. In *The Nea Tyhi*,[143] a statement that goods were "shipped under deck" was treated as a contractual undertaking. This suggests that the form of the statement (being a statement of fact) is not critical.

5.100 What was probably crucial, therefore, in *Compania Naviera Vasconzada* v. *Churchill & Sim* was that the description of the goods originated with the shipper. If so, then the reasoning should apply only to statements which emanate originally from the shipper, such as description and apparent quality. The shipper also states the quantity delivered into the carrier's care, but not necessarily the quantity loaded,[144] if for example the goods are later stolen or otherwise left behind. Mocatta J. thought in *V/O Rasnoimport* v. *Guthrie & Co. Ltd.* that the reasoning should be extended to quantity statements, on the grounds that "words in a bill of lading as to the quantity of goods shipped, like those as to their apparent order and condition, are not, whether made with or without the authority of the owners, words of contract in the sense of a promise or undertaking. They are at most an affirmation of fact or a representation." That may be so where, for example, the goods are in a container, and the carrier is merely taking the shipper's word for the quantity contained, but where (as in *Rasnoimport*) the goods were stolen after receipt by the carrier, the shipper will not be aware of their accuracy, and it is the master (or loading broker) who states the quantity actually loaded.[145]

5.101 It may also be usual for the carrier to state the shipment date, but not necessarily. In *The Almak*,[146] the issue (in effect) was whether shippers of cargo, who were also charterers of the vessel, could sue the shipowners on the carriage contract where the bill of lading had been backdated, the effect of the misstatement being to increase the price they paid under what was probably an f.o.b. sale contract. In refusing to imply such a term, Mustill J. said that no contractual duty arises to check the accuracy of statements which emanate from the other party. In this case, the shipment date must already have been on the bill of lading presented by the charterer for the

141. See also para. 5.131ff.

142. Authority issues with quantity statements are discussed in para. 5.119ff.

143. [1982] 1 Lloyd's Rep. 606.

144. The quantities differed in *Heskell* and *Rasnoimport*, the shipper being unaware in both cases that goods had been left behind.

145. Note that s. 4 of the Carriage of Goods by Sea Act 1992 merely makes them conclusive evidence against the carrier. It does not address the cause of action that follows from that. This would matter if the misstatement was innocently made, and not relied upon, since then only a contractual action would assist.

146. *Rudolf A Oetker* v. *IFA Internationale Frachagentur AG (The Almak)* [1985] 1 Lloyd's Rep. 557. The facts are more complex than stated here, but the issues in essence boil down to these.

master's signature. However, the shipment date will not always originate with the shippers, and if the statement emanates from the carrier, *Compania Naviera Vasconzada* v. *Churchill & Sim* reasoning ought not to apply. The reasoning may then be limited to statements of apparent quality and, perhaps, quantity.[147]

5.102 The principle that one party to a contract should not be presumed to warrant the accuracy of a statement made by the other party seems eminently reasonable, if it is assumed that those are the only two parties to the communication.[148] *The Almak* concerned only the relationship between shipper/charterer and shipowner, and in that context, the reasoning is beyond reproach. In *Compania Naviera Vasconzada* v. *Churchill & Sim*, by contrast, the action was brought by a subsequent holder, yet the case assumes that the master is communicating with the shipper alone, and that the contract between shipper and shipowner is transferred with the bill of lading. This ignores the reality, that since 1855 it has been known that the shipowner is potentially contracting with all holders of the bill of lading. Moreover, in *Leduc & Co.* v. *Ward*,[149] when considering the terms of the transferred contract the Court of Appeal concentrated on the wording in the bill of lading alone, and not the actual conversations that had taken place between master and shipper. Indeed, *Compania Naviera Vasconzada* v. *Churchill & Sim* was followed even in *Brandt* v. *Liverpool*,[150] where a new contract is implied directly with the holder, rather than being statutorily transferred.

5.103 In the event the purchaser won in *Churchill & Sim* (as indeed, did the bank in *Brandt* v. *Liverpool*), on the estoppel reasoning considered below, and it seems likely that had the master been negligent, there would also now be tortious liability (see also below). The lack of a contract action caused no injustice, therefore. However, both estoppel and tort depend on reliance, whereas (as we saw above) there will not necessarily be reliance by the holder. We also saw above that negligence by the master cannot be assumed.[151] In any case, if the shipowner has made a statement to the holder, which can be interpreted as a contractual warranty, then he should be strictly liable in contract, just as the loading broker was in *V/O Rasnoimport* v. *Guthrie & Co. Ltd.* In the twenty-first century, it is surely reasonable to assume (as Mocatta J. did in *Rasnoimport*) that statements in a bill of lading will be communicated other than to the original shipper, and that although the shipper should be expected to be aware of the facts, the subsequent holder will not. Moreover, though the statements are originally made by the shipper, they are confirmed by the master, and not merely as a ministerial act.[152] The master is not simply repeating what has been said to him.

5.104 Nonetheless, it seems clear that the carrier will incur no contractual liability to a subsequent holder, merely because statements made in the bill of lading, or at any rate those which emanate originally from the shipper, are untrue.[153]

147. E.g., Carver on *Bills of Lading* at [3–011] (applies reasoning to quantity), but *cf.* [2–007].
148. See also statements by Evans L.J. in *Trade Star Line Corporation* v. *Mitsui & Co. Ltd. (The Arctic Trader)* [1996] 2 Lloyd's Rep. 449, at 458–459.
149. (1888) 20 Q.B.D. 475.
150. *Brandt* v. *Liverpool, Brazil and River Plate SN Co. Ltd.* [1924] 1 K.B. 575. See above, para. 5.50ff.
151. See paras 5.73ff. and 5.77ff.
152. *Naviera Mogor SA* v. *Societe Metallurgique de Normandie (The Nogar Marin)* [1988] 1 Lloyd's Rep. 412.
153. Bools regards the position as a historical quirk: *The Bill of Lading: A Document of Title to Goods*, LLP (1997), at 118–119.

Estoppels

5.105 In *Compania Naviera Vasconzada* v. *Churchill & Sim*, the shipowner was estopped from denying the truth of the statements as to apparent order and condition. He was therefore unable to resist a claim that the goods delivered were not the same as those loaded, so "not being able to deny that the goods were in good condition at the time of shipment, must pay the damage which was on delivery found to be done to the goods".[154] The estoppel does not depend on the statement being fraudulent, and no fraud was proved in *Churchill & Sim*. Nor, indeed, is it dependent on negligence. It does, however, depend on the purchaser relying on the representation. In *Silver* v. *Ocean SS Co. Ltd.*,[155] where *Compania Naviera Vasconzada* v. *Churchill & Sim* was adopted in the Court of Appeal, the court applied a presumption that someone taking up a clean bill relies on the statements in it, but it is clear that this presumption is rebuttable, for example, in the face of clear evidence that he would have accepted the bill of lading in any event, whatever statements it contained as to the apparent condition of the goods. In *The Skarp*,[156] the sale contract required the buyer to take up the bill in any event, submitting the dispute to arbitration, and Langton J. observed that the courts would not be astute to assume traders would break their contracts. We have also seen how it might be rational, on a rising market, for a purchaser to take up a bill of lading, even in the knowledge that the goods are non-conforming.[157]

5.106 The circumstances in which the ship's delivery order was issued in *The Dona Mari* were set out in chapter 3.[158] Clean ship's delivery orders were issued in respect of a cargo of defective (damp) tapioca. The delivery orders should have been claused, but were not, and a holder who took delivery of the cargo successfully sued the shipowner, on the basis of an estoppel as described in this section.[159] As in the other cases here, the damage had occurred pre-shipment, and clean documents issued for the goods. The shipowner argued that the *Churchill & Sim* estoppel did not work, because there was no reliance on the statement in the bill of lading, as to the apparent order and condition of the goods; under the sale contract the purchasers would have been obliged to take up the documents anyway, even had they been claused, because under the sale contract a quality and analysis certificate was to be regarded as final. Kerr J. did not accept this view of the sale contract, finding that there would probably have been a compromise and a lower price paid, but also indicated that he would have anyway regarded the point as bad. In principle, he thought that the position as between carrier and cargo owner should not depend on the interpretation of the sale contract, to which the carrier was not a party and of which he knew nothing. It may not be possible to avoid looking at the sale contract, though, if the sale contract is relevant to the issue whether there has been detrimental reliance.

5.107 It must be remembered that estoppel is not a cause of action, that it assists only for representations the truth of which assist a pre-existing contract or tort claim. Effectively this limits its use to statements about the apparent condition of the goods

154. [1906] 1 K.B. 237, 251.
155. [1930] 1 K.B. 416.
156. [1935] P. 134. The decision was criticised, and not followed, in *The Dona Mari* [1974] 1 W.L.R. 341, Kerr J. observing that the terms of the sale contract should in principle be irrelevant to the relationship between cargo-owner and shipowner. No doubt they should, but they cannot be, as long as reliance is a requirement of estoppel.
157. Para. 5.77ff.
158. *Cremer* v. *General Carriers SA (The Dona Mari)* [1974] 1 W.L.R. 341. See para. 3.28ff.
159. The cause of action was in contract, on the *Brandt* v. *Liverpool* principle in para. 5.50ff.

on loading, and (subject to the discussion in para. 5.119ff.) the fact of their having been loaded. Suppose, however, the bill of lading is backdated. The purchaser may well be induced to take up and pay for goods which otherwise he would have rejected, for example if the market is falling, or because he needs the goods by a certain date to fulfil another commitment. The shipowner may be estopped from denying the truth of the shipment date stated in the bill of lading, but it is difficult to see that this could be of any possible use, except (perhaps) in an action against him for failure to proceed with reasonable despatch, where it is alleged that the goods have deteriorated on the voyage. Usually for backdated bills of lading, it will be necessary to show an alternative cause of action. As we saw above, sometimes there might (but will not always) be a contract action, since that aspect of *Churchill & Sim* does not always apply to the shipment date.

Fraudulent and negligent misstatement

5.108 Where there is a backdated bill, as in the previous paragraph, an estoppel will be of no use. There might be a contract action against the carrier, but as we have seen, this cannot be assured. In *Kwei Tek Chao* v. *British Traders and Shippers Ltd.* the (c.i.f.) purchaser successfully sued the seller for damages,[160] even after the cargo had been discharged, but the seller's solvency might be doubtful, and in any case nobody wants to be left with an action against another trader abroad.[161]

5.109 If the representation results from the fraud of the master himself, then a deceit action will lie, as in *The Saudi Crown*.[162] Moreover, the shipowner can be vicariously liable, even though the master has acted fraudulently. It is well-established that where an agent is performing acts within his actual or apparent authority, for him to act fraudulently does not take him outside that authority.[163] In *The Saudi Crown*, the shipowner was held directly liable for the fraudulent misrepresentation of a shipment date, made by the master. Of course, the reasoning would apply to any fraudulent misrepresentation causing loss, not just to representations about shipment dates.

5.110 It is not clear whether liability would lie in the event of a negligent misrepresentation by the master, the fraud being that of another party, but in principle *Hedley Byrne* liability might arise.[164] In *Heskell* v. *Continental Express Ltd.*,[165] a bill of lading had been issued for goods which were not on board the ship at all,[166] due to the negligence of the loading broker. Devlin J. thought that the loading broker would not be liable in tort, but only because there was no general liability for negligent misstatements, prior to *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* In *Hedley Byrne* itself, now as Lord Devlin he thought that there might be tort liability today.[167] A master who negligently makes a false statement in a bill of lading can surely anticipate that it might be relied upon by a holder in due course, causing him economic loss. *Hedley Byrne*

160. [1954] 2 Q.B. 459, [1954] 1 Lloyd's Rep. 16, in para. 5.73ff.

161. In *Compania Naviera Vasconzada* v. *Churchill & Sim*, being left to sue a foreign seller was regarded as a detriment for the purposes of establishing an estoppel.

162. [1986] 1 Lloyd's Rep. 261. See also below, para. 5.121ff.

163. Sheen J. cited *Lloyd* v. *Grace Smith & Co.* [1912] A.C. 716. See also the discussion of *Grant* v. *Norway*, in para. 5.119ff., which it was necessary for Sheen J. to distinguish.

164. *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.

165. [1950] 1 All E.R. 1033, (1950) 83 Ll. L. Rep. 438.

166. This was an application of *Grant* v. *Norway*, in para. 5.119ff. See also the discussion of breach of warranty of authority, in para. 5.131ff.

167. [1964] A.C. 465, 532.

liability is not imposed lightly, however, the House of Lords in *Caparo Industries plc* v. *Dickman* holding that it is not enough merely for economic loss to be reasonably foreseeable.[168] There, the House was reluctant to impose liability "where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate." Here, by contrast, the statement is circulated not generally, but only to those who will become holders of the bill, who will rely on the statement in a fairly obvious way. *Caparo* is distinguishable. Ultimately, the question is whether there is an assumption of responsibility by the master to the holder of the bill of lading.[169] In the circumstances of today's trade, such a conclusion would surely be justified.

5.111 The tort action is not a panacea, though. It depends on reliance, and in the case of an innocent representation, as in *V/O Rasnoimport* v. *Guthrie & Co. Ltd.*,[170] there could of course be no liability in tort. For quantity statements, there is an additional problem, which might prevent the shipowner being vicariously liable, even where personal liability for a misstatement could be established against the master (see para. 5.119ff.).

Nature of master's obligation to state truth

5.112 Article III(3)(c) of the Hague-Visby Rules requires the shipowner to issue a bill of lading (if demanded) showing "the apparent order and condition of the goods".[171] This requires the shipowner to make a true statement. The shipper can demand that the bill of lading be issued clean, if the goods are in apparent good order and condition. He has no interest in requiring the bill of lading to be claused, and suffers no loss if it is issued clean when it should have been claused. Indeed, it is very important for him for the bill of lading to be issued clean, and as we will see in chapter 8, a bank will only accept a clean bill of lading under UCP 600.[172] However, the shipowner is entitled to refuse to issue a clean bill, if the goods are not in apparent good order and condition. In *The David Agmashenbeli*,[173] Colman J. held that the master was required to exercise his own judgment on the appearance of the cargo being loaded. The standard was not particularly high, however. He is not expected to have the knowledge of an expert surveyor, and the test of knowledge and experience is that of a reasonably careful master.

Carrier indemnities

5.113 Given the importance of sellers' tendering conforming documents, it should come as no surprise that shippers sometimes persuade carriers to issue clean bills of

168. [1990] 2 A.C. 605.
169. *Henderson* v. *Merrett Syndicates* [1995] 2 A.C. 145, *per* Lord Goff at 81; see also *White* v. *Jones* [1995] 2 A.C. 207.
170. In paras 5.73ff. and 5.131ff.
171. See para. 3.61ff.
172. Para. 8.34ff.
173. [2002] E.W.H.C. 104 (Admiralty). On the facts, though the master was in breach of his duty, the cargo-owners failed to establish that the bill of lading should have been issued clean, and that the breach by the master had caused them any loss.

lading even where the goods are clearly defective, or there is some doubt about whether they conform to contractual requirements or not.

5.114 Obviously carriers who issue clean bills for defective goods lay themselves open to actions by consignees and indorsees, on the principles discussed in this section. On the other hand, if the goods are in apparent good order and condition, the shipper is entitled to a clean bill of lading. If, therefore, there is doubt, it can most safely be resolved by the issue of a clean bill of lading, subject to an indemnity from the shipper should the receiver sue.

5.115 In *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton (London) Ltd.* there was no doubt.[174] The goods were clearly defective, and a clean bill of lading should not have been issued for them. The master (for the shipowners) was induced by the shippers, on the promise that the shippers would indemnify the shipowners, to sign clean bills of lading for a cargo of barrels of orange juice which were clearly leaking. They were successfully sued by the consignee, on the principles discussed here, and claimed from the shipper on the indemnity. The shipper successfully resisted the claim on the grounds that the indemnity was unenforceable as an illegal contract, because it was a fraud on the buyer.

5.116 The shipowners thought that they were merely following common business practice, and were probably surprised to be branded as fraudulent. The shippers' position, on the other hand, was quite unmeritorious. As Morris L.J. observed,[175] it was they who had requested the procedure, and that "they are prepared to condemn their own conduct in order to save their own pocket." Nonetheless, by issuing a clean bill of lading for goods which were clearly defective, the shipowners had made statements which they knew to be false, knowing that those statements would be relied upon by subsequent purchasers. They therefore committed the tort of deceit, and were precluded from enforcing a contract of indemnity against the shippers, being unable to claim without relying on the illegality.[176] In the case itself nobody appears to have been prejudiced, and the receivers had successfully recovered from the carrier. However, as Morris L.J. also observed, a holder could certainly be prejudiced if the shipowners were foreign, and may encounter difficulties on a re-sale, if the sub-buyer rejected the goods. The whole purpose of the indemnity was to protect the shipowners from the consequences of their own fraudulent misrepresentation, and was therefore unenforceable as an illegal contract.

5.117 Conversely, it is also clear from the case that an indemnity is enforceable if the carrier has a genuine doubt about whether the goods are in apparent good order and condition, and because of the doubt is prepared to issue a clean bill only on the promise of an indemnity. No element of fraud is present in such a case.

5.118 It is unclear how far, if at all, the principles in this case can be extended to cover other situations, for example, indemnities taken by shipowners delivering goods other than against a bill of lading.[177] It is clear, however, that merely because a practice is common, it does not follow that the courts will necessarily look kindly upon it.

174. [1957] 2 Q.B. 621.
175. *Ibid.*, at 629.
176. Under the *ex turpi causa non oritur actio* doctrine, discussed in a slightly different context in para. 9.67ff.
177. See para. 7.29ff.

STATEMENTS AS TO QUANTITY

Grant v. *Norway*

5.119 Since the shipper ought normally to know the quantity of goods shipped,[178] and to originate the statement of quantity in the bill of lading, *Compania Naviera Vasconzada* v. *Churchill & Sim* would suggest that statements by the shipowner as to the quantity of goods shipped should probably not normally be contractual statements. Yet quantity statements are statements of fact, and if relied upon by the holder of the bill, ought to trigger the estoppel reasoning from that case, but only if the statement in the bill of lading can be attributed to the shipowner. However, the well-known case of *Grant* v. *Norway* established that the master has neither actual nor apparent authority to issue bills of lading for goods which are not loaded on board the ship. Thus, at common law at least, a shipowner will not be bound by a statement in a bill of lading (whether fraudulent, negligent or innocent) issued where no goods have been shipped, nor one which overstates the quantity of goods shipped. The case has been heavily criticised, proceeding as it did on a narrow view of agency, the master's authority being defined by the usage of trade and the general practice of shipmasters, presumably as defined when the case was decided, in the middle of the nineteenth century. Nonetheless, to the extent that it has not been altered by legislation, *Grant* v. *Norway* remains good law.[179]

5.120 Lord Esher purported to follow *Grant* v. *Norway* in *Cox* v. *Bruce*,[180] and extended the reasoning to hold that the master or captain has no authority to bind the shipowner by statements as to "the particular mercantile quality of the goods before they are put on board". But there is no reason to assume a ship's master *would* have any knowledge of the mercantile quality of goods, whereas he ought to know whether they have been loaded on board. In other words, *Cox* v. *Bruce* is probably consistent with ordinary principles of agency, and does not depend on the correctness or otherwise of *Grant* v. *Norway*. It is, of course, a decision of great interest in its own right.

Grant v. *Norway not extended*

5.121 In recent years, the courts have refused to extend *Grant* v. *Norway*, taking the view that it is out of line with the general law, and anomalous. In *The Nea Tyhi*,[181] for example, Sheen J. refused to extend the reasoning to a misstatement that goods had been shipped under deck, and in *The Saudi Crown*[182] he held that the master had ostensible authority to issue backdated bills. It is now clear that *The Saudi Crown* holds, even where the bills were signed before the goods were loaded.[183] In *The Nea Tyhi* the statement in the bill of lading was treated as a contractual warranty. In *The Saudi Crown* it founded an action for fraudulent misrepresentation.

178. Not necessarily, since what he left with the carrier may not have been loaded, as in *Heskell* v. *Continental Express Ltd.* [1950] 1 All E.R. 1033, (1950) 83 Ll. L. Rep. 438. (There was no carriage contract in *Heskell*, however.) See further on *Heskell* para. 5.131ff.

179. The House of Lords approved *Grant* v. *Norway*, in a different context, in *George Whitechurch Ltd.* v. *Cavanagh* [1902] A.C. 117.

180. (1886) 18 Q.B.D. 147.

181. [1982] 1 Lloyd's Rep. 606.

182. [1986] 1 Lloyd's Rep. 261.

183. *The Starsin* [2000] 1 Lloyd's Rep. 85. This aspect of the decision was not subject to appeal: [2001] 1 Lloyd's Rep. 437, nor was it later discussed in the House of Lords: [2004] 1 A.C. 715.

5.122 Nonetheless, in all these cases, *Grant* v. *Norway* was accepted as entrenched authority, at least for the narrow proposition that a master has no authority to sign bills of lading for goods which are not loaded on board the ship. In *V/O Rasnoimport* v. *Guthrie*, the purchasers were forced to sue the person in the position of the master, for breach of warranty of authority.[184] This will normally be pointless, but in *Rasnoimport* the defendants were loading brokers, and thus a substantial concern.

5.123 However restrictively the case has been interpreted, to the situation where goods mentioned in the bill of lading are never shipped *Grant* v. *Norway* still applies, except to the extent that it has been curtailed by legislation.

Legislation

5.124 The Hague-Visby Rules address the *Grant* v. *Norway* problem where a third party (subsequent holder) is involved. The important part is Art. III(4), 2nd sentence:

" . . . a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described . . . However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party in good faith."

5.125 This appears to be effective in principle, although two difficulties could arise. First, the Article applies only to proof of *receipt* of the goods, not to their shipment, and secondly, it may be possible to argue that where no goods at all are shipped, the bill of lading is a nullity, and there is no contract of carriage, so that the section may not be triggered at all.[185]

5.126 Section 4 of the Carriage of Goods by Sea Act 1992 replaces "receipt" with "shipped on board" where appropriate[186]:

"A bill of lading which—

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who had become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment."

5.127 However, a bill of lading is defined, for the purposes of the Act, as a negotiable bill, and therefore statements in "straight" bills of lading, or waybills, are excluded.[187] Also, there remains authority that a bill of lading, issued where no goods at all are shipped, is a complete nullity.[188] It represents no goods, and is not really a bill of lading at all. Therefore the comprehensive 1992 Act will not apply to it. Moreover,

184. An action that worked precisely because of the rule in *Grant* v. *Norway.* The usefulness of the breach of warranty of authority action (discussed in para. 5.131ff.) is significantly reduced by s. 4 of the Carriage of Goods by Sea Act 1992, especially if the damages reasoning in *Heskell* v. *Continental Express Ltd.* is correct, in one of the few situations where the 1992 Act does not work.

185. *Heskell* v. *Continental Express Ltd.* [1950] 1 All E.R. 1033, (1950) 83 Ll. L. Rep. 438.

186. Which is set out in Appendix B.

187. See above, para. 5.28ff., and also s. 1(2) in Appendix B.

188. E.g., *Heskell* v. *Continental Express Ltd.* [1950] 1 All E.R. 1033, (1950) 83 Ll. L. Rep. 438. See also *Hindley & Co. Ltd.* v. *East Indian Produce Co. Ltd.* [1973] 2 Lloyd's Rep. 515, 518, *per* Kerr J. A forged bill of lading might also be a nullity: e.g., Stuart-Smith L.J. in *Motis Exports Ltd.* v. *Dampskibsselskabet AF 1912, Aktieselskab* [2000] 1 Lloyd's Rep. 211 (see para. 7.14ff.). See also *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)* [1983] A.C. 168, 187–188 (*per* Lord Diplock).

where no goods are shipped there may also be no contract of carriage,[189] and hence nothing for the Carriage of Goods by Sea Act 1992 to transfer. Neither of these arguments apply where some goods are shipped, but the bill of lading overstates the quantity. Here, the Act will apply, as long as a quantity is stated.

Qualifications on quantity statements

5.128 Sometimes it is difficult for a carrier to state a quantity. It may be difficult precisely to measure a bulk cargo, whether dry or liquid, and the shipowner may have no idea what is contained in a container. The efficacy of both the Hague-Visby Rules and the Carriage of Goods by Sea Act 1992 are severely curtailed by judicial statements that qualifications in bills of lading, such as "weight or quantity unknown" negate statements of quantity altogether,[190] and the same might also be true of "said to contain".[191] If there is no statement at all as to quantity then there is nothing upon which a holder can sue, at any rate on the basis of the bill of lading. Claims may still be made in respect of a shortfall, but the claimant will have to prove the quantity shipped. Moreover, though the shipper is entitled to demand that the bill of lading states a quantity, under Art. III(3) of the Hague-Visby Rules,[192] the carrier is not required to state anything that he has no reasonable means of checking, and in any case, the provision is triggered only by the shipper's demand. In respect of container transport at least, this is likely to reduce significantly the value of bills of lading, where quantity statements are concerned.[193]

Quantity statements and tort actions

5.129 Where s. 4 of the 1992 Act applies, quantity statements are attributed to the shipowner, who will be liable in contract or tort, or on the basis of an estoppel, on the principles described above.[194]

5.130 Where s. 4 does not help, it might be thought possible to avoid the problem by suing the shipowner in tort, vicariously for the master's deceit (or negligent misstatement if the fraud is that of another party). There are, however, two problems with this. First, where the bill of lading is qualified as above, there is no misstatement, even by the master. Secondly, whether or not there is such a qualification, there is nothing in s. 4 explicitly to extend the master's actual or apparent authority, and at least in cases of fraud, his course of employment for vicarious liability purposes is coextensive with his ostensible authority for agency purposes.[195] Though there is no UK authority, in *Blue Nile Co. Ltd.* v. *Emery Customs Brokers (S) Pte Ltd.*,[196] Chan Sek Keong J.

189. There was none in *Heskell*.
190. *The Atlas* [1997] 1 Lloyd's Rep. 225; *The Mata K* [1998] 2 Lloyd's Rep. 614.
191. *The River Gurara* [1998] Q.B. 610, though this issue was left open.
192. The relevant provisions of the Hague-Visby Rules are set out in Appendix D.
193. See, however, Art. 26 of UCP 600, discussed at para. 8.42ff.
194. In *Rasnoimport*, as we saw above, Mocatta J. thought that quantity statements were not contractual, but he also saw no reason why they should not give rise to a *Churchill & Sim*, or *Silver* v. *Ocean* estoppel, all the elements of estoppel being present. Of course, the shipowner was not estopped in fact, because of *Grant* v. *Norway*.
195. This is clear from the House of Lords decision in *The Ocean Frost* [1986] A.C. 717, at any rate in fraud cases. The case also decided that an agent without ostensible authority cannot give himself authority by representing that he has it.
196. [1990] 2 M.L.J. 385 (Singapore).

observed that if "the defendants [shipowners] are not liable for the fraud of their servant [master] they cannot, rationally, be liable for his negligence". If this is correct, course of employment would also be co-extensive with ostensible authority in negligence actions. Therefore, since misstatements as to quantity are outside the master's apparent authority, they are also outside his course of employment, and will therefore not impose vicarious liability on the shipowner.

Breach of warranty of authority

5.131 Since the curtailment of *Grant* v. *Norway* by the 1992 Act this action has reduced practical importance,[197] but it is included for completeness, and might apply where the 1992 Act does not (or as an alternative, even where it does).

5.132 Even if the shipowner himself cannot be sued it may still be possible to sue the master or agent signing the bill for breach of warranty of authority. The argument is that since the master has only actual and apparent authority to sign bills of lading for goods which are actually loaded on board the ship, it follows that by signing bills of lading for goods which are not loaded, he is purporting to exercise authority that he does not have. Where the consignee or indorsee is suing (as in *V/O Rasnoimport* v. *Guthrie & Co. Ltd.*), the cause of action is based on an implied contract between himself and the master, the master's warranty of authority (by issuing the bill of lading) being regarded as an offer to all the world, accepted by the act of the indorsee in taking up the bill of lading.

5.133 In *Heskell* v. *Continental Express Ltd.*,[198] a loading broker (Strick) issued a shipped bill of lading for cargo which had been left behind. No cargo at all had been shipped. When the case was decided in 1950, there was no prospect of suing the shipowner, because of *Grant* v. *Norway.* An action for breach of warranty of authority would have succeeded except that, in Devlin J.'s view, the breach of warranty had caused no loss. The damages were what the plaintiff had lost by being unable to sue the shipowner. No cargo having been loaded, there was no contract of carriage, and therefore there would have been no useful action against the shipowner, even had Strick had the authority he warranted. In the absence of a contract of carriage the bill of lading was a nullity, and the fact that it was issued without the authority of the shipowners robbed it of no virtue.

5.134 This approach to damages is not self-evident, because if Strick had had the authority he warranted, the goods would have been shipped, and there would have been a carriage contract. Doubt was cast on Devlin J.'s approach in *V/O Rasnoimport* v. *Guthrie*, Mocatta J. taking the view that the correct approach was to examine the position of the plaintiffs not on the hypothesis that the owners themselves signed the bill of lading, but on the basis that the defendants had the authority which they warranted. In *Rasnoimport*, as we have seen, 90 bales had been shipped (the bill of lading having been issued for 225), so there was a contract of carriage. Whether or not Devlin J. had been correct in *Heskell*, the breach of warranty of authority did therefore deprive the indorsee of a useful action against the shipowner.

5.135 Except perhaps for straight bills of lading, which are outside s. 4 of the 1992 Act, *Rasnoimport* would appear to have little direct application today. It remains of

197. There will still be a breach of warranty of authority, but because of s. 4, no loss, the shipowner being liable in any event.

198. [1950] 1 All E.R. 1033, (1950) 83 Ll. L. Rep. 438.

interest, however, because of a finding of fact that the misrepresentation in the bill of lading was innocently made, and because (unlike *Compania Naviera Vasconzada* v. *Churchill & Sim*) a factual statement in a bill of lading was held to amount to a contractual warranty to the indorsee. Of course, unlike *Churchill & Sim*, the indorsee took the benefit of a new contract (that implied from the warranty of authority), whereas in the earlier case his contract was assumed to be simply transferred from the shipper.

WHICH DOCUMENTS?

5.136 As we saw in para. 5.28ff., the Carriage of Goods by Sea Act 1992 applies to documents other than the traditional shipped bill of lading. This also strengthens the position in respect of misrepresentations, because the estoppel in *Compania Naviera Vasconzada* v. *Churchill & Sim*, and other cases involving misstatements about the goods when loaded, supports an action for breach of contract, and therefore depends on the existence of a contract between the parties.

5.137 Given the existence of a contract between the claimant and the representor, there is no reason why the estoppel in *Churchill & Sim* should not work equally well, whether the statement is contained in a bill of lading, delivery order or waybill. Moreover, unless the information emanated originally from the shipper, there is no reason why such statements should not also amount to contractual warranties, as did the statement in *The Nea Tyhi*, that the goods were loaded under deck.[199]

5.138 It is true that s. 4 of the 1992 Act applies only to the negotiable bill of lading, but s. 4 is needed at all only because of the rule in *Grant* v. *Norway. Grant* v. *Norway*, as we have seen, was based on the usage of trade and the general practice of shipmasters, probably in the middle of the nineteenth century.[200] The courts have shown no enthusiasm to extend the ambit of the case, and it is by no means certain that it would apply at all, outside the issue of bills of lading. Would the usage of trade and the general practice of shipmasters prevent the master from binding the shipowner to quantity statements in a waybill? It is not self-evident that it would.

5.139 Even a mate's receipt is *prima facie* evidence of quantity and condition of goods received.[201] There is, however, unlikely to be a contract between the claimant and the shipowner, since a mate's receipt will not come within the 1992 Act. Therefore any estoppel raised by statements in the document could not be used to support a contract action. However, there seems no reason in principle why they should not give rise to an action in tort, on the principles in para. 5.108. There would have to be reliance on the statements, but there could be if it were used as the document against which the goods were, in reality, delivered, as in *Kum* v. *Wah Tat Bank* in chapter 7.[202]

5.140 The cases in paras 5.69ff. and 5.119ff. have nearly all concerned bills of lading, which is not surprising because, except for *The Dona Mari* where there was an implied contract between holder and shipowner, a bill of lading was needed to establish

199. [1982] 1 Lloyd's Rep. 606. See above, para. 5.96ff.
200. Para. 5.119ff.
201. *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* [1938] A.C. 429, 445.
202. [1971] 1 Lloyd's Rep. 439, discussed in para. 7.98ff.

a contractual nexus between the parties to the action. With the 1992 Act the contractual nexus can be established with a wider range of documents. There is no obvious reason why the principles discussed in para. 5.119ff. should not apply to those documents also.

CHAPTER 6

THE DOCUMENTS AS SECURITY II: PROPERTY

INTRODUCTION

6.1 The principles discussed in the last chapter protect the parties, including a bank as holder of a bill of lading, against misdescriptions of the goods, and loss or damage occurring while they are at sea. Contract is now also the main basis for the misdelivery actions and defences in chapter 7. They do not protect the holder against the bankruptcy of the buyer. However, long before the developments considered in the last chapter, it became accepted that control of the bill of lading could also control the passing of property in the goods, and property does protect against the bankruptcy of the other parties.

Security against bankruptcy, not against fraud

6.2 We saw in para. 1.10ff. that the law has also long recognised that mercantile customs developed to protect the parties against the bankruptcy rather than the fraud of those with whom they deal, and that they should look to their own expertise to guard against dealing with fraudsters. This principle is relevant to this chapter,[1] and indeed recurs throughout international trade law. In a famous statement made almost a century and a quarter ago, Bowen L.J. observed that "the object of mercantile usages is to prevent the risk of insolvency, not of fraud", and that "mercantile genius consists principally in knowing whom to trust and with whom to deal".[2] The merchant who deals with a fraudster is not well protected by mercantile usage or by the law. Consequently the trading system remains to this day vulnerable to fraud.[3]

Relationship between property and constructive possession

6.3 There is a close tie-in between the discussion in this chapter and the next. Chapter 7 is about the right to take delivery of the goods when they arrive at their destination. In many cases, the person who has the property will also be the person entitled to possession, and it seems likely that the principles relating to constructive possession, which developed for the most part in the late nineteenth century, were an offshoot of principles relating to the transfer of property.

6.4 There is also a tie-in the other way, however. If a document entitling a person to possession is retained, that can be a strong indication that the retainer of the

1. See paras 6.43ff. and 6.86ff.
2. *Sanders* v. *Maclean* (1883) 11 Q.B.D. 327, 343. The quote is set out fully in para. 4.85ff.
3. See further para. 9.160ff.

document also intends to retain property—not a conclusive indication, but a strong one. Conversely, the transfer of such a document might also reasonably indicate an intention to transfer the property in the underlying goods. In the early cases, both property and the right to possess the goods were generally taken to pass with the transfer of the bill of lading, the inference that these rights should pass together being taken as natural.

6.5 With the passing of the Carriage of Goods by Sea Act 1992, considered in the previous chapter, a greater range of documents can pass the right to possession, the holder of the document being contractually entitled, as against the carrier, to take delivery of the goods. It is reasonable to draw inferences about the passing of property from the transfer or retention of such documents, just as has been done traditionally with bills of lading. In the case of a waybill, contractual delivery rights can be enforced by "the person to whom delivery of the goods to which the sea waybill relates is to be made by the carrier in accordance with the contract". Retention or transfer of the document is unlikely to have any legal significance, but property inferences might be drawn from shipping the goods and naming a consignee. In other words, to retain or transfer control over delivery might have property consequences.

6.6 Nonetheless, it would be a mistake to conclude that property and the right to possession always pass together. Both depend on the intention of the parties, and in particular of the transferring party. It is perfectly possible, and indeed can be logical, to transfer one without the other. With property in particular, there are many factors which may be taken into account in ascertaining that intention, so the question when property passes can be quite complicated.

Importance of passing of property

6.7 An important consequence of property is that it can protect against the bankruptcy of the other party, since if one of the parties goes bankrupt, in general the liquidator has a claim only on the property of the bankrupt. An unpaid seller whose buyer has gone into liquidation (or indeed receivership) is in a much better position if he has retained title to the goods than if he has not.[4] Conversely, a buyer who has paid will be nothing more than an unsecured creditor of a bankrupt seller, unless he has obtained the property in the goods.[5]

6.8 From the earliest days of international sales, sellers have attempted to retain property as security against payment.[6] Ultimately, it is for the seller to transfer property, and it is the intention of the seller that is crucial,[7] though the terms of the sale contract are relevant to determining that intention. Though in any sale of goods, the physical delivery point (shipment in f.o.b. and c.i.f. contracts) might be regarded as the natural point to pass property, as early as *Lickbarrow* v. *Mason* it was recognised that

4. E.g., *Ginzberg* v. *Barrow Haemetite Steel Co.* [1966] 1 Lloyd's Rep. 343, where c.i.f. sellers were protected against the receivership of the buyers because property had not passed to them. See further paras 6.24ff. and 6.39ff.

5. See, e.g., *Carlos Federspiel & Co., SA* v. *Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240, where the (f.o.b.) buyers had paid for goods but had not obtained property at the time of the seller's bankruptcy. See para. 6.60ff.

6. An early case, where the sellers failed to retain property, is *Cowas-Jee* v. *Thompson* (1845) 3 Moore Ind. App. 422, 430, 18 E.R. 560, 563, in para. 1.15ff. See also the Sale of Goods Act 1979, s. 19(3), described in para. 6.86ff.

7. A seller cannot force property upon a buyer who does not want it, but he controls the situation to the extent that he can prevent property passing.

the negotiable bill of lading could be used to transfer property.[8] Hence, its retention by the seller, particularly where taken to his own order, could delay the transfer of property. Particularly with the development of the c.i.f. contract, and the separation of constructive from physical delivery of the goods, the courts were prepared to imply a move away from property passing at the point of physical delivery (shipment), to passing at the point of constructive delivery (tender of documents).[9] Where the bill of lading was taken to seller's order, this *prima facie* indication of the seller's intention became codified in s. 19(2) of the Sale of Goods Act 1979.[10] This was undoubtedly one of the original motivations for sellers retaining bills of lading against payment, and taking bills of lading to their own order.[11]

6.9 The s. 19(2) presumption works well when payment is made against tender of documents. Sometimes, however, the seller might have no choice but to transfer the documents themselves prior to payment. In some circumstances, the courts have been prepared to allow retention of property until payment, even beyond tender of documents. After all, since the seller controls the passing of property, he can also place conditions upon its passing, whether or not he continues physically to retain the documents. One of these situations is now codified in s. 19(3) of the Sale of Goods Act 1979, and is discussed further below.[12] However, though retention of property will protect a seller against a bankrupt, but honest buyer, it will generally provide at best limited, but usually no protection against a dishonest buyer, who (without paying for them) fraudulently re-sells or pledges the goods to a third party, and absconds with the proceeds.[13]

6.10 Where the sale is by documentary credit, the transfer of bill of lading (as a document of title) to the bank can create a pledge, giving the bank the property rights of a pledgee.[14] This property will secure the confirming bank in the event of the issuing bank's bankruptcy, and the issuing bank in the event of the buyer's. The issuing bank may be prepared to relinquish the bill of lading, even prior to payment by the buyer, to enable the buyer to re-sell. It need not necessarily thereby relinquish its own security. Just as the seller can control the passing of property to the buyer, even after relinquishing the bill of lading, so the bank can retain its special property as pledgee. Indeed, by making the buyer its agent for the purposes of the re-sale, it can also assert legal title to the proceeds, even after sale. It can also require the buyer to declare himself trustee of the goods until sale, and the proceeds thereafter, thereby adding equitable general property to its special legal property in the goods.[15]

6.11 The bank's legal title at any rate depends on the pledgor having property in the goods at the time of the pledge. Since it is the seller who makes the pledge, the bank will obtain this security only if the seller has retained property until tender of documents (except in the exceptional case discussed in the next section, where the pledge

8. (1794) 5 Term Rep. 683. See paras 1.10ff. and 5.21ff.

9. See further below, para. 6.72ff.

10. See Appendix C. Also further below, para. 6.86ff.

11. The passing of property also has other consequences, for example if the seller wishes to sue for the price: see, e.g., *Colley* v. *Overseas Exporters* [1921] 2 K.B. 302, applying Sale of Goods Act 1893 (now 1979), s. 49(1). It has relevance in Prize cases arising from seizures of vessels and cargoes in wartime: e.g., *The Parchim* [1918] A.C. 157, *The Kronprincessan Margareta* [1921] 1 A.C. 486, *The Glenroy* [1945] A.C. 124, *The Gabbiano* [1940] P. 166.

12. See further below, para. 6.86ff.

13. See also the observations in para. 6.51ff.

14. See further below, para. 6.14ff.

15. See para. 6.39ff.

is of the goods themselves, on shipment). If property has already passed to the buyer on shipment the bank will, at this stage at least, be unsecured.[16] The pledgor must also be able to pass property. There are situations where the law does not allow property to be transferred, in which case the bank will again be unsecured.[17] The timing of the passing of property under the sale contract can therefore affect whether the bank will be a secured or unsecured creditor under the documentary credit.

6.12 Incoterms, UCP 600 and most standard form sale contracts are silent on the passing of property. Its precise timing can depend on a number of factors, and it may be a matter of doubt until determined by a court in litigation proceedings. Yet disputes about the passing of property are quite rare. It is true that the late nineteen eighties and early nineteen-nineties saw a flurry of case law on the exact timing of the passing of property in international sales contracts.[18] In all these cases, however, the reason why property was an issue was that s. 1 of the Bills of Lading Act 1855, which transferred contractual rights under the carriage contract from the shipper to the holder of the bill of lading, depended for its operation on the timing of the passing of property. Hence, the sole reason for the litigation was to determine whether anybody but the original shipper of the goods could sue the carrier,[19] should the goods be lost or damaged on the voyage, or be sued by him for freight, demurrage, or other liabilities under the carriage contract. Since the Bills of Lading Act 1855 was repealed and replaced by the Carriage of Goods by Sea Act 1992,[20] for the operation of which the timing of the passing of property is unimportant, disputes about property also seem to have diminished, although the passing of property affects far more than merely the transfer of contractual rights and liabilities to the holder of the bill of lading. Perhaps the truth is that its importance can be over-stated. Issuing banks rarely go into liquidation, and although buyers undoubtedly do, an issuing bank, knowing its customer as it does, is taking a far lesser risk in this regard than an overseas seller would be. Banks have been known to issue and confirm documentary credits, where the seller has passed title to the buyer prior to tender of documents, accepting the diminution in security.[21] They are also prepared to issue standby letters of credit, or other forms of credit where the documents provide no property security at all.[22] Before the amendments made to the Sale of Goods Act in 1995,[23] banks would routinely advance money on bills of lading or delivery orders for parts of undivided bulk cargoes, when property could not possibly pass to them. Perhaps the reality is that the security aspect of a documentary credit is not all that important, at least as far as it depends on property.

16. Equitable title under a trust receipt does not depend on the bank's legal title: see para. 6.39ff.

17. Primarily where the goods are unascertained. See further below, paras 6.53–6.60ff.

18. E.g., *Hispanica de Petroleos SA* v. *Vencedora Oceania Navegacion SA (The Kapetan Markos (No. 2))* [1987] 2 Lloyd's Rep. 321, *Mitsui & Co. Ltd.* v. *Flota Mercante Grancolumbiana SA (The Ciudad de Pasto)* [1988] 1 W.L.R. 1145; [1988] 2 Lloyd's Rep. 208, *Aramis (cargo owners)* v. *Aramis (owners) (The Aramis)* [1989] 1 Lloyd's Rep. 213, *Enichem Anic SpA* v. *Ampelos Shipping Co. Ltd. (The Delfini)* [1990] 1 Lloyd's Rep. 252. On the problems of s. 1, see generally para. 5.21ff.

19. In *The Ciudad de Pasto* [1988] 1 W.L.R. 1145 (para. 6.72ff.), the 1855 Act clearly did not apply, but if (and only if) the plaintiff had property (or an immediate right to possession) at the time the goods were damaged he could sue the carrier in tort: *The Aliakmon* [1986] A.C. 785 (in para. 5.59ff.).

20. Above, para. 5.27ff.

21. E.g., *Sale Continuation Ltd.* v. *Austin Taylor & Co. Ltd.* [1968] 2 Q.B. 849; [1967] 2 Lloyd's Rep. 403. See para. 6.24ff.

22. See para. 2.69ff. on standby letters of credit, and chapter 10 on alternatives to documentary credits entirely.

23. Below, para. 6.110ff.

6.13 Nonetheless, there may well be situations where banks desire the security of a property interest, and in any case, lawyers are interested in what happens when things go wrong; then property issues can become important, whether or not they have been considered in advance. When a bankruptcy occurs, there are two situations which might create problems in terms of the bank's security: first, where property has already passed from seller to buyer before the seller makes the pledge by tendering the documents (assuming that the pledge is made by tender of documents, rather than by shipping the goods themselves),[24] and secondly, where property is prevented from passing to the bank at all. First, however, we should consider the nature of the pledge, and then the normal situation, where the seller retains property beyond shipment, so that he can transfer it to the bank, on pledging the documents.

THE BANK AS PLEDGEE

6.14 Typically, the bank's security is that it becomes pledgee of the goods. At common law at least, the pledge requires the transfer of possession. In principle, dealings with the goods themselves might constitute the pledge. In *Kum* v. *Wah Tat Bank Ltd.*,[25] the shipment of the goods by the seller was itself regarded, quite apart from any transfer of documentation, as pledging the goods in the bank's favour.[26] Though whether a pledge is so constituted will depend on all the facts, it was relevant in *Kum* that no document of title was issued,[27] nor was it envisaged that one would be issued, so that conflicting transfers by documents would not occur. Secondly, the document that was issued, the mate's receipt, named the bank as consignee. Thirdly, the bank had already paid, so there was no reason for the seller to retain property.

6.15 The extent to which it is possible to generalise from this case is not clear. The Privy Council thought that the rules for sale and pledge should be the same, which suggests that considerations pointing to the passing of property on shipment in a sale contract would also create a pledge on shipment, were that the intention. The decision probably cannot be generalised to cover bills of lading. Where a bill of lading names a buyer as consignee, retention of that document by the seller can lead to an inference of retention of property by him,[28] because the bill of lading is needed for the buyer to obtain delivery of the goods after discharge. On the same reasoning, substituting the bank for the buyer named as named consignee, a pledge would not be created on shipment. This will be true for any document of title, possession of which is needed is required to obtain delivery of the goods. But if a document of title is not used, retention of the document by the seller should not need to lead to an inference to retain property, since the named consignee can obtain the goods without it. The reasoning in *Kum* v. *Wah Tat Bank* can probably be extended to waybills, therefore, allowing a bank, named as consignee in a waybill, in principle to obtain the security of a pledgee. It is arguably a relevant factor that in *Kum* the bank had already paid, negating still further any inference of retention of title by the seller. However, the discussion of standby

24. Discussed immediately below, in para. 6.14ff.
25. [1971] 1 Lloyd's Rep. 439.
26. See also Treitel, *Legal status of straight bills of lading* (2003) 119 L.Q.R. 608, 618 (discussing use of waybills "as security to obtain financing").
27. The document was argued to be a document of title, but was held not to be, because it was marked non-negotiable. See further para. 7.98ff.
28. E.g., *The Kronprinsessan Margareta* in para. 6.35ff.; *The Rafaela S* in para. 7.123ff.

letters of credit in para. 6.96ff. suggests that it is enough, where it is envisaged that delivery will not be made against a document of title, that payment by a bank is assured. This will suffice to rebut any inference that the seller intends to retain title.[29]

6.16 *Kum* v. *Wah Tat Bank* therefore suggests the possibility of using waybills, or other documents, to give banks under documentary credits security as good as a bill of lading. But property is not transferred against payment, as it can be where a document of title is used. The bank in *Kum* had already paid, and must therefore have been unsecured at least until the pledge was completed on shipment. Had the bank not paid (and assuming that the pledge can be constituted, even in the absence of pre-payment), the seller would not have been able, by retaining the document which was not a document of title, to obtain any property security after shipment. Similarly, a waybill, or other document which is not a document of title, cannot be used to transfer delivery rights to the buyer against payment. A waybill can provide security for the bank, but at the expense of that of the other parties.[30]

6.17 More commonly, and certainly where a document of title is used, the pledge is constituted by transfer of documents. This is the situation considered in the remainder of this section.

Legal property as pledge

6.18 After *Lickbarrow* v. *Mason*, and until the House of Lords decision in *Sewell* v. *Burdick*,[31] it was widely thought that the transfer of a bill of lading for consideration, whether by sale or pledge, automatically transferred general legal property to the new holder. Indeed, this was the view of the majority of the Court of Appeal in *Sewell* v. *Burdick* itself.[32] In a documentary credit context, therefore, the tender of documents by a seller who had retained property would have transferred the entire legal title to the bank. Under the regime of the Bills of Lading Act 1855, s. 1, the bank would have been able to sue, but also liable to be sued, on the carriage contract.

6.19 The House of Lords, reversing the Court of Appeal, held that whether property was transferred depended on the intention of the parties, and was not an automatic consequence of the indorsement and delivery of a bill of lading. [33] If the intention is to create a pledge, the bank does not obtain the general property in the goods, but only a special legal title, which gives the holder of the bill of lading[34]:

> "a pledge accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realize them for the purpose of the security."

29. The cases in para. 6.96ff. do not involve pledges, but as we saw above, the rules for sale and pledge should be the same.

30. See further para. 3.51ff.

31. (1884) 10 App. Cas. 74; a pledgee obtained, on the transfer of a bill of lading, only special property, not the general property in the goods, and this was insufficient to trigger s. 1 of the Bills of Lading Act 1855, the contractual regime then in force. See para. 5.21ff.

32. (1884) 13 Q.B.D. 159 (CA), *per* Brett M.R. and Baggallay L.J., Bowen L.J. dissenting, primarily on an interpretation of Buller J.'s view in *Lickbarrow* v. *Mason* (1794) 5 T.R. 683. The transferee, in the view of the majority, was left with equitable title only. Brett M.R. and Baggallay L.J. had taken the same view in *Glyn Mills* v. *East and West India Dock Co.* (1880) 6 Q.B.D. 475 (CA), but Baggallay L.J. had there held that, though the holder (pledgee) had title to sue, the shipowner had committed no wrongful act: at 502–503. On *Glyn Mills* in the House of Lords see further para. 7.26ff.

33. (1884) 10 App. Cas. 74. The case also makes clear that the title is legal, and not merely equitable. See also para. 5.21ff., where the case is discussed in the context of the Bills of Lading Act 1855, s. 1.

34. *Ibid.*, at 82 (*per* Lord Selborne).

6.20 In *Kum* v. *Wah Tat Bank Ltd.*, Lord Devlin said[35]:

"this is not property in the ordinary sense; the pledgee has not even temporarily the use and enjoyment of the goods but simply the right to retain them until the pledge is honoured and, if it is not, to sell them and reimburse himself out of the proceeds."

6.21 As pledgee with special legal title, therefore, the bank has no right to enjoy the goods, but has the right to retain them until the pledge is honoured and, if it is not, as would inevitably be the case in the event of the buyer's bankruptcy, to sell the goods and reimburse itself from the proceeds.

Seller must retain property to create the pledge

6.22 At common law, the pledge is made by the legal owner of the goods delivering them, or the documents representing them,[36] to the pledgee, with the intention that he should become pledgee.[37] Under a documentary credit it is almost always the seller who tenders the documents, and in order thereby to create the pledge he must have legal title at the time of tender. If the property in the goods has already passed from seller to buyer before the documents are pledged by the seller to the bank, then the seller can pass no property to the bank as pledgee. Only if property passes on tender of documents is the bank likely to be adequately protected against the bankruptcy of the buyer (or in the case of a confirming bank, the bankruptcy of the issuing bank).[38] As Lloyd L.J., giving the judgment of the court in *The Future Express* observed[39]:

"the bank's security depends, not on the contract between the buyer and his bank, but on the ability of the seller to pledge the documents of title on his behalf, or with his consent. Otherwise the confirming bank would be unsecured in the perhaps unlikely event of the issuing bank becoming insolvent."

6.23 Clearly, then, the passing of property under the sale contract has implications for the bank's security, at least insofar that that security depends on legal property.

Does the bank need legal property?

6.24 In *The Parchim*,[40] property in an international sale was held to pass on shipment, ie, long before tender of documents. Lord Parker took the view that, on the unusual

35. [1971] 1 Lloyd's Rep. 439, 447, citing with approval remarks in *The Odessa* [1916] 1 A.C. 145.

36. The documents must still be valid as documents of title when delivery is made. In *The Future Express* [1993] 2 Lloyd's Rep. 542, the documents were only delivered to the bank after the goods had been discharged, and the Court of Appeal held that they never became pledgees. See para. 7.14ff.

37. Diamond J., whose views were upheld in the Court of Appeal, observed in *The Future Express* [1992] 2 Lloyd's Rep. 79, 93 (col. 2) that "At common law a pledge cannot be created without delivery or constructive delivery of the thing pledged and delivery is necessary to give the bank the possessory right without which it cannot sustain an action for conversion", citing *Official Assignee of Madras* v. *Mercantile Bank of India Ltd.* [1935] A.C. 53, 58–59, and *Kum* v. *Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439, 442. The possibility of an equitable pledge is discussed in para. 7.102ff., but it also depends on delivery of a document.

38. In *The Future Express* at first instance, the bank argued that it could have obtained title as equitable pledgee before the documents had been transferred to it, the buyer at this stage having legal title. The argument was rejected for lack of evidence. Possibly it could work in principle, if it could be shown that the buyer intended to declare himself trustee for the bank, but the courts are disinclined lightly to infer declaration of self as trustee from surrounding circumstances, and are unwilling to allow the intervention of equitable property in international trade transactions except where (as in the case of a trust receipt) there is an express declaration of trust. The argument was not pursued in the Court of Appeal. On equitable property, see further para. 6.123ff.

39. [1993] 2 Lloyd's Rep. 542, 547 (col. 2).

40. [1918] A.C. 157. The facts and issues are in paras 6.72ff. and 6.92ff.

facts, the reservation of the seller's lien was sufficient to secure the contract price.[41] There was no documentary credit in that case, and on the particular facts, the reasoning is not unconvincing.

6.25 Detailed consideration of the rights of lien and stoppage in transit are beyond the scope of this book,[42] but even if property has passed to the buyer, an unpaid seller retains rights as defined in s. 39 of the Sale of Goods Act 1979, these rights being elaborated in ss. 41–48.[43] The combination of the seller's lien, right of stoppage in transit and right of re-sale allow an unpaid seller to prevent the buyer from obtaining delivery, and in some circumstances to re-sell the goods. It may be unnecessary also to retain title. Certainly, a seller is better protected by retention of title, but it is actually quite difficult to find cases where property clearly protects a seller, whereas the combination of the possession rights would not.

6.26 In principle, a seller who retains the bill of lading retains possession, and can rely on his lien. Only once possession is lost does the more limited right of stoppage in transit become relevant.[44] One problem lies with s. 43(1)(a), under which the seller loses his lien upon delivering the goods to the carrier, without reserving a right of disposal. If reserving a right of disposal here means the same as retaining title,[45] the lien will be retained only if property is retained, but it is by no means certain that this is the effect of this section.[46] In *The Parchim*, Lord Parker said[47]:

> "Having regard to the doctrine that the master of a ship who gives to the shipper of goods a bill of lading becomes bailee of the goods to the person indicated by the bill of lading, a seller holding a bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship . . . his warehouse . . . so that the seller retains a lien."

6.27 Perhaps the explanation is that the right of disposal in this context reserves only possession, not property.[48] However, there is no clear authority on this point.

6.28 If the unpaid seller loses his lien he can still stop in transit, at any rate if the buyer becomes insolvent.[49] Stoppage in transit applies only while the goods are in transit,[50] and is lost where the buyer is able to obtain the goods from the vessel prior to payment.[51] In such cases the carrier could be liable if the delivery was made without production of the bill of lading, though of course, rights against the carrier would be personal only. But how useful is property here anyway? If before going bankrupt, the buyer with the bill of lading re-sells the goods, he can pass title to the sub-buyer, whether or not the seller has retained property,[52] and unless the proceeds are clearly

41. *Ibid.*, 171.
42. See, e.g., Goode, *Commercial Law*, 3rd ed., Penguin (2004), ch. 15; Atiyah, *Sale of Goods*, 11th ed. (2005) ch. 25; Murray, D'Arcy and Cleave, *Schmitthoff's Export Trade (The Law and Practice of International Trade)*, 10th ed., Stevens & Sons (2000), at [5–013] *et seq.*
43. See Appendix C; an unpaid seller is defined in s. 38.
44. The main difference is that stoppage in transit is triggered only by the buyer's insolvency.
45. As in para. 6.72ff.
46. Atiyah, at 457–458. The assumption in *The Parchim* must have been that the lien was retained.
47. [1918] A.C. 157, 171, citing Pollock C.B. in *Browne* v. *Hare* 3 H. & N. 484. The facts of this case are set out in para. 6.92ff.
48. E.g., Atiyah, at 457.
49. Sale of Goods Act 1979, s. 44.
50. Sale of Goods Act 1979, s. 45.
51. In such cases the lien would be lost by virtue of s. 43(1)(a), and stoppage in transit by s. 45. Thus, for example, a lien would not have protected the sellers in a case such as *Ginzberg* v. *Barrow Haemetite Steel Co.* [1966] 1 Lloyd's Rep. 343 in para. 6.86ff.
52. See para. 6.86ff.

identifiable the seller will be left unsecured. If the buyer did not have the bill of lading he will not be able to pass property on the re-sale, in which case the seller will remain secured, at least as long as the goods remain identifiable (not, for example, where they are consumed or used in manufacture, or where oil is mixed in the receiver's tanks).

6.29 One of the few cases where property availed a seller, where the possession rights would not have, is *Ginzberg* v. *Barrow Haemetite Steel Co.*[53] Here, the seller allowed the buyer to take delivery from the ship before payment was made, and the buyer went into receivership while the goods were still in his hands. The seller had relinquished possession, and transit was at an end. But cases are rare, where property prevails though lien and stoppage in transit would have been lost. Though Lord Parker's views in *The Parchim* have not gained general acceptance, nor are they entirely unconvincing.

6.30 The situation is different where there is a documentary credit. Now the seller needs to be able to pledge property, not merely his lien. Lord Wright, in *T.D. Bailey, Son & Co.* v. *Ross T. Smyth & Co. Ltd.*, made the following general observations about the passing of property under a c.i.f. contract[54]:

> "The general property in the goods must be in the seller if he is to be able to pledge them. The whole system of commercial credits depends on the seller's ability to give a charge on the goods and the policies of insurance. A mere unpaid seller's lien would for obvious reasons be inadequate and unsatisfactory."

6.31 Although, as we shall see, the courts have occasionally accepted that retention of a lien by the seller is sufficient, they appear generally to have accepted that it is desirable for a bank to obtain property as pledgee.[55] To Lord Wright the reasons were "obvious". Perhaps for this reason they were not explained, and authorities on liens and rights of stoppage, which might shed light, are few and far between. The most likely explanation is simply that a seller who has been paid under a documentary credit is not an unpaid seller, and has no lien to pledge. The bank that does not obtain property therefore obtains no security at all.

6.32 Sassoon has argued that even if the seller merely retains an unpaid seller's lien, property having already passed to the buyer, he can still pass a title to the bank, by virtue of s. 24 of the Sale of Goods Act 1979.[56] This section, which is set out in Appendix C, can allow a seller tendering a document of title to the bank to pass title, even where the goods have already been sold elsewhere, but only if the bank is acting "in good faith and without notice of the previous sale". But the bank will of course be aware of the sale. It may not be aware that property has already passed to the buyer, but that may not be sufficient to bring it within the section. This interpretation of the section has not been tested, but the tenor of the authorities suggest that Sassoon's view would not be accepted.

6.33 The position may be different where the credit provides for deferred payment, whether using a time draft or not. Now the seller has not been paid and the lien retains a value.[57] Perhaps for this reason the bank was content to accept the security of a lien, in the knowledge that property had already passed, in *Sale Continuation Ltd.* v. *Austin*

53. [1966] 1 Lloyd's Rep. 343. See also para. 6.86ff.
54. (1940) 67 Ll. L. Rep. 147, 156.
55. The authorities are set out below, in para. 6.72ff.
56. Sassoon, *C.i.f. and Fo.b. Contracts*, 4th ed., Sweet & Maxwell (1995), paras 571ff.
57. The conclusion that he has not been paid follows from *Maran Road Saw Mill* v. *Austin Taylor Ltd.*, in para. 4.50ff.

Taylor & Co. Ltd.[58] The credit was opened by agents of the seller, for a sale on to buyers, on terms that the property would be deemed to pass to the buyers on shipment, subject to a vendor's lien for the purchase price. The credit provided for payment by acceptance of 90-day time drafts, and in the normal course of events (which as we saw in para. 4.59ff. did not, in the event, occur), the bank would have expected to be reimbursed before the 90-day credit period elapsed, triggering its liability to pay and consequently the termination of the lien. The applicant for the credit appears to have been well known to the bank, and the bank presumably deemed the security of the lien sufficient.

6.34 In any case, if the bank releases the documents to the buyer to enable him to effect a re-sale, it can require the buyer to declare himself trustee for the bank, of the goods until they are sold, and thereafter of the proceeds of sale.[59] This requires only that the buyer has, by this stage, the general property in the goods. It is of no consequence that the buyer might have obtained property, prior to the tender of documents to the bank. The efficacy of the trust receipt will therefore be defeated only where there is some reason preventing property passing both to the buyer and to the bank.[60]

Retention of legal property

6.35 On the assumption that the purchaser has not put the issuing bank in funds in advance, the issuing bank will need to recoup its costs, and its own commission, from him. Often, the purchaser cannot reimburse the issuing bank before he has himself re-sold the goods, but he cannot re-sell the goods without obtaining the bill of lading. The bank will obviously be reluctant to release the bill of lading to the buyer, without some form of security being provided against the bankruptcy of the buyer.

6.36 As long as the bank has, through its possession of the bill of lading, obtained special property in the goods,[61] it can retain its title until the buyer makes reimbursement to it, whether or not it gives up the bill of lading to the buyer. All it is doing, in effect, is giving the buyer authority to sell the goods on its behalf. In *North Western Bank Ltd.* v. *John Poynter, Son, & MacDonalds*,[62] the appellant bank were pledgees, as security for an advance, of bills of lading for a cargo of phosphate rock, which was at sea. Thus, they were in the same position as an issuing bank with which documents of title had been placed under a documentary credit, and which had thereby obtained the special property in the goods. Later, the bank released the bills of lading back to the pledgors, to enable them to sell the goods, on the understanding that the pledgors were to take delivery of the goods and sell them as agent for the bank.[63] The House of Lords held that by so releasing the documents the bank had not thereby prejudiced special property as pledgee. Lord Herschell L.C. observed[64]:

58. [1968] 2 Q.B. 849, [1967] 2 Lloyd's Rep. 403. For the facts and issues see para. 4.59ff.

59. See para. 6.39ff.

60. As in paras 6.53ff. and 6.60ff.

61. Special property is also referred to as possessory title. Of course, if the bank does not obtain special property, then the protection afforded by a trust receipt (para. 6.39ff.) is of greater importance.

62. [1895] A.C. 56.

63. The terms of the undertaking are set out *ibid.*, at 65.

64. *Ibid.*, at 68. This was assumed clearly to be the law in England, the issues in the case being whether the position was different under Scottish law, and if so, whether Scottish law applied. English law was held to apply, although the disputed fund was situated in Scotland, because both the bank and the pledgor were situated in England.

"There can be no doubt the pledgee might hand back to the pledgor as his agent for the purpose of sale, as was done in this case, the goods he had pledged, without in the slightest degree diminishing the full force and effect of his security."

6.37 In *North Western Bank*, the goods had in fact been sold by the pledgors, and property in them thus passed to their buyers. However, the proceeds of sale were held in an identifiable fund, ready to be paid over to the pledgors by their purchasers, and the bank were able to assert title to this fund.

6.38 In a normal documentary credit context, if the buyer goes bankrupt before selling the goods the bank can continue to assert its special property as against the other creditors, and can sell the goods as if it were owner. Once the goods are sold, property in the goods will pass to the sub-buyer, either because this is within the scope of the buyer's authority, or on the principles of *Lloyds Bank* v. *Bank of America National Trust and Savings Association* discussed in the next section.[65] The bank will be able to assert title to the proceeds of sale, which can be regarded as simply a substitute for the goods, but only as long as they remain identifiable. Once they are mixed with other funds of the buyer, they will generally cease to be identifiable, and the bank will cease to be able to assert title to them.[66] If the buyer goes into liquidation at this stage, not having reimbursed the bank, the bank will lose the protection of its special property.

Trust receipts

6.39 For the bank to release the bill of lading in exchange for a trust receipt normally constitutes the buyer trustee for the bank of (and thereby giving the bank equitable title to) the documents of title and the goods until sold, and of the proceeds of sale once sold. For example, in *Sale Continuation Ltd.* v. *Austin Taylor & Co. Ltd.*,[67] the bank obtained a receipt in the following terms:

"We hereby acknowledge the receipt of the . . . documents of title relating to the . . . goods (now in pledge to you as security for advances) to be held by us on the following terms and conditions: We undertake to hold the documents of title and the . . . goods when received (and the proceeds thereof when sold) as trustees for you . . . further to pay to you the proceeds of sale without deduction of any expenses immediately on receipt thereof. . . . "

6.40 Typically the buyer can obtain the documents of title, only if he is prepared to sign such a receipt, in which case he obtains the property only as trustee. If he goes into liquidation, whether before or after the goods are sold, the bank will be able to assert its equitable title to claim in preference to the general creditors. This increases its security, by comparison with that of special legal title alone, in two respects.

6.41 First, it does not matter if legal title has already been transferred to the buyer, prior to tender of documents.[68] The bank's equitable title depends only on the buyer having constituted himself trustee of the goods until sold, and the proceeds of sale

65. [1938] 2 K.B. 147.

66. Discussion of tracing at common law is beyond the scope of this book, but see, e.g., *Taylor* v. *Plumer* (1815) 3 M. & S. 562, [1814–23] All E.R. 167, *Banque Belge pour l'Etranger* v. *Hambrouck* [1921] 1 K.B. 321, *Re Diplock* [1948] Ch. 465, *Agip (Africa) Ltd.* v. *Jackson* [1991] Ch. 547 and *Trustee of the Property of F.C. Jones and Sons (a Firm)* v. *Jones* [1997] Ch. 159.

67. [1968] 2 Q.B. 849, the terms of the receipt being set out at 857. Terms of trust receipts can vary. The documents were, for example, released in exchange for a trust receipt in *North Western Bank* v. *Poynter* (though the decision did not depend upon this). It constituted the pledgor trustee only of the bills of lading, and not of the proceeds of sale once the goods were sold: the terms of the trust receipt are set out at [1895] A.C. 56, 65.

68. As in the cases in para. 6.92ff.

thereafter. Whether or not the bank also has special legal property as pledgee is immaterial; as long as the buyer has the general property in the goods when the trust is declared, he can declare himself trustee of them for the bank. In *Sale Continuation Ltd.* v. *Austin Taylor & Co. Ltd.*, property had passed from the seller to the buyers before the documents were pledged, so that the bank could not have obtained a possessory title as pledgee.[69] The documents were later released, *not* to the buyers who had property, but to the defendants, against a trust receipt. (The defendants, who were the applicants for the credit, acted merely as seller's agents for the sale.) As property had already passed to the buyers, no trust of the goods could have been declared, even at this stage. A trust could be declared by the applicants for the credit of the documents, however, and when these were exchanged with the buyer against payment, the bank could, in principle at least, obtain equitable title to the proceeds of sale.[70]

6.42 The second respect in which the bank's position is improved is in its ability to trace the proceeds of sale in equity, even if they have become mixed with other moneys, as long as they are not entirely dissipated.[71]

Protection against buyer's fraud

6.43 There are limits to the protection that retention of property, whether legal or equitable, can provide.[72] Where an honest buyer goes into liquidation before the bank is reimbursed, either the goods themselves or the proceeds of sale will usually be identifiable, and the bank will be able to assert its property.

6.44 The position is entirely different, however, if the buyer re-sells or re-pledges the goods and dishonestly misappropriates the proceeds. Any title the bank may have to the proceeds of sale would be useless, and there would be no point in the bank proceeding against its customer; in order to succeed it would need to sue whoever had come into possession of the documents. It would succeed if it could assert title to the goods. On the face of it, it might seem that the bank would have a good case, as the re-sale or re-pledge would have been unauthorised, but the Court of Appeal has held that legal title can pass, on reasoning that is essentially similar to that in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co. Ltd.*, discussed in para. 6.86.[73] If legal title passes, a purchaser or pledgee, for value and in good faith, will (on general equitable principles) take free of any equitable title.

6.45 In *Lloyds Bank Ltd.* v. *Bank of America National Trust and Savings Association*,[74] Lloyds Bank released shipping documents to their customer, Strauss & Co. Ltd., in exchange for a trust receipt. The documents had been obtained by Strauss "in order to enable the company [Strauss] to sell the merchandise as trustees for the plaintiffs . . . ".[75] Instead Strauss pledged the shipping documents with the Bank of

69. Property passed on shipment by virtue of an express clause in the sale contract: [1968] 2 Q.B. 849, 855E; [1967] 2 Lloyd's Rep. 403, 406 (col. 2).

70. In the event, the seller as pledgor was entitled validly to cancel the pledge: see para. 4.59ff.

71. The bank as beneficiary under a trust of the proceeds can trace in equity, including into mixed funds: *Re Hallett's Estate* (1880) 13 Ch. D. 696.

72. [1899] 1 Q.B. 643, in para. 6.86ff., where the essentially similar position of sellers' parting with the bill of lading prior to payment is discussed.

73. Para. 6.86ff. The statutory position is different, but to the same effect.

74. [1938] 2 K.B. 147.

75. *Ibid.*, at 159.

America National Trust and Savings Association, thereby raising further money on the goods. This was an unauthorised transaction, and though no doubt Strauss would thereupon have become trustees of the proceeds of sale, on the later liquidation of Strauss, the proceeds were probably not identifiable. Lloyds Bank therefore sued the Bank of America for the return of the shipping documents, or damages for conversion, but the Court of Appeal held that ownership had passed to the Bank of America.

6.46 The issue was whether the Bank of America obtained the legal title which Lloyds Bank had by virtue of being pledgee. If so, Lloyds Bank lost not only its security as pledgee, but also (the Bank of America having given value, and acting in good faith) any equitable title it may have had in the goods under the trust receipts. It follows, therefore, that whether or not the bank had equitable title under the trust receipt, the terms and indeed the very existence of the trust receipt, were all irrelevant to the decision.

6.47 The Court of Appeal held that Strauss was able to pass good title to the Bank of America, because of the application of the Factors Act 1889, s. 2(1).[76] This provision allows mercantile agents in possession of goods (or documents representing the goods) with the consent of the owner, to pass good title to a third party. Lloyds Bank was regarded as owner for these purposes, by virtue of its special property as pledgee, and Strauss was treated as a mercantile agent within the meaning of the section (even though he also, as pledgor, had the general property in the goods).

6.48 The trust receipt did not therefore protect Lloyds Bank against Strauss's unauthorised transaction and subsequent litigation. The position is similar if a buyer under a commercial credit re-sells the goods and fraudulently dissipates the proceeds. If the bank has possessory legal title to the goods it passes to the sub-buyer under the Factors Act 1889 provision. Its equitable title to the goods is defeated by the transfer of legal title to the sub-buyer, and the proceeds of sale (in which the bank still has equitable title under the trust receipt) no longer exist. There is therefore nothing left in which the bank can claim any property. Of course, if the bank had not obtained special property as pledgee, its equitable title in the goods under the trust receipt would be defeated simply by the transfer on sale of the (entire) legal title of the buyer to the sub-buyer, at least on the assumption that the sub-buyer was a *bona fide* purchaser for value without notice. There would be no need to invoke the Factors Act 1889 provision.

6.49 It has already been observed that mercantile practices are assumed to have developed to protect the parties against the bankruptcy, but not the fraud, of those with whom they deal. They are expected to use their own commercial judgment to ensure that they deal only with honest traders. Hence, the only protection against this type of fraud is for the issuing bank either to make certain of the honesty of the buyer before agreeing to open the credit, or to refuse to release the shipping documents except against full reimbursement of the sums advanced, interest and commission.

76. The section is essentially the same as s. 25(1) of the Sale of Goods Act 1979, in para. 6.86ff., but applying to a pledge, rather than a sale. Relevant provisions from the Factors Act 1889 are set out in Appendix D. Note that the definition of a document of title in s. 1(4) of the Factors Act 1889 includes any bill of lading, including (presumably) received for shipment bills, and is thus wider than the common law definition (on which see para. 7.102ff., at least in the absence of a trade custom).

RETENTION BY SELLERS OF PROPERTY BEYOND SHIPMENT

6.50 We must now turn to the question when property passes under the sale contract. As we have seen, the ideal position is for the seller to retain property until the documents are tendered,[77] whereupon general property passes to the buyer, and special property to the bank as pledgee. It is undesirable for property to pass before tender, if the bank is to obtain a legal title. It is also undesirable for the seller to retain property after tender, especially if it is intended for the buyer to constitute himself trustee under a trust receipt. Probably we should not over-state this ideal, because it is clear that banks are frequently prepared to depart from it. Often, however, the ideal position is reached by the law.

Early cases

6.51 As was seen in chapter 1,[78] the delivery point in f.o.b. and c.i.f. contracts is shipment, and in the early cases there was a strong presumption, particularly for f.o.b. contracts, that both property and risk passed then. Indeed, the Exchequer Chamber reasoned in *Browne* v. *Hare* that an f.o.b. seller would be in breach of contract if by taking bills of lading to his own order he was thereby presumed to be retaining property after shipment;[79] this inference should not be lightly drawn, even when bills of lading were taken to seller's order. Nonetheless, even prior to *Browne* v. *Hare*, it had been held in *Wait v. Baker* that an f.o.b. seller,[80] who had taken bills of lading to his own order, was thereby able to pass title to a third party; the form of the bill of lading postponed the passing of property to the f.o.b. buyer.[81] *Wait* v. *Baker* was approved by the Court of Appeal in *Mirabita* v. *Imperial Ottoman Bank*, a case which also concerned a contract that was probably f.o.b.[82] It later became clear in *Inglis* v. *Stock*,[83] that an f.o.b. seller was not necessarily in breach merely because property did not pass on shipment. The link between delivery and passing of property was therefore broken, and it became clear that property could pass after shipment in appropriate circumstances.

6.52 Generally speaking, there are two reasons why the passing of property might be delayed beyond shipment, in an f.o.b. or c.i.f. sale. First, it may be prevented by operation of law. Secondly, the form of the bill of lading, or other evidence, may point to the retention of property by the seller. These are considered in the next two sections.

Property cannot pass on shipment: goods unascertained

6.53 Goods may be either specific or unascertained. Specific goods can be identified from the time of contract as being destined for the buyer, and him alone. A common example of the sale of specific goods might be the sale of a particular manufactured

77. At any rate if a document of title is to be used to transfer property (see section 6.14).
78. Para. 1.29ff.
79. (1858) 3 H. & N. 484, 4 H. & N. 822, 157 E.R. 1067, where an f.o.b. seller, by taking bills of lading to his own order, retained property which he transferred to a third party, probably in breach of contract.
80. (1848) 2 Exch. 1, 154 E.R. 380.
81. It was not decided whether the retention of title also amounted to a breach of contract.
82. (1878) 3 Ex. D. 164 (CA).
83. (1855) 10 App. Cas. 263. Property could not pass on shipment because the goods were part of an undivided bulk, and hence unascertained goods: see further para. 6.110ff.

item. Though international sale contracts for the sale of specific goods might have been common in the early 19th century, c.i.f. and f.o.b. contracts for the sale of specific goods today seem to be relatively rare.

6.54 Most c.i.f. and f.o.b. contracts today are for unascertained goods. Goods are unascertained when the buyer cannot point to the particular goods which are destined for him. A common case is bulk cargo on board a vessel, which is mixed with other identical cargo on the same vessel. Though the bulk as a whole is specified, if the cargo on the vessel is destined for different buyers, no buyer can identify his particular cargo until it is physically separated, usually on discharge. Special rules now apply to undivided bulks, which are considered later.

6.55 Subject to these exceptions on bulk cargoes, the common law requires property to be identified physically before it can pass to a buyer: property simply cannot pass in unascertained goods. The common law position is codified in s. 16 of the Sale of Goods Act 1979,[84] which, subject to the special rules on undivided bulk cargoes considered at the end of the chapter, provides that property in unascertained goods cannot pass unless and until the goods are ascertained:

> " . . . where there is a contract for the sale of unascertained cargo no property in the goods is transferred to the buyer unless and until the goods are ascertained."

6.56 Ascertainment identifies the particular cargo destined for the particular purchaser. The seller identifies the cargo by appropriating it to the particular contract, after which it would be a breach of contract to substitute other cargo.

6.57 In the bulk commodity trade, it is common to contract for future goods which are purely generic goods, where the contract states simply quantity, quality, description and (perhaps) port of loading or discharge and shipment date, without defining the goods further. For example[85]:

> "any origin milling wheat in sound good condition, crop 1993/1994 or 1994/1995 at sellers option at $225 per mt C-FFO Port Sudan."

6.58 Even manufactured goods are often specified generically.[86] Often no vessel is specified, and the seller can supply goods satisfying the description from anywhere in the world. Indeed, a c.i.f. seller can perform by purchasing goods which are already afloat. Clearly, at the time the contract is made, the buyer cannot point to the particular cargo destined for him; indeed, in contracts for bulk commodities to be shipped at some future date, the cargo often does not even exist.

6.59 Goods of this type are unascertained until the seller appropriates the goods to the particular contract. Until then, property cannot pass. Once the goods are ascertained, property may pass immediately, but it will not necessarily do so. We need to consider therefore, the process of ascertainment, and the passing of property once goods are ascertained.

84. Subject to the amendments made to the legislation in 1995 to deal with undivided bulk cargoes, on which see para. 6.110ff., the sections of the Sale of Goods Act considered in this section re-enact without alteration those of the Sale of Goods Act 1893. The 1893 Act itself was intended to consolidate the common law, and it follows that cases of any age can be regarded as authority.

85. This particular example is taken from *Huyton SA* v. *Cremer GmbH & Co.*, Q.B.D. (Commercial Court), 21 October 1998.

86. E.g., *C. Groom* v. *Barber Ltd.* [1915] 1 K.B. 316 and *Carlos Federspiel & Co. SA* v. *Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240, the facts of both cases being considered in para. 6.60ff.

Appropriation to ascertain the goods

6.60 It follows from s. 16 that (leaving aside sales in undivided bulk cargoes, which are considered later),[87] the earliest time at which property can pass is ascertainment. Unascertained goods become ascertained by appropriation, which ties in the particular goods to the contract with the buyer. Appropriation is irrevocable in the sense that once the goods have been appropriated to the buyer's contract, the buyer knows that the contract will be fulfilled by the provision of those goods, and no others, and the seller will be in breach if he later withdraws the goods from the contract, or substitutes other goods.

6.61 There are two distinct senses in which the word "appropriation" is used. Here, it describes the process by which goods become ascertained, or in effect locked into the buyer's contract. It is the earliest moment at which property can pass. The second type of appropriation is that described in the following section,[88] the unconditional appropriation which actually passes the property. Property can pass as soon as the goods are ascertained, though often it will not pass until later. What can be stated with certainty, however, is that property never passes prior to ascertainment.

6.62 *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.* concerned a c.i.f. contract[89]:

> "for the sale of 15,000 units of . . . No. 2 Yellow American corn . . . to Hull, shipment to be from Canadian or Atlantic ports, including Albany. Bills of lading were to be dated not earlier than Aug. 16 and not later than Aug. 31, 1938."

6.63 Clearly, this was a sale of unascertained goods, which could be satisfied by any cargo matching the description, on board a vessel between the ports named, bills of lading being dated within the stipulated period. The contract quantity of 15,000 units was described as the mean quantity, and the sellers were allowed a 5 per cent margin more or less. The sellers gave a notice of appropriation of the cargo on board a vessel, amounting to more than 15,000 units, but within the allowed tolerance. After disputes with the buyers about the documentation, they later sent a second invoice, for 15,000 units only. The buyers argued that the second appropriation amounted to a repudiatory breach, since property in the larger amount had already passed to them, by the first notice. The House of Lords disagreed, emphasising that appropriation to ascertain the goods and appropriation to pass property are different. The first appropriation had ascertained the goods, but not passed the property. In Lord Wright's words[90]:

> "The notice of appropriation under an ordinary c.i.f. contract is not intended to pass and does not pass the property. Where, as here, the sale is of unascertained goods by description there are, at that stage, no goods to which the contract can attach. The seller is free to appropriate to the contract any goods which answer the contract description. This he does by the notice of appropriation which specifies and defines the goods to which the contract attaches. These thereupon he is bound to deliver and the buyer is bound to accept, subject to the terms of the contract. But that does not involve the passing of the property. The property cannot pass under

87. Para. 6.110ff.
88. Para. 6.72ff.
89. (1940) 67 Ll. L. Rep. 147, 153. The c.i.f. unit price was also stated.
90. *Ibid.*, at 155 (col. 1).

a contract of sale until the goods are ascertained,[91] but once they are ascertained, the property passes at the time when the parties intend it shall."[92]

6.64 The appropriation here identified the goods. It did not pass property, but merely determined the earliest time at which property could pass. The sending of the amended invoice, whatever other legal consequences it might have had, was not an attempt to withhold property already passed, and did not amount to a repudiatory breach of contract.[93]

6.65 Nonetheless, the appropriation required for ascertainment irrevocably commits those goods to that contract; it will not occur until the seller has committed himself no longer to substitute other goods. In *Carlos Federspiel & Co. SA* v. *Charles Twigg & Co. Ltd.*,[94] Pearson J. had to consider an f.o.b. sale of children's cycles. The seller had clearly identified the bicycles and tricycles for the buyer's contract, and the buyer had already paid for them, but (apparently because there was no available vessel) the goods had not been shipped. At this stage the seller was compulsorily wound up, and Pearson J. held that property had not passed to the buyers. Much of the discussion revolved around whether there had been an unconditional appropriation, as described in the next section, to pass the property, but the court apparently took the view that there had been no appropriation either, Pearson J. observing that[95]:

"A mere setting apart or selection of the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer."

6.66 This passage describes the conditions for "an appropriation of the goods to the contract". Once the cycles had been shipped, the seller would have been unable to substitute other goods; they would then have been ascertained and, the price having been paid, the court would almost certainly have inferred immediate passing of property to the buyer.[96] But the court was not prepared to hold that merely to make preparations for shipment was sufficiently final to amount to appropriation, irrevocably committing those particular cycles to the contract. A requirement physically to separate goods that can be substituted has also received support from the Court of Appeal in *Everwine Ltd.* v. *Commissioners of Customs and Excise*.[97]

6.67 It follows that, as long as the goods are not uniquely defined in the contract, but are capable of being substituted, it is most unlikely that they would be ascertained at least until shipment,[98] but it is quite possible for ascertainment to take place later.

91. Lord Wright refers to Sale of Goods Act 1893, s. 16, which is in the same terms as the equivalent part of the 1979 Act.

92. Lord Wright went on to consider the passing of property: para. 6.72ff.

93. *Ibid.*, at 158.

94. [1957] 1 Lloyd's Rep. 240. The discussion of unconditional appropriation within s. 18, r. 5 may seem inappropriate in the context of ascertainment, but no conditions would have attached to appropriation given that the price had already been paid, so once ascertainment had occurred, property would have passed immediately.

95. *Ibid.*, at 255.

96. See para. 6.72ff.

97. [2003] E.W.C.A. Civ. 953, at [29]–[31].

98. Possibly just before, but at any rate property will not pass before shipment. See further para. 6.72ff.

Where a number of identical consignments are shipped by the same seller for different buyers, appropriation will not take place until the seller has decided which consignment is destined for which buyer, and this may not occur until tender of the bill of lading. Suppose, for example, that in *Federspiel* the sellers had shipped, on the same vessel, bicycles for a number of different customers. If the cycles were of essentially the same specification, it would be possible to substitute between contracts, even at this stage. Separate bills of lading would usually be issued for each contract, which might identify (by packaging marks, etc.) the cycles to be allocated to each contract, but it is strongly arguable that the seller would not *irrevocably* commit himself until the actual tender of the bills of lading to each customer, in which case the goods would remain unascertained until that time, and property would not be able to pass.

6.68 Let us now turn to bulk commodity trades, but leaving aside, for the moment, undivided bulk cargoes shipped on board the same vessel. Usually neither cargo nor ship will be particularly identified in the contract, in which case the goods remain unascertained at least until the ship is identified, and on the logic of *Carlos Federspiel*, the goods shipped. But the irrevocable commitment, necessary for ascertainment, may occur later. In a case such as *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.*,[99] for example, the goods will not be ascertained until the seller has irrevocably committed himself to using the cargo on board a particular ship. The notice of appropriation required to do this could, under the contract considered there, have been communicated up to seven days after shipment. Had it been communicated at the latest time allowed, property could not have passed until then at least, the goods being until then unascertained.

6.69 Another possibility is where a c.i.f. seller can tender documents for goods already afloat. In *C. Groom Ltd.* v. *Barber*,[100] for example, the contract was for:

> "100 bales of Hessian cloth at 18s. 6d. per 100 yards for shipment from Calcutta, one half between June 1 and 30, and the other half between July 1 and 15, 1914, by steamer and/or steamers to London upon c.i.f. terms . . . "

6.70 As in *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.*, the identity of the ship was not stated, and would not have been known at the time of the contract. Moreover, the seller was himself in a chain, and did not know the identity of the vessel until over a month after she had sailed.[101] Within an hour, the seller invoiced the buyers, and hence appropriated those goods to that contract. In such a case, the goods necessarily remain unascertained until well after shipment, thereby delaying the earliest moment at which property can pass.

6.71 We see, then, that quite apart from considerations in the next section, s. 16 will often prevent property passing until documents are tendered.

Seller retains title to ascertained goods

6.72 In this section we are considering goods which are ascertained. Where the vessel is identified, and all the goods of that description on board are destined for a single

99. (1940) 67 Ll. L. Rep. 147, and see also above (in this section).

100. [1915] 1 K.B. 316; the main issue in the case was whether the seller could appropriate to a c.i.f. contract goods which had by then (probably without his knowledge) been lost at sea. Atkin J. held that he could: the facts are set out further in para. 4.116ff.

101. *Ibid.*, at 317–318.

buyer, the goods will be ascertained once shipped. Arguably, the moment of irrevocable commitment might come just before shipment, when they are physically committed to the stevedores' lifting equipment, or perhaps in the case of an oil cargo, when they are in the pipeline leading to the vessel; the seller had put it beyond his power to substitute different goods by then. Even if they are ascertained just prior to shipment, however, property will not normally pass until shipment, that being the agreed delivery point in a c.i.f. or f.o.b. contract, and also the point at which risk passes.[102] Where the vessel is not identified, the goods will remain unascertained until she is, and the seller has committed himself to use goods on board that particular vessel, perhaps by notice of appropriation as in *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.*, perhaps by tender of the documents shipping documents themselves. Similarly, where goods of the same description, on board an identified vessel, are destined for different buyers, ascertainment will not occur until the goods are irrevocably allocated between the various contracts.[103]

6.73 Just because the goods are ascertained, it does not follow that property passes immediately.[104] Where the sale is of specific goods, or once goods are ascertained, the general principle is stated in s. 17(1) of the Sale of Goods Act 1979, which provides that property passes when the parties (to the sale contract) intend it to pass.[105] Section 17(2) elaborates, providing that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.[106]

6.74 Section 17(1) refers to the intention of both parties, and s. 17(2) requires regard to be had to the terms of the sale contract. The sale contract is not conclusive if the seller acts actively to retain property in breach,[107] but otherwise its express terms may decide the property issue. Thus, a sale contract that expressly provides for property to pass on shipment can operate to prevent the seller from pledging property to the bank, and hence to the bank's security.[108] While such terms do not seem generally to be all that common, contracts for the sale of oil cargoes seem frequently to provide for property to pass on shipment.[109]

102. The possibility of property passing before shipment was apparently argued in *The San Nicholas* [1976] 1 Lloyd's Rep. 8: see Roskill L.J.'s judgment at 13 (though he did not see the need to decide upon it), but even if the seller has put it beyond his power to withdraw the goods, the courts seem reluctant to hold that property passes before shipment. Not only is this the view taken in *Carlos Federspiel* v. *Charles Twigg* itself, but see also *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, where the property at time of loss (just before they crossed the ship's rail) was assumed to remain in the f.o.b. seller, although he could hardly withdraw the goods from the contract at that point, and since the goods had been paid for had no reason to reserve title after appropriation.

103. If, however, they are all destined for the same buyer, but under different contracts, they can nevertheless be ascertained: *The Elafi* [1981] 2 Lloyd's Rep. 679, the decision in which has now been codified (see para. 6.110ff.).

104. It was part of the reasoning in *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.* that the notice of appropriation did not pass the property, though it ascertained the goods.

105. The section applies literally only where "there is a contract for the sale of specific or ascertained goods", but it has been assumed also to apply to sales of unascertained goods, once the goods have become ascertained. See *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.* (1940) 67 Ll. L. Rep. 147, *per* Lord Wright at 155, and comments by McNair J. in *Ginzberg* v. *Barrow Haemetite Steel Co.* [1966] 1 Lloyd's Rep. 343, 352.

106. The full text is set out in Appendix C.

107. See, e.g., *The San Nicholas* [1976] 1 Lloyd's Rep. 8. Lord Denning M.R. at least thought that there was a good arguable case that property had passed on indorsement, though the contract of sale stated that it passed at the permanent hose connection of the vessel.

108. E.g., the contract in *Sale Continuation Ltd.* v. *Austin Taylor & Co. Ltd.*, discussed in para. 6.24ff.

109. E.g., *The San Nicholas* [1976] 1 Lloyd's Rep. 8 (at the permanent hose connection of vessel).

6.75 However, the sale contract, at least if it is on c.i.f. or f.o.b. terms, is often silent. For example, whereas Incoterms and standard forms such as GAFTAs make detailed provision as to the rights and duties of the parties, and the transfer of risk, they are completely silent on property issues. Moreover, as Lord Wright observed in *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.*,[110] "the parties seldom express any such intention or perhaps even think of it". Even if an intention can be discerned, that of each of the parties may well be different.

6.76 Consequently, s. 17, on its own, is not a provision which makes it easy to determine precisely when property will pass in any given case. However, principles for ascertaining intention are set out in ss. 18 and 19, the most significant of which (for our purposes) are r. 5 of s. 18, and the first two subsections of s. 19.[111] Section 18, r. 5(1) provides, in effect, that the appropriation of goods to the contract, to ascertain them, will also pass property in them, if the appropriation is unconditional, whereas r. 5(2) provides for property to pass on shipment, unless the seller reserves a right of disposal. If either of these rules applies, it will tend to lead to an early passing of property. However, r. 5(1) applies only if the appropriation is unconditional, and r. 5(2) is subject to the seller not reserving the right of disposal. In reality, these are quite serious limitations.

6.77 The unconditional appropriation in r. 5(1) requires the assent or co-operation of the buyer, thereby giving him some control over the passing of property. This is also in accord with s. 17, which requires the intentions of both parties to be considered. In reality, this is likely to be limited to cases where the buyer can prevent an unconditional appropriation from being made to pass property, for example by refusing to accept delivery of the goods,[112] or refusing to take up the documents. Otherwise, the buyer's assent can be express or implied, and will usually be implied from the sale contract itself, or the practices of the trade, since it is usually in the interests of buyers to accept property.[113] In contentious cases it is therefore the seller who controls the passing of property. He can retain property, even in breach of contract, by withholding delivery of the goods or documents, or by reserving the right of disposal. Thus as we have seen, r. 5(2), the application of which would otherwise lead to a presumption of property passing on shipment, is subject to the seller not reserving the right of disposal.

6.78 Property can pass at any time after the goods have become ascertained, and if there is no reason to infer reservation of a right of disposal, for example where the seller has already been paid, the seller's appropriation to ascertain the goods will also amount to the unconditional appropriation to pass property in them.[114] Otherwise, the issue is whether the seller has, expressly or by implication, reserved a right of disposal in the goods. Whereas express reservations of title under s. 19(1) are rare in c.i.f. and f.o.b. contracts,[115] such an inference may be made by the physical retention of the bill of lading, preventing constructive delivery, or where the bill of lading is made out to seller's order, whereupon s. 19(2), codifying the old common law, creates a statutory

110. (1940) 67 Ll. L. Rep. 147, 155.

111. See further below, and Appendix C for the full text. Note that these provisions create presumptions only, and do not operate where there is a clear contrary intention.

112. E.g., *Colley* v. *Overseas Exporters* [1921] 2 K.B. 302.

113. Observations of Lord Wright in *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.*, at 155.

114. In both *Carlos Federspiel & Co. SA* v. *Charles Twigg & Co. Ltd.*, above, para. 6.60ff., and *The Elafi* in para. 6.110ff., applying r. 5(1), the courts apparently assumed that property would pass as soon as the goods were ascertained.

115. But see *The Aliakmon* [1986] A.C. 785, considered in a different context in paras 5.60ff. and 7.55ff., where (in an unusual case) the section was applied.

presumption that the bill of lading is retained as security against payment.[116] Conversely, where the bill of lading is made out to, or to the order of the buyer, or physically transferred to him, any presumption that the bill of lading is retained as security against payment is weakened.

6.79 There is no doubt that historically, particularly for f.o.b. contracts, there was a strong presumption that property passed at the delivery point, on shipment.[117] Even as late as in *The Parchim*,[118] the Privy Council took the view that in a contract that should probably be regarded as f.o.b.,[119] the seller was adequately protected by the unpaid seller's lien (which protects the person who has possession, even after property has passed), even though the bill of lading was taken out to his own order. Lord Parker of Waddington held that property in the goods had passed with risk on shipment.[120] He said that where[121]:

> "the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract,[122] he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract."

6.80 He also said that where the seller was sufficiently protected by the lien the inference that property would pass only conditionally upon payment by the buyer was necessarily weak, and easily rebutted.

6.81 However, *The Parchim* seems to stand pretty well alone among the authorities. Normally, the issue of the bill of lading to the order of the seller, and his retention of it, will lead to the inference that he intends to retain the right of disposal. An early authority is *Mirabita* v. *Imperial Ottoman Bank*, where the contract was probably f.o.b., Cotton L.J.'s view forming the basis of what later became s. 19(2)[123]:

> "If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers."

6.82 Whatever its merits, the argument in *The Parchim* that the unpaid seller's lien may provide sellers with adequate security has not found favour with the courts, particularly where payment is by documentary credit, and *The Parchim* was said to have

116. See Appendix C for the full text. Note that where the bill of lading is made out to seller's order, the statutory presumption under s. 19(2) is that he reserves a right of disposal against payment, not against indorsement, so that the property may pass after indorsement if payment is made later. An example of this is *The Ciudad de Pasto* [1988] 1 W.L.R. 1145, in para. 6.96ff., where as a result the buyer was unable to sue the carrier in tort.

117. See the cases referred to in para. 6.51ff. In *Carlos Federspiel & Co. SA* v. *Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240, Pearson J. observed at 247 that: "There is authority which shows quite clearly that normally, at any rate, under an f.o.b. contract the property passes on shipment."

118. [1918] A.C. 157. This was a Prize case, and the consequence of this decision was that the seizure was unlawful.

119. The sale contract, although expressed to be c.i.f., had more of the characteristics of an f.o.b. contract, only cost and charterparty freight—not insurance—being included in the price: see Lord Parker at 163–164.

120. For risk see paras 1.20ff. and 5.10ff. Sale of Goods Act 1979, s. 20, creates a presumption that risk passes with property (though the presumption was being operated in reverse in *The Parchim*, to conclude that property passed with risk).

121. [1918] A.C. 157, 171.

122. As in *Wait* v. *Baker* (1848) 2 Exch. 1, in para. 6.51ff.

123. (1878) 3 Ex. D. 164, 172.

been "decided on very special facts" in *The Kronprinsessan Margareta*, and not to lay down any general rule.[124] This case concerned a number of shipments, but in one, where the contract was c. & f., property was held not to have passed until after shipment, even though the bill of lading was taken out not to the order of the sellers, but of the consignees. It was, however, physically retained by the seller, who was therefore able to control the passing of property. A lien argument advanced in *The Kronprinsessan Margareta* was rejected, albeit on the facts rather than as a general principle.[125] In subsequent cases, lien arguments have not generally found favour,[126] and there is now authority that as a general proposition property does not pass until indorsement and payment, at least for c.i.f. contracts. Thus, for example, Roskill L.J. expressed unreserved acceptance in *The Albazero* of the proposition that[127]:

> " . . . in the absence of any contrary intention appearing from the contract, the conduct of the parties and the circumstances of the case, where goods are sold on c.i.f. terms the property will not pass from the seller to the buyer except against tender of documents by the seller to the buyer and payment by the buyer to the seller against those documents."

6.83 The presumption against property passing before tender of documents and payment is stronger where s. 19(2) applies,[128] and is not necessarily rebutted even where the bills of lading are taken out to the order of the buyers.[129]

6.84 The case for postponing the passing of property until tender of documents, and payment of the price, is strong in c.i.f. contracts, which envisage both physical and constructive delivery. The argument is perhaps weaker for f.o.b., and a factor in *The Parchim* was that the contract, though expressed to be c.i.f., in reality had the characteristics of an f.o.b. contract. However, f.o.b. contracts have developed since the nineteenth century, and in many f.o.b. contracts the documents perform exactly the same role as in c.i.f.[130] In *The Ciudad de Pasto*,[131] the Court of Appeal applied the s. 19(2) presumption, and essentially the reasoning set out here, rejecting an argument based on a distinction between f.o.b. and c.i.f. contracts, that property had passed on shipment. It is reasonable to suppose, therefore, that at least where the documents are performing the same role as in a c.i.f. contract, the inferences drawn from their form, and from the seller's dealings with them, are the same whether the sale contract is f.o.b. or c.i.f.

124. [1921] 1 A.C. 486, 516. In *The Parchim* [1918] A.C. 157, the bill of lading was not in fact retained as security against payment, nor indeed physically retained by the seller at all. Nor was there a documentary credit in *The Parchim*. Also, unlike *The Kronprinsessan Margareta*, the bills were not physically retained by the seller in *The Parchim*, but by a bank.

125. [1921] 1 A.C. 486, 514.

126. E.g., *Ross T. Smyth & Co.* v. *Bailey Son & Co.* (1940) 67 Ll. L. Rep. 147, in para. 6.24ff.

127. [1975] 3 W.L.R. 491, [1975] 2 Lloyd's Rep. 295, later reversed on other grounds [1977] A.C. 774 (HL).

128. In *Pacific Molasses Co. and United Molasses Trading Co. Ltd.* v. *Entre Rios Compania Naviera SA (The San Nicholas)* [1976] 1 Lloyd's Rep. 8, Lord Denning M.R. took the view that property passed on indorsement because of s. 19(2), even though the sale contract expressly provided for it to pass on shipment, or more accurately, at the permanent hose connection of the vessel (Roskill L.J. decided the case on different grounds). The s. 19(2) presumption may not necessarily therefore be rebutted even by the express terms of the sale contract.

129. As in *The Kronprinsessan Margareta*, above, note 123.

130. E.g., *Concordia Trading BV* v. *Richco International Ltd.* [1991] 1 Lloyd's Rep. 475, in para. 4.122ff.

131. *Mitsui & Co. Ltd.* v. *Flota Mercante Grancolombiana SA (The Ciudad de Pasto)* [1988] 1 W.L.R. 1145; [1988] 2 Lloyd's Rep. 208, in para. 6.96ff.

6.85 We can conclude, perhaps, that in the normal case property will not pass before tender of documents, at least where a bill of lading is used, and that therefore the seller will be able to create a valid legal pledge in favour of the bank.

Retention of title after release of documents

6.86 Just as a buyer may be unable to reimburse an issuing bank without first re-selling the goods, so also, in the absence of a documentary credit, the buyer may wish to obtain the goods before paying the seller. The problem is similar to that which faces an issuing bank: the buyer needs to obtain the bill of lading, but it is the bill of lading that provides the security for payment.

6.87 The inference in the last section is that the seller reserves a right of disposal until payment, and as long as he retains property until the documents are handed to the buyer, he can opt, on transferring those documents, to transfer the property only conditionally, on payment. In this way he can retain property until payment, even though he has parted with the documents. Similarly, he may part with other documents allowing the buyer to obtain possession of the goods, without jeopardising his property. In *Ginzberg* v. *Barrow Haemetite Steel Company Ltd.*,[132] c.i.f. sellers of a cargo of bulk ore had not received the bills of lading by the time the ship arrived. To expedite delivery they arranged with the ship's agents that delivery should be made against a delivery order instead of the bill of lading. The buyers were thus able to obtain delivery of the ore, and later went into receivership, before paying the sellers. McNair J. held that the sellers had retained property in the ore, the alteration in the mechanics of delivery not having affected the ordinary incidents of a c.i.f. contract, that property would pass only against payment.

6.88 Quite a common device is the use of a documentary bill.[133] This is a bill of exchange drawn on the buyer, which is attached to the bill of lading that is sent to him, the buyer being required to return the bill of lading, should he fail to accept and honour the bill of exchange. Since the nineteenth century House of Lords authority old case of *Shepherd* v. *Harrison*,[134] the law has recognised that even though the bill of lading has been passed to the buyer, property remains in the seller until he has been paid.[135] *Shepherd* v. *Harrison* was codified in s. 19(3) of the Sale of Goods Act 1979, which is set out in Appendix C.[136]

6.89 As with the cases we have already considered, where the issuing bank releases the bill of lading to the buyer,[137] and in line with the principles considered at the start of this chapter,[138] the retained property can protect the seller against the bankruptcy of an honest buyer, but not against a dishonest buyer, who essentially steals the bill of lading. There will always be a fraud risk, unless the buyer is required to pay before

132. [1966] 1 Lloyd's Rep. 343. This case depended on retention of property. The lien and right of stoppage would not have availed the seller, the goods having been delivered: see para. 6.24ff.

133. The terminology is taken from *Schmitthoff's Export Trade*, 10th ed., at [9–006].

134. (1871) L.R. 5 H.L. 116.

135. Thus the recipient of the bill of lading will be liable in conversion if he parts with it contrary to his authority: *Ernest Scragg & Sons Ltd.* v. *Perseverance Banking & Trust Co. Ltd.* [1973] 2 Lloyd's Rep. 101. The buyer is, of course, contractually liable for the price anyway, but a conversion action might be a useful alternative if the market has risen.

136. Re-enacting the 1893 provision, which itself (as a codifying provision) did no more than to enact the House of Lords decision in *Shepherd* v. *Harrison*.

137. Para. 6.39ff.

138. Para. 6.2ff.

obtaining the bill of lading. This can be ensured using the collection arrangement described in chapter 1,[139] but fraud will be guarded against only if the buyer is required to pay on taking up the bill of lading, not if credit is extended. It is for the merchants and not the law to guard against extending credit to dishonest traders.[140] Thus, s. 19(3) gives no protection against a fraudulent buyer who uses the bill of lading to re-sell the goods. Because the fraudulent buyer is regarded as being in possession of the documents of title with the consent of the seller, the seller's property does not avail him against the sub-buyer: the provisions of the Sale of Goods Act 1979 operate to allow good title to be passed to the sub-buyer, and also to defeat the seller's rights of lien and stoppage *in transitu*.

6.90 In *Cahn* v. *Pockett's Bristol Channel Steam Packet Co. Ltd.*,[141] the sellers shipped copper on the defendant's ship and sent bills of lading and a draft to buyers who were insolvent. The buyers did not accept the draft but did transfer bills of lading to the plaintiffs, who took them in good faith. The Court of Appeal held that the plaintiffs had obtained good title to the copper under what is now s. 25(1) of the Sale of Goods Act 1979.[142] This provision allows a buyer in possession of the goods or documents of title, with the consent of the seller, to pass good title to any person receiving them in good faith, and without notice of the seller's title. The sellers also attempted to stop the goods in transit, but the plaintiffs were held protected against this action also by what is now s. 47 of the Sale of Goods Act 1979. This provision operates to defeat the seller's rights of lien and stoppage in transit where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith for valuable consideration.[143]

6.91 It can be seen therefore that where the seller relinquishes physical control over the bill of lading the protection that it affords him is limited, protecting him against the bankruptcy but not the fraud of the buyer to whom credit is extended.

CASES WHERE PROPERTY PASSES BEFORE TENDER

6.92 Though it is probably the norm for property to pass only on tender of documents, against payment, for both c.i.f. and f.o.b. contracts, the passing of property depends ultimately on the intention of the parties, and in particular, whether the seller is taken to have reserved a right of disposal. Circumstances may tend to rebut this inference,[144] even where the seller has taken the bill of lading to his own order; indeed,

139. Para. 1.10ff.

140. Para. 6.2ff.

141. [1899] 1 Q.B. 643.

142. Then s. 25(2) of the Sale of Goods Act 1893, mercantile agent being defined in s. 2 of the Factors Act 1889. The definition of a mercantile agent is now set out in s. 26 of the Sale of Goods Act 1979. The property sections of the 1979 Act are set out in Appendix C.

143. Then the identical provision in the Sale of Goods Act 1893. For the full text of the 1979 provisions see Appendix C. The crucial point in the Court of Appeal was again that the buyer was in possession of the bill of lading with the consent of the sellers, in spite of s. 19(3). On lien and stoppage in transit, see para. 6.24ff.

144. In a slightly different case involving an f.a.s. contract, an express reservation of a lien by the sellers, in the sale contract, displaced any intention to reserve title: *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* [1938] A.C. 429, 444. This case is considered in detail in para. 7.95ff.

s. 19(2) creates only a *prima facie* presumption. One such circumstance is where he has no need to retain property, as security against payment. As we have seen, where property passes before tender of documents, the seller will be unable to pass property to the bank, under a documentary credit.

6.93 We saw that the presumption was rebutted in *The Parchim*.[145] Though the bill of lading was taken to the order of the sellers, the form was determined by the seller's agent without knowledge of the contract.[146] Nor was it physically retained, but placed with a bank whose instructions were to release it only on payment, but not to return it to the seller unless the buyers defaulted.[147] The contract had f.o.b., rather than c.i.f. characteristics, and as we have seen, the circumstances pointed rather to a desire to support the seller's lien than to a desire to retain his property. On the precise facts of the case this inference was perhaps justified, but it seems most unlikely that the decision will be extended.

6.94 A more general circumstance is where the seller has no need to reserve a right of disposal, perhaps because he is assured payment, perhaps because the sale is not between strangers, but related companies. These can certainly be strong, if not conclusive factors. *The Albazero* concerned a c.i.f. sale between two associated companies, where one of the issues was whether property had passed before the goods were lost at sea. This was before indorsement and payment, but after the sellers had posted the bill of lading to the buyers. Although the Court of Appeal recognised that in a normal c.i.f. contract property would not have passed, they held that it had passed here, the presumption in s. 19(2) being rebutted.[148] This was not a normal c.i.f. contract; there was no intention to pledge the shipping documents, and no need to reserve a right of disposal. Payment was not due until 180 days after sight (i.e., the seller was extending credit), and so the sellers were not, in any meaningful sense, using the documents to secure payment.[149] Nonetheless, property was not held to have passed on shipment; it was also found that the only reason for the bill of lading being reserved to seller's order was that the group's business arrangements required flexibility of distribution, which in turn required the sellers to hold the bill of lading initially. It was therefore held that property passed on posting of the bill of lading to the eventual consignee. The case has unusual facts, and the result is unlikely to be of general application, except to show that the normal presumption for c.i.f. contracts can be displaced, and to demonstrate some of the relevant factors.

6.95 In neither of these cases was payment by documentary credit, and this was undoubtedly a factor in the reasoning in *The Albazero*, though perhaps not in *The Parchim*. With a documentary credit, any departure from the normal c.i.f. position can prejudice the bank's security. The issue is, therefore, whether (and if so, how) payment by documentary credit affects the passing of property under the sale contract.

145. Para. 6.72ff.
146. [1918] A.C. 157, 172.
147. *Ibid.*, at 167.
148. [1975] 2 Lloyd's Rep. 295, 302–303. Another case where the presumption in s. 19(2) was rebutted is *Enichem Anic SpA* v. *Ampelos Shipping Co. Ltd. (The Delfini)* [1990] 1 Lloyd's Rep. 252. See also the discussion of *The Filiatra Legacy*, in para. 6.96ff.
149. It is, in any case, difficult to see how title to a cargo of oil can be asserted in practice, once it has been delivered to the receiver.

Where payment is guaranteed by a bank

6.96 It seems probable that Lord Wright would have taken the view in *Ross T. Smyth & Co. Ltd.* v. *T.D. Bailey Son & Co.*[150] that where payment is by documentary credit the presumption of property passing on tender of documents should if anything be strengthened, because the bank needs to obtain from the seller a special property in the goods as pledgee. This will only happen if the seller has not before tender to the bank (for example, on shipment) passed all property to the buyer.

6.97 A difficulty with this view is that by virtue of s. 17, the question when property passes under the sale contract depends only on the intention of the parties to that contract (i.e., seller and buyer), and not on the intention of the bank. It is necessary therefore to infer that the parties to the sale contract intend to protect the bank against the buyer's insolvency. Such an inference can of course theoretically be drawn from the mere fact that the parties have agreed that sale is to be by documentary credit, but it is arguably a somewhat artificial inference.[151]

6.98 In any case an alternative view is sometimes taken, which tends towards the opposite conclusion. Since where payment is by documentary credit the seller ships goods in the sure knowledge that he is going to be paid, there is no need for him to retain the bill of lading as security against payment. Therefore there is no reason for property to pass later than shipment. Such an argument was advanced in *The Kronprinsessan Margareta*,[152] but Lord Sumner did not need to decide upon it, since in his view there was in fact no irrevocable or confirmed credit in existence.[153] In any case, he said, payment by documentary credit is no more than indirect evidence of the intention of the parties under s. 17 of the Sale of Goods Act.[154] Property there was held to have passed on indorsement, even though the bills of lading were not reserved to the seller's order. The likelihood that a bank would pay (even if not legally obliged to do so) did not alter this conclusion.

6.99 On the other hand, given that the only relevant intention is that of the parties under the sale contract, there is a certain logic in the view that if the seller knows that he is going to be paid by a reputable bank, there is less need for him to reserve a right of disposal. If property passes before tender of documents that may well prejudice the security of the bank, but that is arguably not the concern of the parties to the sale contract.

6.100 In general, however, the courts have been reluctant to infer that the existence, at any rate of a documentary credit, is a reason for passing property on shipment. In *The Glenroy*,[155] a cargo shipped from Japan to Germany was seized as enemy property in October 1939 (i.e., before Japan entered the war), and in order to justify the seizure the British Crown had to argue that property had already passed to the German buyers at the time of the seizure. One of their arguments was that because the sellers had obtained an undertaking from a bank under a letter of credit, they were no longer interested in the goods, because they had been assured of payment in full.

150. Above, para. 6.72ff.

151. See, however, Debattista, *The Sale of Goods Carried by Sea*, 2nd ed., Butterworths (1998), at [5–22].

152. [1921] 1 A.C. 486, 515. See also para. 6.72ff.

153. *Ibid.*, at 513–514. The bank had not apparently accepted any irrevocable commitment to pay the consignors (see 513). This was probably therefore a revocable letter of credit, which was not used as security for payment (it was opened partly as protection against exchange rate fluctuations).

154. *Ibid.*, at 517.

155. *Part Cargo ex. Glenroy* [1945] A.C. 124.

(Indeed, they had already been paid under a negotiation credit, though on the principles discussed in chapter 2, this would have been with recourse.)[156] Lord Porter, rejecting this argument, observed that the bank might fail, or that as happened in the case, circumstances of war might induce it not to pay.[157] (The issuing bank refused to accept the drafts, once it became clear that the goods were in British hands.)[158]

6.101 A similar view was taken in *The Ciudad de Pasto*,[159] a case concerning an f.o.b. sale of prawns, even though 80 per cent of the price had already been paid, before shipment, only the 20 per cent balance being secured by letter of credit.[160] The bill of lading made the goods deliverable to the order of the seller, and the court, applying the s. 19(2) presumption, inferred that the seller retained the bill as security against payment of the remaining 20 per cent.[161] On the limited facts available, the court refused to infer that property had ever passed to the f.o.b. purchaser. On the effect on passing of property of the letter of credit, Staughton L.J. said[162]:

"Nor can I attach much weight to the fact that the balance of the price was (as I assume) payable by letter of credit. Even the most copper-bottomed letter of credit sometimes fails to produce payment for one reason or another; and the seller who has a letter of credit for 100 per cent of the price will nevertheless often retain the property in his goods until he has presented the documents and obtained payment."

6.102 The courts have not in general accepted, therefore, the proposition that because the existence of a documentary credit assures them of payment, the seller should be assumed not in intend to retain the right of disposal in the goods.

6.103 Different considerations apply to standby letters of credit guaranteeing payment, where the bill of lading is expected to play no part in the delivery process, and need play no part in the mechanism of payment.[163] Here, not only is the seller guaranteed payment by a bank, but retention of the bill of lading neither secures payment, nor realistically controls the disposal of the goods. *The Delfini* concerned a c.i.f. contract for the sale of a cargo of oil, where bills of lading were made out to seller's order. Payment was secured by standby letter of credit, and this being a short voyage, it was not expected that bills of lading would be available in time for discharge of the cargo. Property was held to have passed at latest on discharge, though neither payment nor indorsement occurred until later.[164] Mustill L.J. concluded that[165]:

" . . . it is sufficient to remind oneself that the inference to be drawn from the taking of an order bill is rebuttable. I think it clear that the shipowners have rebutted it here."

156. See para. 2.37ff.
157. [1945] A.C. 124, 135.
158. Drafts were to be drawn on a London bank for a German company.
159. *Mitsui & Co. Ltd.* v. *Flota Mercante Grancolombiana SA (The Ciudad de Pasto)* [1988] 1 W.L.R. 1145; [1988] 2 Lloyd's Rep. 208.
160. Or so the Court of Appeal assumed. The quality of evidence was described as "woefully inadequate": [1988] 1 W.L.R. 1145, 1147, 1154.
161. The timing of the passing of property was relevant to a tort claim by the buyers.
162. [1988] 1 W.L.R. 1145, 1153.
163. See the description in para. 2.69ff.
164. The buyers argued that property passed on indorsement, to trigger s. 1 of the Bills of Lading Act 1855. This was a case where (unusually—and solely because of the requirements of that section) it was the buyers who argued for a late passing of property.
165. [1990] 1 Lloyd's Rep. 252, 271 (col. 2). The bill of lading appears in any case to have been blank indorsed, not indorsed to order, but the case did not turn on the distinction: *ibid.*

6.104 He thought the buyer's argument that passing of property be postponed until indorsement absurd, given that this could be months after discharge, and indeed even after cargo had become admixed with other cargo belonging to the receivers.

6.105 For similar reasons, the Court of Appeal held that property in an oil cargo had passed on shipment, or at any rate before the oil was discharged or paid for, in *The Filiatra Legacy*.[166] As in *The Delfini*, the contract was c.i.f. This time the bill of lading was taken out to sellers' order, but like the bill of lading in *The Delfini*, it was in no sense performing its traditional function as a document of title. It was always envisaged that the cargo would be delivered without its production; it did not need to be presented to the bank for the sellers to obtain payment, and the bank had no interest in when property passed, since unlike a bank under a conventional documentary credit, it obtained no security under the standby letter of credit whatever happened.[167] Mustill L.J. observed that[168]:

> "The voyage foreseen by the contract was a short one. It was plainly contemplated that the oil might be delivered . . . , mixed with other oil, and even refined and distributed, before payment of the price became due. The contract nevertheless provided for a thirty-day period of credit. It also contemplated that the bill of lading might not reach the buyers before discharge of the cargo. In those circumstances the parties can scarcely have intended that passing of the property should depend either on payment of the price or on transfer of the bill of lading, at all events unless they expressly said so."

6.106 These factors are similar to those in *The Delfini*, but it was also a factor that the price had been secured at latest at shipment, since the credit had been opened by then, and the bill of lading not required for payment.

6.107 In both *The Delfini* and *The Filiatra Legacy*, the most important factor in the reasoning was the contemplation that the cargo would be discharged without production of the bill of lading. The fact that the sellers had secured payment was also relevant, albeit perhaps not a strong factor. It was a stronger factor in Longmore J.'s decision in *The Atlas*; property was assumed to have passed on shipment in an f.o.b. sale, where payment was by irrevocable bank guarantee. The fact that payment was guaranteed, and secured without the need for documents to be presented, was a significant factor in the decision.[169]

6.108 To conclude this section, there are no cases where the existence of a documentary letter of credit has clearly had any effect either way on when property passed. Though it may be relevant in ascertaining the intention of the parties, it is very unlikely to tip the balance, and displace the usual presumptions for the passing of property under c.i.f. and f.o.b. contracts. On the other hand, recent cases beginning with *The Delfini* suggest that where credit is offered on an unsecured basis, by a reputable bank which does not require tender of the bill of lading, and where the bill of lading is not expected to perform its traditional role as a document of title, any presumption that the

166. *Anonima Petroli Italiana SpA* v. *Marlucidez Armadora SA (The Filiatra Legacy)* [1991] 2 Lloyd's Rep. 337. The buyers sued the carriers in tort, alleging that they had retained cargo on board the vessel at discharge. The carriers claimed that the buyers had no property in the cargo until (at the earliest) it had been discharged. Hence, they never had any property, or title to sue, in respect of any cargo remaining on board. The Court of Appeal held that property had passed to the buyers on shipment, or at latest when discharge commenced, so that they had title to sue, but in the event the plaintiffs' claim was rejected on the substantive issues.

167. See para. 2.69ff.

168. [1991] 2 Lloyd's Rep. 337, 342 (col. 2)–343 (col. 1).

169. *Noble Resources Ltd.* v. *Cavalier Shipping Corporation (The Atlas)* [1996] 1 Lloyd's Rep. 642, 644 (col. 2).

seller is reserving a right of disposal is likely to be rebutted, even where the bill of lading is reserved to his own order. Of course this will limit the bank's security, because it will not obtain special property as pledgee, but in cases such as these, the bank seems (by agreeing to such a credit) effectively to have accepted that its position may be no better than that of an unsecured creditor, should the buyer go into liquidation.

6.109 We saw at para. 6.14ff. that a pledge can be constituted on shipment, where the bank is named as consignee under a document which is not a document of title, and where it is not envisaged that delivery will be made against a document of title, at least where the seller has already been paid. The cases here are probably operating on a similar principle, though here the property passes directly to the buyer, the bank being unsecured. At any rate, however, the cases are similar in that the seller is assured of payment, and the document that is used will not control delivery. In such cases retention of title cannot be inferred from retention of the document.

UNDIVIDED BULK CARGO

6.110 Until the law was amended in 1995, where the sale was of part of an undivided bulk cargo, the seller typically retained property until discharge. This was quite simply because until then the goods were unascertained. Neither the bank nor the buyer would obtain any legal title,[170] and because the buyer had no title, he could transfer no equitable title, at any rate to the goods, to the bank under a trust receipt. Indeed, prior to the Carriage of Goods Act 1992, the only rights arguably obtained by the holder of a bill of lading, for part of an undivided bulk cargo, would have been to demand discharge of the appropriate amount from the carrier, and as we will see in the next chapter,[171] even this right was not granted to him beyond doubt, since in the absence of property, he may not have enjoyed constructive possession either. Writing in 1987, Professor Goode observed that[172]:

> " . . . bills of lading covering an unidentified part of a bulk cargo are acted upon by buyers and banks as being documents of title. Each buyer in a chain imagines he has a proprietary interest in a part of the cargo; each bank advancing money on the security of imported goods happily believes that in taking possession of the bill of lading . . . it acquires a valid pledge. The true position is that, there being no appropriation to each individual claimant, the holder of such a bill of lading acquires no real rights of any kind, whether of ownership or of constructive possession."

6.111 Since that time, there have been three developments. The Carriage of Goods by Sea Act 1992 has already been covered,[173] securing at any rate the contractual position of holders of such bills of lading. Secondly, the decision in *The Elafi*, codified in amendments to s. 18 of the Sale of Goods Act, resolved a particular issue (which is identified below). Thirdly, the remaining 1995 amendments to the Sale of Goods Act 1979, creating a new s. 20A, provided a more general solution, so that now, holders of such bills enjoy essentially the same security as holders of other bills.

6.112 Before 1995, sales of undivided bulk cargo, whether in liquid or dry cargo form, were sales of unascertained goods if parts of the bulk were sold to a number of

170. Nor was there any possibility of equitable property passing directly: below, para. 6.123ff.
171. See paras 7.55ff. and 7.75ff.
172. (1987) 103 L.Q.R. 433, 450.
173. In chapter 5.

different buyers: no individual buyer could state which part of the bulk will be his until it is appropriated to him (by being divided out). This would usually occur on the splitting of the bulk on discharge, and only then did the cargo become ascertained. Because of the absolute rule stated in s. 16, therefore, property in part of an undivided bulk cargo could not usually pass until delivery, and clearly whether or not payment is by irrevocable documentary credit could have no effect on this.

6.113 Apart from the undesirable consequences this had on the bank's security, this also had major implications for buyers of undivided bulk cargoes under the regime of the Bills of Lading Act 1855,[174] since s. 1 could never apply in their favour, and therefore they could not sue the carrier in contract if the goods were lost or damaged on the voyage. In 1989 the Law Commission considered amending both s. 1 and s. 16, in order to deal with this problem.[175] The main problem was seen to be with s. 1, which was eventually replaced by the Carriage of Goods by Sea Act 1992. This resolved all the problems discussed in chapter 4 on bulk cargoes. Contractual rights to take delivery would also have been assured, but property issues on the bankruptcy were not addressed.

6.114 The problem was that the goods were unascertained, and a particular aspect of it was resolved in *The Elafi*.[176] C.i.f. buyers had purchased 6,000 tonnes of copra under four identical contracts. The sellers used 12 bills of lading, each for 500 tons of cargo aboard *The Elafi*, to satisfy this contract. Total bill of lading quantities for cargo aboard *The Elafi* were for 22,000 tons, but in fact slightly more had been loaded. The bills of lading were negotiated, and the buyers paid against them. They also purchased, from another seller (Frank Fehr), the additional cargo on board, over and above the 22,000 tons. This cargo was not covered by a bill of lading (though nothing turns on that for present purposes).

6.115 The goods were being shipped from the Philippines to Sweden, and at intermediate ports of call during the voyage (Hamburg and Rotterdam) some of the cargo was discharged to other buyers, after which all that remained on the ship was destined for the claimant buyers, albeit under a number of different contracts, from two different sellers. This occurred some time after the bills of lading had been indorsed in favour of the buyers, and payment made.

6.116 At some time later than this some of the cargo was damaged by water entering a hold as the result of the shipowners' negligence. In order to sue in tort, the buyers had to show that property had passed to them by the time the damage had occurred,[177] but, of course, this was before the cargo was discharged.

6.117 Mustill J. held that nevertheless, property had passed before the damage occurred, appropriation occurring by process of exhaustion, without the need of any further act by the seller.[178] There was no additional need for the goods to be appropriated to each of the separate contracts under which the buyers purchased the goods for the property to pass.

6.118 The case was untypical, but it has in any case now been codified in the new rr. 5(3) and 5(4) of s. 18 of the Sale of Goods Act 1979.[179]

174. On which see para. 5.21ff.
175. Working Paper No. 112 (Rights to Goods in Bulk), 1989.
176. *Karlshamns Oljefabriker* v. *Eastport Navigation Corp. (The Elafi)* [1981] 2 Lloyd's Rep. 679.
177. There was also a contract claim, which is not relevant to the present discussion.
178. Mustill J. followed *Wait and James* v. *Midland Bank Ltd.* (1926) 24 Ll. L. Rep. 313; (1926) 31 Com. Cas. 172.
179. See Appendix C.

6.119 In 1995, the Sale of Goods Act was amended, in accordance with the 1989 Law Commission proposals, to allow property in undivided bulks to pass to all the buyers as tenants in common, once the cargo had been paid for.[180] This reform should also enable a bank to obtain a special title as tenant in common. In effect, the law requires now only ascertainment of the entire bulk, rather than of the individual consignments destined for each buyer.[181] There are detailed provisions, in ss. 20(A) and 20(B), dealing with shortfalls and over-deliveries, it being difficult to partition bulk cargoes *exactly*, as between a number of buyers.

6.120 The 1995 amendments therefore resolve most of the difficulties, as far as banks are concerned. Indeed, since the property passes only when the goods are paid for,[182] they also resolve issues about property passing too early, considered above. However, the bulk itself must be defined, either in the contract or by subsequent agreement between the parties.[183] This would clearly apply where the seller sold, to different purchasers, all the cargo on board a specified ship, or where, having purchased afloat such cargo, he appropriated that bulk cargo for the various purchasers. Another situation is where cargo from two or more sellers is loaded on board, and mixed in undivided holds.[184] It seems possible that, on mixture, each seller would become a tenant in common of the entire bulk (though not by virtue of the statute), in which case there would seem to be no difficulty sub-dividing their shares among the various buyers, and arguably at least, the entirety of the cargo on board becomes identified as the relevant bulk for the purposes of the legislation, even though that bulk is made up from the cargo of different sellers.

6.121 We can consider variations on what occurred in *The Elafi* itself. There, all the cargo was originally shipped by the same sellers to a number of buyers, one of whom were the plaintiffs, whose cargo was covered by 12 bills of lading. When the plaintiffs paid, had the 1995 amendments applied, they would immediately have become tenants in common of the entire cargo, in the appropriate share. Eventually, all the cargo that was left on board was destined for the plaintiffs. Part of that cargo, however, the part not covered by the 12 bills of lading, had been sold by the seller to Frank Fehr, Frank Fehr then selling on to the plaintiffs. Had Frank Fehr not sold on, and on the assumption that Frank Fehr had paid the original sellers, Frank Fehr and the plaintiffs would, at this stage, have shared the entire cargo as tenants in common. It is difficult to see why it should make any difference if Frank Fehr had not bought from the original sellers; surely the entirety of the cargo on board the ship would still have been the defined bulk, for the purposes of the legislation.

6.122 If an entire bulk cargo is sold to a single buyer (as often happens with oil cargoes), the cargo is ascertained and the principles discussed in the previous sections apply. Similarly if the cargo is divided, for example by being carried in a number of holds, if the whole of the cargo in the same hold is destined for the same buyer, the cargo is ascertained. In each case, there is no need for the application of the 1995 legislation.

180. Sale of Goods (Amendment) Act 1995. The main amendments are to ss. 16, 18, r. 5 (enacting the result in *The Elafi*), and there are new ss. 20A and 20B. All relevant provisions are set out in Appendix C.

181. Goode, *Commercial Law*, 3rd ed., ch. 8.

182. Sale of Goods Act 1979, s. 20(A)(1)(b).

183. Sale of Goods Act 1979, s. 20(A)(1)(a).

184. As occurred, for example, in *The Dona Mari* [1974] 1 W.L.R. 341.

EQUITABLE PROPERTY

6.123 We have already seen the role of equitable property in the trust receipt.[185] However, apart from situations such as there, where there is an express declaration of trusteeship, the courts have limited the scope of equitable property in international sales of goods, Atkin L.J. in *Re Wait* in particular taking the view that the Sale of Goods Act provisions for the passing of legal title form a complete code, which would be undermined if equitable property were able generally to pass earlier[186]:

> "It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code."

6.124 These sentiments are clearly reasonable where the seller deliberately reserves title, as in *The Aliakmon*, where Lord Brandon approved Atkin L.J.'s view.[187] It would also tend to undermine the security of both sellers and banks, were equitable property to pass in advance of legal, where the seller intends to control the passing of property with the bill of lading. It is true that equity might have had a useful role to play, where legal title cannot pass for a technical reason, as in *Re Wait* itself, where the sale was of part of an undivided bulk. Fortunately, the problems arising from undivided bulk cargoes have now been largely resolved by the Sale of Goods (Amendment) Act 1995, which amended the relevant provisions of the Sale of Goods Act 1979.[188]

6.125 The cases here also suggest a reluctance by the courts to develop equitable property in commercial cases, especially when there is in place an established regime for the passing of legal title. The same sentiments ought to relegate equitable pledges to the margins of international trade law.[189]

WHICH DOCUMENTS?

6.126 In *Lickbarrow* v. *Mason*,[190] it was only the shipped bill of lading that was regarded, by custom of merchants, as capable of passing property. Ultimately, of course, the passing of property is a matter of the parties' intention, and there is nothing to stop them providing for the passing of property to be triggered by the transfer of any document they like, or indeed, by any other event. Professor Treitel has observed that a Christmas card could be used to pass property, should the parties so wish.[191] What applies to a Christmas card applies to any other document, so the parties can, in principle at least, replace the bill of lading with other documents, while still allowing them to be used to pass property.

185. Para. 6.39ff.

186. [1927] 1 Ch. 606, 635–636.

187. *Leigh & Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785, 812H. Also *Re Goldcorp Exchange* [1995] 1 A.C. 74, at 91 A–B (PC).

188. On property in bulk cargoes, see para. 6.110ff.

189. See, however, the discussion in para. 7.102ff., where exceptionally, an equitable pledge was constituted.

190. (1794) 5 Term Rep. 683.

191. Treitel, *The Legal Status of Straight Bills of Lading* (2003) 119 L.Q.R. 608, 617 (a note on the Court of Appeal decision in *The Rafaela S* [2004] Q.B. 702). Also Treitel, *Passing of Property under c.i.f. contracts and the Bills of Lading Act 1855* [1990] L.M.C.L.Q. 1, 2 (note on *The Delfini* [1990] 1 Lloyd's Rep. 252).

6.127 The use of a Christmas card would obviously require express provision, but we have seen that sale contracts typically make no provision on the passing of property.[192] Where no provision is made the law has to draw inferences. For the passing of property, the Sale of Goods Act codifies some of the presumptions that the courts make in the normal case. Thus, for example, applying these presumptions, the courts can say that normally in a c.i.f. contract, property passes on tender of the bill of lading,[193] a conclusion which is based on the presumed intentions of the parties.

6.128 In reality, the parties have probably not given the passing of property any thought at all, and the courts may have nothing more to go on than the way in which they have handled the documents. The courts are now finding intention only in a somewhat general and fictitious sense. They can only use presumptions, one basis for which is trade usage, or in other words the custom of merchants. As we will see in the next chapter, the courts may give effect to a custom of merchants in a particular trade, but only if they have evidence of such a custom.[194] Absent such evidence, the presumptions about retaining and transferring property in para. 6.50ff., including the presumptions in ss. 19(2) and 19(3) of the 1979 Act, will apply a document that is regarded as a document of title at common law, as defined in para. 7.95ff. in the next chapter, the custom of merchants being applicable to such documents, even in the absence of any other evidence.

6.129 The courts are engaged in the exercise of attempting to establish the intention of the parties, who have probably given no thought to the passing of property. The custom of merchants is one basis for forming a presumption. Also, the presumptions in paras 6.50ff. and 6.92ff. are derived from the control that the document gives its holder over delivery. Indeed, we have seen that in cases such as *The Delfini*,[195] where such control is in practice absent (even though the document there was a document of title), the normal presumptions do not apply. Similarly, where a document of title is not used, as in *Kum* v. *Wah Tat Bank*, the courts might be prepared to infer the constitution of a pledge from delivery of the goods themselves, in that case by shipping them. If this analysis is correct, then (assuming no contrary evidence) the presumptions in this chapter apply to a document which controls delivery.

6.130 To this must be added the rider that retention of a document that needs to be presented to obtain a document of title might also give rise to an inference of retention of property. A mate's receipt controls delivery, because normally it should be presented, in order to obtain a shipped bill of lading. It is not a document of title, but the courts accept that the issue of such a document generally binds a carrier to this restriction.[196] It should follow that retention of a mate's receipt, at least if it must be

192. See para. 6.7ff.

193. *Ginzberg* v. *Barrow Haemetite Steel Co.* [1966] 1 Lloyd's Rep. 343, and see above. See also Lord Wright in *Ross T. Smyth & Co.* v. *Bailey Son & Co.* (1940) 67 Ll. L. Rep. 147, 156 (col. 2), cited by Lloyd L.J. in *The Future Express* [1993] 2 Lloyd's Rep. 542, 547 (col. 2).

194. Para. 7.98ff.

195. Para. 6.96ff.

196. In *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* [1938] A.C. 429, Lord Wright said at 445 that "*prima facie* it is the recipient or possessor [of the mate's receipt] who is entitled to have the bill of lading issued to him". In the case itself, the mate's receipt expressly named the buyer as shipper, negating any control that would otherwise have been retained by the seller, who retained the document. See also Treitel (2003) L.Q.R. 608, 617 (note on *The Rafaela S*).

given up in exchange for a bill of lading, could have consequences for the passing of property.[197]

6.131 Whether a particular document must be presented, before delivery is made, usually depends on the terms of the carriage contract. There might be an express term requiring the carrier to deliver only against production of the document.[198] If so, that may have knock-on consequences for the passing of property. If not, then again the courts must work from presumptions, and in the absence of evidence to the contrary, are likely to hold that the only document, that is required to be presented before delivery is made, is a document of title. The common law definition of a document of title remains important in this regard, therefore. But express provision may well be made for delivery against production, for example in a delivery order or combined transport document, and since the Carriage of Goods by Sea Act 1992, these provisions ought to be enforceable against the carrier, by the holder of the document. The document does therefore control delivery, and it is reasonable to draw property inferences from its retention or transfer.

6.132 To sum up then, a common law document of title controls delivery, and it is therefore reasonable to draw inferences about property, from dealings with it. Other documents might also control delivery, perhaps because of an express term in the carriage contract, and if the document transfers contractual rights under the Carriage of Goods by Sea Act 1992 then it is also reasonable to draw similar inferences from dealings with it. Still other documents might also control delivery, albeit indirectly as in the case of a mate's receipt.

6.133 If it is clearly not envisaged that the document used will have a part to play in the delivery process, then no inferences should be drawn from its retention or transfer. In such a case property might pass on delivery of the goods themselves, on shipment, to the person entitled to delivery, at any rate if the seller has been paid, or is assured of payment. In particular, where a document of title is not used, goods may be pledged on shipment if the bank is entitled to delivery, and if the seller has been paid.

197. *F.E. Napier* v. *Dexters, Ltd.* (1926) 26 Ll. L. Rep. 184 is equivocal on whether from retention a mate's receipt could be inferred retention of title, since the mate's (or wharf) receipt was in fact given to the buyers.

198. As in, e.g., *The Rafaela S*, in para. 7.123ff.

CHAPTER 7

THE DOCUMENTS AS SECURITY III: POSSESSION

7.1 Another nineteenth-century development was the idea that the person holding the bill of lading was entitled to constructive possession of the goods. The bill of lading, as a document of title, has been described as the "symbol of the goods", or the "key to the warehouse".[1] Bowen L.J. famously observed in *Sanders* v. *Maclean* that[2]:

> "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo."

7.2 By obtaining symbolic possession, the transferee appears to obtain, in effect, the same rights as a possessor of the goods themselves would possess.[3]

7.3 This is obviously a very important feature of the bill of lading, and the extent to which, if at all, it is shared by other documents, is considered further below.

7.4 Bowen L.J.'s analysis was almost certainly based on the common law bailment and conversion actions, but especially since the Carriage of Goods by Sea Act 1992, bringing with it the increased likelihood of a contractual nexus between holder and carrier, the need for these has been largely superseded by contractual actions and defences. The non-contractual actions are something of a throwback, and it would arguably have been better to bring everything within the contractual regime.

WHAT IS CONSTRUCTIVE POSSESSION?

The concept of constructive possession

7.5 The general idea is that the holder, and only the holder, of a document of title is entitled to possession of the goods. Only the holder may claim those goods from the vessel when they are discharged. This implies that the holder will have an action against the carrier if they are delivered to somebody else, and if the carrier refuses to

1. See, e.g., *Barber* v. *Meyerstein* (1870) L.R. 4 H.L. 317, 330, *per* Lord Hatherley (quoting Martin B. from the court below).
2. (1883) 11 Q.B.D. 327, *per* Bowen L.J. at 341. Precisely what this means is discussed further at para. 7.55ff.
3. Bools, *The Bill of Lading: A Document of Title to Goods*, L.L.P. (1997), at 180–181, attempts to define constructive and symbolic possession, but I would suggest that the courts mean by symbolic possession all those rights that would normally go with actual possession. The right to sue in conversion, for example, would be an example of the type of right encompassed by this expression.

deliver to him.[4] It also implies that the carrier should be entitled to refuse to deliver, except on production of the document of title, and that the carrier is entitled to deliver them to the holder of such a bill. The importance of carrier defences should not be overlooked. If an order bill of lading is issued and negotiated several times, its presentation is evidence to the carrier of the entitlement to the holder of the goods. It is likely to be the best, if not the only, evidence of that entitlement. There is no reason why the carrier should know anything of the dealings in the goods while at sea, and he therefore needs to be able to deliver safely against its production, without being required to enquire further.[5] He must also be allowed to refuse to deliver otherwise, and not to be required to enquire whether the person claiming the goods is indeed entitled to them.

7.6 It follows that the concept of constructive possession must be supported by actions against carriers by holders, but also by defences available to carriers who are acting properly. Constructive possession is defined by these actions and defences, so that where the holder has no cause of action, even if the document is a document of title, it will not in any meaningful sense give him constructive possession.[6] The actions and defences are the subject of the first part of this chapter. Later, we consider which documents can be documents of title, for these purposes.

7.7 In summary, for the holder of a document of title to have constructive possession of the goods implies that all the following conditions obtain:

1. The holder of the document must be able to demand possession from the carrier; the carrier must be under an obligation to deliver to the holder, and must not deliver to anybody else.
2. Nobody else, apart from the holder of a document of title, must be able to demand possession; the carrier should be entitled to refuse to deliver to anybody else.
3. The carrier must be protected from suit if he delivers against production of a document of title, even if the person to whom he delivers does not have title to the goods.

7.8 Though we consider at the end of the chapter which documents can be documents of title, the traditional shipped bill of lading is regarded as such by the courts, and the cases all concern such documents.

Importance of Carriage of Goods by Sea Act 1992

7.9 The Carriage of Goods by Sea Act 1992 has been examined in chapter 5, and it is clearly central to the discussion in that chapter. Its role in this chapter should not be underestimated, however, for it has significantly enhanced the usefulness of documentation in misdelivery actions.

4. The term carrier will be used throughout this chapter. If an action is brought in contract this will be the contracting carrier. If the action is in conversion or bailment then the defendant will normally, but not necessarily, be the contracting carrier. The contracting carrier will usually, but not necessarily, be the shipowner.

5. E.g., *The Houda* [1994] 2 Lloyd's Rep. 541, 552 (col. 2), *per* Neill L.J.; 556 (col. 2), *per* Millett L.J. Similar reasoning was extended to straight bills of lading in *The Rafaela S*, in para. 7.122ff.

6. E.g., *The Future Express*, in paras 7.55ff. and 7.75ff. If the same facts occurred today, there would be an action under the Carriage of Goods by Sea Act 1992.

7.10 Before 1992 it was by no means assured that contractual rights would be transferred, even with the shipped bill of lading, and they would be transferred with other documentation, only to the limited extent that *Brandt* v. *Liverpool* applied.[7] As we will see, bailment actions were probably available usually only to the original shipper.[8] If the carrier refused to deliver, or delivered to the wrong person, the claimant would usually have been thrown back on an action in conversion. Title to sue would have been available to someone who had property at the time of the conversion,[9] but (for example) a purchaser of part of an undivided bulk cargo would not have obtained property until after delivery was supposed to have been made, which would have been too late. It is possible that a holder of a bill of lading, as a document of title to goods, would have had title to sue in conversion, whether or not he also had property at the time of the conversion, but as we will see this is by no means certain.[10] At any rate, holders of documents other than a document of title at common law would have had title to sue, only if they could show title to the goods themselves at the time of the conversion.

7.11 If a conversion action could be established, the carrier would have a defence, only if he had delivered against an original document of title.[11] The definition of a document of title at common law would again have been crucial. He would have been entitled to contractual defences, time bars, etc., only if he could have established privity of contract with the person entitled to the goods,[12] and as we saw in chapter 5 the contractual regime prior to 1992 was patchy to say the least.

7.12 Since 1992 both liabilities and defences are much more easily established in contract. If the 1992 Act applies the issue is simply whether the carrier has delivered in breach of the carriage contract, and if so he will also be entitled to contractual exemptions. We do not need to concern ourselves with the timing of the passing of property, nor on whether the person claiming title holds a shipped bill of lading, or other document of title at common law. Indeed, the relevance of the definition of a common law document of title has been significantly reduced since the coming into force of the 1992 Act.

7.13 A major effect of the Carriage of Goods by Sea Act, then, has been to extend to holders of received for shipment bills of lading and ship's delivery orders possession rights, at any rate in contract, previously only available to holders of a common law document of title. It also extends protection to the person named as consignee under a sea waybill, though in that case possession of the document itself has no legal significance.

PRINCIPLES OF LIABILITY AND DEFENCES

Liability

7.14 In principle, if the carrier delivers other than against production of an original document, or refuses to deliver against it, he is liable to the holder of the original

7. See para. 5.50ff.
8. See para. 7.72ff.
9. Technically conversion protects possession, but property (including special property) will usually confer the necessary possession right. See further para. 7.43ff.
10. Para. 7.55ff.
11. See para. 7.26ff.
12. Established in relation to the Hague-Visby Rules in *The Captain Gregos*, in para. 5.60ff.

document. Note that liability attaches only to misdelivery. It is perfectly acceptable for a shipowner to discharge goods from the ship, as long as he does not deliver them without production. In the meantime, he can, for example, store them in a warehouse to his own order. It seems common for containers to be discharged from the vessel into a container yard, from where they are later delivered. In such cases the shipowner might, upon production of the bill of lading to him, issue a delivery order to the container yard, in favour of the consignee named in the bill of lading.[13]

7.15 Liability for misdelivery will usually be established in contract, the carrier who issues an order or bearer bill of lading expressly or impliedly undertaking to deliver only against its production. Where a consignee is named, the carrier undertakes a contractual liability to deliver to him, also against production of the bill of lading.[14] Under the Bills of Lading Act 1855, contractual liability was not necessarily assured. We saw in chapter 5 that the requirements in s. 1, for the passing of property, often precluded the operation of that Act, but in misdelivery actions there could have been other reasons for failure, on contractual grounds. In *The Future Express*,[15] the bank financing a sale by documentary credit did not obtain the bill of lading until after the goods had been discharged to the buyer, who did not produce the bill. The buyer failed to reimburse the bank, and the bank sued the carrier for misdelivery of the goods. The Court of Appeal held that the carrier had committed a wrongful act by delivering the goods to the buyer, but the bank failed to establish a cause of action, either in contract or anything else. It was conceded that s. 1 of the 1855 Act did not apply, the bank having failed to establish that it had obtained any property in the goods as pledgee on tender to it of the stale bill of lading, property having long before then passed to the buyers. Another reason for failure was that the bill of lading may well have been stale, at the time it was negotiated.[16] It was not clear that the 1855 Act would have applied, where by the time the bill of lading were negotiated, the goods had long been delivered. Had the case been decided under the 1992 Act, the bank would clearly have had contractual cause of action: it was named as consignee in the bill of lading and became holder of the bill, albeit not until after delivery of the goods.[17] Because the bank failed only because it was unable to establish title to sue, the 1992 Act would have reversed the decision in that particular case.[18]

7.16 Since 1992, then, the holder of the bill of lading will usually enjoy the benefit of a contractual action. There may additionally be liability in bailment or conversion. For example, in *The Sormovskiy 3068*, considered below, Clarke J. thought that the carrier would be liable in conversion, as well as breach of contract.[19] (Similarly *Sze Hai Tong* and *Motis Exports*, in the next two paragraphs.) The extent to which, if at all, these common law actions add to the contractual regime is considered below.[20]

13. On the application of contractual clauses to misdelivery after discharge, see para. 7.33ff. On attributing to carriers the state of mind of agents, warehouse operators, etc., see para. 7.43ff.

14. See further para. 7.122ff.

15. [1993] 2 Lloyd's Rep. 542. See also below, paras 7.55ff. and 7.75ff.

16. See further para. 7.84ff., below.

17. The bill of lading would have fallen within s. 2(2), because the bank became holder "by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right of possession ceased to attach to possession of the bill", and under the 1992 Act absence of property would have been of no consequence. The full text of the Act is in Appendix B.

18. Lloyd L.J. recognised the transformation made by the 1992 Act at 546 (col. 1), but he could not apply it retrospectively to the facts before him. This is however subject to a possible time bar, which was mentioned in the case but not decided on.

19. [1994] 2 Lloyd's Rep. 266, 283 (col. 1).

20. See paras 7.43ff. and 7.72ff.

7.17 The principle of liability goes back at least as far as 1889 in *The Stettin*,[21] where the defendant carrier was successfully sued for wrongful delivery. In *The Stettin* the consignee was named, and the main issue was what was the position under German law. However, German law was assumed to be the same as English law. The principle was in any case strongly reasserted, for an order bill, in the Privy Council in *Sze Hai Tong Ltd.* v. *Rambler Cycle Co. Ltd.*,[22] where a shipping company (as carrier) was held liable to the shipper for delivering, against an indemnity but without production of an original bill of lading, to a consignee who had not paid for the goods. The carrier (through his authorised agent), delivered goods without production of a bill of lading, a common practice at the port of Singapore, against an indemnity in his favour, from the consignee's bank. The consignee had not paid the seller for the goods, and the Judicial Committee held that the carrier was liable to the seller/consignor, for breach of contract and conversion.

7.18 In *Sze Hai Tong*, the shipping company knew that it was acting wrongly in delivering without production, but liability was also established in *The Sormovskiy 3068*,[23] where the shipowners believed that they were delivering to the person entitled to take delivery (or rather, his agent). In *Motis Exports Ltd.* v. *Dampskibsselskabet AF 1912, Aktieselskab*,[24] a shipowner, who delivered without production of an original bill of lading, believed the bill of lading tendered to be an original, but it was in fact a forgery. The Court of Appeal held that he was liable to the holder in contract and conversion.

7.19 It does not matter, then, that the carrier believes he is delivering to the person entitled. Indeed, it would still be a breach of contract to deliver to the person actually entitled. In *The Houda*, Leggatt L.J. said that[25]:

"Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession."

7.20 At first instance in *The Future Express*, Diamond J. thought that the shipowners had acted wrongfully, by delivering the cargo, without production of an original bill of lading, even though delivery was made to the owner of the cargo.[26] Had the plaintiffs had title to sue,[27] they would have succeeded in a conversion action.

7.21 Normally, of course, if delivery is made to the person actually entitled to take delivery there will be no loss to the claimant, and hence no damages. However, it is implicit in the statements referred to from *The Houda* that the carrier can refuse to deliver except against production of an original bill of lading. This was the actual

21. (1889) 14 P.D. 142, where the bill of lading was made out in favour of a named consignee or his assigns. See also *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, where, however, the statements of Diplock J. are *dicta*, the issue in the case being when the bill of lading ceased to be a document of title.

22. [1959] A.C. 576. The main issue was whether the shipping company could rely on a contractual exemption clause, on which see also para. 7.33ff. The appellant bank was involved in the action because it admitted liability to indemnify the carrier were the carrier liable.

23. *Sucre Export SA* v. *Northern River Shipping Ltd. (The Sormovskiy 3068)* [1994] 2 Lloyd's Rep. 266. On the facts, the shipowners were held to have delivered to someone not entitled to take delivery, but the decision would have been the same even if the shipowners' beliefs had been true.

24. [2001] 2 Lloyd's Rep. 211 (C.A.).

25. *Kuwait Petroleum Corp.* v. *I. & D. Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep. 541, 553 (col. 1).

26. [1992] 2 Lloyd's Rep. 79, 102 (col. 1). There is no disapproval of this view in the Court of Appeal, where only title to sue issues were taken. See further on this case para. 7.55ff.

27. See paras 7.55ff. and 7.75ff.

decision in the case, and this aspect is discussed further below. Leggatt L.J. continued:

> "It is necessarily implicit in the power to order the issue of bills of lading which make the goods deliverable 'to order' that the obligation is accepted to deliver to the holder upon production of the bill of lading."

7.22 It follows that refusal to deliver to the holder upon production of the bill of lading would also amount to a breach of contract.

7.23 Both Diplock J. in *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise* and Clarke J. in *The Sormovskiy 3068* suggested that there might be limited exceptions to the shipowner's liability, for example where the bill of lading had been lost or stolen, but these *dicta* have since been disapproved by the Court of Appeal in *The Houda*. There are no exceptions to the "simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder of the bill of lading who presents it to him".[28]

7.24 Liability will not attach only for actual misdelivery. In *Motis Exports* the goods were converted when the carrier issued a delivery order, allowing the fraudsters to take delivery (after they had been discharged), without production of a bill of lading. In *Motis Exports* the fraudsters got away with the goods, but in *Trafigura Beheer BV* v. *Mediterranean Shipping Co. SA* the fraud was discovered while the goods were still in the container yard at the discharge terminal.[29] However, because the fraudsters had already presented their delivery order the holders of the bill of lading were prevented from taking delivery from there, being unable to obtain customs clearance. It was accepted without argument that the carrier had converted the goods by issuing the delivery order to the fraudsters, and that this also amounted to a breach of the bill of lading contract.

7.25 It is said that "a shipowner who delivers without production of the bill of lading does so at his peril".[30] It seems that, subject to cause of action issues considered below, and in the absence of an exclusion clause protecting the shipowner, there are no defences to an action by the person entitled.

Carrier defences

7.26 For the bill of lading to operate satisfactorily as a document of title, it is necessary for the carrier to be protected if he refuses to deliver except on production of an original bill of lading, and if he delivers against an original bill, but not to the true owner.

7.27 Authority for the first proposition can be found in Diplock J.'s judgment in *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise*,[31] but the best authority is now *The Houda*,[32] where the shipowners were held by the Court of Appeal justified in refusing to deliver without production of bills of lading on the instructions of their time charterers.

28. *The Sormovskiy 3068* [1994] 2 Lloyd's Rep. 266, 274.
29. [2007] E.W.C.A. Civ. 794.
30. *Sze Hai Tong Ltd.* v. *Rambler Cycle Co.* [1959] A.C. 576, 586 (*per* Lord Denning).
31. [1963] 1 Lloyd's Rep. 81, 88. For the issues upon which the case turned, see para. 7.84ff.
32. *Kuwait Petroleum Corp.* v. *I. & D. Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep. 541. On this case and *The Sormovskiy 3068*, see also Wilson [1995] L.M.C.L.Q. 289.

7.28 The carrier who delivers against an original bill will normally deliver to the person entitled, in which case he takes no risk in so delivering. It is, however, possible for property to become separated from the bill of lading. For example, suppose property passes under the sale contract on shipment, but the bill of lading is retained by the seller. A dispute arises, the seller is not paid, and uses the bill of lading to take delivery. It is important for the carrier to be protected from action from the buyer. Another possibility arises from the practice of issuing original bills of lading in sets of three.[33] If these are separately negotiated (a situation that can realistically occur only where there is a fraud), the carrier can again find himself delivering to a holder, who is other than the owner of the goods. In *Glyn Mills Currie & Co.* v. *East and West India Dock Co.*,[34] the House of Lords held that a shipowner who delivered against the first original bill tendered of a set of three, would be protected against the claim of the true owner (of whose title the shipowner had no notice). In *Glyn Mills* itself, a pledgor pledged only one bill of a set of three, retaining one of the others, which he used to collect the goods, without first having repaid the loan. The House held that the shipowner is protected as long as he delivers against production of any original; he need not require tender of all three, nor need he take steps to enquire whether the holder of the original presented is in fact entitled to take delivery of the cargo.[35]

Indemnities

7.29 Carriers commonly deliver without production, taking an indemnity from the consignee or the charterers (who in the case of an oil cargo, for example, might be expected to know the identity of the ultimate receiver of the cargo).[36] The indemnity is commonly backed by a bank guarantee. Another practice is for the carrier to take an original bill on board, acting in effect as a postman, and delivering against that bill. As long as the goods remain in existence, and identifiable, misdelivery will not affect any property of the lawful holder, who will be entitled to assert it against the party to whom the goods have been wrongly delivered.[37] If not, then the holder will be left only with his personal action against the misdelivering carrier, and a conversion action against the person who has taken delivery.[38] This is, of course, a significantly weaker form of security.

7.30 There is also an issue about the enforceability of the indemnity. There was an indemnity in *Sze Hai Tong*, which was assumed to be enforceable. However, no argument was addressed to the court on this issue, as the bank admitted liability. If, however, the shipowner knew that he was delivering to someone not entitled, an indemnity against what would in effect be theft should be unenforceable as an illegal contract, on the basis of *Brown Jenkinson & Co. Ltd.* v. *Percy Dalton (London) Ltd.*,[39] in para. 5.113ff. The carriers in *Sze Hai Tong* knew that what they were doing was

33. This oft-criticised practice is described in para. 3.26ff.

34. (1882) 7 App. Cas. 591. The action was against a dock company, but the principles are equally applicable to shipowners.

35. *Ibid.*, although Lord Blackburn took the view, at 613, that the shipowner should interplead if he had notice that the parts had been separately negotiated. The juristic basis of the defence is discussed at paras 7.67ff. and 7.91ff.

36. See para. 1.109ff., and also the discussion of standby letters of credit, in para. 2.81ff.

37. The result in *Barber* v. *Meyerstein* (1870) L.R. 4 H.L. 317.

38. See para. 7.43ff. for conversion. The action against the carrier could be in contract, conversion or bailment.

39. [1957] 2 Q.B. 621.

wrong, but did not know, or presumably even suspect, that they were delivering to someone who was not entitled. Probably that would not attract the *Brown Jenkinson* principle. In *The Stone Gemini*,[40] the Australia Federal Court, New South Wales District Registry in Admiralty held an indemnity enforceable on similar facts.

7.31 It might be different had an original bill been carried on the ship. On the assumption that the other originals in the set are left with the shipper, there is little point in doing this unless the other originals were to be negotiated, and then there would be a real risk that the person taking delivery might not be entitled. If delivery were construed as a fraud on any subsequent holder of the other two originals, that would attract the *Brown Jenkinson* principle. *Brown Jenkinson* also demonstrates that merely because a fraudulent practice is common does not lead the courts to looking on it any more kindly.

7.32 In the Australian case *The Stone Gemini*,[41] the bill of lading (by incorporation of charterparty terms) appeared to allow delivery without production, against an indemnity. Tamberlin J., following *The Sormovskiy 3068* (where there had been a similar clause), observed that making provision for a letter of indemnity amounted to an admission that the shipowners would become liable to the lawful holder for wrongful delivery, and the clause could not therefore be used as a defence to a conversion action. In that case the carrier was therefore held liable, but the indemnity was assumed to be enforceable.

Contractual provisions, exemptions, time bars and liability limits

7.33 The issue here is whether the above position can be altered by express contractual provision, and whether a misdelivering carrier is protected by the time bar and liability limits in the Hague or Hague-Visby Rules.

7.34 Misdelivery, and failure to deliver to the person entitled, amount, of course, to a conversion, and also to very serious breaches of the carriage contract, but whatever views held in the past, there is no substantive doctrine of fundamental breach in English law.[42] There are therefore no breaches that are so serious that an exemption clause, time bar or package limitation cannot apply.

7.35 In *The Houda*, there was no express contractual provision entitling the charterers to demand delivery without production of the bills of lading, and one would not be implied from the existence of an indemnity, but Millett L.J. suggested that the position would have been different if there were an express contractual term.[43] This is also consistent with *Sze Hai Tong Ltd.* v. *Rambler Cycle Co. Ltd.*, where Lord Denning observed of shipowners who had delivered without production of a bill of lading that[44]:

> "They are, therefore, liable for breach of contract unless there is some term in the bill of lading protecting them."

40. [1999] 2 Lloyd's Rep. 255, paras 67 ff. The possibility was there discussed of waiver operating against the holder of a bill of lading, who had consented to the goods being delivered without production, against a letter of indemnity, but the evidence did not support waiver: para. 48ff.

41. *Ibid.*, at paras 49 ff.

42. *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827.

43. [1994] 2 Lloyd's Rep. 541, 559.

44. [1959] A.C. 576, 586.

7.36 This implies that they could have been protected by an express contractual provision (although that case also makes clear that very clear words would be required—see further the discussion immediately below).

7.37 Whether any particular clause covers misdelivery depends on its construction, and "the seriousness of the breach is no longer a self-sufficient yardstick for determining whether exception or limitation clauses apply to particular breaches".[45] Having said that, and especially given the seriousness of this particular breach, any exemption clause will be construed very narrowly, and in particular so as not to frustrate the main object and intent of the contract.[46] Moreover, "the contract . . . has, as one of its main objects, the proper delivery of the goods . . . against production of the bill of lading".[47] In the light of that, almost any construction possible will be preferred to one which protects the carrier against the consequences of misdelivery. Thus, for example, the clause in *Sze Hai Tong Ltd.* v. *Rambler Cycle Co. Ltd.*, providing that the responsibility of the carrier should cease absolutely after the goods are discharged "must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery".[48] Even the widest of clauses can be construed as protecting the carrier against accidental damage or even theft, rather than deliberate misdelivery. For example, the clause in *Motis Exports Ltd.* v. *Dampskibsselskabet AF 1912* stated that there should be no liability whatever after discharge for "any loss or damage to the goods while in its actual or constructive possession", and even this was held not to protect the shipowners against the consequences of misdelivery.[49] More recently, the Court of Appeal has also applied a *contra proferentem* construction (i.e., against the party relying on it), to hold that a clause did not protect a misdelivering carrier, in *Trafigura Beheer BV* v. *Mediterranean Shipping Co. SA*.[50]

7.38 Nonetheless, given the absence of a substantive doctrine of fundamental breach in English law, it cannot be true that no clause can possibly protect the carrier against the consequences of this breach. "The exemptions limitations terms and conditions in this bill of lading shall apply whether or not the loss or damage is caused by . . . actions constituting fundamental breach of contract" was suggested by Professor Wilson as providing sufficient protection.[51] With a clause of this width, however, there is a danger that the contract as a whole would be regarded as void, as it is not clear that the carrier has provided any consideration at all, given a freedom to commit fundamental breaches.

7.39 The clauses considered so far are attempts effectively to re-define the contractual undertakings of the parties. The same cannot necessarily be said of time bars and limits to liability, where a more natural (and less restrictive) interpretation might be appropriate. Nor should the doctrine of fundamental breach be re-introduced

45. *Daewoo Heavy Industries Ltd.* v. *Klipriver Shipping Ltd. (The Kapitan Petko Voivoda)* [2003] 2 Lloyd's Rep. 1 at [10].

46. Effectively the line of cases ending with *Motis Exports Ltd.* v. *Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 211. The reasoning is based on *Glynn* v. *Margetson and Co.* [1893] A.C. 351.

47. *Sze Hai Tong Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576, 587.

48. *Ibid.*, at 587, applied in *Motis Exports* at [17]. In both cases the goods had been discharged from the ship before the misdelivery occurred.

49. [2000] 1 Lloyd's Rep. 211. See also para. 7.14ff.

50. [2007] E.W.C.A. Civ. 794.

51. Wilson [1995] L.M.C.L.Q. 289, 298. This particular clause is taken from *The Antwerpen* [1994] 1 Lloyd's Rep. 213, a decision of the New South Wales Court of Appeal.

through the back door. In *The Captain Gregos*,[52] the Court of Appeal held that the time bar in Art. III(6) of the Hague-Visby Rules applied to a short delivery which was probably an actual theft by the carrier. The wording of Art. III(6) is quite wide,[53] discharging the carrier "from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery . . . ".[54] Nonetheless, the case is important in showing that an appropriately worded clause can cover even the most serious breach.[55] Article IV(5), the limitation of liability provision, is perhaps weaker, providing that " . . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding . . . " the appropriate amount. However, a "limitation of liability is different in character from an exception".[56] In *The Kapitan Petko Voivoda*,[57] the Court of Appeal applied the Art. IV(5) limits under the original Hague Rules to carriage on deck, even though the breach exposed the cargo to a significantly increased risk of damage. Perhaps the words are wide enough also to cover misdelivery, though there are no English cases which expressly so hold.

7.40 Attempting to apply Art. IV(5) to misdelivery can give rise to another difficulty, however, where, as is common particularly for container cargoes, misdelivery occurs after discharge. The regime of the Hague and Hague-Visby Rules ends at discharge,[58] though it is fairly clear that the Rules apply at least to the entirety of the loading and discharge process.[59] It is also clear that the parties can, should they so choose, restrict the contractual period, and there may be situations, for example, when shipowners prefer not to undertake discharge obligations at all.[60] Conversely, the parties may, by contractual provision, extend the period of both responsibility and immunities in the Rules beyond discharge. Such an extension can be by express term, but it might also be easy to imply such an extension. This will, however, not avail a carrier where (as is quite common) there is an express clause in the bill of lading, purporting to exclude post-discharge responsibility. The bill of lading in *Trafigura* v. *MSC*,[61] the bill of lading contained the following clause:

"The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and including discharge from the vessel and the Carrier shall not be liable for loss of or damage to the goods during the period before loading onto and the period after discharging from the vessel, howsoever such loss or damage may arise."

7.41 The Court of Appeal took the view that this excluded the possibility of extending the Hague Rules regime, in respect of both liabilities and immunities, beyond discharge. Moreover, interpreting it (and other clauses) in the bill of lading

52. *Cia Portorafti Commericale SA* v. *Ultramar Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310.

53. The full text is in Appendix D.

54. Indeed, it was re-drafted from the original Hague Rules in order to cover misdelivery: Diamond, *The Hague-Visby Rules* [1978] L.M.C.L.Q. 225, 256.

55. Indeed, described by Bingham L.J. as "the most obvious imaginable breaches of Art. III(2)": [1990] 1 Lloyd's Rep. 310, 315.

56. Tuckey L.J. in *The Happy Ranger* [2002] 2 Lloyd's Rep. 357, at [38], on Art. IV(5). On the Art. III(6) time bar see also *The Captain Gregos* [1990] 1 Lloyd's Rep. 310, 315: the wording "means exactly what it says".

57. [2003] 2 Lloyd's Rep. 1.

58. *Trafugura* v. *MSC* [2007] E.W.C.A. Civ. 794, interpreting Art. II (set out in Appendix D).

59. *Pyrene* v. *Scindia Navigation* [1954] 2 Q.B. 402.

60. E.g., *Jindal Iron & Steel Co. Ltd.* v. *Islamic Solidarity Shipping Co. (The Jordan II)* [2005] 1 Lloyd's Rep. 57.

61. [2007] E.W.C.A. Civ. 794.

contra proferentem, it did not protect the carrier against liability for post-discharge misdelivery. Carriers may well be advised to reconsider the drafting of such clauses, to ensure that at least the package limitation in Art. IV(5) can apply to post-discharge misdelivery.

7.42 Even if the Hague-Visby regime ends on discharge, the contractual obligation to deliver the goods to the proper person can remain, and in most of the cases in para. 7.14 there was alternative liability in contract and conversion. Additionally, the obligation not to convert the goods remains, and the carrier might also remain bailee. The issue is not therefore whether the carrier is liable for post-discharge misdelivery, but the basis of that liability, and whether package limitation clauses, etc., apply.

CONVERSION

Conversion

7.43 Historically, conversion was a common law action, the essence of which was denial of the claimant's title. Later, it developed to protect possession, or the immediate right to possession. Assuming title to sue, a conversion action can be brought, should the carrier refuse to deliver, or misdeliver the goods[62]:

> "Conversion is a common law action, tortious in form, imposing strict liability for a wrongful interference with the right to possession of a chattel. It consists of any act of wilful interference, without lawful justification, with any chattel in any manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it."

7.44 The act of interference must be voluntary. Thus, for example, a bulk oil carrier who (because of sedimentation, evaporation, clingage, etc.) fails to deliver to the person entitled all of the cargo received might be liable for breach of contract,[63] or in negligence, but only in the case of theft is he likely to be liable in conversion. However, delivery to the wrong person is usually voluntary,[64] as will be a refusal to deliver to the person entitled. In *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.*, the misdelivery was the act not of the carrier personally, but by his authorised agents at the port of discharge. This did not protect the carrier, because the state of mind of the shipping agents who "deliberately disregarded one of the prime obligations of the contract", could "properly be regarded as the state of mind of the shipping company itself".[65] This was not vicarious liability as such, but an attribution of their state of mind to the defendant carriers. It is not clear how far the principle extends. In *East West Corp.* v. *DKBS AF 1912* the goods had come into the possession of warehouse operators and port agents, who were sub-contractors, by the time they were misdelivered. It seems to have been accepted that a carrier will not have imputed to him the state of mind of authorised agents or sub-contractors, unless he has failed to make appropriate arrangements when sub-contracting. In the event Mance L.J. refused to

62. Accepted without dispute by the parties in *MCC Proceeds Inc.* [1998] 4 All E.R. 675, 686.

63. Argued in *Enichem Anic SpA* v. *Ampelos Shipping Co. (The Delfini)* [1990] 1 Lloyd's Rep. 252, unsuccessfully because title to sue in contract was not established under the Bills of Lading Act 1855. A contractual action would succeed, were the same facts to occur today. See further para. 5.21ff.

64. Unless there has been inadvertent over-delivery of part of a bulk *en route*, as may have occurred in *The Aramis* [1989] 1 Lloyd's Rep. 213, where (as in *The Delfini*) a breach of contract claim failed for lack of title to sue. The decisions in *The Aramis* and *The Delfini* were a major motivation for the change in the law in 1992 (see further para. 5.21ff.).

65. [1959] A.C. 576; [1959] 2 Lloyd's Rep. 114, at 587–588; 121, *per* Lord Denning.

decide whether there was a conversion by the carriers in *East West*, since there was alternative liability in both negligence and bailment.[66]

7.45 Though the act of interference must be voluntary (i.e., intentional), it is not necessary for there also to be an intention to interfere with the rights of the claimant. Hence, in *Motis Exports Ltd.* v. *Dampskibsselskabet AF 1912, Aktieselskab*,[67] liability was established where forged bills of lading were used to obtain delivery orders, and hence delivery to the fraudsters of goods on board the defendant's vessel. It mattered not that the shipowners did not know that the bills of lading were forged, and hence that they were interfering with the plaintiff's rights. It was enough, to establish the conversion claim, only that the delivery was intentional.

7.46 Where goods are misdelivered, both the carrier and the person who has wrongfully taken delivery might be liable in conversion. Though there will usually be alternative liability, in contract and possibly bailment, against the carrier, the only claim against the person who has taken delivery will usually be in conversion.

Relevance of additional conversion action

7.47 In the cases in para. 7.14ff., liability was alternatively in contract or conversion, and the conversion action adds little to the action in contract. With the extension of contract liability in 1992,[68] it will be rare for the person entitled not to have an action in contract.[69] But it is not impossible. For example:

(1) The bill of lading may have been lost, or for some other reason not reached the claimant. In some of the oil cargo cases, the bill of lading never reaches the eventual receiver, or at least not before action is brought.
(2) A document has been used which does not come within the 1992 Act, for example a mate's receipt or a delivery order not coming within the Act. The person entitled to the cargo might still have an action in conversion, should the carrier refuse to deliver to him, or deliver to someone else.[70]
(3) The bill of lading may have been returned to the shipper, where the contractual action has been divested but not re-vested by the 1992 Act.[71] There was no contractual action in *East West Corp.* v. *DKBS*.[72] In that case, an action succeeded in bailment, but in such a case, a conversion action might also be possible.
(4) The cargo-owner could be an f.o.b. seller with either the bill of lading or property or both, but not the shipper and therefore with no contract with the carrier.[73]

66. [2003] Q.B. 1509, in paragraphs concluding at [67].
67. [2000] 1 Lloyd's Rep. 211, in paras 7.14ff. and 7.33ff.
68. See chapter 5.
69. This has not always been the case. In *The Future Express*, in paras 7.55ff. and 7.75ff., there was no contract between plaintiff and defendant, so conversion and bailment actions (both of which in the event failed) were the only possibilities. Today, the claimant in a similar situation would be able to base a claim on the Carriage of Goods by Sea Act 1992.
70. E.g., *Kum* v. *Wah Tat Bank* [1971] 1 Lloyd's Rep. 439.
71. As in *East West* v. *DKBS*, in para. 7.72ff.
72. [2003] Q.B. 1509, noted by Baughen, *Misdelivery and the Boundaries of Contract and Tort* [2003] L.M.C.L.Q. 413. Bills of lading had been indorsed and delivered to banks but the goods had not been paid for. They had been redelivered but not re-indorsed to the claimant shippers.
73. A variation on this theme is *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*, in para. 7.139ff.

(5) Moreover, even where the claimant is lawful holder of the bill of lading, where the cargo has been misdelivered he might also have a conversion action against the person who took delivery. This action would be wholly independent of contract. Any exemptions, limitations or time bars in the carriage contract would be avoided, and the action could certainly be of use, were the carrier in liquidation.

7.48 Though the scope of conversion has undoubtedly been reduced by the expansion of the contractual regime in 1992, it has not been entirely curtailed, therefore.

7.49 Where, however, there is an alternative contractual claim, there is almost certainly no advantage in suing in conversion. Where a claimant in conversion could alternatively sue in contract, rights of suit having been transferred by s. 2 of the Carriage of Goods by Sea Act 1992, it might be thought that in principle, he should be able to sue in tort and avoid contractual exemption clauses, time bars and so on. However, in *Henderson* v. *Merrett Syndicates Ltd.*,[74] Lord Goff approved the following statement of Oliver J. in *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*[75]:

> "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort."

7.50 Clearly, this ought to preclude an action in conversion whose effect would be to avoid contractual exemptions, were the claimant to sue instead under s. 2 of the 1992 Act.

7.51 Nonetheless, there remains a problem where the claimant has no alternative contractual claim. In *The Captain Gregos (No. 2)*,[76] PEAG were intermediate purchasers of an oil cargo, part of which (it was alleged) had been stolen by the shipowners, and hence not delivered. They had no title to sue under the Bills of Lading Act 1855, then in force,[77] and they would have had no title to sue today, had the Carriage of Goods by Sea Act 1992 been in force.[78] Nor were they party to a *Brandt* v. *Liverpool* contract, it being BP, the ultimate receivers, rather than they themselves, who took delivery of the goods. They were, however, able to sue in conversion, independently of both the bill of lading and the carriage contract, their action being based on their title to the goods, which they obtained on shipment of the cargo. There being no contract between themselves and the shipowners, they were able to avoid the time bar in the Hague-Visby Rules, which would otherwise have been applicable.[79]

7.52 *The Captain Gregos (No. 2)* was unusual, in that the action was brought by an intermediate purchaser, who would normally have no interest in suing (because risk passes to the ultimate purchaser as from shipment).[80] Usually, a conversion claim

74. [1995] 2 A.C. 145, 191.

75. [1979] Ch. 384, 522.

76. *Compania Portorafti Commerciale SA* v. *Ultramar Panama Inc. (The Captain Gregos (No. 2))* [1990] 2 Lloyd's Rep. 395. The case arose from the same facts as *The Captain Gregos* in para. 7.33ff. BP, the eventual receivers, also sued, but were held to be party to an implied contract with the carrier: see para. 5.60ff. BP, but not PEAG, were therefore bound by the time bar in the Hague-Visby Rules.

77. Property passed to them on shipment and not upon or by reason of indorsement: see Bingham L.J. at 401.

78. Though their possession of the bill of lading would confer on them contractual rights of suit, these would have been divested on the later transfer of the bill to BP, the ultimate receivers.

79. *The Captain Gregos*, above, para. 7.33ff.; the Hague-Visby Rules operate by incorporation into a contract, and hence not between parties who are not in privity of contract.

80. See para. 1.20ff.

would be more likely to be brought by the eventual receiver. Indeed, BP, as eventual receivers, also claimed in *The Captain Gregos (No. 2)* itself, but having a contract with the shipowners, implied by the *Brandt* v. *Liverpool* doctrine,[81] BP were bound by the contractual time bar. Only an ultimate receiver who never obtained a bill of lading would normally be able, by suing in tort, to by-pass carriage contract exemptions.

7.53 For an intermediate purchaser to have an interest in suing was unusual, but so was the contract in the case. PEAG's contract with BP, the ultimate receivers, was described as a "processing deal".[82] Though it was regarded as a sale, it certainly does not appear to have been an ordinary sale contract, and PEAG retained options to repurchase part of the cargo, after processing by BP. Thus, they could be affected by any losses to it.[83] It was unusual in a second respect, that the alleged conversion (theft of the cargo was alleged against the carrier) occurred early in the voyage, while PEAG retained property; in a more usual misdelivery case, only BP, to whom property passed during the voyage, would have had title to sue, and they were in any case bound by the carriage contract exemptions.[84]

7.54 Perhaps it would be wrong, then, to get too excited about *The Captain Gregos (No. 2)*. Nonetheless, as we saw in chapter 5, there are occasions when the Carriage of Goods by Sea Act 1992 does not apply, and in those cases a conversion action could, at least in principle, be used to avoid carriage contract exemptions. But even where there is privity of contract between cargo-owner and carrier, the misdelivery might not take place during the contractual period. For example, a carrier who misdelivers after discharge might not be liable under the carriage contract, and contractual exemptions and limitations might not apply. The duty not to convert continues to apply after discharge, however, whenever the carrier's duties end.[85]

Title to sue in conversion

7.55 As explained above, conversion protects possession, or the immediate right to possession. The legal owner of goods will usually enjoy one of these rights, though where there is a bailment, conversion may protect the rights of the bailee, rather than the bailor.[86] Title to sue is therefore similar to that in negligence,[87] and in particular,

81. This aspect of the case is discussed in para. 5.50ff.

82. It is described by Bingham L.J. [1990] 2 Lloyd's Rep. 395, 398 (col. 1). The effect of the sale and (optional) buy-back seems to have been to allow BP to process part of the cargo for a fee.

83. An intermediate purchaser would also retain an interest in suing where the price was payable on outturned cargo, not unusual in the oil trade.

84. BP, the ultimate receivers, also sued, also in conversion, but were unable to avoid the time bar because a contract was implied between themselves and the carriers.

85. Para. 7.33ff.

86. This will depend on the terms of the bailment, and in particular on whether the bailment is terminated by the conversion, thereby re-vesting the immediate right to possession in the bailor. The bailor can also have possessory rights where the bailment is terminable at will: see the discussion in *The Okehampton* [1913] P. 173, 182, referred to in the C.A. in *Transcontainer Express Ltd.* v. *Custodian Security Ltd.* [1988] 1 Lloyd's Rep. 128, 134, and *East West Corp.* [2003] Q.B. 1509, [27]. A reversionary owner will have title only if there is damage to the reversionary interest: *Candlewood Navigation Corp. Ltd.* v. *Mitsui OSK Lines Ltd. (The Mineral Transporter)* [1986] 1 A.C. 1; [1985] 2 Lloyd's Rep. 303; Tettenborn "Reversionary Damage to Chattels" [1994] C.L.J. 326.

87. *Leigh & Sillavan Ltd.* v. *Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785, 809; [1986] 2 Lloyd's Rep. 1, 10 (col. 1), *per* Lord Brandon of Oakbrook. Both *The Okehampton* [1913] P. 173 and *Transcontainer* [1988] 1 Lloyd's Rep. 128 were concerned with negligence actions.

a mere contractual right to the cargo is not sufficient.[88] There is, however, one important difference. As we saw in chapter 5,[89] it was held in *The Starsin* that a duty of care in negligence is owed only to the owner of the cargo, or person with an immediate right of possession, at the time of the breach.[90] With a conversion claim, by contrast, it is sufficient for the claimant to obtain title only after the misdelivery has taken place, because the transferee can make a fresh demand on the carrier, who will be unable to set up his own prior wrongful act as a defence.[91] Since most bill of lading holders will, at least eventually, obtain title to the goods, this significantly extends the scope of the action.

7.56 Thus, there will usually be no difficulty when the bill of lading transfers property to its holder, as long as the holder has property at, or after the time the misdelivery occurs. If the transfer of the bill of lading, or other document of title transfers property in the goods, even if only the special property of a pledgee, the carrier who refuses to deliver, or who delivers to someone who is not entitled to delivery, will be liable in conversion. Thus, nearly all buyers, at any rate as long as property passes to them eventually,[92] will be able to sue. A bank which does not obtain special property will not, and may be forced to rely on its contractual action against the carrier (if it has one).

7.57 This chapter began with a very well-known statement, from Bowen L.J., that "the bill of lading operates as a symbolical delivery of the cargo", the reason being that a "cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery", so that during the voyage, "the bill of lading by the law merchant is universally recognised as its symbol". Nor is this an isolated statement. For example, in *Meyerstein* v. *Barber* Erle C.J. said that "the indorsement and delivery of the bill of lading while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do".[93]

7.58 It is possible that these, and other similar statements, refer only to delivery for the purposes of transferring property, whether general or special.[94] Transfer of the bill of lading, in other words, can transfer property under a sale contract, just as delivery of the goods would. It can also constitute a pledge. For example, in *Sewell* v. *Burdick*, delivery of the bill constituted a pledge, transferring to the bank special property and, had the issue arisen, title to sue in conversion.[95] But it is arguable that, if the bill of lading transfers no property, its mere possession adds nothing, on its own. In other words, while its transfer might (for the reasons outlined in the previous chapter) have an effect on rights to the underlying goods, but ultimately it is those rights with which we are concerned, the bill of lading conferring no additional rights, as such.

88. *MCC Proceeds Inc.* v. *Lehman Bros International (Europe)* [1998] 4 All E.R. 675.

89. Para. 5.59ff.

90. Part of the *ratio* of *Homburg Houtimport BV* v. *Agrosin Private Ltd. (The Starsin)* [2003] U.K.H.L. 12; [2004] 1 A.C. 715; [2003] 1 Lloyd's Rep. 571. See in particular Lord Bingham at [39], approving Rix L.J. in the CA: [2001] E.W.C.A. Civ. 56; [2001] 1 Lloyd's Rep. 437, [96].

91. See the explanation of *Bristol & West of England Bank* v. *Midland Railway Co.* [1891] 2 Q.B. 653 in *Margarine Union GmbH* v. *Cambay Prince Steamship Co. Ltd. (The Wear Breeze)* [1969] 1 Q.B. 219, 246; [1967] 2 Lloyd's Rep. 315, 334 (col. 2); also *The Future Express* [1993] 2 Lloyd's Rep. 542, 548–549.

92. But perhaps not if the goods are destroyed after the conversion, but before they obtain property in them.

93. (1866) L.R. 2 C.P. 38, 45.

94. See, e.g., Bools, *The Bill of Lading: A Document of Title to Goods*, L.L.P., 1997, at 178–179, using other passages from *Barber* v. *Meyerstein*, but in the House of Lords: (1870) L.R. 4 H.L. 317.

95. See also *Official Assignee of Madras* v. *Mercantile Bank of India Ltd.* [1935] A.C. 53, 58–59; *Kum* v. *Wah Tat Bank* [1971] 1 Lloyd's Rep. 439, 442 (col. 1).

7.59 There is an alternative wider, and probably more natural, view that one can take of Bowen L.J.'s statement. Delivery of goods always transfers possession, and that with delivery goes sometimes, perhaps even usually, but not always, the general or special property. Possession of the goods can found an action in conversion, whether or not the claimant also enjoys general or special property (it is the right to possession that is protected by a conversion action). Certainly, property and possession can be separated, and the separation of property and possession is implicit in the discussion of the lien cases in para. 6.24. In those cases the seller who has passed property retains possession. In *Ginzberg* v. *Barrow Haemetite Steel Co.* in para. 6.24ff., a seller who retained title allowed the buyers to take possession. Whether he would have had an immediate right of possession, sufficient to found an action in conversion, is another issue, which was not decided. In *The Future Express*,[96] possession and property were discussed separately, implying that possession could have passed, whether or not property had. In the event, however, neither property nor possession had passed to the holder of the bill of lading, who failed in a conversion action against the carrier.

7.60 If, as Erle C.J. said in *Meyerstein* v. *Barber*, delivery of the bill of lading is truly to be regarded as the equivalent of delivery of the goods, possession of the bill of lading should grant the same rights as possession of the goods themselves.[97] Its possession should confer the right to sue in conversion, whatever property rights exist in the underlying goods. On this view a bank (for example) under a documentary credit, which holds the bill of lading has title to sue in conversion, whether or not it also has special property, where the carrier has delivered, without production of a bill of lading, even if delivery has been made to a buyer, independently of any dealings with the bill, but to whom property has passed.[98] (It does not necessarily follow that a conversion action could be brought against the property-owner who had taken delivery without production, since he would be able to assert his own, superior title.)[99]

7.61 Possession of a bill of lading, of itself, conferring title to sue in conversion also gives substance to the view that it gives its holder constructive possession. If its transfer does no more than facilitate the transfer of property, and give defences to carriers,[100] then it seems inappropriate to talk in terms of the bill of lading conferring constructive possession at all.

7.62 The authorities cannot, however, be said unequivocally to lean in favour of possession of the bill of lading, of itself, conferring title to sue. Indeed, their weight is probably against that proposition. In *The Aliakmon*, the House of Lords held that c. & f. buyers, to whom property had not passed, were unable to sue the carriers in negligence for damage to the goods.[101] It must necessarily follow (since the tests for title to sue in negligence and conversion are essentially the same),[102] that they had neither property nor an immediate right of possession, and nor therefore title to sue in conversion. Yet they held the bills of lading, were named in them as consignees, and indeed used them to obtain delivery of the goods.

96. [1993] 2 Lloyd's Rep. 542.

97. This seems to have been the view of Debattista, *Sale of Goods Carried by Sea*, Butterworths (1989), at 29, cited by Bools at 150. A slightly different view was put forward in Debattista's second edition (1998): at [2–07].

98. An unsuccessful argument of the bank in *The Future Express* [1993] 2 Lloyd's Rep. 542.

99. A possible explanation of *Coxe* v. *Harden* (1803) 4 East 211, where plaintiff indorsees failed against the defendant who had come into physical possession of the goods, after their delivery from the ship.

100. Para. 5.59ff.

101. [1986] A.C. 785.

102. See para. 7.43ff.

7.63 The simplest explanation of *The Aliakmon* is that possession of a bill of lading does not, of itself, confer title to sue in conversion, if the holder has neither special nor general property in the goods. However, another explanation is that, on the unusual facts, the consignees held the bills of lading, not on their own behalf, but on that of the sellers. Hence, the right of possession remained with the sellers, who were also the shippers. The original c. & f. sale contract was varied, because the buyers were unable to pay for the goods, having failed to make their intended resale. Lord Brandon observed that the contract had been varied in the following respects[103]:

"First, the sellers, despite delivery of the bill of lading to the buyers, were to reserve the right of disposal of the goods represented by it. Secondly, while the buyers were to present the bill of lading to the ship . . . and take delivery of the goods . . . , they were to do so, not as principals on their own account, but solely as agents for the sellers. Thirdly, after the goods had been discharged, they were to be stored in a covered warehouse to the sole order of the sellers."

7.64 It is possible, therefore, that the buyers in *The Aliakmon*, though in physical possession of the bill of lading, were simply holding it on the sellers' behalf, and were therefore not really holders at all. Suggestions that the person in physical possession of a bill of lading might not be its holder were also considered in *The Ythan* and in *East West* v. *DKBS*, which we have discussed in the context of the Carriage of Goods by Sea Act 1992.[104] In principle, there seems no reason why the person in physical possession of the bill should not be holding it on behalf of someone else (especially if it is a bearer bill), and the cautious approach to separating the holder from the person in physical possession of the bills, justified for reasons of certainty under the 1992 Act, need not necessarily apply here. (However, if this is the correct view of *The Aliakmon*, the buyers would also not necessarily be regarded as holders of the bill of lading were similar facts to arise today, the buyers suing on the basis of the Carriage of Goods by Sea Act 1992.)[105]

7.65 *The Future Express* is another case where the bank under a documentary credit, though holder of the bill of lading, obtained no rights at all against a misdelivering carrier, whether in contract, conversion or bailment.[106] When it took the bill of lading from the seller all parties knew that the goods had already been discharged, and probably consumed. (The bank appears to have been prepared to accept these documents, extending the credit to allow them to be tendered, because it was short of foreign currency, and therefore welcomed the postponement of its own obligation to pay the sellers.)[107] Were similar facts to arise today the bank would be able to use the 1992 Act, but would still have no action in conversion or bailment. One view of this case is that possession of the bill of lading, of itself, confers no rights. But the case may not decide that. Lloyd L.J. accepted only the lesser argument, that since the sellers had neither possession nor right to possession of the wheat, they could not pass any such right to the bank.[108] Clearly the sellers had no actual possession of goods that no longer existed. Since, moreover, they had procured the indemnity used by the buyers to obtain the goods,[109] the inference that they retained no right to possession themselves,

103. [1986] A.C. 785, 808.
104. In para. 5.43ff.
105. Detailed discussion of this issue is beyond the scope of this book, but I have set out the arguments in *The Bill of Lading and Delivery: The Common Law Actions* [2006] L.M.C.L.Q. 539.
106. [1993] 2 Lloyd's Rep. 542.
107. *Ibid.*, at 548 (col. 1).
108. [1993] 2 Lloyd's Rep. 542, 547 (cols 1 and 2).
109. *Ibid.*, at 545 (col. 2).

against the carrier, seems unanswerable. Having no such right, they could transfer nothing to the bank.

7.66 The authorities do not finally decide, therefore, whether possession of the bill of lading confers any rights that are additional to those conferred in the goods themselves. What can be said with certainty is that mere physical possession will not necessarily confer any rights. The person in physical possession of the bill would have had no title to sue in conversion in *The Aliakmon*, and in fact had no such title in *The Future Express*. Even if possession of the bill of lading grants to its holder additional rights, we must enquire whether he holds it on behalf of someone else. In any case, the bill of lading is not a negotiable instrument, and cannot pass to the transferee rights not enjoyed by the transferor. If the transferor holds no right to possession, he can transfer no such right to the transferee.

Defences to a conversion action

7.67 Where the action is in contract, then defences will also be in contract, by express or implied term. Moreover, as long as there is a contract between the parties, a claimant will not be able to sue in conversion, thereby to avoid any defences or limitations otherwise available to the carrier under the contract.[110] Of course, contractual defences will not normally be available in the absence of such a contractual nexus.

7.68 Where the documents are issued, as is commonly done, in sets of three, and the person with the property is also in possession of one of the documents in the set, the carrier will be concerned to defeat a conversion action, should he deliver against production of another document in the set. If the person suing holds another original bill, the carrier might be able to invoke a contractual defence. Alternatively, the doctrine, *volenti non fit iniuria*,[111] would probably apply where it is known by the parties, or is plain from the face of the document, that there are other documents in the set. However, neither defence would necessarily avail against a stranger who had property, but had no document of title.

7.69 For conversion the interference must, however, be wrongful, and without lawful justification. We have seen that in *Glyn Mills Currie & Co.* v. *East and West India Dock Co.*,[112] the carrier was protected from suit, having delivered to someone not entitled, but on production of an original bill of lading. The action was in conversion, there being no contractual nexus, at that time, between plaintiff and defendant,[113] and for the same reason, the carrier's defence cannot have been contractual. The best explanation is that to deliver to somebody who produces a document of title is not to deal wrongfully with the goods, and hence there was no conversion.[114]

110. See the discussion of *Henderson* v. *Merrett Syndicates Ltd.* in para. 7.47ff.

111. To a willing person, no injury is done.

112. (1882) 7 App. Cas. 591. On the rationale that the carrier has not acted wrongfully, see in particular the views expressed by Bramwell L.J. in the C.A. (whose decision was upheld in the H.L.): (1880) 6 Q.B.D. 475, 491. Earl Cairns in the H.L. recommended that a purchaser should take the precaution of ensuring that all parts of the bill were delivered to him: at 600.

113. The plaintiff was a bank with special property. See further para. 7.91ff.

114. See also para. 7.91ff.

7.70 The carrier is also entitled refuse to deliver, except on production of an original bill of lading. In *The Houda*, Millett L.J., reviewing earlier authorities, concluded that[115]:

"[they] clearly establish . . . that under a bill of lading contract . . . the shipowners are obliged to deliver cargo only against presentation of a bill of lading."

7.71 Indeed, *The Houda* suggests that the carrier is not merely entitled, but also obliged to refuse to deliver, other than on production of a bill of lading, and therefore that it is wrongful so to deliver, even to a person entitled to take delivery. It cannot therefore be wrongful to refuse to deliver, and such a refusal should not amount to a conversion. The remarks in *The Houda* reason from the bill of lading contract, but from there is no suggestion that the bases of liability in contract and conversion should differ.

BAILMENT

Relationship between bailment and contract

7.72 When cargo is shipped the shipper is bailor and the shipowner (or other carrier) bailee for reward. The carrier therefore comes under the duties of a bailee for reward. Usually, where there is a contract between the parties, the terms of the bailment will be modified by the contract, and the bailment action will add nothing to that in contract. As with conversion, however, the bailment action may be crucial where there is no contract action. Though it is less likely in the light of the Carriage of Goods by Sea Act 1992, the realisation that the contractual regime is still not exhaustive was brought home, in the Court of Appeal, in *East West Corp.* v. *DKBS*.[116] There, the bill of lading proved to be the key to the warehouse, but only because of a common law bailment action. As we have seen, the shipper had indorsed bills of lading, and hence been divested of a contractual action by s. 2(5) of the Carriage of Goods by Sea Act 1992, and though the bills of lading had later been returned to him, the circumstances were not such as to re-transfer contractual rights to him. Nothing in the 1992 Act divested the shipper of his rights as bailor, however, which continued throughout, and allowed him to sue the carrier for misdelivery.

Reversed burden of proof

7.73 The bailment action will always give the holder an action for misdelivery, or for failure to deliver, but by comparison with conversion, breach of bailment is a far stronger weapon in the holder's hands[117]:

"If the goods are lost or damaged, whilst they are in [the bailee's] possession, he is liable unless he can show—and the burden is on him to show—that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty."

115. *Kuwait Petroleum Corp.* v. *I. & D. Oil Carriers Ltd. (The Houda)* [1994] 2 Lloyd's Rep. 541, 556 (col. 1), approving Diplock J. in *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, 89 (col. 1).

116. [2003] Q.B. 1509, noted by Baughen, *Misdelivery and the Boundaries of Contract and Tort* [2003] L.M.C.L.Q. 413.

117. *Morris* v. *CW Martin & Sons* [1966] 1 Q.B. 716, *per* Lord Denning M.R. at 726.

7.74 Thus, if the goods cannot be delivered, the burden of proof is on the carrier as bailee to show why. Moreover, a bailment action is more generalised than conversion, allowing claims for any loss or damage, not just misdelivery. Breach of bailment can apply to misdelivery before transfer of the document of title, but that is also true of a conversion action.[118]

Who can sue?

7.75 The issue is, for whom is the carrier bailee, since only the bailor can sue? Does a holder of a bill of lading, for example, either by virtue of being a holder or otherwise, become bailor of the goods? There is clearly a bailment by the shipper to the carrier, but unless the carrier attorns, it is not straightforward to find a bailment in favour of a subsequent holder.[119] The carrier may attorn to the holder of the bill of lading when the cargo is delivered,[120] but this is unlikely to occur in misdelivery cases, save those like *The Captain Gregos (No. 2)*, where the allegation is of misdelivery of only part of the cargo.[121]

7.76 Two possible answers have been posed to the attornment problem. One is that it is not needed in bill of lading transfers.[122] The other is that the carrier, by issuing an order bill of lading (or any other document of title), attorns in advance to any subsequent holder.[123] Authorities, however, are no stronger than in the conversion debate, indeed probably weaker. There was certainly no bailment in either *The Aliakmon* or *The Future Express*.[124]

7.77 It must have been part of the *ratio* in *The Aliakmon* that the c. & f. purchasers were not bailees.[125] Lord Brandon observed that[126]:

"The only bailment of the goods was one by the sellers to the shipowners. That bailment was certainly on the terms of a usual bill of lading incorporating the Hague Rules. But, so long as the sellers remained the bailors, those terms only had effect as between the sellers and the shipowners. If the shipowners as bailees had ever attorned to the buyers, so that they became the

118. See para. 7.43ff.

119. For the conventional view, that attornment is necessary, see Baughen, *Bailment's Continuing Role in Cargo-Claims* [1999] L.M.C.L.Q. 393, 396.

120. Treitel, *Bills of Lading: Liabilities of Transferee* [2001] L.M.C.L.Q. 344, 354 (note on *The Berge Sisar* [2002] 2 A.C. 205).

121. In *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep. 395, 406 (col. 2), Bingham L.J. doubted "whether it would be proper to find an attornment on the terms of the bills from the mere fact of delivery to BP [the receivers] without presentation of the bills (and without more)", but saw no reason to doubt that there was an attornment (to BP, not to PEAG) on the additional facts in the case. See also Baughen [1999] L.M.C.L.Q. 393, 397.

122. McMeel, *The redundancy of bailment* [2003] L.M.C.L.Q. 169, 196–198. Also Treitel [2001] L.M.C.L.Q. 344, 354–355.

123. The view originally propounded by Professor R.M. Goode: Goode, *Proprietary Rights and Insolvency in Sales Transactions* (1985), at 6 to 7 and Goode, *Commercial Law* (1982), at 63. Goode takes a weaker position in later editions of *Commercial Law.*

124. The detailed arguments are beyond the scope of this book, but I have set them out in [2006] L.M.C.L.Q. 539.

125. There are inconclusive remarks, apparently to the contrary, by Lord Hobhouse in *The Berge Sisar* [2002] 2 A.C. 205, at [18], but Professor Treitel accorded more weight to this passage than to that of Lord Hobhouse, partly because it was part of the *ratio*: [2001] L.M.C.L.Q. 344, 353.

126. [1986] A.C. 785, 818. A similar view was adopted by Colman J. at first instance in *The Starsin* [2000] 1 Lloyd's Rep. 85, 101 (col. 2), but bailment arguments were not pursued when the case went to the C.A. and H.L.: [2001] 1 Lloyd's Rep. 437; [2004] 1 A.C. 715.

bailors in place of the sellers,[127] the terms of the bailment would then have taken effect as between the shipowners and the buyers. Because of what happened, however, the bill of lading never was negotiated by the sellers to the buyers and no attornment by the shipowners ever took place."

7.78 Clearly this points to a need for attornment to replace the shippers as bailors.[128] Indeed, Lord Brandon seems generally to be unimpressed by an attornment in advance argument, continuing:

"I would add that, if the argument for the buyers on terms of bailment were correct, there would never have been any need for the Bills of Lading Act 1855 or for the decision of the Court of Appeal in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*[129] to which I referred earlier."

7.79 Unlike conversion, a breach of bailment action also covers loss of, or damage to goods. As Lloyd L.J. observed in *The Future Express*[130]:

"[the bank] stopped short of submitting that the consignee could sue the shipowners in bailment for damage to goods in the course of transit. But if [the bank] is right that the consignee can sue in bailment, it is not clear to me why he should not be able to make such a claim. A bailee for reward is as much liable for failing to take care of the goods in his keeping, as he is for misdelivery."

7.80 This would have rendered unnecessary both the Bills of Lading Act 1855 and *Brandt* v. *Liverpool* implied contract doctrine, at least insofar that they gave actions to holders.[131] A similar argument also seems to have influenced Bingham L.J. in *The Captain Gregos (No. 2)*.[132] Moreover, though it was not in force at the time of any of these decisions, the later Carriage of Goods by Sea Act 1992 would also have been unnecessary, at any rate to transfer actions.[133]

7.81 Though detailed discussion of the authorities is beyond the scope of this book,[134] the weight appears to be against anyone but the shipper having an action in bailment, in the absence of attornment by the carrier.

Avoiding contractual terms

7.82 It seems unlikely that bailment actions can be used to avoid contractual terms. In *East West* v. *DKBS* the claimant, as shipper, would have been bound by the terms of the bailment, and hence by contractual exemption clauses. If there is an attornment, it will almost certainly be on the terms either of the original bailment, or on bill of lading terms (these will usually be the same, but need not be, for example as in *The*

127. In place of, not as well as. Hence the transferor, by negotiating the bill, must impliedly accept extinguishment of his own rights. *Cf. East West* [2003] Q.B. 1509, [37]–[39], where Mance L.J. does not accept this as an automatic implication.

128. The reference to, and relevance of, negotiation is unclear, as the buyers were in possession of the bills, and named as consignees.

129. [1924] 1 K.B. 575. See para. 5.50ff.

130. [1993] 2 Lloyd's Rep. 542, 550 (col. 2).

131. They would still have been necessary to impose liabilities. A similar argument had been used for denying a negligence claim in *The Wear Breeze* [1969] 1 Q.B. 219, 242.

132. [1990] 2 Lloyd's Rep. 395, 406 (col. 2).

133. Except in circumstances like *East West* v. *DKBS* [2003] Q.B. 1509, where the contractual action was, but the bailment action was not, transferred to the consignees.

134. See [2006] L.M.C.L.Q. 539.

Gudermes,[135] where the goods were shipped by a charterer, the terms of the charter-party differing from those of the bill of lading). An attornment in advance, if the doctrine is applicable at all, will be on the terms of the bill of lading, and if delivery of the bill of lading can itself change the identity of the bailor, without the need for an attornment, it seems likely that the transferee, if he relies on the original bailment, will also be bound by its terms.[136]

7.83 Another issue is that even if the claimant can also sue in contract, a bailment action reverses the burden of proof, and may to this extent, therefore, be more favourable than the action in contract. This is particularly an issue if the identity of the bailor is transferred without any need to attorn. The bailor will probably nearly always have an alternative contractual action, but the principles in *Henderson* v. *Merrett Syndicates*, while preventing avoidance of exemption clauses, may not prevent a claimant taking advantage of the superior claim in bailment, whether or not an alternative contractual action is available.[137]

STALE DOCUMENTS

7.84 Bools takes the view that the justification for the bill of lading as a symbol ends on delivery, whether the delivery be lawful or not,[138] but the courts fairly clearly take the view that the bill of lading remains a document of title, even when the goods have been delivered, until they are delivered to the lawful owner.[139] This seems correct in principle, since otherwise the carrier would be able to use his own wrongful act (of misdelivery) to evade liability. It has not been decided whether the bill can remain a document of title where although delivery has been made to the true owner, the bill has not been produced; there are, however, good arguments for holding that the bill remains a document of title in these circumstances, since otherwise (for example) a bank under a documentary credit could be unprotected even if it had taken the precaution of obtaining all the bills in the set, because property could (unbeknown to it) already have passed to a buyer who had taken delivery without production of the bill.[140]

7.85 However, these arguments also imply that a carrier can never be safe, if he delivers without production of an original bill, even if he takes an indemnity; as long as bills of lading remain in circulation, he is potentially liable to the holder. Moreover, the prospect of sales of rights of action is opened up, something about which the Law Commission was squeamish in its report leading to the enactment of the Carriage of Goods by Sea Act 1992.[141]

135. [1993] 1 Lloyd's Rep. 311.

136. This was accepted in *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep. 395, 406 (col. 1). However, PEAG did not need to (and indeed could not) rely on bailment, having an independent action in conversion.

137. In para. 7.47ff. Arguably the principles in *Henderson* v. *Merrett Syndicates* do not apply at all to bailment, rather than tort actions, but bailment shares, with the negligent misstatement in the case, dependence on an assumption of responsibility, and there is a strong case for applying the same principles.

138. Bools, *The Bill of Lading: A Document of Title to Goods*, at 193–194.

139. *Barclays Bank Ltd.* v. *Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep. 81. Though the goods there had not been delivered, remaining in the shipowner's custody after discharge, Diplock J. at 88 thought that the bill would become stale only on delivery to the person entitled.

140. This was Diamond J.'s view in *The Future Express* [1992] 2 Lloyd's Rep. 79, 99–100.

141. Law Com. 196, [2.43].

7.86 In any case, the weight of authority is probably against the wider view, and in favour of the proposition that the bill of lading becomes stale, once delivery is made to the person entitled to take it,[142] whether or not he has been required to produce the bill of lading.[143] This is also the position adopted under the Carriage of Goods by Sea Act 1992. [144]

7.87 Though the issue was discussed (at first instance) in both *The Delfini* and *The Future Express*,[145] it did not form part of the *ratio* in either case, so the point remains open. In principle, we need to consider exactly what it means to be a document of title. After all, any document can be used to transfer title to goods, and the issue is whether the courts should imply an intention to transfer property against a document, in the absence of any intention being expressed. The issue is essentially the same, if the bill of lading can also transfer the right to possess the goods, even where no property passes to the holder, though the precise intention might be different. These are issues of intention, on which there may be evidence, either directly of the intention of the parties or of the custom in a particular trade. If there is no other evidence, the matter will be decided by the general custom of merchants, or at any rate what the courts assume the custom of merchants to be.

WHICH DOCUMENTS?

Liabilities

7.88 As we will see, the common law recognises the shipped bill of lading (whether or not made negotiable), and perhaps some other documents, as documents of title. Among the effects of this will be to imply terms into any carriage contract that:

(1) The carrier undertakes to deliver only against presentation of the document.
(2) The carrier undertakes to deliver against presentation of the document (i.e., not to refuse delivery).
(3) The carrier has a contractual right to refuse to deliver except against presentation of the document.
(4) The carrier will also be protected from action in contract, should he deliver against presentation of one original document, having no notice of a conflicting title.

7.89 Similar rights and undertakings will also be implied into the terms of any bailment, and will govern the issue whether the carrier has acted wrongfully, for the purposes of a conversion action. Moreover, because the document of title will thus give

142. E.g., Mustill L.J. in *The Delfini* [1990] 1 Lloyd's Rep. 252, 269 (col. 2). See also the discussion in [2006] L.M.C.L.Q. 539.

143. See also the view taken by the Court of Appeal in *The Future Express*. See also *The Delfini* at first instance, [1988] 2 Lloyd's Rep. 599, where the cargo had been discharged before the bills of lading were transferred to the receiver. It must also be the case that a bill of lading cannot pass property if the goods no longer exist, for example because they have become inextricably mixed, but there is no obvious reason why constructive possession cannot pass.

144. See also *East West* v. *DKBS* at first instance [2002] 2 Lloyd's Rep. 182, [35]–[41], where there is a full discussion of the cases, and in the C.A. [2003] Q.B. 1509, [19]. The claimants' argument, which was rejected at first instance, and not pursued in the C.A., was that there was no need to re-indorse the bills of lading on re-transfer to them, because by that time they were stale.

145. Respectively at [1992] 2 Lloyd's Rep. 79 and [1988] 2 Lloyd's Rep. 599, 608 (cols. 1 and 2).

its holder control over the delivery of the goods, it will also trigger the presumptions about the passing of property, considered in the previous chapter.[146]

7.90 (1) and (2) give rights, against the carrier, to the holder of an original document. In principle, equivalent rights can be given, by way of express terms in any carriage contract, to the holder of any document, whether that document is regarded by the common law as a document of title or not. (The only effect of it being regarded as a document of title at common law is that those terms will be implied, even if not expressed.) As long as the holder of the document is in a contractual relationship with the carrier, he can thereby obtain the benefits of a document of title (and as he will be able to control delivery of the goods, it should give rise to the presumptions about the passing of property, considered in the previous chapter). To ensure the existence of a contractual relationship, ideally the document should be one of those within the Carriage of Goods by Sea Act 1992, considered in chapter 5. However, there is no reason, for example, why a received for shipment bill of lading, and (if within the 1992 Act) combined transport document should not be used in this way, given appropriate express provision. A mate's receipt, however, even if intended to be presented for delivery, would not transfer contractual rights, being outside the 1992 Act, though it might transfer property, and hence the right to sue in conversion.[147]

Defences

7.91 Defences create more of a difficulty. Refusal to deliver to the holder can be provided for by contract, as can the principle in *Glyn Mills Currie & Co.* v. *East and West India Dock Co.*,[148] where the claimant is holder of another original document. In principle, *Glyn Mills* can apply where there is only one original, which (whether by fraud or otherwise) has got into the wrong hands. In this case, the claimant may not be holder of a document at all, and may therefore have no contractual relationship with the carrier.

7.92 In *Glyn Mills* itself, the defence cannot have been contractual. The plaintiff (who as we have seen failed in a conversion action) was a bank with whom a bill of lading had been deposited as pledgee, the defendant having delivered the goods to the holder of another original bill. Two years later, in *Sewell* v. *Burdick*, the House of Lords held that a pledgee holder, such as the plaintiff in *Glyn Mills*, was not in privity of contract with the carrier; therefore the carrier could not have raised a contractual defence. The defence might have been based on the principle of *volenti non fit iniuria* (effectively, a defence of consent). Lord Blackburn observed that the plaintiffs must have been aware that there was more than one bill, since their bill was marked "first" and also bore the words " . . . one of which bills being accomplished, the others shall stand void". Lord Watson's view also seems to depend on the plaintiff's notice, and the form of the bill of lading.[149] This would also be consistent with a *volenti* defence. If that was the basis of the decision, it does not depend on the nature of the document used, but in that case the decision would not apply if the plaintiff were unaware that there

146. Except for ss. 19(2) and 19(3), which explicitly refer only to the bill of lading. However, since these were codification sections, it is reasonable to suppose that they would generalise to any common law document of title.

147. See below, para. 7.139ff.

148. Paras 7.26ff. and 7.67ff.

149. (1882) 7 App. Cas. 591, at 606 and 614.

was more than one original in circulation, nor if the plaintiff had no original document at all.

7.93 The view of Lord Selborne L.C.,[150] depending on mercantile usage, does not suffer from this limitation, and nor indeed does what is perhaps the best explanation of the case. Conversion requires a wrongful act by the carrier, whereas to deliver against production of an original bill, without notice of competing claims, is not wrongful.[151] This explanation provides the carrier with a general protection, whether or not the claimant holds another original document, but it would apply only to documents of title recognised as such, because of mercantile usage, by the common law.

7.94 This is a situation, then, where the common law definition of a document of title remains important.

Which documents are documents of title at common law?

7.95 Though the parties can, with express provision, protect themselves to some extent with other documents, the common law definition of the document of title remains important, where no such provision is made. The definition of a document of title is also of importance for other reasons, for example to trigger the application of the Hague or Hague-Visby Rules.

Shipped bill of lading

7.96 The principles in *Lickbarrow* v. *Mason* applied only to the shipped bill of lading, and not to any other document.[152] Bowen L.J.'s remarks in *Sanders* v. *Maclean*, at the start of this chapter, were not expressly so limited, but he probably also had in mind the shipped bill, since received for shipment bills were not commonly negotiated, even towards the end of the nineteenth century. Equally, it is clear from *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*, in the next section, that a mate's receipt will not generally be regarded as a document of title at common law.[153] It is also clear from *Lickbarrow* v. *Mason* and *Sanders* v. *Maclean*, however, that whether a document is a document of title is a question of fact, depending on the custom of merchants, and is not laid down as a matter of law. It follows that a document which is not a shipped bill of lading may also be held, as a matter of fact, to be a document of title. The extent to which other documents can be documents of title at common law is examined in the following sections.

Some general principles on documents of title

7.97 It will become clear that apart from the shipped bill of lading, other documents can become documents of title on proof of custom. It is not clear whether any other documents are documents of title at common law, without proof of custom. Where proof of custom is relied on, the custom must establish that the document is being used as a document of title. It is necessary to consider, therefore, what in principle we mean

150. *Ibid.*, at 596.
151. Bools, *The Bill of Lading: A Document of Title to Goods*, at 166.
152. See paras 1.10ff. and 6.3ff.
153. [1938] A.C. 429.

when we say that a document can be a document of title. I would suggest that the following principles can be established:

(1) It is part of the essence of a document of title that it can be negotiated, so a non-negotiable document can never be a document of title.[154] Sea waybills cannot therefore be documents of title at common law, nor non-negotiable transport documents. Since the whole point of using a sea waybill is that it does not need to be presented at delivery, its purpose would be entirely negated, were it to be regarded as a document of title.

(2) Since it is of the essence that a document of title can transfer constructive possession and, if so intended, property in the goods, it must be the document which is expected to be negotiated, and against which the goods will ordinarily be delivered. It cannot therefore be a preliminary document, intended to be given up for another document, issued at a later stage, against which the goods will be delivered. This is a ground for distinguishing between a received for shipment bill of lading, which will usually be the last document issued by the carrier,[155] and a mate's receipt, which is usually given up, in exchange for a bill of lading issued later. However, a custom to the effect that a mate's receipt is in reality the last document issued, against which delivery of the goods is usually made, ought in principle to be accepted as evidence of a custom that a mate's receipt is a document of title at common law.

(3) It must also be implied that the carrier has undertaken to deliver only against production of an original document of title. This probably adds little to the previous paragraph, except that the document must also have been issued by or on behalf of the carrier.

Effect of local custom

7.98 The common law pays heed (or at least lip service) to the custom of merchants. The custom of merchants need not be a worldwide custom, so that what is a document of title can vary as between different trades and different parts of the world. In *Kum* v. *Wah Tat Bank Ltd.*,[156] the Privy Council could "see no reason in principle why a document of title should not be created by local custom",[157] and were prepared to accept that even a mate's receipt could in principle be a document of title. Thus the existence of a local custom is sufficient, and it is not necessary to show a worldwide custom. The test was stated by Lord Devlin as follows[158]:

"Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this case applies only to part of the shipping trade

154. The *decision* in *Kum* v. *Wah Tat Bank* [1971] 1 Lloyd's Rep. 439, considered in detail later in this section.
155. Though it might be later annotated on shipment: see para. 3.18ff.
156. [1971] 1 Lloyd's Rep. 439.
157. *Ibid.*, at 443 (col. 2).
158. *Ibid.*, at 444 (col. 1).

within the State of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore."

7.99 The evidence showed that from Sarawak to Singapore between 90 per cent and 95 per cent of the traffic was being carried on mate's receipts, without a bill of lading.[159]

7.100 The custom was that a bill of lading was not issued at all, so that the only document which could be a document of title was the mate's receipt.[160] The usage in the case itself was in accord with the custom. Wah Tat Bank took mate's receipts (naming the bank as consignee) as security, where they advanced credit to the shipper of a cargo. It was envisaged that when the bank was reimbursed, the bank would hand back the mate's receipt endorsed to the shippers so that they could obtain delivery of the goods. It was therefore contemplated that the mate's receipts would in fact operate as a document of title, in the sense that delivery would not take place except against their production, and that no other document of title would be issued for the cargo. It is in this respect that the case differed from *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*, in the following section, where the mate's receipt was envisaged as a preliminary document only. Normally (though this did not happen in *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* itself), a mate's receipt would later be given up for a bill of lading, the latter being used as a document of title. Indeed, given the reasoning in the previous section, had it been usual in *Kum* v. *Wah Tat Bank* for the mate's receipt to be given up for a bill of lading, it is difficult to see how any local custom that mate's receipts were used as documents of title could have been established.

7.101 In spite of the universality and notoriety of the custom, however, their Lordships in *Kum* v. *Wah Tat Bank* refused to hold that the mate's receipt was a document of title in the particular case, because it was marked "Not Negotiable". The parties do not seem to have given much thought to the form of the document, but whether or not these words were really intended to have this effect, the parties were held to the words they had used.[161] It follows from the decision in *Kum* v. *Wah Tat Bank* that any document which is negotiable can become a document of title by local custom, but that a non-negotiable document can never be a document of title. Waybills are therefore never documents of title at common law.

Documents issued before shipment, without proof of custom

7.102 For over 200 years, as we have seen, the courts have recognised that shipped bills of lading are always, by custom of merchants, documents of title, and there is no need to prove a local (or more widespread) custom. Other documents can become documents of title by custom, except for non-negotiable documentation, which cannot become documents of title.

7.103 It is not clear, however, whether any other document, apart from the shipped bill of lading, is always treated as a document of title, even without proof of custom. A mate's receipt is not, and this is clearly correct in principle, given that it is

159. It seems that the custom needs to be established only in one direction; in the opposite direction the percentage was between 75 per cent and 80 per cent. *Ibid.*, at 443.

160. *Ibid.*, at 443 (col. 1).

161. Arguments dependent on form rather than substance seem unsatisfactory, but there is a case for holding commercial people to what they say. See further para. 7.122ff., where there is probably no alternative to a distinction based on form.

usually intended to be merely a preliminary document, to be given up in exchange for a document which might be a document of title. Mate's receipts are not generally required to be presented to obtain delivery, and therefore do not satisfy the tests for a document of title, set out above. Nonetheless, there may be circumstances where they can provide their holder with protection similar to that provided by a document of title.[162]

7.104 The mate's receipt in *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* did not protect its holder, Ramjiban Serowgee, an f.a.s. seller who had retained it against payment, when the buyer defaulted without payment.[163] However, had it been made out in Ramjiban's own name as shipper, the situation might have been different.

7.105 In *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*, the sale contract was expressed to be cash against mate's receipts, and the shipowners had issued mate's receipts to the sellers (Ramjiban Serowgee) when the goods were received alongside ship. These were retained by the sellers, but any inference that the sellers might thereby also have retained property was negated by provision in the contract for a lien. Property therefore passed when the goods were delivered into the shipowner's possession, alongside the ship.[164] Moreover, the mate's receipt stated the name of the buyers (International Export) as shippers, because Ramjiban were not shippers in their own right.

7.106 When the goods were shipped, the shipowners issued shipped bills of lading, against a letter of indemnity, to International Export, without the mate's receipts being given up in exchange. The bills of lading were negotiated to Japanese sub-purchasers further down the chain, to whom the shipowner delivered the goods.

7.107 When Ramjiban Serowgee tendered the mate's receipts to International Export, for payment under the f.a.s. sale contract, International Export defaulted. Ramjiban then turned to the shipowners, but were unable to establish a cause of action against them. As long as the shipowner was entitled to issue the bill of lading, without requiring delivery up of the mate's receipt in return, no complaint could be raised at his delivery to the Japanese sub-purchasers, because the shipowner is clearly entitled to deliver against an original bill of lading. The issue therefore was whether the shipowner should have issued the bills of lading. This would have amounted to a conversion, had Ramjiban retained title, but both property and possession in the goods had passed to International Export, on whose behalf the goods were expressed to be shipped. Ramjiban were left only with a lien on the mate's receipt itself, but although *prima facie* the recipient of a mate's receipt is entitled to have the bill of lading issued to him, here the mate's receipt acknowledged receipt from International Export as shipper, and in those circumstances, the shipowner was entitled (indeed bound) to issue the bills of lading to International Export, rather than to Ramjiban Serowgee.[165]

7.108 Obviously the situation would have been very different, had the mate's receipt been held to be a document of title, but Lord Wright said: "The mate's receipt is not a document of title to the goods shipped."[166] It would also have been different if the sellers had delivered the goods to the ship in their own name as shippers, so that

162. Para. 7.139ff.
163. [1938] A.C. 429.
164. *Ibid.*, at 444.
165. *Ibid.*, at 445–446. See also *Cowas-Jee* v. *Thompson* (1845) 3 Moore Ind. App. 422, 430; 18 E.R. 560, 563, in para. 6.7ff., where f.o.b. sellers also attempted unsuccessfully to protect themselves by having mate's receipts issued to themselves, but where the bills of lading were nonetheless issued directly to the buyers.
166. *Ibid.*, at 445.

the ship would have held the goods on their behalf.[167] But as Lord Wright observed, they delivered the goods as being shipped by International Export, and took a mate's receipt which expressly stated the name of International Export as shippers.[168]

7.109 Though in *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* therefore, the mate's receipt, as a preliminary document only, gave its holder no protection, there would have been an action against the carrier, had the document required the carrier not to issue a bill of lading except against its production. In *Kum* v. *Wah Tat Bank*, the mate's receipt was not intended to operate as only a preliminary document, and had it not been expressly stated to be non-negotiable, would have operated as a document of title.

7.110 A received for shipment bill of lading differs from a mate's receipt in that normally it will be the last document issued, and it may well be a reasonable inference that the carrier undertakes to deliver only against its production. Nonetheless, there are two arguments against regarding it as a document of title, without proof of special custom. First, there is an argument for restricting the range of documents of title, since to the extent that they give rights to their holders, they necessarily prejudice the rights of those who deal in the goods themselves.[169] This injustice cannot arise where it is impossible physically to deal with the goods, for example when they are at sea, but dealings with the goods themselves remain possible as long as they have only been received for shipment. This argues for restricting documents of title to those issued only after the goods have been shipped,[170] but there are two observations to make on this argument. First, it does not relate to the custom of merchants, upon which the common law definition of a document of title rests. Secondly, even though it may be theoretically possible, it might be very difficult in practice to deal with goods even prior to shipment, once they have been received by the carrier, for example if they have been loaded into a sealed container, or while they are on the stevedore's crane, as in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[171] But if difficulty, or impossibility, of dealing with the goods is the test then even a dock warrant could become a document of title.

7.111 The test should be the custom of merchants, rather than the theoretical possibility of trading with the goods themselves, in the absence of any document. But what custom? It can only be that delivery is made only against its production, and that a carrier is entitled to deliver against its production, without making further enquiries. The custom need be applicable, only if such a document is issued. It cannot be an argument, for example, that there remain trades, such as bulk dry cargo and bulk oil, where shipped bills of lading remain universally used. Clearly no custom could be established there, simply because received for shipment bills are not used at all. But if that were the test, then on precisely the same argument (that there remain trades where they are not used) the straight bill of lading also could not be a document of title at common law, yet as we will see, the House of Lords has now so recognised it.[172] The test must be, if the document is issued, is there a custom that delivery is made only against it?

167. *Ibid.*
168. *Ibid.*
169. Treitel, *Legal status of straight bills of lading* (2003) 119 L.Q.R. 608, 622 (note on *The Rafaela S*).
170. Carver, on *Bills of Lading*, 2nd ed. (2005), at [6-030].
171. [1954] 2 Q.B. 402.
172. Para. 7.122ff.

7.112 There would seem to be two arguments against recognising the received for shipment bill as a document of title, without proof of a custom. The first is, as is clear from the discussion in *Ishag* v. *Allied Bank*, below (in this section), that received for shipment bills are sometimes used like mate's receipts, and exchanged for shipped bills of lading, rather than being used directly to take delivery of the goods. Secondly, there is no clear notion of what constitutes a received for shipment bill. It may clearly state that the goods have been received for shipment aboard a particular vessel, or it may leave the carrier with a discretion as to the identity of the vessel (see further below). It may state that the carrier has received the goods personally, or it may merely state receipt by an agent. It must be more difficult to recognise a worldwide custom where the document itself can admit of so wide a variation, though, of course, a custom may well be established in particular trades.

7.113 The authorities are inconclusive on the issue of received bills of lading. In *The Marlborough Hill*,[173] the Judicial Committee of the Privy Council observed that "it is a matter of commercial notoriety" that received for shipment bills are used in place of shipped bills, and are called bills of lading. Moreover[174]:

"There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion or quay, or his storehouse awaiting shipment, and his acknowledging that the goods have actually been put over the ship's rail. The two forms of bill of lading may well stand, as their Lordships understand that they stand, together."

7.114 Lord Phillimore went on[175]:

"The older is still in the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas 'received for shipment' is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage."

7.115 Taken together, it seems to have been found that in certain trades at least, received for shipment bills are used in place of the "older" shipped bill, that these are called bills of lading, and that there can be no difference in principle between these and the traditional shipped bill. There is no finding of a general custom of merchants, that received for shipment bills are used as documents of title, delivery being made only against their presentation.

7.116 In the event, the Judicial Committee held that a received for shipment bill was a bill of lading for the purposes of the Admiralty Court Act 1861, s. 6, which related to the jurisdiction to arrest a vessel. The bills of lading merely stated that goods had been "received for shipment by the sailing vessel *Marlborough Hill*, or by some other vessel owned or operated by" the same operators.[176] They did not state that the goods had been "shipped on board", nor indeed did they restrict the shipowner to a particular ship. The case did not decide that such a bill of lading was a document of title at common law, though Lord Phillimore was not disposed to distinguish in principle between shipped and received for shipment bills of lading, even where the

173. [1921] 1 A.C. 444; (1920) 5 Ll. L. Rep. 362. This case was, however, criticised in *Diamond Alkali*, below.

174. Although this was not clearly stated. The quote is taken from [1921] 1 A.C. 444, 451.

175. *Ibid.*

176. *Ibid.*, at 450.

carrier had power to substitute another vessel. Moreover, there is at least an implication that these were bills of lading within the Bills of Lading Act 1855,[177] suggesting (perhaps) that the custom of merchants had extended to their use as documents of title by 1855.

7.117 By contrast, in *Diamond Alkali Export Corporation* v. *Fl Bourgeois*,[178] also discussed in chapter 4,[179] McCardie J. drew a clear distinction between shipped and received for shipment bills of lading. The *ratio* of the case is only that the particular bill of lading, which stated only that the goods had been received for shipment aboard *SS Anglia* or upon a following steamer,[180] was not good tender under a c.i.f. contract, despite the form being of frequent use at American ports. The conclusion is unremarkable in that a c.i.f. buyer needs evidence of shipment by the seller, but McCardie J. went further, taking the view that the custom stated in *Lickbarrow* v. *Mason* was limited to the shipped bill, a custom which was still operative, and indeed expressly recited, in the Bills of Lading Act 1855.[181]

7.118 Though McCardie J. does not expressly state that a received for shipment bill of lading is not a document of title at common law, that is quite a strong inference that can be drawn from his judgment. Certainly, he thought that the custom of merchants had not extended to the particular bill of lading before him, at the time of *Lickbarrow* v. *Mason* or the 1855 Act. Of course, the test ought to be one of commercial custom today, not as it was in 1794 or 1855, but I have already suggested that such a custom could not be established even today, except in particular trades.

7.119 The issue arose directly for decision in *Ishag* v. *Allied Bank International*,[182] where Lloyd J. followed *The Marlborough Hill*, assuming that it had found a custom of merchants regarding received for shipment bills. The shipper had indorsed a received for shipment bill to a bank for an advance. However, the same shipper, who had sold the same cargo to two buyers, was later issued a shipped bill of lading in respect of it, without being required to deliver up the received for shipment bill.[183] The holder of the first bill sought to enforce his security, and the question therefore arose directly whether he had a document of title.

7.120 Lloyd J., applying *The Marlborough Hill*,[184] held that the received for shipment bill was a document of title, capable of passing property and constructive possession to its holder.[185] He clearly assumed that (even without proof of custom) a received for shipment bill was a document of title, even without proof of custom, and that the only issue here was whether this bill of lading was indeed equivalent to a received for

177. *Ibid.*, at 451.

178. [1921] 3 K.B. 443. The buyers were also entitled to reject because a certificate of insurance was tendered, not an assignable policy. See para. 4.116ff.

179. Para. 4.73ff.

180. The form of the bill of lading is set out at 446. It did not even identify the vessel conclusively: see also 451.

181. [1921] 3 K.B. 443, 450. See further chapter 4 on the Bills of Lading Act 1855.

182. [1981] 1 Lloyd's Rep. 92.

183. Obviously this should not have happened. The circumstances were examined in more detail in later proceedings arising out of the same facts: *Elder Dempster Lines* v. *Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep. 548, 551–552.

184. But not mentioning the criticisms of that case in *Diamond Alkali.*

185. In the later proceedings, no issue was taken on this point, but it was reserved if necessary for the Court of Appeal: [1983] 2 Lloyd's Rep. 548, 550 (col. 2). There were also a number of other issues in both *Ishag* cases, which are not relevant to the present discussion.

shipment bill,[186] acknowledging as it did no more than that the goods were at the disposal of the vessel's agents (though it also stated the name of the intended ship). The issue, in Lloyd J.'s view, was whether this made any difference, and he held that it did not. It was therefore appropriate to follow *The Marlborough Hill*. However, this was not part of the *ratio* of the case, since Lloyd J. also held that the deposit of the documents constituted an equitable pledge, even if the received for shipment bill of lading was not a document of title.[187] This was not defeated by the subsequent sale, as legal title under the second sale had not passed to the purchaser.

7.121 The authorities, then, two at first instance and one in the Privy Council, are not by any means conclusive. What is clear, however, is that received for shipment bills of lading come in many different flavours, and are sometimes used only as preliminary documents. That being so, it is surely difficult to regard them as documents of title without proof of custom. Probably there will, however, often by proof of custom within a particular trade. Even where there is not, where for example all that can be proved is that a shipped bill of lading will not be issued in respect of the same cargo, without the received for shipment bill being surrendered:

(1) They come within the Carriage of Goods by Sea Act 1992, so that a carrier who later issues a shipped bill without such a surrender will be liable in contract to the holder of the received for shipment bill.
(2) Statements in received for shipment bills should be capable of giving rise to estoppels just as those in shipped bills.
(3) Since the received for shipment bill controls (albeit indirectly) the delivery of the cargo, inferences might properly be drawn, as with a shipped bill, that its retention also retains property.

7.122 In many circumstances, therefore, received for shipment bills will provide security no worse than the "older" form of shipped bills.

Straight bills of lading

7.123 The straight, non-negotiable, bill of lading is not made out to order but names a consignee. This document can be transferred once only, to the consignee. The Carriage of Goods by Sea Act 1992 treats it as a species of waybill, not a document of title.[188] However, in 2005 the House of Lords held, in *The Rafaela S*, that a straight bill of lading was a document of title, to trigger the application of the Hague-Visby Rules.[189] Although it was not necessary for the actual decision, the House also appears to have granted it the status of a document of title at common law, because the consignee must produce it to obtain delivery of the cargo. One reason was to allow the document to secure sellers against non-payment, a contrast therefore between straight bills of lading and sea waybills. The conclusion that the straight bill of lading is a

186. [1981] 1 Lloyd's Rep. 92, 97 (col. 2)–98 (col. 1). If the sentiments expressed in this passage are correct, then presumably a bill in this form would also be a received for shipment bill for the purposes of the Carriage of Goods by Sea Act 1992 (on which see further chapter 5).

187. See para. 7.129ff.

188. These provisions are, of course, concerned with the transfer of contractual rights and duties, and not with delivery of the cargo.

189. *J.I. MacWilliam Company Inc.* v. *Mediterranean Shipping Co. SA (The Rafaela S)* [2005] 2 A.C. 423, [2005] U.K.H.L. 11. On the application of the Hague-Visby Rules, triggered by the contract of carriage expressly or by implication providing for the issue of a bill of lading or any similar document of title, see para. 3.61ff.

document of title at common law raises issues, however, not least in distinguishing it from a waybill. A waybill is not a document of title, and does not have to be presented to take delivery. Indeed, that is precisely why it is so commonly used.[190]

7.124 Once it is accepted that a straight bill of lading does, and a waybill does not, have to be presented to obtain delivery of the goods, it is clearly necessary to be able to distinguish between them.[191] In the House of Lords, great regard was had to the form of the document.[192] This was a bill of lading, and not a waybill, because it said so, on the face of the document. In the case itself, an attestation clause required production of the document in order to obtain delivery, and the document was issued in three originals, something which would not have been necessary, had its presentation not been necessary. However, it is clear that the same conclusion would have been reached, even in the absence of the attestation clause,[193] and it seems difficult to believe that the status of the bill of lading would depend upon it being issued in more than one original. The conclusion has to be then, this document was a bill of lading, and not a waybill, because it said so.

7.125 Though arguments of form can appear unattractive, it is perhaps reasonable to suppose that commercial people mean something by their choice of words. In *Kum* v. *Wah Tat Bank Ltd.*,[194] as we saw above, the Privy Council held that a document, which otherwise had all the characteristics of a document of title, could not be, because it was marked "non-negotiable". The courts will also give effect to words like "to order" or "to bearer". The courts appear to pay great regard to the form of a document,[195] unless of course there are inconsistencies within it.[196]

7.126 The reasoning was (essentially) that the document was a document of title because it had to be produced in order to obtain delivery of the goods. In the particular document before them, this was required by the attestation clause, and in any case, a set of three was issued, which would have been quite unnecessary had production not been necessary to obtain delivery.[197] However, the reasoning in the case appears to apply more generally, to any straight bill of lading. It was said that the carrier may need production of the bill to ascertain the identity of the consignee, and that the seller of goods, who obtains a straight bill of lading, may wish to hold on to the bill as security for payment of the price.[198] This justifies the requirement for production of the bill, and the conclusion that it is a document of title (at least in Lord Bingham's view, and probably also Lord Steyn's) follows from this.

7.127 The House of Lords is adopting a link: a document of title has to be presented to obtain delivery of the goods, and the converse also, that a document which has to be presented to obtain delivery of the goods, is a document of title. The link has been criticised,[199] and I suggest it necessary to add at least that a carrier who

190. See para. 3.51ff.
191. An issue discussed by Treitel, (2003) 119 L.Q.R. 608, 614.
192. E.g., Lord Bingham, [2005] 2 A.C. 423, at [5].
193. *Ibid.*, at [20].
194. [1971] 1 Lloyd's Rep. 439, 445.
195. E.g.: "While it is true that a BL, devoid of the characteristic of negotiability, is substantially similar in effect to that of a sea waybill, that is not to say that they are the same. If the parties had intended to create a sea waybill they would have done so": *Voss* v. *APL Co. Pte Ltd.* [2002] 2 Lloyd's Rep. 707, at [48].
196. As in *Homburg Houtimport BV* v. *Agrosin Private Ltd.* [2004] 1 A.C. 715, cited by Lord Bingham, [2005] 2 A.C. 423, at [6].
197. E.g., [2005] 2 A.C. 423, [2005] U.K.H.L. 11, at [45] (Lord Steyn).
198. *Ibid.*, at [6] (Lord Bingham).
199. Treitel, *The Legal Status of Straight Bills of Lading* (2003) 119 L.Q.R. 608, 612.

delivers against its production is protected. The link only works, in any case, if the reasoning extends beyond the particular bill of lading, to straight bills of lading in general; it does not follow at all that merely because a document makes express provision for delivery only against its production, it is a document of title. Why should a straight bill of lading generally be regarded as a document of title? In the absence of particular evidence, it can surely only be because a worldwide custom of merchants is so recognised. What would be the effect of the custom? That the document must be presented for delivery, and that the carrier is entitled to deliver against its production.

7.128 It cannot be said that the House of Lords reasoned explicitly on the basis of the custom of merchants, and conclusions based on evidence that shippers use such documents as security, much as they would an order bill of lading, have been criticised.[200] Nonetheless, Lord Rodger was concerned to "reflect commercial usage" in *The Rafaela S*,[201] and the custom of merchants might in reality justify the decision. It would be necessary, of course, unlike the received for shipment bill, to find reasonable uniformity of custom. It should not be sufficient that sometimes it is, and sometimes it is not required for presentation.

Equitable pledge

7.129 In *The Future Express* at first instance, the possibility was considered that the person with legal title (in that case the buyer) might contract to transfer a security interest to the bank when the documents reached the bank.[202] Equity treats as done that which ought to be done, and so the arrival of the documents would constitute the pledge. The bank would thus obtain a security interest, at least by way of equitable property. This might, in principle, enable the bank to obtain a security interest, even where property has passed to the buyer before documents are tendered to the bank. However, there is nothing in *The Future Express* to suggest dispensation with the requirement that documents of title must reach the bank, even to constitute the equitable pledge. Since in *The Future Express*, by the time the documents arrived the goods had been discharged and dispersed, there was by then no property capable of constituting the pledge. In any case, equitable property depends on equitable remedies being available to enforce the contract, and in sale contracts at least, the courts have shown great reluctance to allow a separate structure of equitable rights to be established, inconsistent with, and more extensive than common law rights.[203] The equitable pledge argument was not pursued in the Court of Appeal in *The Future Express*, and it cannot be assumed that the argument would work, even in principle.

7.130 In any case there is nothing in *The Future Express* to suggest that even an equitable pledge will be constituted without the transfer to the bank of a document of title. In *Ishag* v. *Allied Bank*,[204] on the other hand, it was conceded that the tender of the received for shipment bill might constitute Allied equitable pledgees, whether or not it was a document of title. However, the document was either intended to be the

200. The conclusions as to customary usage (for straight bills of lading and waybills), of the Court of Appeal in *The Rafaela S* [2004] Q.B. 702, were criticised, as factual conclusions, by Treitel, (2003) 119 L.Q.R. 608, 615 *et seq.*
201. [2005] 2 A.C. 423, [2005] U.K.H.L. 11, at [64], defining a bill of lading.
202. [1992] 2 Lloyd's Rep. 79, 90.
203. Para. 6.122ff.
204. Para. 7.102ff.

document against which delivery was to be made, or if not, a document which would need to be given up before a shipped bill of lading could be issued. For the owner of goods to transfer such a document might well be taken as an irrevocable commitment to transfer legal title were the document given up for a later document of title. Either the document was a document of title, therefore, or it was the document, possession of which was required to obtain the document of title. *Ishag* v. *Allied Bank* is authority, albeit not very strong authority (because the point was conceded), that such a document can be used at any rate to constitute an equitable pledge. But there is a case for inferring that inferences about the transfer of legal title could also be inferred from dealings with such a document.[205]

7.131 It seems unlikely, then, that the equitable pledge will affect the principles in this chapter, or in chapter 6.

Other documents

Delivery orders

7.132 We have seen the distinction between types of delivery order, and the requirements for tender under c.i.f. contracts.[206] It is of the essence of a ship's delivery order that the carrier undertakes to make delivery to its holder, so like a bill of lading, a ship's delivery order confers on its holder a contractual entitlement to take delivery against its production, an entitlement which is generally enforceable given that ship's delivery orders are included within the scheme of the Carriage of Goods by Sea Act 1992.[207] Since the reforms to the Sale of Goods Act in 1995 property can pass, even in undivided parts of bulk cargo.[208] Whether or not a ship's delivery order is a document of title at common law, it controls the delivery process, and therefore the property presumptions in paras 6.50 and 6.92 ought to apply to it.[209] It should be capable of passing property to its holder, and indeed it is difficult to see that the holder of a ship's delivery order stands in any different position from the holder of a bill of lading, for part of an undivided bulk cargo.

7.133 Where the delivery order is a ship's delivery order because of an attornment by the carrier, the carrier will be bailee for the holder, entitling the holder also to sue in bailment, in the event of a misdelivery. The attornment is likely to be on bill of lading terms, so this is unlikely significantly to alter the holder's position, by contrast with a contractual action.

7.134 A delivery order other than a ship's delivery order is simply an order to the carrier to deliver, probably to the person who has the document. It might be issued by the holder of the bill of lading, but since it contains no undertaking or attornment by the carrier, it confers no enforceable rights against the carrier. Such a document is of little value, in legal terms.

7.135 In *Colin & Shields* v. *W. Weddel & Co. Ltd.* in chapters 3 and 4,[210] a delivery order was issued by a carrier who was no longer in possession of the cargo. It conferred

205. See para. 6.125ff.
206. Respectively paras 3.28ff. and 4.97ff.
207. Para. 5.28ff.
208. Para. 6.110ff.
209. Apart from Sale of Goods Act 1979, ss. 19(2)–(3), which on their terms apply only to bills of lading.
210. [1952] 2 Lloyd's Rep. 9, and see paras 3.28ff. and 4.97ff.

no rights against the local carrier who was in possession, and for this reason, it was not acceptable tender under a c.i.f. contract. Because they were no longer in possession, an attornment by the shipowners would have been of no value, though an attornment by the local carrier might have been. Presumably, however, there is no reason why the shipowner cannot undertake to deliver to the holder, effectively sub-contracting the local stage (in that case from Manchester to Liverpool), just as with a through bill of lading.[211] The concept of the through delivery order has not been tested, however.

Waybills

7.136 Under a waybill the carrier does not undertake to deliver, only against presentation of the document, but to the consignee named in the waybill. The shipper can alter the identity of the consignee, unless the carriage contract evidenced by the waybill prohibits this. The delivery obligations are contractually enforceable by the named consignee, by virtue of the Carriage of Goods by Sea Act 1992.[212] The carrier should obviously ensure that a waybill and bill of lading are not issued for the same cargo. It is not clear what the carrier's position would be, were he to deliver to the consignee named in a waybill, when he was not in fact the person entitled to the property. Arguably he has not acted wrongfully in carrying out his contractual obligations, and clearly he should not be liable to the shipper, who has named the consignee in the first place. If on the other hand the shipper was not himself originally the owner of the cargo, it is difficult to see how delivery under a contract with him could provide a defence to a conversion action, by the true owner.

7.137 Because possession of a waybill has no legal implications there is no call to presume anything about property from its retention or transfer, but we saw in para. 6.14ff. that dealings with the goods themselves can sometimes lead to property being transferred to the consignee. The consignee under a waybill can therefore obtain useful rights, as extensive as those of the holder of a bill of lading.[213] But since the transfer of the document has no legal consequences, it is difficult to see how a seller can retain property until he is paid, transferring it only against payment. In this respect the waybill is inferior to the bill of lading.[214]

7.138 The pressure to replace bills of lading with waybills has to a large extent come from the transport community, and obviously they avoid the problems of the bill of lading not being available by the time the goods arrive. Because a document will not be presented, however, it is important that the carrier can effectively establish the identity of the consignee who claims entitlement to the goods.[215]

Mate's receipts

7.139 A mate's receipt is usually a preliminary document only, and not a document of title. Sometimes it can become a document of title by trade custom, including a local custom, in which case the principles of this chapter, and the presumptions in paras 6.50ff. and 6.92ff. should apply to it. It probably will not give contractual rights to its

211. Para. 3.21ff.
212. Para. 5.28ff.
213. See para. 3.51ff.
214. See the discussion in para. 7.123ff.
215. See para. 3.51ff.

holder, however (unless he is the original shipper),[216] so any delivery rights conferred will be based on the conversion actions in para. 7.43ff. (and if they apply to holders of documents of title, bailment in para. 7.72ff.).

7.140 When the mate's receipt is being used as a preliminary document only, it is usually given up in exchange for the bill of lading, and *prima facie* the holder of the mate's receipt is entitled to the bill of lading.[217] The carrier is expected, on issue of the bill of lading, to check the accuracy of statements made in the mate's receipts, and not blindly to sign the bill of lading, based only on the seller's assurances.[218] Because the holder of a mate's receipt is *prima facie* entitled to have the bill of lading issued to him, possession of a mate's receipt can therefore control (albeit indirectly) ultimate entitlement to delivery. It is at least arguable, therefore, that its retention and transfer can have property consequences (and of course there is nothing to stop transfer of the mate's receipt, or indeed any other document, being used to transfer property, should the sale contract so provide).[219]

SOME CONCLUSIONS

7.141 Because of the changing nature of international trade, the parties are moving away from traditional forms of documentation. The issue is, whether the security offered by the newer forms is equivalent. From a security viewpoint, the rights and defences considered in this chapter are probably the most important.

7.142 The Carriage of Goods by Sea Act 1992 made a tremendous difference to the viability of alternative documentation. If a document, such as a received for shipment bill of lading or (possibly) multimodal transport document, or a ship's delivery order, makes express provision for delivery, then these contractual provisions can (generally) be enforced by the holder against a carrier, whether or not that document is also a document of title. In the absence of express provision, delivery terms can be implied. This is likely to depend either on the custom in a particular trade, or on the custom of merchants generally, but in respect of the latter, the courts do not seem definitely to have recognised a custom regarding any document other than the shipped bill of lading.

7.143 If a document can be used to control delivery, then the inferences drawn in the last chapter, about reservation of title from dealings with the bill of lading, might also apply to the document concerned, again whether it is or is not a document of title. This should be true even if the document concerned controls delivery only indirectly. For example, a mate's receipt will not be a document of title in the absence of a trade custom to that effect, but if the carrier is required to issue a bill of lading only against its production, then retention of a mate's receipt effectively (albeit indirectly) controls delivery of the goods. In principle, the same inferences about property can be drawn from its retention as can be drawn from retention of a bill of lading itself.

7.144 From the viewpoint of traders and banks, then, the movement away from documents of title need not be disastrous in terms of security (though sellers are less

216. Because it is not a document within the 1992 Act: see para. 5.28ff.

217. Any such *prima facie* inferences were, however, negated in *Nippon Yusen Kaisha* v. *Ramjiban Serowgee*, in para. 7.102ff.

218. Para. 5.89ff.

219. The only authority, *F.E. Napier* v. *Dexters Ltd.* (1926) 26 Ll. L. Rep. 184, is equivocal.

well protected by documents other than documents of title).[220] From the carrier's viewpoint the situation is less satisfactory. He needs to be able to deliver against a document, in the knowledge that he will be protected if he does so. After all, the document might be the only evidence he has of the entitlement of the person claiming the goods. Unless the claimant also holds a document falling within the Carriage of Goods by Sea Act 1992, the carrier may be unable to invoke a contractual defence against him, and the defences to conversion, in cases such as *Glyn Mills* and *The Houda*, probably depend on delivery being made against a document of title.[221] Thus, unless there are countervailing considerations, such as the likely non-arrival of the documents in time, it is still to the advantage of carriers at least to continue to use common law documents of title, and to deliver only against their production.

220. Para. 7.123ff.
221. Para. 7.67ff.

CHAPTER 8

DOCUMENTATION AND THE UCP

INTRODUCTION

8.1 The reasons for the retreat, over the last thirty-five years or so, from the traditional shipped bill of lading, have already been described, in outline, in chapter 1.[1] Successive revisions of the UCP, since 1974, have responded to this, and to the development of replacement forms of documentation.

8.2 Under the 1974 revision to the UCP, separate provision was made for marine bills of lading,[2] combined transport documents,[3] and other shipping documents for different types of transport.[4] By the time of the 1983 revision, documentation had evolved further, and the 1974 Articles had been giving rise to difficulties. Moreover, not only were trading practices perceived to be rapidly changing, but so also was the law itself.[5] To deal with anticipated future developments, as well as the difficulties that had already arisen, the 1983 revision (UCP 400) adopted a different approach, "legislating for what the transport community was, is and seems likely to be producing in the way of documentation".[6] Provision was no longer made for specific types of acceptable documentation. The marine bill of lading was still dealt with separately,[7] but in the case of all other "transport documents"[8]:

> "The 1983 Revision . . . endeavours to establish the broad 'characteristics' of an 'acceptable' transport document, having in mind developments over which the banking community can have little, if any, direct control, but which it cannot ignore."

8.3 In attempting to achieve this objective, the 1983 revision lumped together all other transport documents apart from the "marine bill of lading",[9] and set out generally acceptable characteristics.

8.4 While this had obvious advantages in terms of flexibility, especially at a time when the likely development of documentation was unpredictable, it led to essentially disparate forms of documentation being considered together, in Art. 25. In reality, the

1. Para. 1.109ff.
2. UCP 290, Art. 19.
3. Article 23.
4. Article 24.
5. A lengthy description can be found in *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411, at 46. In fact, the anticipated legal developments, and in particular the Hamburg Rules, never came into force. The problems with UCP 290, Art. 23 seem to have been that it was too permissive, UCP 400 requirements in Art. 25 being much stricter. See also further below, para. 8.24ff., on the present requirements for combined transport documents.
6. *Ibid.*
7. In UCP 400, Art. 26.
8. *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411 (1984), p. 46.
9. Into UCP 400, Art. 25.

requirements of Art. 25, which applied whenever the credit did not call for a marine bill of lading, were triggered primarily by the combined transport document, but non-negotiable waybills also had to satisfy the requirements, where the credit called for them.

8.5 To the extent that the 1983 revision was motivated by a desire to avoid the difficulties of the 1974 revision, it was not successful. Nearly half the queries which were put to the ICC Banking Commission on the 1983 revision concerned Arts 22–42, on documentation, and about a quarter on Art. 25 and 26 alone.[10] This was probably as much due to the continued development of trade practices, as to defects in the drafting of the 1983 revision, but whatever the true cause, the 1993 revision (UCP 500) reverted to enumeration of specific documents, rather than an attempt to define broad generally acceptable characteristics. Obviously specific enumeration, in contrast to the general principles of the 1983 revision, could cause problems if new documentation, previously unthought of, comes into general use, but it is difficult to see that new forms of documentation, apart from electronic documentation, could differ in principle from that which is already in general use.[11] The 2006 revision (UCP 600) continues the policy of specific enumeration of acceptable documents, and is little changed, in this regard, from UCP 500.[12]

8.6 Though it was probably covered by the 1983 revision, the non-negotiable sea waybill was expressly provided for, for the first time, in 1993. This appears to have been partly with an eye to possible future electronic developments, at a time when it was thought that electronic documentation could replace only the non-negotiable sea waybill, and not the negotiable bill of lading.[13] The 1993 revision did not, however, make provision for electronic documentation, which was later (and continues to be) provided for separately in the eUCP, a code which appears to be little used.[14] This might be partly because of the conservatism of the banking community, but two practical problems have also been alluded to.[15] First, there is a fear of recirculation of documents. Secondly, and perhaps more pertinently, there are legal difficulties with electronic bills of exchange, and as long as the other documents are bundled with bills of exchange, there is no point in dematerialising them, unless the bill of exchange is also dematerialised.[16] UCP 600 continues to relegate electronic documentation to the eUCP.

8.7 In the meantime, UCP 600 sets out the acceptable characteristics for bills of lading in Art. 20, and charterparty bills of lading in Art. 22. Combined transport is dealt with in Art. 19, and non-negotiable sea waybills in Art. 21. Provision is made for other types of documentation, and there are also general requirements, such as a definition of an original document in the new Art. 17, and a clean transport document

10. E.g., *Opinions of the ICC Banking Commission on queries relating to Uniform Customs and Practice on Documentary Credits 1984–1986*, ICC Publication No. 434 (1987). UCP 400, Art. 26 was the marine bill of lading provision.

11. A similar problem was confronted by the Law Commission, Law Com. 196 (1991). See para. 5.28ff.

12. As noted in para. 1.77ff., UCP 600 refers to itself as the 2007 revision, but all previous revisions have been referenced by the year of revision, not year of publication, whatever they call themselves, and that tradition will be continued here.

13. E.g., Sub-Working Group, *UCP 400 Revision: Transport Articles*, ICC Document No. 470–37/5.

14. It is set out in Appendix A.

15. Ellinger, *The Uniform Customs and Practice for Documentary Credits (UCP): their development and the current revisions* [2007] L.M.C.L.Q. 152, 158.

16. We saw in para. 2.14ff. that the use of bills of exchange is quite unnecessary.

in Art. 27. The commercial invoice is provided for in Art. 18, and insurance documents in Art. 28. With the exception of the important addition of Art. 17,[17] the substance of these provisions is essentially unchanged from the 1993 revision.

TRANSPORT DOCUMENTS: CARRIAGE WHOLLY OR PARTLY BY SEA

8.8 UCP 600, Arts 19 to 22 set out the requirements for the main transport documents, where carriage is wholly or partly by sea. Though Art. 19 is actually for multimodal transport documents, it seems more logical to begin by discussing bill of lading requirements, and comparing the other documents with the traditional bill of lading.

8.9 Separate provision is made for the charterparty bill of lading, in UCP 600, Art. 22.[18]

Bills of lading

8.10 Where the credit calls for a bill of lading, other than a charterparty bill, the requirements are set out in Art. 20 of UCP 600.[19] Not surprisingly, given the uses of bills of lading in reality, the requirements largely mirror those for a clean shipped bill of lading under f.o.b. and c.i.f. sale contracts,[20] largely eliminating the chance of material discrepancies between the requirements of sale and banking contracts.

8.11 There is nothing in Art. 20 requiring the bill of lading to be negotiable, and it may be that the ICC regarded the straight, or non-negotiable bill of lading, as a species of waybill. As we will see, UCP 600, Art. 21, setting out the requirements for the non-negotiable sea waybill, is in essentially similar terms to Art. 20. Both begin (as indeed does UCP 600, Art. 19, on combined transport) by applying to the document of the type, "however named". It seems that the purpose of this drafting is to cater for bills of lading which may be used either for port-to-port or for combined transport operations, and might be called something like "Combined transport bill of lading".[21] Whether they fall within Art. 19 or Art. 20 is a test of substance not form. A test of substance distinguishing between a waybill and a bill of lading might be more difficult to operate. As we saw in the discussion of *The Rafaela S* in chapter 7,[22] the difference between the waybill and the straight bill of lading may in fact be one largely of form. What the document calls itself will often determine what it is, although as we also saw in the discussion of *The Rafaela S*, other matters can be relevant, such as whether the document is issued in more than one original, and whether it states expressly that delivery is to be made only against its production. If so, then it is more likely to be regarded as a bill of lading. However, since Arts 20 and 21 are in essentially similar terms, it probably does not matter much how the document is classified.

17. Para. 9.57ff.
18. Replacing UCP 500, Art. 25.
19. The full text of UCP 600 is set out in Appendix A.
20. See para. 4.68ff.
21. See further para. 3.42ff. See also *Schmitthoff's Export Trade*, 10th ed., Stevens (2000), at [16–007].
22. [2005] 2 A.C. 423, [2005] U.K.H.L. 11. See para. 7.123ff.

8.12 Article 20(a)(v) caters for short form bills of lading. Article 23(a)(iii) of UCP 500 would have catered for a combined transport operation where the credit nevertheless called for a shipped bill of lading, by allowing for a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge. (The places of taking in charge and final destination could be, for example, inland container depots, far removed from the ports of loading and discharge.) There is no equivalent in Art. 20 of UCP 600, multimodal transport now being covered exclusively by Art. 19.

8.13 Article 20(a)(ii) reflects f.o.b. and c.i.f. requirements by requiring the bill of lading to indicate that the goods have been loaded on board or shipped on a named vessel, and also requires the name of the actual vessel. Banks will not accept a received for shipment bill, nor one which merely indicates an "intended vessel". In this respect, therefore, the requirements of Art. 20 are generally in line with those for c.i.f. and f.o.b. contracts.[23] Article 20(a)(i) requires the bill of lading to have been issued by or on behalf of the carrier or master, identified by name, and if an agent signs then the agent must also be identified by name.

8.14 One respect in which the UCP provisions are still more stringent than the common law on sale may be found from Article 20(a)(iv). This requires tender of the full set of originals issued, if issued in more than one original. By contrast, under a c.i.f. sale contract, tender of one original of the set is sufficient unless the contract expressly stipulates otherwise.[24] It has long been customary for banks to demand the entire set, as a precaution against fraud, in which regard this provision clearly makes sense. Nevertheless, buyers should make equivalent provision in the sale contract, or risk being in breach if the bank rejects tender of less than the full set.

8.15 The equivalent provision under the 1983 revision required tender only of the full set of originals issued to the consignor, if issued in more than one original.[25] The intention was to allow for issue of a sole original, but was regarded as unclear, so the present wording has been used since the 1993 revision.[26] The present wording should also deal with another practice which is clearly undesirable for the banking community, but which is engaged in by some carriers. Sometimes the carrier retains an original and carries it on board, the consignor negotiating only the other two. The wording of the 1983 provision could be interpreted as requiring the bank to accept tender of the two negotiated in these circumstances.[27] The 2006 wording is quite clear. All originals issued must be tendered.

8.16 It has been explained that through bills of lading can be good tender c.i.f., as long as they are either expressly stipulated in the contract, or customary in the trade, and provide coverage for the entire voyage.[28] Articles 20(b)–(d) make similar provision, Art. 20(c)(i) allowing the bill of lading to indicate that the goods will or may be transhipped, provided that the entire carriage is covered by one and the same bill of lading. Article 20(d) is necessary because nearly all bills of lading give the carrier a liberty to tranship, whether or not transhipment actually takes place.

8.17 There is nothing in Art. 20 as to the form of the bill, for example whether it be made out to bearer, or to order, and if the latter, to whose order. If it is made out

23. Para. 4.71ff.
24. Para. 4.85ff.
25. Article 25(a)(iii) of the 1983 revision.
26. *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), at 23.
27. Unless it could be argued that all three were technically issued to the consignor.
28. Para. 4.94ff.

to the order of the buyer, this may have property consequences, reducing the security of the bank.[29]

Charterparty bills of lading

8.18 Until the 1993 revision, the UCP provisions were out of step with the common law on sale, regarding the tender of charterparty bills of lading. The 1983 revision provided that bills of lading which were subject to the terms of a charterparty would be rejected unless expressly authorised by stipulation in the credit.[30] By contrast, the position under a c.i.f. contract is that a charterparty bill of lading must be accepted, even if the charterparty is not tendered, at any rate if it is on an unamended standard form commonly used in the trade.[31]

8.19 The pre-1993 approach was certainly cautious, there being no reason for a bank to be aware of the terms of even commonly-used charterparties, nor of which charterparties are used for particular trades, even on the assumption that a standard form charterparty is used without amendment. Yet the terms of the carriage contract, to which the bank may have no access, can affect its security. Nevertheless, the old UCP provisions were out of step with trade practice, since charterparty bills have long been extremely common.[32] Another problem was that if the requirements of the credit did not match those of the sale contract, rejection by the bank of a charterparty bill could place the buyer in breach of the contract of sale. It has also been observed that the applicant and beneficiary will be aware of the terms of the carriage contract, and that the bank is protected by the proviso in what is now UCP 600, Art. 22(b), that it will not examine charterparty contracts, even if they are required to be presented by the terms of the credit.[33] It is not entirely clear that this addresses the issue, since banks themselves may be interested in the terms of the carriage contract. Moreover, it may not be true that the applicant and beneficiary will necessarily be aware of the terms of the carriage contract if there is a long chain.

8.20 Anyway, whatever the reservations, with the 1993 revision the ICC at last changed its position, with the then new UCP 500, Art. 25 making express provision for the tender of charterparty bills where the credit calls for or permits them. This has been reproduced in the new UCP 600, Art. 22. Rather surprisingly, there is no restriction as to the terms of the carriage contract, perhaps because they cannot realistically be inspected, but UCP 600, Art. 22(b) precludes the bank from having to examine the charterparty even if it is tendered, and relieves it of any responsibility for failing to do so.[34]

Non-negotiable sea waybills

8.21 Requirements for sea waybills were introduced in 1993 for the first time, in Art. 24 of UCP 500, though sea waybills would also have been covered in the general

29. See chapter 6.
30. UCP 400, Art. 26(c)(i).
31. See para. 4.90ff.
32. Ventris, *Bankers' Documentary Credits*, 3rd ed., L.L.P. (1990), p. 30.
33. *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), at 74 (on the previous revision). The applicant should at least be aware of what is current in the trade, at least if it is a single sale.
34. Replacing UCP 500, Art. 25(b).

principles set out in the 1983 revision, on transport documentation.[35] It appears that in 1993, the ICC was responding to "an increasing commercial trend towards the non-negotiable sea-waybill".[36] It does not seem that the banking community has taken to them wholeheartedly; rather, they have had to respond to events.

8.22 The requirements for the non-negotiable sea waybill are now set out in UCP 600, Art. 21. This article is substantially identical to UCP 500, Art. 24, and it may have been assumed that a sea waybill was simply a non-negotiable bill of lading, a proposition that must now be regarded as questionable in the light of the recent House of Lords decision in *The Rafaela S*.[37] At any rate, UCP 600, Art. 21 is essentially identical to UCP 600, Art. 20, except for the substitution of the words non-negotiable sea waybill for bill of lading. Thus, for example, though sea waybills are often in received for shipment form,[38] to be acceptable under UCP 600 the waybill must indicate that the goods have been shipped aboard a named vessel. It can therefore be used in contracts where the seller's obligation includes shipment of the goods, and because it does not need to be presented for delivery, it matters less that it cannot be issued until after shipment. Like the bill of lading, UCP 600 requires that the full set must be tendered if issued in more than one original, and that the waybill is not subject to a charterparty. The requirement in Art. 21(a) that the waybill be issued by or on behalf of the carrier or master is an important limitation, since a waybill, unlike a bill of lading, can in principle be made out by the consignor.

8.23 There is nothing in Art. 21 on the form of the waybill, for example that the bank be named as consignee. We saw in chapter 3 that this can increase the bank's security, and in chapters 3 and 6 that to name the bank as consignee might have property consequences, in certain circumstances.[39] The UCP requirements seem to be addressed more to the value of the waybill as a receipt, and in binding the carrier to representations therein. They do not address the security that might be provided by the document.

Multimodal transport documents

8.24 Provision for multimodal transport documents was first made in 1974, in UCP 290,[40] but the difficulties, particularly as to who can sign, and for whom, had not been fully worked through at that time. Successive revisions of the UCP have reacted to developing trading practices, the latest revisions taking particular account of the changing practices of freight forwarders.

8.25 In UCP 600, multimodal transport documents are covered by Art. 19. Obviously, many of the desirable features of a multimodal transport document match those of a bill of lading or a waybill. Consequently, much of Art. 19 mirrors the provision in Arts 20 and 21. So for example, documents that are subject to a charterparty are likewise not permitted (it is difficult to see the relevance of charterparty terms in a multimodal document). The requirement to tender all originals, added in the 1983 revision, also mirror Arts 20 and 21.

35. UCP 400, Art. 25.
36. See *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), at 72.
37. See paras 3.17ff. and 7.123ff.
38. Schmitthoff's *Export Trade*, 10th ed. (2000), at [15–033].
39. Paras 3.51ff. and 6.14–6.92ff.
40. UCP 290, Art. 23.

8.26 Obviously transhipment is provided for (as it is with the bill of lading and the waybill), the multimodal transport document being conceptually a development of the through bill of lading. Unlike the through bill of lading, however, transhipment need not be from one vessel to another at sea, but can be from land to sea or vice versa, which explains the wider transhipment provisions in Art. 19(b). "A transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document."[41]

8.27 However, there are important differences, reflecting the essential difference between multimodal transport documents and bills of lading. Most obviously, UCP 600, Art. 19 requires the document only to evidence the dispatch or taking in charge of the goods by the carrier, and unlike Arts 20 and 21 does not require evidence of actual shipment. In reality, multimodal documents are often issued earlier. Commenting on an earlier revision, the ICC Banking Commission said that[42]:

> "Except in the case of a port-to-port shipment under a marine bill of lading, the majority of transport documents will indicate that cargo has been accepted for transport from 'a place of final destination'. Also, and especially in the case of combined transport, insistence on an 'on board' document is likely to hold back the document, thereby postponing the time when the beneficiary can present documents in order to secure payment, and delaying delivery of the goods at destination (with the possibility of costly demurrage) because the goods arrive before the documents."

8.28 These sentiments remain valid today. From as early as UCP 290, a combined transport document was accepted even if it did not state that goods were on board a named vessel.[43]

8.29 UCP 500, Art. 25(a)(i) allowed for the multimodal transport document to be signed or otherwise authenticated by the multimodal transport operator or his agent, as well as the carrier or his agent. A combined or multimodal transport document is often issued by a freight forwarder at an inland freight terminal,[44] and UCP 500, Art. 30 allowed a combined transport document to be issued by a freight forwarder acting as principal.[45] However, concern has been expressed at freight forwarders issuing documents as agents for both carrier and shipper,[46] and so Art. 19(a) reverts to requiring issue by the carrier, master or agent. UCP 500, Art. 30 has not been reproduced. UCP 600, Art. 14(l) continues to allow the document to be issued by a freight forwarder, but subject to the agency requirements of UCP 600, Art. 19. What is important is not who issues the document, but in what capacity.[47]

OTHER TRANSPORT DOCUMENTS

Air transport documents

8.30 Air transport documents are catered for by UCP 600, Art. 23, which again is similar in structure to Art. 20, but with a number of substantive differences. It is usual

41. UCP 600, Art. 19(c)(i).
42. *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411 (1984), at 51.
43. UCP 290, Art. 23(b).
44. See para. 3.42ff.
45. Generalising Art. 25(d) of the 1983 revision, where approval was given specifically to the ICC approved FIATA Combined Transport Bill of Lading (or FIATA FBL).
46. Shohid, *Countdown to UCP 600* (2007) 7 Shipping and Trade Law 1, 3.
47. See also Ulph, *The UCP 600: Documentary Credits in the 21st Century* [2007] J.B.L. 355, 369.

for such documents to be issued before the goods are actually loaded on board the aircraft, and under Art. 23(a)(ii) the documents need to do no more than indicate that they have been accepted for carriage. It is also worth noting Art. 20(a)(v). Where air waybills are issued, usually only one of the three originals is issued to the consignor. Obviously in such a case (always assuming that a bank is wise to accept an air waybill at all), it would be absurd to require tender of the entire set, so that only the document which appears to be the original for consignor or shipper is required.

Road, rail or inland waterway transport documents

8.31 Road, rail or inland waterway transport documents are covered by Art. 24. Under Art. 24(a)(ii) it is necessary only that the document indicates that the goods have been received for shipment, dispatch or carriage. Article 24(b) relaxes the usual requirements for originality.

Courier and post receipts

8.32 Postal receipts and certificates of posting (if the credit calls for them) are covered by Art. 25. Of the similar Art. 30 of the 1983 revision, Ventris commented[48]:

> "One may wonder why the ICC included in the 'credit' system goods sent by post as the applicant for the 'credit' has no means of assuring himself, as far as he can, that that which has been dispatched is in accordance with his order."

8.33 We really are getting a long way from the traditional documentary credit. Courier and post receipts are of virtually no value as either evidence or security, and we are almost in standby letter of credit territory here, if these are the only documents required.

GENERAL PROVISIONS ON DOCUMENTATION

Definition of clean transport document

8.34 Any transport document must be "clean", the requirements being set out in UCP 600, Art. 27. Though this article applies to any transport document, it is clearly desirable that, where a bill of lading is tendered, the definition accords with that of the clean bill of lading under a c.i.f. contract. Sadly, that is not clearly the case.[49]

8.35 Article 27 provides only a negative requirement,[50] that the document bears no clause or notation which expressly declares a defective condition of the goods or their packaging. This restrictive wording is intended to prevent such "legally useless clauses (such as 'ship not responsible' when the Hague Rules apply)" rendering a bill of lading unclean.[51]

48. Ventris, *Bankers' Documentary Credits*, 3rd. ed., L.L.P. (1990), at 33.
49. On the c.i.f. contract, see para. 4.97ff.
50. Replacing Art. 32 of UCP 500.
51. *The problem of clean bills of lading*, ICC Publication No. 283 (1963, reprinted 1987), p. 4, the point being that the Hague, or where they apply the Hague-Visby Rules, place a minimum responsibility on the shipowner, and Art. III(8) prevents him from contracting out of this minimum standard.

8.36 There is no positive requirement: "The word 'clean' need not appear on a transport document, even if a credit has a requirement for that transport document to be 'clean on board'." The removal of a positive requirement originated in the 1983 revision, to correct a common practice to require bills of lading actually to bear the words "clean on board". The ICC Banking Commission took the view that "clean" is defined in the current Art. 27, and "on board" in the other transport document articles, so there was no need for additional wording to be required, as long as the bill of lading complied with those provisions.[52]

8.37 It is unfortunate that Art. 27 does not state when the defective condition is supposed to apply, especially as the position for sale contracts was clarified nearly 30 years ago, and there have been no fewer than three revisions of the UCP since then. In *The Galatia*,[53] the Court of Appeal held that a clause stating that the goods had been damaged after shipment did not render the bill of lading unclean for the purposes of tender under a c. & f. contract.[54] Yet the bill of lading had been rejected earlier, by the sellers' bank, and was later rejected by another bank in the chain.[55] Clearly, if the banks were correct in so rejecting, on the basis of a superimposed clause declaring a defective condition of the goods, even though it related to damage after shipment, then the requirements of the UCP are out of line with those of a c. & f. (and by extension c.i.f.) contract.

8.38 Whether the banks were in fact entitled to reject was not decided in *The Galatia*, nor even considered in the Court of Appeal. At first instance, however, Donaldson J. (as he then was, and whose decision the Court of Appeal upheld) thought that in an action by seller against buyer under the sale contract, the provisions of the UCP were irrelevant.[56] He noted that the UCP was silent as to the time with respect to which the notation speaks, but also that no custom had been found in the trade, that c.i.f. documents "shall be such as to satisfy the UCP rules as to 'clean' bills of lading, which rules do not have the force of law". Moreover, any ambiguity as to the meaning of UCP articles "should if possible be resolved in a way which will result in the rules reflecting the position under general maritime and commercial law." His view, which was upheld in the Court of Appeal, was that the bill of lading was clean because the superimposed clause did not qualify the statement that the goods when loaded were in apparent good order and condition.

8.39 It is surprising and unfortunate that the difficulty in *The Galatia* has not been resolved by subsequent revisions to the UCP, but if the UCP provision is ambiguous, as Donaldson J. thought, any ambiguity should be resolved in favour of the rules being interpreted to reflect the general maritime and commercial law. If so, Art. 27 ought to be interpreted so that "clause or notation" means a clause or notation qualifying the statement that the goods were loaded in apparent good order and condition. In that case, the UCP terms would also coincide with the requirements under an ordinary sale contract.

52. See *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), 90, in relation to the generally similar UCP 500, Art. 32.

53. *M Golodetz & Co. Inc.* v. *Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495. See para. 4.97ff.

54. The issue arose when sub-buyers rejected, having failed to insure the goods. The facts are stated more fully in the decision at first instance: [1979] 2 All E.R. 726, [1979] 2 Lloyd's Rep. 450, on this point at [1979] 2 All E.R. 726, 736–737.

55. The credits were governed by the 1962 revision of the UCP, art 16 of which was in terms essentially similar to Art. 27 of UCP 600.

56. [1979] 2 All E.R. 726, 737–738.

8.40 It also seems clear from *The Galatia* that neither banking practice, nor UCP terms, will be allowed to dictate common law sale contract requirements, at any rate where (as in the case) the sale contract makes no mention of the UCP; of course, the UCP does not have the force of law.[57] Perhaps if the sale contract required payment by a commercial credit to which the UCP applied, it might be interpreted to conform with the provisions of Art. 27 (if different), but equally arguably, a definition of clean bill of lading which took into account the condition of the goods after loading might be held to be repugnant to a contract on c.i.f., or c. & f. terms.[58]

8.41 It is a pity that in its latest revision of the UCP, the ICC has not thought fit to redress so long-standing a problem, and bring UCP documentary requirements clearly into line with those of the common law on c.i.f. contracts.

Deck cargo, shipper's load and count, said to contain and freight

8.42 The risk of damage to cargo, especially from weather and heavy seas, is obviously increased for ordinary cargo which is carried on deck. Moreover, "cargo which by the contract of carriage is stated as being carried on deck and is so carried" falls outside both the Hague and Hague-Visby Rules.[59] Carriers are therefore free to limit their liability, without regard for compulsory international conventions. Not surprisingly therefore, Art. 26(a) of UCP 600 states that a "transport document must not indicate that the goods are or will be loaded on deck."

8.43 The growth of containerisation clearly requires that goods can be carried on deck. Containerised cargo so carried is not at the same risk as ordinary cargo so carried, and provision was made for container cargo to be carried on deck as early as UCP 290 in 1974.[60] Some provision for deck cargo must clearly be made, and the compromise adopted in the current Art. 26(a) is to allow acceptance of a document which permits loading on deck, as long as it does not indicate that the goods are actually loaded on deck.

8.44 Article 26(b) also allows clauses such as "shipper's load and count" and "said by shipper to contain". This is also a provision prompted by containerisation, since carriers will not normally be in a position to verify the contents of a container. The effect of the qualification "said to contain" was considered by the Court of Appeal in *The River Gurara*,[61] but no decision reached whether it negated any evidential value as to quantity shipped that the bill of lading might otherwise have.[62]

8.45 Article 26(c) provides for outstanding demurrage, etc. There is nothing about freight itself, and indeed, there can be no uniform rules about freight prepaid and freight collect bills, since sale contracts are not themselves uniform. For example, the buyer is responsible for payment of freight f.o.b., whereas it is the seller c.i.f. and c. &

57. See para. 1.81ff.

58. On repugnancy see *Comptoir d'Achat et de Vente Du Boerenbond Belge SA* v. *Luis de Ridder Limitada (The Julia)* [1949] A.C. 293.

59. Hague-Visby Rules, Art. I(c).

60. UCP 290, Art. 23(b).

61. *River Gurara (owners of cargo lately laden on board)* v. *Nigerian National Shipping Line Ltd. (The River Gurara)* [1998] Q.B. 610. See generally para. 5.128ff.

62. Discussed inconclusively by Phillips L.J. at 626; the cargo-owners had conceded that it negated any such evidence, but Phillips L.J. was uncertain that the concession was correct.

f., and f.o.b. with additional duties.[63] The essentially permissive provisions in the old UCP 500, Art. 33 have not been reproduced, being presumably superfluous.

Other provisions

8.46 Articles 14(i) and (k) cater for chain sales. Where bills of lading are used in chain sales of goods afloat, then except in the case of the first sale, the beneficiary under the credit will not be the consignor of the goods. The same applies to back-to-back credits,[64] where the consignor is likely to be the beneficiary under the main credit, but the applicant for the credit under the second credit (which will finance the purchase of goods from the manufacturer or supplier). Article 14(k), which has its origins in the 1983 revision,[65] allows the shipper or consignor of the goods to be someone other than the beneficiary under the credit.

8.47 Article 14(i) also has its origins in the 1983 revision.[66] It also caters for chain sales, by allowing a document dated prior to the issuance date of the credit. Where cargo is purchased afloat, the bill of lading may well have been issued before the eventual buyer's credit is opened.

8.48 The UCP 600 provisions on the commercial invoice are contained in Art. 18, considered in para. 9.190ff.

INSURANCE REQUIREMENTS

8.49 Insurance documents and coverage are dealt with in Art. 28. We have seen that at common law, in the absence of express stipulation, a certificate of insurance is not good tender c.i.f., the buyer being entitled to require the policy, or at the very least a certificate which shows on its face the terms and conditions of the insurance policy.[67] It is probable that a brokers' cover note can never be good tender c.i.f. Under para. (c), cover notes will not be accepted, but UCP 600, Art. 28(a) allows tender of either a policy or a certificate. If a certificate alone is allowed, appropriate amendments should be made to the sale contract, if on c.i.f. terms.

8.50 Coverage must be from no later than the date of shipment, and in the absence of any indication as to amount, "must be at least 110% of the CIF or CIP value of the goods".[68] UCP 600, Art. 28(g) places the responsibility on the applicant to give precise instructions, in the absence of which he takes the risk that the banks will accept whatever documents are tendered, assuming they conform with the general provisions of Art. 28.[69] The explanation for the drafting of UCP 600, Art. 28(h), the precursor to which was amended slightly in 1983,[70] is that in 1982 Lloyd's and the Institute of

63. On types of sale contract see para. 1.20ff. *Glencore Grain Rotterdam BV* v. *LORICO* [1997] 2 Lloyd's Rep. 386 suggests that a freight prepaid bill of lading will not generally be appropriate tender under an f.o.b. contract, but in principle, it could be under f.o.b. with additional duties, where the buyer is then invoiced for the freight paid.

64. See para. 2.52ff.

65. As Art. 33 of the 1983 revision. Prior to 1974, the position had been different. The 1974 revision adopted no provision, and 1983 clarified.

66. As Art. 24 of the 1983 revision.

67. Para. 4.116ff.

68. This is allowed as a valued policy under s. 27 of the Marine Insurance Act 1906.

69. Obviously, the bank might also be interested in the minimum risks covered.

70. UCP 400, Art. 39, from which UCP 600, Art. 28 is derived.

London Underwriters altered their policy, such that the "all risks" clause is now headed "Clause A", and like all "all risks" clauses, does indeed exclude certain risks.[71]

ELECTRONIC DOCUMENTATION

8.51 The provisions for electronic documentation are contained in a mini-code, the eUCP, which was originally issued as a supplement to UCP 500, coming into effect in April 2002. It continues as an appendix in UCP 600, as version 1.1, with minor amendments but substantively identical.[72] Unlike the UCP itself, the eUCP has not been a triumph of harmonisation, having enjoyed little use, in spite of a huge publicity campaign.[73]

8.52 Perhaps the banking community was gearing itself up for a possible change in transport community practice, as it did twenty years or so ago, with the increased use of non-negotiable documentation, in place of the traditional bill of lading.[74] As yet, however, there has been little use made of the eUCP, electronic documentation having gained little currency in the half-decade or so of its operation. Reasons that have been given include doubts about the ability to control illicit electronic copies, and that since bills of exchange have to be in writing anyway, there is little point in dematerialising the remaining documentation.

8.53 The eUCP deals with issues that might arise as to the acceptability of electronic documentation, such as the place of presentation in Arts e3(a) and e5(a), and date of issuance in Art. e9, which may not be as obvious as with their paper counterparts. There are definitions of electronic records and electronic signatures, but the ICC appears to have considered the problems that might arise in applying the UCP to wholly or partly paperless presentations, and attempted to come up with equivalent solutions. The eUCP facilitates electronic presentations, attempting to provide as good as possible a match with paper presentations.

8.54 Facilitation is of course essential if the use of electronic documentation is to develop, but it is only the starting point. There has long been provision, in both the UCP and Incoterms, for tender of waybills in place of traditional bills of lading, but that does not, of itself, provide the parties who use them with equivalent security. Waybills can provide their holders with security ranging from little or none to quite extensive.[75] On waybills and combined transport documents, UCP 600 does not simply take uncritically what the trading parties throw at it, but insists on certain protections. So with electronic documentation, merely making provision for it does not ensure that such documentation is functional and safe.[76] Protections need to be built in, which are probably quite different from those which are appropriate in the paper world.

71. *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411 (1984), at 63. Also *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), at 98.
72. For the full text, see Appendix A.
73. E.g., Ellinger, *Use of some ICC Guidelines* [2004] J.B.L. 704, 706.
74. This was one of the major differences between the 1983 and 1974 revisions of the UCP, the latter making provision for alternative documentation.
75. See para. 3.51ff.
76. A point made by Ellinger [2004] J.B.L. 704, 707, regarding risks of fraudulent copying.

8.55 If we consider the evolution of provision for combined transport documents from 1974 to 2006, we see that in 1974 the UCP did little more than make provision for them, whereas by 2006 lessons have been learnt, and the requirements are much more prescriptive. No doubt we will see a similar trend with successive versions of the eUCP, assuming further versions are needed at all. We might expect to see, for example, standards on encryption software and certification, protection against illicit copying and so on. (It is important, of course, that whatever tests are put in place are checkable by banks.)

8.56 The real problem with the eUCP, I suggest, is that its model is traditional documentation, but in electronic form. Most of its provisions would be admirably suited to documents sent by email, for example. But it seems very unlikely that this will be the nature of electronic documentation. It seems far more likely that carriers or other third parties will retain a register of title, with access and transfer rights being accorded to current holders, who would probably identify themselves to the system by password, or some such method. There is no obvious reason why the documentation should move at all, as opposed to being merely stored on the system. The eUCP could probably be used for such a model of documentation, but it does not appear to have been designed for it.

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CHAPTER 9

BANKS' DUTIES TO ACCEPT OR REJECT PRESENTATION

GENERAL CONSIDERATIONS

9.1 This chapter is concerned with the banks' duty to determine whether a presentation is a complying presentation (to use the wording of UCP 600, Art. 14(a)).

Contracts autonomous but interconnected

9.2 It was explained in Chapter 1 that in principle the four contractual relationships in a confirmed documentary credit, as identified by Lord Diplock in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)*, are autonomous.[1] It follows therefore that in principle, the obligations of the confirming bank towards the beneficiary may differ from those between the two banks, and those between the issuing bank and its customer. If, for example, the terms of the credit differed from the customer's instructions, the confirming bank's relations with the beneficiary would be governed by the terms of the credit, whereas the relationship between issuing bank and customer would be governed by the customer's instructions. The relationship between the two banks would also not govern that between confirming bank and beneficiary. The second paragraph of Art. 4(a) of UCP 600 states, in effect, that the beneficiary cannot avail himself of the provisions of either of the other contracts involving the banks: "A beneficiary can in no case avail himself of the contractual relationship existing between the banks or between the applicant and the issuing bank."

9.3 However, there ought to be no difference between these contracts, since the terms of the credit should conform precisely to the customer's instructions. Only if one or other bank exceeds its mandate will the documentary requirements under these contracts differ. On the assumption that the same documents are stipulated in each of these contracts, it would be very inconvenient if the courts held that the obligations owed under each contract differed. It is essential for practical workability, for example, that a confirming bank is required to pay the beneficiary only if he can be assured of reclaiming the money paid from the issuing bank, and the issuing bank from the customer.[2]

1. [1983] 1 A.C. 168. See para. 1.57ff.
2. See, for example, the statements made by Lord Diplock in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)*, discussed below, para. 9.69ff. Sir John Megaw observed in *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443 that: "The metaphor 'autonomous' means only that one does not read into any one of the four contracts the terms of any of the other three contracts. But the 'genesis and the aim of the transaction' (Lord Wilberforce's words in another authority) are not to be ignored where they may be relevant to assist in the interpretation of the terms of the contract."

9.4 The courts recognise this, and in reality, therefore, obligations under these contracts may be regarded as the same (unless of course the bank exceeds its instructions in the issue of the credit). This is probably what is meant by the notion that the four contracts, although autonomous, are interconnected.[3]

9.5 It is also recognised, on the other hand, that the contracts constituting the credit are independent of the underlying transaction (the contract of sale). In performing their duties under the credit, banks are unconcerned with whether their actions might thereby put either seller or buyer in breach of the sale contract, of whose terms they may in any case be unaware. If, for example, the terms of the credit require a bank to reject documents which the buyer would be required to accept under the sale contract, then the seller's remedy is to sue on the contract of sale.[4] The bank's obligations are defined by the terms of the credit alone, and the sale contract is irrelevant. Indeed, it may even be governed by the law of a different jurisdiction to that governing the credit.[5] UCP 600 adopts the same principle, Art. 4(a) beginning[6]:

"A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. . . . "

Banks' expertise in documents not goods

9.6 A theme underlying the discussion in this chapter is that the law assumes that whereas banks hold themselves out as experts in handling documents, they hold out no expertise in the handling of goods. If the documents do not conform, the banks do not know whether or not the non-conformity is material. Hence, Art. 5 of UCP 600 provides: "Banks deal with documents and not with goods, services or performance to which the documents may relate."[7] In UCP 600, Art. 14(a), concerned with the standard for examination of documents, the bank must "determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation". It is not required to, and indeed must not look behind the face of the documents, because it is not in a position to form a relevant judgment. This also justifies the disclaimer on effectiveness of documents in UCP 600, Art. 34. The point that emerges from these provisions is that neither issuing nor correspondent bank is interested in anything apart from whether the documents conform on their face to the credit requirements. Neither bank is interested in the condition of the goods, nor on whether either seller or buyer is in breach of the sale contract.

9.7 Under UCP 500, Art. 13(a), banks were required to examine documents with reasonable care. This phrase has been omitted from UCP 600, Art. 14(a), apparently

3. *United City Merchants*, *per* Lord Diplock at 182H–183C. This passage is also set out in para. 1.52ff.

4. As he attempted, unsuccessfully, for example, in *Soproma SpA* v. *Marine & Animal By-Products Corp.*, para. 4.21ff.

5. See para. 2.119ff.

6. UCP 600, Art. 4(a). The reference to "other contract" is probably intended to cover stand-by letters of credit, where the underlying transaction may be a construction, rather than sale contract (see para. 2.69ff.). The clause, "even if any reference whatsoever to such contract(s) is included in the credit," was added in 1983. It was not intended to have any effect on the practical handling of credits, but was a reaction to the practice of making reference in the credit itself either directly to the commercial contract, or to the invoice which will often include a reference to the commercial contract. Direct reference to the commercial contract is a practice which again is more likely with standby credits: *UCP 1974/1983 Revisions Compared and Explained*, ICC Publication No. 411 (1984), 13.

7. This provision was unchanged in 1993 from the 1983 revision, and changed only in detail in 2006.

in line with a policy of "the removal of vague phrases".[8] While one can appreciate the desire to strive for certainty, it may not always be capable of achievement. Once examination is required at all, the courts must necessarily determine a standard of care, and would almost certainly apply a reasonable standard in any case.[9] It seems unlikely that the removal of this phrase will have any effect.[10]

9.8 Article 13(a) of UCP 500 also required banks to adopt international standard banking practice in determining compliance. This continues under UCP 600, Art. 14(d), though only in relation to data in the document. The ICC has codified its approach to international standard banking practice, the present provision being ISBP 2007.[11]

Banks' expertise in documents not factual situations

9.9 A related point is that banks should not be concerned with the existence or otherwise of any other fact situation, apart from that indicated on the face of the documents themselves. Otherwise, extensive inquiries may be required, in an area where again the bank may not necessarily be assumed to have any relevant expertise.

9.10 In *Banque de l'Indochine et de Suez SA* v. *JH Rayner (Mincing Lane) Ltd.*,[12] the credit called for: "shipment to be effected on vessel belonging to Shipping Company that is a member of an International Shipping Conference." Sir John Donaldson M.R. noted that[13]:

> "This is an unfortunate condition to include in a documentary credit, because it breaks the first rule of such a transaction, namely that the parties are dealing in documents, not facts. This condition required a state of facts to exist. What the letter of credit should have done was to call for a specific document which was to be acceptable to the buyer and his bank evidencing the fact that the vessel was owned by a member of a conference."

9.11 For the same reason, vague terminology should also be avoided. UCP 500, Art. 20(a) actively discouraged it, listing a number of terms which should not be used.[14] UCP 600, Art. 3 defines some vague time terms, and allows banks effectively to disregard other terms, such as "first class", "well known", "independent", "official", "competent", "prompt" or "as soon as possible", to take a few examples from the provision. The problem with such terms is not simply that they are vague, but that they require the bank to consider a factual situation (e.g., whether a certificate is "independent" or "official"), whereas their only concern should be with the documents themselves.

8. Ulph, *The UCP 600: Documentary Credits in the 21st Century* [2007] J.B.L. 355, 362.
9. E.g., the assertion by Debattista, *The New UCP 600—Changes to the tender of the Sellers's Shipping Documents under Letters of Credit* [2007] J.B.L. 329, 337. In any case, in *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine*, in para. 9.23ff., Lord Diplock thought that the requirement "to examine the documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit", as required by what was then Art. 7 of UCP 290, "does no more than restate the duty of the bank at common law": [1974] 1 W.L.R. 1234, 1238–1239. The removal of the requirement should therefore make no difference.
10. Ulph, *op cit.*
11. ICC Publication No. 681.
12. [1983] Q.B. 711. See further below, para. 9.190ff.
13. *Ibid.*, at 728.
14. Similar to Art. 22(b) of the 1983 revision.

9.12 We will see in para. 9.183ff. that any ambiguity in the applicant's instructions is resolved in the bank's favour, if the issue is whether the bank has exceeded its mandate in accepting documents.

Quick decision required

9.13 If a bank were to take too long to examine the documents this would have an obvious adverse effect on the negotiability of the shipping documents, particularly where multiple re-sales are envisaged.[15] A quick decision is also of importance from the point of view of the beneficiary under the credit, since if the documents are rejected he will wish to have them at his disposal as quickly as possible, in order to effect alternative transactions.

9.14 In spite of the importance of a quick decision, prior to UCP 500, the UCP did not stipulate a maximum time for the examination of the documents, UCP 400 stipulating only that the bank should have a reasonable time in which to examine them.[16] Placing an upper limit was thought to raise difficulties. Transactions were not all the same, and it was arguable that a longer period may be appropriate where the credit is for a very substantial sum, or the documents are either numerous or unusually complex, or in a foreign language.[17] Also of importance for a document that was intended to be used worldwide was that there was little uniformity as between jurisdictions as to what is a reasonable time.[18] By 1993, the view had changed. UCP 500 fixed an upper limit, Art. 13(b) providing that:

> "The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the receipt of the documents, to examine the documents and determine whether to take up or to refuse the documents and inform the party from which it received the documents accordingly."

9.15 Thus, for the first time, an upper limit was placed on "reasonable time", albeit an upper limit that was sufficiently high to be unlikely to have significant, if any, practical effect, at any rate in London.[19]

9.16 Closely related to these provisions were requirements to communicate refusal, beginning with Art. 16(c) of the 1983 revision:

> "If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him. . . . "

15. We have observed elsewhere in the book that speed of document handling and transmission is one of the main reasons for the move, in recent decades, away from the shipped bill of lading towards less traditional forms of documentation: para. 1.109ff.

16. UCP 400, Art. 16(c).

17. E.g., Ellinger: *Reasonable time for examination of documents* [1985] J.B.L. 406, 407–408.

18. On why an upper limit was not adopted at that time, see also *UCP 1974/1983 Revisions Compared and Explained*, ICC publication No. 411 (1984), 33.

19. In *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443, the Court of Appeal (interpreting UCP 400) thought that eight days was too long, at any rate in London, while accepting that what was reasonable will depend, not only on the number and complexity of the documents, but also on the level of sophistication in dealing with documents in the particular country. What is reasonable will not be the same everywhere, and the figure of seven was arrived at as a compromise: *UCP 500 & 400 Compared*, ICC Publication No. 511 (1993), 40. However, the high maximum limit implied that in London at least, the issue would continue to be determined by the definition of a reasonable time.

9.17 This was transformed into UCP 500, Art. 14(d), in substantially similar terms, but with a seven-day maximum limit, thus paralleling the provision for expeditious examination of the documents.

9.18 In *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*,[20] the Court of Appeal, interpreting the 1983 provision, held that the bank must first decide whether telecommunication was possible and if not must choose some other expeditious means, and in either case the bank must act without delay. In other words, whether telecommunication or other expeditious means was used, it must be used without delay. The court also held that the obligation to communicate without delay was additional to that of deciding within a reasonable time whether to take up or refuse the documents. Sir Christopher Staughton justified this by observing that examination and communication were very different kinds of obligation[21]:

> "The time needed for checking documents must necessarily be somewhat vague; it depends how any documents are required by the credit, what detail they must contain, and how clearly or (as the case may be) obscurely that is spelt out. But once that is done and the decision taken, it will ordinarily be a fairly simple task to give notice to the beneficiary."

9.19 He did not further elaborate on the meaning of "without delay". In *Bayerische Vereinsbank* v. *Bank of Pakistan* Mance J., interpreting UCP 500, appeared to regard the words "without delay" as meaning something similar to "reasonable time" under UCP 500, Art. 13(b),[22] but this must now be considered in the light of the Court of Appeal decision in *Seaconsar*.

9.20 UCP 600 differs from its predecessors by stipulating, for the first time, a maximum period *in place of* a reasonable time, "to determine if a presentation is complying". In order to determine this, it must examine the presentation, under UCP 600, Art. 14(a).[23] The maximum time under Art. 14(b) is five banking days. Removal of the "reasonable time" requirement conforms with the policy of removing uncertain phrases, but while the change will no doubt resolve issues of uncertainty in interpreting the previous provisions,[24] it is not ideal where a reasonable time might be less than five days. On its terms Art. 14(b) allows the bank five days, whether or not it is reasonable to take that time. Arguably a reasonableness term would be implied. Against that, it is more difficult to justify implying a term, where a fixed time has been expressly stipulated.[25] It is also true that a reasonable time term has been deliberately excluded from UCP 600, but in principle, the views of the ICC Banking Commission should not be relevant in interpreting what is, after all, a private contract.[26] Though arguments can be advanced each way it is at least likely, I suggest, that the courts would continue to require determination within a reasonable time.[27]

20. [1999] 1 Lloyd's Rep. 36.

21. *Ibid.*, at 41. The Court of Appeal differed on this issue from Tuckey J., who had amalgamated the obligations: [1997] 2 Lloyd's Rep. 89.

22. [1997] 1 Lloyd's Rep. 59, citing (at 69 (col. 1)) *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443, in para. 9.34ff.

23. There is no longer a requirement explicitly to examine the documents.

24. Certainty seems to have been a major motivation for the change: e.g., Debattista [2007] J.B.L. 329, 338. As we will see below, what is encompassed within a reasonable time split the Court of Appeal in *Bankers Trust Co.* v. *State Bank of India*: para. 9.34ff.

25. See, e.g., the express stipulation in para. 9.34ff.

26. See the arguments in para. 1.89ff.

27. Implied terms must, however, give way to express contrary terms. As we will see in para. 9.34ff., Art. 16(b) allows approaches, for limited purposes, to be made to the applicant within the five-day period. This express provision would probably override any reasonable time term, even if such a term were implied.

9.21 It seems unlikely that the problems addressed in the latest revision of the UCP have been resolved by it. Probably some kind of reasonableness test will remain, whether or not it is expressed, and to that extent, therefore, the uncertainties associated with the previous provision will also remain. But that is really inherent in the nature of the problem. Unless it is regarded as acceptable for a bank to sit on its hands until the maximum time has expired, an additional test as to the reasonableness of its behaviour is inevitable.

9.22 The same might be said of UCP 600 in cases of refusal. Art. 16(d), replacing UCP 500, Art. 14(d) considered above, no longer uses the words "without delay", though it continues to requires expeditious communication, and parallels Art. 14(b) in providing for a five-day time limit from presentation. "Without delay" is an uncertain phrase, and presumably that is why it has been removed, but again, it seems implausible that a court would allow a bank to sit on its hands until the expiry of the five days. There is no reason for a bank to delay, and it would be expected an implication that communication would be without delay, whether or not it is expressed in UCP 600.[28]

Apparent conformity only required

9.23 Given the requirement for banks to act promptly on presentation of documents, and to determine compliance on the basis of the documents themselves, there is a logic in not requiring more than apparent conformity. As we have seen, the test is whether the bank has taken reasonable care to ensure that the documents conform.[29] Only if it has not done so will it be liable to its customer, even if the documents do not in fact conform to the requirements of the credit.

9.24 The leading authority is that of the Privy Council in *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine*.[30] The case concerned the purchase of a fishing vessel, payment to be by irrevocable credit issued directly by the issuing bank in favour of the beneficiary. Among the "Special Instructions" was a requirement that a certificate, certifying that the vessel had been built according to specifications and was in a fit and proper condition to sail, was signed by Balwant Singh, holder of Malaysian Passport E-13276. A certificate was presented, apparently signed by Balwant Singh, and the issuing bank having checked against the signature on Passport E-13276, paid the beneficiary under the credit, and debited the price of $45,000 from its customer's account. It later became clear, however, that both the signature and passport were forged.

9.25 The customer failed in an action against the issuing bank, claiming that it had been wrongly debited $45,000. In the Judicial Committee of the Privy Council, Lord Diplock said on the issue of conformity[31]:

28. Debattista suggests (at 339) that the requirement for expeditious communication in Art. 16(d), even in advance of the five-day limit, suggests that a bank which failed to decide in a reasonable time could be in breach of this provision, even if not also of Art. 14(b). However, as Staughton L.J. pointed out in *Seaconsar*, above, the obligations to decide and to communicate are different in type, and it may not be acceptable to reason from the one to the other.

29. This almost certainly remains true, even though reasonable care is not explicitly required under UCP 600, Art. 14(a): see above.

30. [1974] 1 W.L.R. 1234; [1974] 2 Lloyd's Rep. 1.

31. [1974] 1 W.L.R. 1234, 1238.

"The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirements of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering the moneys paid under the credit. . . . In business transactions financed by documentary credits banks must be able to act promptly on presentation of documents. In the ordinary case visual inspection of the actual documents presented is all that is called for. The bank is under no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purports to be the signature of the person named or described in the letter of credit."

9.26 He went on to observe that the special requirements of the credit imposed on the bank the additional duty to take reasonable care to ensure that the signature on the certificate appeared to correspond with the signature of Balwant Singh, holder of passport No. E-13276, but that the onus of proving lack of reasonable care was on the customer,[32] and that this onus had not been discharged.

Vendor of goods under a confirmed credit selling under assurance that nothing will prevent him from receiving the price

9.27 In *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.*, Jenkins L.J. observed that "an elaborate commercial system" has been built up, whereby a "vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price".[33] This is very important when exporting to a foreign country, especially in view of the fact that the vendor himself will often use a documentary credit to raise money to purchase or manufacture the goods, the subject matter of the contract of sale. In *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada*, a case considered in detail below, Lord Diplock said[34]:

"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment."

9.28 It can be seen that, for Lord Diplock, the need for the seller's assured right provides another powerful argument for banks not to be involved in substantive disputes between the parties to the sale contract. In *Hamzeh Malas* itself, Jenkins L.J.'s observation above justified the following proposition[35]:

" . . . that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not."

9.29 In this case, the plaintiffs, Hamzeh Malas & Sons, were c.i.f. buyers of two consignments of reinforced steel rods from the defendant sellers, British Imex Industries Ltd., payment to be effected by confirmed letters of credit in respect of each consignment. The credits were accordingly opened.[36] Hamzeh Malas alleged that the first consignment, against which payment had already been made under the first letter

32. *Ibid.*, at 1239.
33. [1958] 2 Q.B. 127, 129.
34. [1983] 1 A.C. 168, 183. On *United City Merchants*, see further para. 9.67ff.
35. [1958] 2 Q.B. 127, 129.
36. The full facts of the case are to be found in *British Imex Industries Ltd.* v. *Midland Bank Ltd.* [1958] 1 Q.B. 542; [1957] 2 Lloyd's Rep. 591, which involved the same transaction but different parties.

of credit, was "by no means up to contract quality", and in order to secure any damages which they may eventually be awarded, sought an injunction barring the defendants from claiming the price under the second letter of credit. The court took the view that it had no jurisdiction to interfere, the dispute being under the sale contract, with which the bank was properly unconcerned.[37] Jenkins L.J.'s autonomy principle was approved by Lord Denning M.R. in *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.*,[38] a decision which was itself approved by the House of Lords in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada*.

9.30 There are also ways in which the principle can be eroded. First, the bank might consult with the applicant before accepting documentation, thereby shifting the actual decision to him. Secondly, the buyer might claim to reject on a trivial ground. It should also be remembered that buyers are not motivated to reject only because there is something substantively wrong with the goods. They may be motivated simply by market considerations, if there has been a general market fall since the contract was made, making it cheaper to buy replacement goods elsewhere. There is a third issue, which relates to the first two. The credit requirements may be excessively onerous and detailed, or vague. The first makes it much more likely that a trivial ground for rejection will exist. The second is more likely to raise doubts about whether the documents conform, encouraging banks for confirmation from the applicant before they accept them.

9.31 A worse problem, in terms of this principle, is that the terms of the credit itself may allow the applicant to determine substantively whether or not payment is to be made.

9.32 The issues here need to be put into perspective. In *Bankers Trust Co.* v. *State Bank of India*,[39] Lloyd L.J. accepted evidence "that discrepancies are found in nearly half of all credits". Janet Ulph puts the figure even higher today[40]: "Evidence that in recent years up to 70 per cent of documents tendered by sellers have been rejected by banks on first presentation due to discrepancies therefore caused disquiet amongst traders." It may well be true that, as Sir Thomas Bingham M.R. observed in *Glencore International AG* v. *Bank of China*,[41] the discrepancies are rarely litigated, matters usually being settled well before that stage:

> "There are a number of reasons for this. The parties to these transactions (buyers, sellers, issuing and advising banks) are seasoned professionals, not inexperienced consumers. . . . Banks, rightly jealous of their reputation in the international market-place, are generally careful not to refuse payment on grounds of non-conformity unless the non-conformity is clear."

9.33 Nevertheless, the high rate of discrepancies, or alleged discrepancies, is disturbing, because it weakens the security of the seller. If potential problems, and hence the potential for non-payment, exist in half or more of all credits, can it still meaningfully be said that the "vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price"?

37. Sellers L.J. only agreed, subject to reservations about fraudulent transactions: [1958] 2 Q.B. 127, 130. See also further below, para. 9.74ff.
38. [1978] Q.B. 159, 169. See further para. 9.77ff.
39. [1991] 2 Lloyd's Rep. 443.
40. Ulph [2007] J.B.L. 355, 356.
41. [1996] 1 Lloyd's Rep. 135.

Consultation with applicant

9.34 The assurance to the seller, discussed in the previous paragraphs, would seem to demand that whether the documents are accepted or rejected should be a matter for the banks alone, and should certainly not be a decision of the applicant for the credit. But whether documents should be accepted or rejected might not always be clear cut, especially if the credit terms are complex or ambiguous.[42] The bank might decide to go to the applicant for clarification. This is not necessarily bad for sellers. The applicant might be prepared to accept documentation which is technically non-conforming, especially where the discrepancy is minor, and there is nothing wrong with the goods. Technically, the bank should reject, and indeed would have to reject, if the decision were left to itself, but perhaps the applicant for the credit, if consulted, would raise no objection. This is especially likely on a rising market, where it will be more expensive to buy replacement goods than to accept those tendered. If the bank cannot consult with the applicant it may have no option but to reject, even in many cases where the applicant would prefer to keep the credit alive.

9.35 Conversely, it is a serious erosion of the autonomy principle, if the applicant is allowed effectively to determine whether documents are accepted or rejected. The questions arise, therefore, whether the bank should be entitled to consult the applicant, and if so, whether additional time should be allowed to enable it to do so.

9.36 The issue whether the bank should be entitled to consult with the applicant had been considered by the Court of Appeal, under UCP 400, in *Bankers Trust Co.* v. *State Bank of India*.[43] It may be remembered that Art. 16(c) of UCP 400 merely allowed a reasonable time for the examination of the documents, and UCP 400 was silent on the issue of consultation with the applicant. Bernard Wheble, Chairman of the ICC Banking Commission when UCP 400 was drafted, gave evidence to the court that "during the course of consideration of the 1983 revision it was seriously considered whether an article should be put in permitting consultation with the applicant, but that it was decided not to do so because of the fear that such wording could be abused in certain instances". He also "agreed that if a practice developed that whenever the applicant asked for the documents and was given access to them . . . , there was a danger of entering a slippery slope towards the position where it was going to be the applicant and not the bank which determined the discrepancies."[44] The slippery slope argument appealed to Hirst J. at first instance. He took the view that a term should not be implied into Art. 16, allowing time for the bank to consult with the applicant, observing also that[45]:

> "Even allowing for the risk of abuse, I feel sure that, had these expert bankers and commercial men [who drafted UCP 400] regarded such a term as necessary to give Art. 16 business efficacy, they would have included it. This seems to me the best possible indication that the leading bankers and traders, who are in the best possible position to judge, do not regard such a term as necessary, and I am therefore unable, with great respect, to . . . uphold the suggested implied term."

9.37 When the case reached the Court of Appeal,[46] the majority of the court (Lloyd L.J. dissenting on this issue) thought that it was permissible to consult the

42. As in, e.g., *Bankers Trust Co.* v. *State Bank of India* [1991] 2 Lloyd's Rep. 443, also in para. 9.41ff.
43. [1991] 2 Lloyd's Rep. 443.
44. Reported at first instance: [1991] 1 Lloyd's Rep. 587, 593–594.
45. *Ibid.*, at 599.
46. [1991] 2 Lloyd's Rep. 443.

applicant as to whether, particularly when relatively trivial discrepancies have been found, it would or would not wish the issuing bank nevertheless to accept the documents. A reasonable time, within UCP 400, Art. 16, could encompass this process. The entire court agreed that on no view should a bank be allowed time to enable the buyers to examine the documents for the purpose of discovering further discrepancies; in the case itself, the bank had found discrepancies, and consulted with the applicant for a waiver and also further examination of the documents, and the court unanimously held that this was not permitted.

9.38 This outcome of *Bankers Trust* was partially codified in UCP 500, Art. 14(c). The bank is entitled to approach the applicant only for a waiver of discrepancies, but is not allowed additional time, even for this limited form of consultation. It is, as has already been observed, important that documents once rejected are quickly returned to be put back into circulation, and consultations, even with a view to obtaining a waiver of discrepancies, could jeopardise this principle.[47] Article 14(c) of UCP 500 has been replaced by, in UCP 600, Art. 16(b), without substantial change, save that consultation with the applicant must not extend the five-day period, there no longer being a reasonable time requirement in UCP 600, Art. 14(a).[48]

9.39 The applicant should not, of course, be allowed to determine *whether* the documents comply or not, and Art. 16(b) of UCP 600 applies only when (as indeed occurred in *Bankers Trust* itself) the bank has already determined that they do not conform. Since it is approaching the applicant for a waiver of discrepancies, this also implies that the documents are in fact discrepant. If the bank has determined that they comply, then it must accept them without further consultation. It is worth considering how a dispute might arise under UCP 600. The beneficiary would be unlikely to complain unless the documents had been rejected. If they were in fact compliant then the beneficiary would have an action, regardless of UCP 600, Art. 16(b). If they were discrepant, and the bank had unsuccessfully approached the applicant for a waiver, then as long as the eventual determination was made within the five-day period in UCP 600, Art. 14(b), the bank should be protected. Even if a reasonable time term were implied into Art. 14(b),[49] UCP 600, Art. 16(b), expressly allowing such consultation within the five-day period, would surely override it. Moreover, the logic of *Bankers Trust* is that a reasonable time, at least as defined by the courts, would allow for such consultation.[50] If the bank approached the applicant for any other reason, for example for a further examination of the documents, then it would not be protected by UCP 600, Art. 16(b). If it nevertheless made a determination within five days, it would still be within the time limit in UCP 600, Art. 14(b). It would still be in breach, however, if a reasonable time term were implied into Art. 14(b). Article 14(b) also requires the bank to make the determination whether the presentation is complying. If it is in fact the applicant who is making the determination, then the bank is acting outside what it is allowed to do under UCP 600, Art. 14.

47. In *Bankers Trust*, however, Lloyd L.J. observed that consultation over a waiver alone need not take very long, as the applicant would only have to consider those parts of the documentation that were actually discrepant: *ibid.*, at 450.

48. The full text of which is set out in Appendix A. See also para. 9.13ff.

49. See para. 9.13ff.

50. The fact that UCP 500 would not have allowed the time to be extended for this purpose would not be relevant to the interpretation of a common law implied term.

9.40 In *Bayerische Vereinsbank* v. *Bank of Pakistan*,[51] Mance J. took the view that a bank which handed over to its customer the responsibility for determining whether the documents were discrepant, and then simply adopted and communicated whatever decision the customer reached was almost certain to be in breach of the reasonable time provision in UCP 500, Art. 13(b), and also to have failed to act without delay in communicating rejection under UCP 500, Art. 14(d); indeed, this was the outcome in the case itself, where the bank had done little more than act as a postbox to enable the customer to decide, and consequently took longer than it would have done had it exercised its own independent judgment. We have seen that the reasonable time provision in Art. 13(b) has not been replicated in UCP 600, Art. 14(b), and that "without delay" no longer appears in UCP 600, Arts. 16(c)–(d), the provisions equivalent to UCP 500, Art. 14(d). Moreover, though there remains the requirement to communicate by expeditious means in UCP 600, Art. 16(d), in the light of *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*,[52] this should probably be interpreted simply as requiring use of an expeditious means of communication, once a decision had been reached. In other words, Art. 16(d) says nothing as to the decision process itself. So were the facts of *Bayerische Vereinsbank* to arise under UCP 600, it would not be possible to reach the same result, at any rate on the basis of Arts. 14(b) and 16(d) alone. Nonetheless, there is a case for suggesting that *Bayerische Vereinsbank* would be decided the same way under UCP 600. Quite apart from the arguments already discussed, for an implied term to decide within a reasonable time, though Art. 16(b) might allow the bank to approach the applicant for a waiver of discrepancies, it does not allow the bank to hand over to the customer the responsibility for determining whether the documents comply. The bank would therefore be acting beyond what is allowed under Art. 16. Even if the determination was made within the five-day limit in Art. 14, it is the bank that is required to examine the documents and make the determination under Art. 14(a). For the bank to hand over the decision to the applicant would therefore be to exceed its powers under Art. 14(a), whatever other differences there are between UCP 500 and UCP 600.

Trivial defects

9.41 If credit terms are excessively detailed then it will be easy for someone determined to reject, to find reasons for non-conformity. The documents tendered in *Bankers Trust* ran to 967 pages, and had to be mutually consistent. The likelihood of documents of that length being entirely error-free must surely be negligible, and if rejection is allowed, even for the most trivial defects, then assurances given to the seller about being paid, come what may, begin to look somewhat fragile, especially on a falling market.

9.42 As we will see in para. 9.166ff. below, a corollary of the autonomy of the credit, and of the banks being required to determine, on the basis of the documents alone, whether a presentation is complying, is that even defects which substantively do not matter at all can be fatal. For how is the bank to know whether they matter substantively or not, without looking at the merits of the underlying sale contract? In

51. [1997] 1 Lloyd's Rep. 59, 69 (cols 1 and 2).
52. [1999] 1 Lloyd's Rep. 36. Above, para. 9.13ff.

Banque de l'Indochine et de Suez SA v. *JH Rayner (Mincing Lane) Ltd.*,[53] Parker J. thought some margin should be allowed, and that it was not right to require "rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed, but it is slight, and banks will be at risk in most cases where there is less than strict compliance." The possibility was at least considered, therefore, that some defects are so trivial as to not entitle a bank to reject. In *Bankers Trust Co.* v. *State Bank of India*, Lloyd L.J. described as trivial that "the telex number of the buyers' . . . office was given as 931310 instead of 981310". Nothing actually turned on the triviality of this defect, but the view earlier tentatively advanced by Parker J. was to some extent entrenched by this judgment. A further example of a trivial defect was given in *Kredietbank Antwerp* v. *Midland Bank plc*,[54] where Evans L.J. gave as an example an obvious typographical error, such as the possible misspelling of "Smith", as "Smithh". The point about these defects is that it is obvious, from examination of the documents alone, that they raise no substantial objections at all.

9.43 The courts have since *Bankers Trust* been reluctant to extend this category of defect, and indeed it would surely be undesirable if it applied other than to the sort of defect which is obviously trivial, on examination of the documents alone. In *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhuori Islami Iran*,[55] the credit required each of the documents presented to contain the letter of credit number and the name of the buyer. As we will see in para. 9.174, the Court of Appeal refused to enquire as to the reason for this requirement and held that the bank could not ignore it. However trivial an omission, the absence of the letter of credit number and the name of the buyer from the *procès verbal* called for some explanation, and the bank were entitled to reject the documents. Lloyd L.J. observed that[56]:

> "[The plaintiff seller] argues that the absence of the letter of credit number and the buyer's name was an entirely trivial feature of the document. I do not agree. I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires. It would not, I think, help to attempt to define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example, *Bankers Trust Co.* v. *State Bank of India* where one of the documents gave the buyer's telex number as 931310 instead of 981310. The discrepancy in the present case is not of that order."

9.44 So far then, the recognition of a special category of trivial defects, if accepted into the law at all, was restricted to a very narrow scope.[57] In particular, any defect which puts the bank on enquiry is not trivial for these purposes. In *Glencore International AG* v. *Bank of China*,[58] however, the letter of credit (relating to a sale of aluminium ingots) stated "Origin: Any Western Brand". The commercial invoices described the goods as "Any Western Brand—Indonesia (Inalum Brand)". The certificate of origin also certified that the material "is of Indonesian origin (Inalum brand)". Both differed, in other words, from the credit requirements, though in the case of the invoice, only by the addition of the particular country of origin.[59] The Court of Appeal

53. [1983] Q.B. 711. In the event the tender was held there to be bad, both by Parker J. and later by the Court of Appeal, also reported at [1983] Q.B. 711. On the discrepant tender, see further para. 9.185ff.

54. [1999] Lloyd's Rep. Bank 219.

55. [1993] 1 Lloyd's Rep. 236, reversed on other grounds [1994] 1 A.C. 438; [1994] 1 Lloyd's Rep. 1 (H.L.).

56. [1993] 1 Lloyd's Rep. 236, 240.

57. See also, e.g., the decision of the High Court of Singapore in *United Bank Ltd.* v. *Banque Nationale de Paris* [1992] 2 S.L.R. 64.

58. [1996] 1 Lloyd's Rep. 135.

59. On the certificate of origin, see further para. 9.190ff.

took the view that had these been the only defects, the tender would have been good. On the commercial invoice, to which alone, as we will see below, the common law doctrine of strict compliance still applied, Sir Thomas Bingham M.R. thought that a banker would require no knowledge of the aluminium trade to appreciate that there could be more than one brand falling within the genus, "Western brand", and the additional words "Indonesia (Inalum brand)" were not such as to call for further inquiry.[60] In other words, the additional words carried no implication that the origin of the goods was anything other than the "Western brand", with which they were also described in the same invoice.

9.45 In *Glencore* the market was falling, and that, it seems, was the real motivation for the rejection.[61] Clearly, it would significantly erode the seller's security if any defect, however trivial, could allow a buyer to escape a bargain that had turned bad, because of a market fall. Though the defect is different in degree from that instanced by Lloyd L.J. in *Bankers Trust Co.* v. *State Bank of India*, Sir Thomas Bingham M.R. nonetheless regards the meaning as clear from the face of the document alone, without any enquiry into the trade. Thus, the principle is not infringed upon that the bank should be able to determine from the documents alone whether or not to accept them.

9.46 For the first time, UCP 600 makes provision, in Art. 14(j), for differences in the address of the beneficiary, as long as the country is correctly stated, and contact details. These can be disregarded by the banks, who will therefore accept documents, whether or not they conform in these respects. A buyer hunting around for reasons to reject will not be able to rely on contact details differing from those in the credit. Address and contact details of the applicant are, by contrast, properly treated differently, where they appear as part of consignee or notify party details. Discrepancies here are not trivial, if proper notification is to be given.

9.47 There is nothing in UCP 600 affecting the views expressed in *Glencore*, which may be assumed still to apply, additionally to Art. 14(j).

Detailed or vague credit terms

9.48 One reason for the high proportion of discrepancies in letters of credit might be that the credit requirements are too demanding. Whether documents conform to the credit is determined solely by the terms of the credit, but if these are too onerous, the buyer might himself be in breach of the sale contract. Since the opening of an appropriate letter of credit is usually a condition precedent to the seller's duty to perform, this could allow the seller to get out of the contract, should he so desire. The buyer will also be in breach of contract, and so an action for damages ought also to lie (which could, of course, be substantial on a falling market).

9.49 Of course, the sale contract may stipulate the terms of the credit, but if not, we saw in chapter 4 that in *Soproma SpA* v. *Marine & Animal By-Products Corporation*,[62] McNair J. took the view that the credit terms must be fair and reasonable, and must not conflict with the express terms of the sale contract. This appears to give the buyer quite a bit of leeway, but in *Glencore Grain Rotterdam BV* v. *LORICO*,[63] the sale

60. *Ibid.*, at 140.
61. *Ibid.*, at 149.
62. [1966] 1 Lloyd's Rep. 367. See para. 4.21ff.
63. [1997] 2 Lloyd's Rep. 386.

contract was f.o.b., and the Court of Appeal took the view that a credit requiring freight pre-paid bills of lading was inconsistent with the operation of an f.o.b. contract. The result was that the sellers were held justified in refusing to ship the goods.

9.50 One can exhort the parties, and in particular buyers, to simplify documentary requirements under the credit, and if electronic documentation is ever going to have an impact on the speed of the documentary processes, there is also a strong case for standardisation, to enable documents to be computer-read. Quite apart from computerisation, however, a bank will take longer to check vague and non-standard documents, and is more likely to wish to consult with the applicant before deciding to reject them.

9.51 As far as the beneficiary is concerned the credit requirements are stated in the credit itself. These should conform with the mandate from the applicant, but ultimately, a buyer's freedom to stipulate vague or detailed requirements is constrained by sale contract terms. Unless these are expressed, the courts do little more than require the terms to be fair and reasonable.

Credit itself allows applicant to determine whether payment to be made

9.52 The principles stated so far in this chapter might be regarded as fundamental to the operation of documentary credits. Ultimately, however, a documentary credit does no more than create contractual relationships, and the parties are generally free to contract on any terms they wish. If these terms erode the principles discussed above then, however fundamental, so be it.

9.53 The principles outlined in paras 9.2.–9.13, and in 9.27, demand that it is the banks and not the buyer who decide whether to accept or reject documents, that that decision is to be made on the basis of the documents alone, and that banks should be unconcerned about matters relating to the goods, about which they are assumed to have no expertise. The autonomy of the credit, and the principles discussed in para. 9.23, also suggest that banks should be uninvolved in disputes between seller and buyer. The fear in *Bankers Trust Co.* v. *State Bank of India* was an erosion of these principles, by allowing the bank to consult with the applicant over whether to reject non-conforming documents, though the decision, and its partial consolidation in UCP 600, probably does not significantly offend against them.[64]

9.54 A rather more serious infringement of principle can be found in *The Royan*.[65] Ninety per cent of the consignment value was to be paid against presentation of the shipping documents[66]: "The remaining 10% to be paid to beneficiaries within sixty days from date of completion of discharging and after assurance that consignment strictly complying for specifications mentioned in credit terms . . . " This was effectively a simple form of guarantee. If the buyers took the view that the consignment was not up to specification then they would not pay the last 10 per cent of the purchase price. Thus, the clause implied that payment of the final 10 per cent depended on the buyer's assurance that the consignment strictly complies with the specifications in the

64. [1991] 2 Lloyd's Rep. 443, above, para. 9.34ff., now partially codified in UCP 600, Art. 16(b). Lloyd L.J. dissented on this issue.

65. *Co-Operative Centrale Raiffeisen-Boerenleenbank BA (Rabobank Nederland)* v. *The Sumitomo Bank Ltd. (The Royan)* [1988] 2 Lloyd's Rep. 250.

66. [1988] 2 Lloyd's Rep. 250, 256 (col. 1).

credit, and this appears at first sight to be contrary to the principles discussed so far in this section.

9.55 The case was decided on the basis that for the buyers to rely on the clause, they had to claim within the 60-day period that the goods were not up to specification. No such claim had been made in the case, so the remaining 10 per cent should have been paid 60 days after discharge.[67] An argument was also put forward, however, that even on this basis, the clause offended against the fundamental principle that all parties deal in documents, not goods,[68] and Lloyd L.J. was prepared to accept that this was indeed the case. Indeed, it seems at first sight to offend also against the principle that banks are not concerned with disputes between the parties to the contract of sale. For the bank, however, the case probably raises no particular problems. All that the bank is concerned with is whether the buyer claims that the goods do not conform to specification. If so, it withholds the final 10 per cent. It is not concerned with whether the buyer's claim has any merit, and if the seller disputes his claim then he must do so under the sale contract. The bank is thus concerned neither with the provisions of the sale contract nor with the actual condition of the goods, and from its point of view fundamental principles are not in fact infringed. This is not in any case significantly different from the position under a performance bond payable on demand,[69] where in the absence of fraud the bank must act on the buyer's claim however ill-founded. Since the clause in *The Royan* is simply another way of achieving what could have been achieved by performance bond, Lloyd L.J.'s interpretation does not seem to be open to objection.

9.56 The position is also almost as unsatisfactory from the seller's point of view as a performance payable on demand, in that it makes the right to payment depend on the whim of the buyer. It seems from *The Royan* that the courts will enforce clauses of this nature as they stand. Of course they should, because the parties can contract on any terms they wish, but a clause of this nature significantly detracts from the value of a documentary credit; sellers would be well-advised to avoid agreeing to them if possible.

Original documents

9.57 Credits often call for original documents, and sometimes the full set of originals. With today's high quality laser printers and photocopiers, it is not always easy to determine what is an original document. Under Art. 20(b) of UCP 500:

> "... banks will also accept as originals document(s) produced or appearing to have been produced:
> i by reprographic, automated or computerized systems;
> ii as carbon copies;
> provided that it is marked as original and, where necessary, appears to be signed. ... "

67. In the case the final 10 per cent was eventually paid, and the issue was from when the interest was payable. The Court of Appeal held that it was payable from 60 days after discharge, rather than from the later time that the buyers had satisfied themselves that the goods were up to specification.

68. See para. 9.6ff.

69. See, e.g., *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.* [1978] Q.B. 159, considered in detail below, in para. 9.77ff.

9.58 As the Court of Appeal observed in *Kredietbank Antwerp* v. *Midland Bank plc*,[70] the use of the word "also" suggests that this Article was intended to be permissive, rather than restrictive.[71] There was probably an assumption, when UCP 500 was drafted in 1993,[72] that it would be obvious, even on a casual inspection, if a document had been produced by reprographic, automated or computerised systems, or as a carbon copy. Such a document could nevertheless be accepted, if it was clearly marked as original, and signed as appropriate.

9.59 Technology does not stand still, however, and UCP 500, Art. 20(b) did not work so well, once a word-processed or photocopied copy could be made indistinguishable from a true original. It was argued that even original documents could fall within UCP 500, Art. 20(b), since they might appear to be produced by reprographic, automated or computerised systems, and therefore would only be accepted if they were clearly marked as original. On this interpretation, an Article that was intended to be permissive became restrictive. In *Glencore International AG* v. *Bank of China*,[73] the Court of Appeal adopted a very literal, and hence restrictive interpretation of the provision. The beneficiary's certificates certifying, as required by the terms of the credit, that one full set of non-negotiable documents had been sent to the buyer, were either word-processed and laser-printed, or (more likely) photocopies of word-processed and laser-printed documents; the evidence was that the photocopies were indistinguishable from those produced on the laser printer. The certificates were signed, but were not marked as original. The Court of Appeal took the view that even though they appeared to be originals, they were in fact authenticated copies, rather than original documents. The requirements of UCP 500, Art. 20 were triggered, because the certificates (whether laser-printed or photocopied) had been produced by reprographic, automated or computerised means. They were therefore discrepant, even though they had been signed, because they were not marked as original. Sir Thomas Bingham M.R. observed that a signature on a copy makes it an authenticated copy, not an original.[74]

9.60 Though the *ratio* of *Glencore* was limited to documents that were almost certainly copies, the reasoning applied to any document produced by reprographic, automated or computerised means.[75] Even an original laser-printed document would have come within the provision, but if the certificates had been hand-written or typed, the provision would not have been triggered, and there would have been no need to mark them as original.

9.61 The decision in *Glencore* may be criticised for taking a restrictive interpretation of a provision that was intended to be permissive, and the Court of Appeal to some extent resiled from its previous view in *Kredietbank Antwerp* v. *Midland Bank plc*,[76] taking the view that the UCP 500, Art. 20(b) requirements apply only to copies, and not for example, to an original document produced by a laser printer. The reasoning in *Glencore* was thus limited to the photocopy which it was accepted had most likely been tendered in that case. Had one of the laser-printed documents been tendered, the

70. [1999] Lloyd's Rep. Bank 219 (and see further below).
71. This part of Art. 20(b) of UCP 500 reproduced Art. 22(c) of UCP 400, apart from the addition of the word "also". See ICC Publication No. 511, 59–60.
72. Or rather 1983, since the 1993 provision substantially reproduces the 1983 equivalent.
73. [1996] 1 Lloyd's Rep. 135 (also above, para. 9.27ff.).
74. *Ibid.*, at 153.
75. *Ibid.*
76. [1999] Lloyd's Rep. Bank 219.

decision in *Glencore* would therefore (in the view of the later court) have been different.

9.62 Though *Kredietbank Antwerp* differed from *Glencore* in adopting a more permissive interpretation, neither case represents a very satisfactory outcome from the bank's viewpoint. In *Glencore*, the Court of Appeal thought that the bank would have had to accept a typed, but not a laser-printed original (or indeed copy), unless it was clearly marked as original. In *Kredietbank Antwerp*, the court took the view that the bank should accept the laser-printed original, but not a photocopy, unless it were clearly marked as original. But if typed, laser-printed and photocopied documents cannot be distinguished from each other, both these decisions put the banks into an impossible position. They did not cause the problem, though. The problem was that Art. 20(b) assumed that it would be easy to distinguish between documents produced by different means, whereas modern reproduction methods make it impossible to distinguish copies from originals.

9.63 Reacting to *Glencore*, the ICC Commission on Banking Technique and Practice published a "correct interpretation" of UCP 500, Art. 20(b), in July 1999. Their view was, in effect, that a document should be accepted as original if it appeared to be original, and that the requirement in UCP 500, Art. 20(b), that it be marked as original, applied only to documents that did not appear to be original. In *Credit Industriel et Commercial* v. *China Merchants Bank*,[77] David Steel J. took the view that it was legitimate to take account of the ICC interpretation. He took a narrow view of the *rationes* of both *Glencore* and *Kredietbank*, refusing to apply *Glencore* where there was no evidence as to how the documents had been produced. *Glencore* applied only where there was evidence, which suggested that the document was a copy. Though the decision was probably welcomed by the banking community, it was difficult to reconcile it with the actual wording of UCP 500, Art. 20(b).

9.64 The problem has been addressed in UCP 600 by the replacement of UCP 500, Art. 20(b) with an entirely new Art. 17. UCP 600, Art. 17(b) is probably the crux of this provision, and it adopts the same technique as the ICC interpretation of July 1999.[78] It allows acceptance of any document bearing an apparently original signature, etc, unless the document itself indicates that it is not original. UCP 600, Art. 17(c) then lists other types of document that may be accepted. There is, in Art. 17, a presumption that a document is original unless it states to the contrary, so this achieves the permissive effect probably intended by UCP 500, Art. 20(b). It should also be relatively easy for a bank to apply UCP 600, Art. 17, even on a relatively cursory inspection of the documents. It probably resolves the problems, from a bank's viewpoint.

9.65 That said, the law requires originals for some purposes, and the difference in effect between a document that appears to be an original and a true original can be truly significant. In both *Motis Exports Ltd.* v. *Dampskibsselskabet AF 1912, Aktieselskab* and *Trafigura* v. *MSC*,[79] a shipowner who had delivered against a forged document of title, believing it to be an original document, was held liable to the holder of the original. Presumably the forged document was indistinguishable from the genuine, original bill of lading. The only solution to this problem is practical rather than legal, to find a method of making originals more easily recognisable. Perhaps a consequence

77. [2002] C.L.C. 1263.
78. For the full text see Appendix A.
79. Both of which cases are in para. 7.14ff.

of these decisions will be to encourage carriers to make original shipping documents more clearly recognisable, and difficult to forge, a point made in *Motis Exports* itself.[80] There, it is directly in the carrier's interests to make the original document easy to distinguish. There is no such direct interest for other documents, such as the insurance policy that was at issue in *Kredietbank Antwerp*, or the certificate in *Glencore*. Nonetheless, if there is a genuine reason for requiring an original document, then the only real solution is to make it distinguishable, a technological solution to reverse the effects of the technological advances over the past decade or two!

9.66 It is also worthwhile questioning the insistence on original documents. With a bill of lading the reason is obvious, as cases such as *Motis Exports* and *Trafigura* v. *MSC* show. The insurance policy in *Kredietbank Antwerp* probably needed to be assignable, and so again, there was a good reason for requiring an original. With documents such as quality certificates, the recipient needs to know that the signature is genuine, and that the document has not been altered, but that may be possible without an original. With waybills too, the legal significance is surely in the master or carrier's signature. Perhaps the long-term solution is to consider exactly what is needed, and why, and concentrate on how to require that, rather than continuing in all cases to worry about whether the document is original or not.

DOCUMENTS CONFORM BUT DOUBTS ABOUT GOODS

9.67 It should be clear from the preceding paragraphs that there are very strong arguments against banks being required to look behind the documents tendered to them, and in particular to involve themselves in disputes about the goods. Subject to a narrow fraud exception, the law has developed in accordance with these arguments. If the documents conform the bank must pay against them. If it does so, it may claim reimbursement from the customer, or if it is a confirming bank, from the issuing bank. Conversely, if they do not conform, the bank is under no obligation to pay, and if it does pay, has no right to claim reimbursement.

9.68 The leading authority is the decision of the House of Lords in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)*.[81] The case established and justified the principle, and recognised the fraud exception. It also established, or at least reaffirmed, the contractual basis for documentary credits, and equated the bank's duty to pay, under its contract with the beneficiary, with its right to reimbursement from the issuing bank or applicant; the duty to pay, and the right to reimbursement, go hand in hand with each other. I would also suggest that Lord Diplock applied the ordinary law of contract, tempered by public policy, to documentary credits; there is no special law which applies to this type of transaction. This seems right in principle, but there seems also to have been a retreat, or partial retreat, from this position in later cases in lower courts.

United City Merchants

9.69 It is probably fair to say that *United City Merchants* gave House of Lords authority to existing law, rather than making new law. Before *United City Merchants* there had

80. At first instance: [1999] 1 Lloyd's Rep. 837.

81. *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada (The American Accord)* [1983] A.C. 168, [1982] 2 Lloyd's Rep. 1.

been lower court cases between the issuing bank and its customer, where the customer attempted to restrain the bank from paying under the credit, and between buyer and seller, where the buyer attempted to restrain the seller from claiming under the credit.[82] In both cases, the attempt failed, though the seller/beneficiary was allegedly in breach of the sale contract, no fraud being proved on his part.

9.70 In *United City Merchants*, the House of Lords was called upon to rule directly on the position as between confirming bank and beneficiary, and part of the rationale of the decision was to equate the duties under each of the contracts. Thus, only where the confirming bank can reclaim the price from the issuing bank, who can in turn reclaim from the customer, is the confirming bank under any obligation to pay the beneficiary in the first place. Arguably, it would be absurd if the law applied different tests to each contract. The following quote, from Lord Diplock's speech, has already been referred to in chapter 1[83]:

> "It would be strange from the commercial point of view, although not theoretically impossible in law, if the contractual duty owed by confirming and issuing banks to the buyer to honour the credit on presentation . . . were not matched by a corresponding contractual liability of the confirming bank to the seller/beneficiary . . . to pay the sum stipulated in the credit upon presentation of apparently confirming documents."

9.71 In fact though, as we will see, the equation may not be perfect. Moreover, *United City Merchants* (unusually) was concerned with a final trial of the action. More recent cases have tended not to go to final trial, but to be decided at an interlocutory stage, or on an application for summary judgment, and there is a good argument that the application of the tests at this stage differs, depending on which contract is under consideration.[84]

9.72 *United City Merchants* arose from an f.o.b. sale of plant for the manufacture of fibreglass, payment to be by confirmed irrevocable credit. Under the terms of the credit, shipment had to take place on or before 15 December 1976. The cargo was actually shipped on 16 December 1976, but the bill of lading was fraudulently back-dated by the loading brokers, who were not in this regard acting for the plaintiff sellers. Documents which therefore apparently conformed to the credit were tendered, but rejected by the confirming bank because of the loading brokers' fraud. It is important to note that there was no evidence that the seller was fraudulent.

9.73 The issue which directly arose, therefore, in an action by the seller against the bank, was whether a bank was entitled to refuse payment under a confirmed irrevocable documentary credit, where although the documents appeared to be in order on their face, the goods were not in fact shipped according to contract.[85] The House of Lords held that the bank was bound to pay, subject to an exception, "for fraud on the part of the beneficiary seeking to avail himself of the credit."[86] The fraud exception did not apply, because the fraud was that of a third party. The decision in *United City Merchants* applies whenever the documents appear on their face to be in accordance

82. E.g., *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* [1958] 2 Q.B. 127; *Discount Records Ltd.* v. *Barclays Bank Ltd.* [1975] 1 W.L.R. 315; [1975] 1 Lloyd's Rep. 444.

83. Para. 1.57ff.

84. See further para. 9.103ff., considering each contract in turn.

85. The bank also took a second point, which was that the transaction was unenforceable because it was contrary to the exchange control regulations brought into force by the Bretton Woods Agreements Order in Council 1946. The plaintiffs' claim succeeded only to the extent that the contracts did not offend against the regulations. See further para. 9.141ff.

86. [1983] A.C. 168, 184.

with the terms and conditions of the credit, and would equally apply, for example, to a bill of lading which stated, without qualification, that defective goods were shipped in apparent good order and condition. It follows, therefore, that the confirming bank may have to pay for defective goods, and that the issuing bank having reimbursed the confirming bank, can itself look for reimbursement from the buyer. To this extent, both the bank's security and the buyer's position are weakened by the decision, but the bank's autonomy, and the seller's assurance of payment whatever view the buyer takes of the merits, are strengthened.

Justifications for the decision

9.74 The main justifications for the position have already been rehearsed. First, banks should not be expected to know the terms of the sale contract, and should not be interested in disputes between buyer and seller. Secondly, whereas banks may be assumed to have the expertise to check documentation, there is no reason to suppose that they have any expertise in the goods themselves. Perhaps more importantly, it is said that an elaborate commercial system has built up on the basis that a vendor of goods (who may himself be relying on the credit to raise money to purchase or manufacture the goods), selling against a confirmed letter of credit, is selling under the assurance that nothing will prevent him from receiving the price.[87] A commercial credit has been treated as the equivalent of cash, and the autonomy principle as the life blood of commerce.[88] We have seen already how Lord Diplock also considered the importance to sellers of assured payment, regardless of any disputes under the contract of sale.[89]

9.75 If the seller is himself fraudulent, then (but only then) is he barred from bringing an action on public policy grounds, those grounds being the same as those which apply to any other transaction brought before the English courts[90]:

"The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or, if plain English is to be preferred, 'fraud unravels all'. The courts will not allow their process to be used by a dishonest person to carry out a fraud."

9.76 It is important to appreciate the narrowness of the "one established exception". Only fraud on the part of the seller/beneficiary is covered, and it must be proved. Banks have to honour a credit even if they suspect fraud, if they cannot prove it.[91] They even have to pay if they know that the documents tendered are fraudulent, unless they can prove that the seller was aware of the fraud. Professor Schmitthoff has commented that[92]: "[banks] will not like the idea that they have to honour a credit although they know that the documents tendered are fraudulent, only because it cannot be proved, before the credit is honoured, that the seller is aware of the fraud."

87. See para. 9.27ff.
88. E.g., *Harbottle* v. *National Westminster Bank*, in para. 9.77ff.
89. [1983] A.C. 168, 183. See also above, para. 9.27ff.
90. *Ibid.*, at 183–184, applied in *Rafsanjan Pistachio Producers Co-Operative* v. *Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep. 513, one of the few reported cases where the requisite fraud was proved.
91. See para. 9.103ff.
92. [1982] J.B.L. 319, 322.

The performance bond cases

9.77 Though before *United City Merchants* there had been previous cases involving documentary credits, the main authorities then concerned performance bonds. The House approved these authorities, taking the view that the law on documentary credits and performance bonds was the same.

9.78 The law on standby credits and performance bonds is similar to that on documentary credits, in that the relationship between buyer and bank (or in the case of a standby credit issued by the buyer, seller and bank) is governed by the terms of the performance bond or standby credit alone, and not by the contract of sale. Further, as with documentary credits, the banks are not concerned with disputes between the buyer and seller under the sale contract.

9.79 This can cause difficulties in particular for sellers, and contractors under construction contracts, when they are required to provide performance bonds which are wide in their scope, or when insufficient conditions are attached. It is often provided that payment is made on demand, in which case the buyer need do no more than allege default for the bond to be triggered. As with documentary credits, the bank is not concerned with the merits of the buyer's allegation, but must enforce the bond unless it can be proved that the buyer is fraudulent.

9.80 In *Harbottle (Mercantile) Ltd.* v. *National Westminster Bank*,[93] a decision of Kerr J., and in the later decision of the Court of Appeal, which approved it, *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.*,[94] sellers sought injunctions from banks, seeking to prevent them paying on demand under performance bonds agreed by them. In both cases they were unsuccessful. Kerr J.'s justification in *Harbottle*, for refusing to restrain the bank from making payment, was similar to that we have already seen for documentary credits[95]:

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. . . . They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

9.81 This is a well-known quote, and "the life-blood of international commerce" is a phrase that recurs throughout this area of the law. The cash principle from documentary credits has also been applied to performance bonds[96]:

> "Such a bond is, effectively, as valuable as a promissory note and is intended to affect the 'tempo' of parties' obligations in the sense that when an allegation of breach of contract is made (in good faith), the beneficiary can call the bond and receive its value pending the resolution of the contractual disputes."

9.82 Performance bonds, like documentary credits, are treated as the equivalent of cash.

9.83 The facts of *Harbottle* and *Edward Owen* were similar, and *Harbottle* was approved by the Court of Appeal in *Edward Owen*, a case which (as we saw in para.

93. [1978] Q.B. 146.
94. [1978] Q.B. 159; [1978] 1 Lloyd's Rep. 166. See also comments in *Power Curber International Ltd.* v. *National Bank of Kuwait SAK* [1981] 1 W.L.R. 1233, 1238, a case discussed in para. 2.104ff.
95. [1978] Q.B. 146, 155–156.
96. *Cargill International SA* v. *Bangladesh Sugar and Food Industries Corp.* [1996] 2 Lloyd's Rep. 524, 528.

9.27ff.) was in turn approved in the House of Lords in *United City Merchants. Edward Owen* shows how harshly the principle can operate against sellers who agree to performance bonds of this type. The plaintiffs there were English sellers who had contracted with Libyan buyers to erect greenhouses in Libya, and had agreed that a performance guarantee of 10 per cent of the price should be lodged by Barclays Bank with a Libyan bank. Barclays accordingly, on the plaintiffs' behalf, gave a performance bond to the Umma Bank in Libya, which was payable "on demand without proof and conditions".

9.84 Under the sale contract the buyers undertook to provide an irrevocable confirmed documentary credit, but no such letter of credit was opened. Accordingly, the sellers repudiated the contract. But the bond had already been lodged by then, and indeed it seems that the guarantee was given not only before satisfactory arrangements for payment had been made, but even before the contract of sale had been concluded. The buyer invoked the guarantee, and the plaintiffs sought an interlocutory injunction to prevent Barclays Bank from paying the Libyan bank. The Court of Appeal held, approving *Harbottle*, that the injunction should not be granted.

9.85 The decision of the Court of Appeal states that "the performance guarantee stands on a similar footing to a letter of credit".[97] The authorities on credits were reviewed, and the conclusion was that Barclays Bank must honour the guarantee it had given to the Umma Bank according to its terms. It was not concerned with relations between seller and buyer. As with documentary credits, the only exception is where fraud on the part of the buyer can be proved. Not only could that not be done in the case itself, but given the timescale on which performance bonds operate, it would be unlikely for it to be proved, other than in exceptional cases.

9.86 Payment under the performance bond is not necessarily the end of the matter. In principle, the sellers could have attempted to recoup their loss by suing the buyers for damages under the sale contract, but in *Edward Owen* they were not confident of their chances of success, since the sale contract was governed by Libyan law and gave exclusive jurisdiction to the courts of Libya, and it was not practicable for the English sellers to invoke the jurisdiction of the Libyan courts.[98]

Position of sellers (or contractors) and banks

9.87 Because the buyer needs to do no more than demand payment under an unconditional performance bond, and the bank is unconcerned with the validity of his claim, performance bonds are potentially far more dangerous for a seller (or contractor) than a documentary credit is to a buyer. At least to claim payment under a documentary credit the beneficiary must obtain and tender the appropriate shipping documents, and it is obviously difficult to do this in the event of total non-performance by him.

9.88 The sellers in *Edward Owen* really brought their difficulties upon themselves, by agreeing to an unconditional bond. Since the bond will be enforceable on its own terms independently of the sale contract, it is essential that the bond itself must refer to and depend on the main sale contract. It is also vital that it enumerates the

97. [1978] 1 Q.B. 159, *per* Lord Denning M.R. at 171.
98. *Ibid.*, *per* Lord Denning M.R. at 172.

circumstances in which payment becomes due, and preferably that there is some form of independent certification that those circumstances have arisen.[99]

9.89 No doubt sellers (or contractors) are concerned that they may lose the contract should they demand that such conditions are imposed on performance bonds. In a case such as *Edward Owen*, however, where there is no useful action on the sale contract, unconditional performance bonds have been described as "virtually promissory notes payable on demand".[100] If the buyer is honest and reputable, or is likely to wish to continue dealing with the seller (or contractor), then that is unlikely to cause problems. Otherwise the seller (or contractor) is almost certain to lose money, and should take this into account in fixing the price.

9.90 As we saw in chapter 2, a bank obtains no security under a standby letter of credit, and the same is true for a performance bond. The bank has a personal action only against the seller or contractor, to recoup the amount of the bond. Banks can protect themselves to an extent by taking an assignment of all payments due under the underlying contract, which are paid over to the contractor only in the event of the bond not being called. This protects the bank against default by its customer, but is unlikely to protect it against its bankruptcy, since if the seller or contractor goes into liquidation before the contract is completed, it is unlikely that the buyer will make any payments under the underlying contract. It can still claim against the bank on the performance bond, however.[101]

The final accounting

9.91 The performance bond is a mechanism for the speedy and reliable resolution of disputes, without recourse to litigation, perhaps abroad,[102] but it should be seen as a device to protect parties against the uncertainties of litigation, rather than a final resolution. If an unjustified demand is made, or a demand which exceeds the loss suffered by the person making it, there can be a later final accounting. The principle was established in *Cargill International SA* v. *Bangladesh Sugar and Food Industries Corp.*[103] The buyer was held entitled to make a call for the full amount of the bond, so called liquidated damages at 10 per cent of contract price, even where the breach of contract by the seller had caused no loss. This is in line with the principles already discussed, but Morison J. (whose view was upheld in the Court of Appeal) held that the amount paid under the bond was later recoverable by the seller, it being implicit in the nature of the bond (subject to construction of its terms) that there would at some stage be an accounting between the parties.

9.92 In *Edward Owen*, we saw that the real injustice was the perceived inability of the sellers later to bring an action on the sale contract. Hence, in that case at any rate,

99. As there is, at least to a limited extent, in the standby letters of credit in *The Delfini* and *The Filiatra Legacy*, in para. 2.69ff.

100. [1978] 1 Q.B. 159, *per* Lord Denning M.R. at 170. See also above, para. 9.77ff.

101. Banks can also spread their risks by syndication. This is beyond the scope of this book, but see Kronfol, *The Syndication of Risk in Unconditional Bonds* [1984] J.B.L. 13.

102. E.g., *State Trading Corp. of India Ltd.* v. *ED & F Man (Sugar) Ltd.*, C.A., 17 July 1981, *per* Lord Denning M.R. at (quoted in *Cargill* v. *Bangladesh* [1996] 2 Lloyd's Rep. 524, 529 (col. 1)).

103. [1996] 2 Lloyd's Rep. 524 (Morison J.), approved *Comdel Commodities Ltd.* v. *Siporex Trade SA* [1997] 1 Lloyd's Rep. 424 (C.A.), affirmed [1998] 1 W.L.R. 461 (C.A.). See also para. 2.69ff. on the avoidance, using performance bonds, of difficulties over contractual penalty clauses.

the money paid under the performance bond was irrecoverable. In *Cargill* v. *Bangladesh*, *Edward Owen* was regarded as an authority only on the issue of the injunction, being silent on any accounting between the parties.[104]

9.93 In *Cargill* v. *Bangladesh*, the extent of the seller's loss was known by the time of the final accounting, because he had paid under the performance bond. In *Tradigrain SA* v. *State Trading Corp. of India*,[105] a call had been made on the bond, but no payment yet made. Nevertheless, Christopher Clark J. held that the obligation to return any overpayment arose when the fact that there had been an overpayment was established either by agreement or judgment.[106] That applied in the case, and the buyers were required to account the overpayment.

9.94 The position is similar for documentary credits. These are a mechanism for speedy and immediate payment, but they do not preclude an action by the buyer on the sale contract, should the seller's demand for payment turn out to have been unjustified, or should the seller be in breach of contract in any respect. They are only the end of the process, where an action on the sale contract is impossible or impractical, for example where the seller has gone into liquidation, or the difficulties of bringing an action abroad are simply too great.

A special law for documentary credits?

9.95 Though there is no explicit statement, the entire logic of *United City Merchants* is that documentary credits (and hence by implication performance bonds) are governed by the ordinary law of contract, tempered by public policy, also an application of the general law. There is no special law which governs documentary credits alone.[107]

9.96 Since *United City Merchants*, any explanation of documentary credits based on mercantile usage, or some special mercantile law, must be ruled out. To base documentary credits other than on contract would have entailed developing a special law for them. Not only would this be difficult to justify in principle, but it could also be far too restrictive. It would be necessary to define the limits of a special law, but where? There is no reason, for example, to limit the issue of documentary credits to banks. Anyone should be able to issue them, it being markets rather than the law that might limit this in practice to those who have reputable creditworthiness.[108] Moreover, though current trading practices favour the principle of autonomy over almost all countervailing considerations, changes in those practices may, at some future time, favour a different balance. The contractual analysis adopted in *United City Merchants* properly determines that the obligations of the parties depend only on what they have agreed, tempered by any policy considerations developed *generally* by the courts. What the parties have agreed, or are taken to have agreed, can change over time, and can also be adapted to suit particular individual circumstances.

104. [1996] 2 Lloyd's Rep. 524, 530.
105. [2006] 1 Lloyd's Rep. 216.
106. *Ibid.*, at [28].
107. See para. 1.67ff.
108. Indeed, there was said to be debate over whether UCP 600 should continue to refer to issuers and advisers as banks or parties, given "the recognition by the ICC that non-banks can issue L/Cs—as is commonplace for larger US companies when dealing with suppliers in Asia": http://www.mantissa.co.uk/support/nextucp2.htm

9.97 Given the contractual analysis adopted in *United City Merchants*, we must assume that the justifications for the decision feed into terms of the autonomous contracts making up the performance bond or documentary credit. There is no particular difficulty about this. UCP 600 itself provides, in Art. 4, that a credit is a separate transaction from the sale or other contract on which it may be based, and in Art. 5, that banks deal with documents and not with goods, services or performance to which the documents may relate. This is an express contractual provision for the autonomy of the credit, and makes clear the contractual obligations of the banks to the commercial parties, and to each other.[109] Lord Diplock cites the then equivalent to UCP 600, Art. 5, in *United City Merchants* itself.[110]

9.98 The UCP does not apply to performance bonds, but it has not been suggested that the UCP does other than codify the common law. If the UCP does not apply, terms can be implied into the contracts. The parties to the arrangement may be taken to have assumed that the guarantor would neither wish nor (normally) be able to concern itself with disputes under the underlying transaction, and that the seller's assured right to payment should be independent of such disputes. These rationales make perfect sense whether they are expressed in terms of guarantors in general or banks in particular. In both *Edward Owen* and Kerr J.'s earlier decision in *RD Harbottle* v. *National Westminster Bank*,[111] surprise had been expressed at the terms of the bond,[112] but it was emphasised that the applicants had agreed to them.[113] Special rules are not being applied; the parties are bound by their agreed terms. The cash principle, and the life-blood of international commerce, translate less easily directly into contractual terms, but they are at least part of the substratum upon which the parties contract. As before, it does no harm to the sentiments expressed here to replace "banks" with "guarantors" in general. We do not need to develop special principles, applicable only to banks. Kerr J. also observed that the merchants had agreed the risks.[114]

9.99 In *Bolivinter Oil SA* v. *Chase Manhattan Bank*,[115] Lord Donaldson M.R. justified a principle of evidence on enhancement of the reputation of banks for financial and contractual probity. This is slightly more difficult to justify, looking as it does to the position of just one party to the transaction, but it could also be part of the substratum upon which all the parties contract. Nonetheless, it is less satisfactory as a justification; the law does not worry overly about the reputation of businesses in general, so this looks like justifying a special rule for the banking community, and would not obviously apply were a documentary credit or performance bond to be issued by someone other than a bank. It is, however, merely an additional justification for the autonomy principle, and can be readily translated into contractual terms.

9.100 Contract is a flexible instrument, and can adapt itself to the particular transaction. If the substratum is different, then the autonomy principle need not

109. See para. 9.2ff.
110. [1983] 1 A.C. 168, 183, citing UCP 290, Art. 8.
111. [1978] Q.B. 146.
112. *Ibid.*, at 150.
113. *Ibid.*, *per* Kerr J. at 156; See also Geoffrey Lane L.J. in *Edward Owen* v. *Barclays Bank* [1978] Q.B. 159, 174, 176.
114. [1978] Q.B. 146, 150.
115. [1984] 1 Lloyd's Rep. 251, 257. Also below, para. 9.114ff.

remain sacrosanct. In *Safa Ltd.* v. *Banque du Caire*,[116] the bank had an interest in the underlying transaction. When the beneficiary sought summary judgment against the bank, on a guarantee payable on demand, the Court of Appeal may have relaxed the autonomy principle. It is more difficult to imply a term that the credit is a separate transaction where clearly it is not, and an advantage of reasoning from ordinary contractual principles is that we are dealing with what the parties might be taken to intend, rather than rigid rules of law.

9.101 Where the autonomy principle applies, it allows, and indeed requires the banks to distance themselves from the underlying transaction, and to pay on the basis of the documents (or the demand) alone. However, the autonomy principle, like any other principle based on contractual terms, must give way to a public policy rule, preventing a fraudulent beneficiary from claiming. The maxim *ex turpi causa non oritur actio* or, if (as Lord Diplock says) plain English is to be preferred, "fraud unravels all", must take priority over contractual terms. As we have seen, the UCP entrenches the autonomy principle, but has nothing to say about the fraud exception. Whatever the UCP said, it would not be allowed to erode it. It would be sensible for the UCP to address the issue, only if it were wished to widen the fraud exception, and allow banks a greater freedom to reject. It may be supposed that those responsible for drafting the code do not wish to do this.

9.102 Despite the sentiments that (I suggest) underlie *United City Merchants*, in some of the later cases, the autonomy principle has apparently been accorded the status of a special rule, just for documentary credits and performance bonds. The generality of the reasoning in *United City Merchants* has sometimes been forgotten. At the time of writing (July 2007) it is unclear whether the courts will develop the principles in this section as a special rule, or as part of the general law. If documentary credits are to be allowed to evolve, for example to be issued by persons other than banks, then there is a lot to be said for keeping them within the framework of the general law.

Proving fraud by beneficiary

9.103 If there is no special law applicable only to documentary credits, the evidential requirements for proving fraud in documentary credit cases will be the same as elsewhere in the law. In this section we work through those requirements, but also consider the authorities which suggest that stricter principles apply, applicable only to documentary credits.

9.104 In *United City Merchants* v. *Royal Bank of Canada* the bank had refused payment, and was sued by the beneficiary. It was not an action for summary judgment, but a final trial of the action. In principle, the *ex turpi causa* doctrine would preclude the beneficiary from succeeding, were his fraud to come to light at any time before the trial. There can be no possible basis for requiring the evidence to have come to light at an earlier time, nor for requiring the bank or anyone else to have had knowledge of it. The idea that a fraudulent beneficiary could succeed in an action, just because the bank was unaware of his fraud when presentation or payment were made, is nothing short of preposterous.

116. [2000] 2 Lloyd's Rep. 600. Waller L.J. observed that "the letters of credit are undertaking to pay a sum to an insurance broker against the obtaining of financial guarantees of which the bank itself was to be the beneficiary". In fact the decision probably does conform to the principles below, in para. 9.126ff.

9.105 Proving fraud is not easy. These are civil trials, and the appropriate standard is therefore the balance of probabilities, rather than the more difficult criminal standard: beyond reasonable doubt. Nevertheless, allegations of dishonesty are inherently unlikely, and the courts accordingly require stronger evidence[117]:

> "the more serious an allegation is the more intrinsically unlikely it is to be true and therefore the stronger the evidence that is required to establish that it is more probable than not that the allegation is true."

9.106 There are a number of cases, for example where a marine insurance claim is defended on the grounds that the assured has committed wilful misconduct, where a high standard of proof is required.[118] A similar standard would be appropriate in a documentary credit case.

9.107 Most of the cases do not concern final trials of the action, but interlocutory injunctions by applicants to restrain payment, or actions for summary judgment by beneficiaries. In such cases, procedural rules relating to the grant of interlocutory injunctions and summary judgment come into play. Then, other factors, such as the knowledge of the bank, and the time at which it acquired such knowledge, can also become relevant.

Applicant applies to restrain bank from making payment: the bank's mandate

9.108 In an action to restrain the bank from making payment under a documentary credit, the applicant must show that such payment would be a breach of its mandate. This requires a consideration of what the bank's mandate is.

9.109 In *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine*,[119] the bank had debited the customer's account and the customer sought a declaration that the debit was wrongful, unsuccessfully because (as we have seen) the documents conformed on their face. The bank must therefore have complied with its mandate. The documents were in fact forged, it was not found by whom, but in *United City Merchants* Lord Diplock appeared to approve the "landmark" American case of *Sztejn* v. *J Henry Schroder Banking Corp.*,[120] where it was assumed that the beneficiary (seller) was himself fraudulent, and Shientag J. observed that[121]:

> " . . . even though the documents are forged or fraudulent, if the issuing bank has already paid the draft before receiving notice of the seller's fraud, it will be protected if it exercised reasonable diligence before making such payment."

9.110 This suggests that the decision in *Gian Singh* would have been the same, whether or not the forgery was that of the beneficiary himself; it had already paid, without notice of a fraud. If the issue, as between bank and applicant, is whether payment had been wrongly made, the bank will have exceeded its mandate, only where it had prior notice of the fraud.

9.111 On the other hand, *Sztejn* also decided that the autonomy principle does not extend to the situation where the beneficiary's fraud has been "called to the bank's

117. *The Grecia Express* [2002] 2 All E.R. (Comm.) 213, 227. A similar view is expressed in *The Elias Issaias* (1923) 15 Ll. L. Rep. 186, 187.
118. E.g., *The Michael* [1979] 2 Lloyd's Rep. 1.
119. [1974] 1 W.L.R. 1234. Above, para. 9.23ff.
120. (1941) 31 N.Y.S. 2d 631 (Supreme Court of New York).
121. *Ibid.*, 634.

attention before the drafts and documents have been presented for payment". In *Edward Owen*, Lord Denning M.R. went further, saying that "the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment".[122] Why the bank's mandate does not extend to payment in such a case was not made clear in either *Sztejn* or *Edward Owen*, nor indeed in *United City Merchants* itself, which was concerned directly only with the contract between beneficiary and confirming bank, but the best explanation is probably that a bank with knowledge of the beneficiary's fraud would itself be complicit, were it to pay against them and require reimbursement from the applicant. Otherwise the autonomy principle prevails. Anyway, whatever the proper explanation of *Sztejn*, the bank's mandate depends not only upon whether the beneficiary is fraudulent, but also on its own knowledge. If it has the requisite knowledge, it has no mandate to pay.

9.112 On the assumption not only that this is correct, but also that where the action is brought by the beneficiary, any fraud on his part will bar his action, whenever the evidence comes to light, it follows that there is not a total assimilation between the contract between bank and beneficiary, and that between bank and applicant. Even where the bank would not exceed its mandate by making payment, because it did not at that time have clear knowledge of the fraud, it could still refuse to pay, taking the risk whether such evidence would later come to light. This difference in treatment between the two contracts is probably inevitable; clearly, a fraudulent beneficiary should not be allowed to sue, whenever evidence of the fraud comes to light, but equally clearly, a bank should not be liable to its customer for making payment, unless it knew of the fraud.

9.113 From *Sztejn* it is not clear whether the relevant time for the bank's notice of fraud is payment, or presentation of documents. In principle, its mandate surely cannot extend to making payment where (at any time before payment) it discovers that the demand is fraudulent. Discovery only after payment will not give rise to a breach of mandate, on the basis of *Gian Singh* itself. This suggests that the relevant time is the time of payment.[123]

Applicant applies to restrain bank from making payment: requirements for interlocutory injunction

9.114 In *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine*, payment to the beneficiary had already been made. The case therefore proceeded with no unusual urgency, and all relevant evidence must be assumed to have been available. More often, in cases between the bank and its customer, the customer seeks an injunction, aiming to prevent payment by the bank. This must necessarily be heard quickly, without the full examination of the facts that would be undertaken at full trial.

9.115 The outcome of such disputes is determined by two general principles, unless an exception applies. First, there is *The Siskina* principle, that injunction jurisdiction is ancillary to a substantive claim.[124] In the present context, that implies that

122. [1978] Q.B. 159, 169. The reference to forged documents needs to be qualified in the light of *United City Merchants*, to those where the beneficiary knows of the forgery.

123. See also *United Trading Corp.* v. *Allied Arab Bank Ltd.* [1985] 2 Lloyd's Rep. 554 (note), 560 (cols 1–2); *Czarnikow-Rionda Sugar Trading Inc.* v. *Standard Bank* [1999] 2 Lloyd's Rep. 187, 202.

124. From the House of Lords decision in *The Siskina* [1979] A.C. 210.

the jurisdiction for the issue of the injunction is to prevent the bank exceeding its mandate, thereby breaking its contract with its customer, and that no wider jurisdiction is being invoked, to prevent fraud more generally. The second principle is taken from the House of Lords decision in *American Cyanamid Co.* v. *Ethicon Ltd.*, where Lord Diplock noted of the interlocutory stage that[125]:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

9.116 For this reason, the claimant need not show a strong *prima facie* case, since to establish that would be likely to involve substantial resolution of the main issues. He only has to show that there is a serious question to be tried (the threshold test), and that the balance of convenience test favours the granting of the interlocutory remedy. In general, therefore, the merits of the case are not examined at the interlocutory stage. Application of that principle to the present situation implies a relatively low evidential threshold for the claimant.

9.117 Both principles are subject to exceptions, and the issue is whether the situation under discussion is exceptional. Lord Diplock himself recognised that he had stated the principle in *The Siskina* too narrowly,[126] and it now seems that the courts also have jurisdiction (at least) to award an injunction to prevent a party from committing unconscionable conduct.[127] The difficulty is that the unconscionable conduct alleged is not that of the party against whom the injunction is sought. There is a further principle, derived from *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners*,[128] the effect of which is to allow jurisdiction to order disclosure against a third party who has become mixed up in the transaction concerning which discovery is required. That is very different from the injunction sought in the case under consideration, and there seems no doubt that a jurisdiction generally to prevent the fraud of a third party would be an extension beyond present case law. Though there are cautious statements that *Siskina* does not apply to the fraud rule here discussed,[129] a cause of action was assumed to be required for the granting of an injunction in *United Trading Corp. SA* v. *Allied Arab Bank Ltd.*[130] Rix J. was firmly of the view that the *Siskina* principle applied in *Czarnikow-Rionda Sugar Trading Inc.* v. *Standard Bank*,[131] partly on the ground that the cases required the knowledge by the bank of the bank, whereas the general prevention of fraud would require no such knowledge. Actually there is no such requirement expressly stated in *United City Merchants*,[132] but fraud to the knowledge of the bank is

125. [1975] A.C. 396, 406.

126. *British Airways Board* v. *Laker Airways Ltd.* [1985] A.C. 58, 81–82.

127. *South Carolina Co.* v. *Assurantie NV* [1987] A.C. 24, 40, *per* Lord Brandon. Lord Goff would have accepted wider powers, at 44–45.

128. [1974] A.C. 133.

129. E.g., Staughton L.J. in *Group Josi* v. *Walbrook Insurance Co. Ltd.* [1996] 1 W.L.R. 1152, tentatively at 1159–1160.

130. [1985] 2 Lloyd's Rep. 554, 559 (col. 2).

131. [1999] 2 Lloyd's Rep. 187.

132. In *Rionda*, Rix J. thought that it was implied, because Lord Diplock approved *Sztejn* and *Edward Owen*, but where (as in *United City Merchants*) the action is brought by the beneficiary, only his fraud ought to be relevant to the application of the *ex turpi causa* issue; the knowledge of the bank is relevant only to the issue of its mandate with its customer.

the test of all three members of the Court of Appeal in *Edward Owen Engineering Ltd.* v. *Barclays Bank*.[133]

9.118 For the establishment of a seriously arguable case, at any rate against the applicant's own bank, it matters little whether or not *Siskina* applies, since if there is evidence of fraud by the beneficiary, the proceedings will themselves provide the bank with the requisite knowledge. It matters for the application of the balance of convenience test, however. It also matters if the injunction is directed against a bank with whom the applicant has no direct contractual relationship. In *United Trading Corp. SA* v. *Allied Arab Bank Ltd.*, the applicants procured performance bonds not through a direct approach to the bank issuing them (Rafidain), but by requesting their own bank to instruct Rafidain to issue them.[134] Ackner L.J. thought there might be a cause of action in tort should Rafidain pay against a demand that it knew to be fraudulent,[135] but this was on the basis of authorities that have since been discredited.[136] Though he was not dealing with one, he also observed that the contracts in a confirmed credit, though interconnected, are autonomous.[137] Thus if *Siskina* applies, it may not be possible for an applicant to restrain payment by a confirming bank under a normal confirmed credit. Only the bank with whom the applicant is in a direct contractual relationship can be restrained.

9.119 The possibility of exceptions was also recognised by Lord Diplock to the principles in *American Cyanamid*, though there was no elaboration within the case as to the basis upon which any exceptions might be created. All Lord Diplock said was that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases".[138] A possible justification for separate treatment of documentary credits might be that the issues are effectively decided at the interlocutory stage, and it is certainly true that the value of credits and performance bonds might be reduced, were interlocutory intervention by the courts to become widespread. (We have seen that even where there is a claim on the credit or bond, to the extent that it is unjustified, there is a later accounting,[139] but an action against a foreign seller or buyer will not always be practicable or indeed possible.) Nonetheless, though there are statements that *American Cyanamid* does not apply to the claims considered here,[140] Ackner L.J. applied, or at least purported to apply it in *United Trading*.[141]

9.120 The threshold test in *American Cyanamid* is only that there is a serious question to be tried, which on its face anyway, suggests a low standard of proof. However, the allegation is of fraud, and if *Siskina* applies, it must be alleged that the bank is effectively complicit in the fraud. The courts have always taken the view that proof of dishonesty is difficult, simply because so serious an allegation is intrinsically

133. [1958] 2 Q.B. 127.

134. [1985] 2 Lloyd's Rep. 554 (note), 555 (col. 2).

135. *Ibid.*, at 560 (col. 1).

136. *Anns* v. *Merton L.B.C.* [1978] A.C. 728 and *The Irene's Success* [1982] 1 Q.B. 481, neither of which can be regarded as good law in the light of *The Aliakmon* in para. 5.59ff.

137. *Ibid.*, applying *United City Merchants*.

138. [1975] A.C. 396, 409.

139. See above, para. 9.91ff.

140. E.g., Phillips J. in *Deutsche* v. *Walbrook* [1995] 1 W.L.R. 1017, 1028–1029. See also Staughton L.J. in *Group Josi* v. *Walbrook Insurance Co. Ltd.* [1996] 1 W.L.R. 1152, 1161, adopting the view of Lloyd L.J. in *Dong Jin Metal Co. Ltd.* v. *Raymet Ltd.* (unreported), 13 July 1993, that this is within the exceptions.

141. [1985] 2 Lloyd's Rep. 554, 561 (col. 2).

unlikely to be true.[142] Purporting to apply the threshold test in *United Trading*, Ackner L.J. famously said that[143]:

"We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud."

9.121 The only realistic inference test may perhaps be regarded as an elaboration of views previously expressed in *Bolivinter Oil SA* v. *Chase Manhattan Bank*, that[144]:

" . . . the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests upon the uncorroborated statement of the customer . . . "

9.122 Though *Bolivinter* did not explicitly consider *American Cyanamid*, these views are probably consistent with it, given the serious nature of the accusation. In *Bolivinter*, there was insufficient evidence of fraud for the injunction to be granted, and in *United Trading*, the *American Cyanamid* threshold test was explicitly not satisfied.[145]

9.123 Whether or not the threshold test is satisfied, however, the balance of convenience will hardly ever be, at any rate if *Siskina* principles apply. This point was first made by Kerr J. in *Harbottle*[146]:

"The plaintiffs then still face what seems to me to be an insuperable difficulty. They are seeking to prevent the bank from paying and debiting their account. It must then follow that if the bank pays and debits the plaintiffs' account, it is either entitled to do so or not entitled to do so. To do so would either be in accordance with the bank's contract with the plaintiffs or a breach of it. If it is in accordance with the contract, then the plaintiffs have no cause of action against the bank and, as it seems to me, no possible basis for an injunction against it. Alternatively, if the threatened payment is in breach of contract . . . , then the plaintiffs would have good claims for damages against the bank. In that event the injunctions would be inappropriate . . . , because they might cause greater damage to the bank than the plaintiffs could pay on their undertaking as to damages, and because the plaintiffs would then have an adequate remedy in damages. The balance of convenience would in that event be hopelessly weighted against the plaintiffs."

9.124 This passage was approved and applied in *United Trading* and also in *Czarnikow-Rionda Sugar Trading Inc.* v. *Standard Bank*.[147] It would seem applicable in any case where there is no doubt about the solvency of the bank.

9.125 To conclude this section, then, if the normal principles from *Siskina* and *American Cyanamid* apply, it will never be possible for an applicant to obtain an injunction against a bank with whom he has no contractual relationship, and hardly ever even against his own bank. Even if the situation considered here is an exception to *American Cyanamid*, there is no suggestion that an injunction can thereby be obtained more easily; indeed, the effect of an exception would be to make it even more difficult.

142. Para. 9.103ff.
143. [1985] 2 Lloyd's Rep. 554, 561 (col. 1), elaborated in 561 (col. 2).
144. [1984] 1 Lloyd's Rep. 251, 257.
145. [1985] 2 Lloyd's Rep. 554, 565 (col. 1).
146. [1978] Q.B. 146, 155.
147. Respectively at [1985] 2 Lloyd's Rep. 554, 565 and [1999] 2 Lloyd's Rep. 187, 190.

Disputes between beneficiary and bank

9.126 The principles upon which disputes between beneficiary and bank should be decided are quite different from those between applicant and bank. As in *United City Merchants* itself, the bank must pay if the documents apparently conform, the only exception being if the *ex turpi causa* doctrine applies. All evidence available up to the date of the action ought to be available to the bank, and the bank's mandate to its customer is not directly relevant. One of the problems with the recent cases in this area has been the willingness of the courts to use principles applicable as between banks and applicants in disputes between beneficiary and bank. If the ordinary law of contract applies, however, the terms of the two contracts differ in this respect, and principles from the one contract need not be directly applicable in the other.

9.127 By no means all disputes are, as *United City Merchants* was, final actions against the bank for payment. A beneficiary may sue the bank for summary judgment. In such cases, it is appropriate to apply the normal rule, that the beneficiary is not entitled to summary judgment if the bank has a real prospect of success at defending the action at final trial.[148] In *Solo Industries UK Ltd.* v. *Canara Bank* Mance L.J. said[149]:

> "A 'real prospect' of establishing fraud is a comparatively low hurdle. *Civil Procedure 2001* (Spring 2001), vol. 1, para. 24.2.3 identifies it with 'some prospect, i.e., some chance of success'; it continues: 'That prospect must be real, i.e., the court will disregard prospects which are false, fanciful or imaginary', and adds that it does not involve showing probability of success at trial."

9.128 This therefore appears to present a lower threshold for the defendant than the *American Cyanamid* threshold presents to a claimant, at any rate as that threshold has been interpreted in the interlocutory injunction cases taken against banks.

9.129 The problems of conflating the two contracts can be seen quite clearly in *Balfour Beatty Civil Engineering* v. *Technical and General Guarantee Co. Ltd.*[150] This was an Order 14 case, effectively for summary judgment under the old rules.[151] The beneficiaries argued from interlocutory injunction authorities, such as *Edward Owen* and *United Trading*, that the bank must pay unless there was clear evidence of fraud available to the surety at the time of the demand. Given that those cases depended on the bank's mandate, the knowledge requirement is logical and reasonable.[152] However, Waller L.J. thought it would be absurd if, in an Order 14 case, the bank could not use evidence of fraud which had come to light between the demand and the hearing. In order to achieve this, he adopted an explanation that if there was evidence of fraudulent misrepresentation by the beneficiary, between the demand and the hearing, that misrepresentation could give rise to a counterclaim by the bank against the beneficiary, upon which the bank could bring its own Order 14 proceedings. The two sets of proceedings would cancel each other out; the beneficiary's Order 14 claim, which could not be defeated by evidence of fraud that came to light after the demand, would nevertheless be cancelled out by the bank's counterclaim.

9.130 A problem with this analysis is that, because the threshold for defending a summary judgment claim is quite low, the bank will have a hard task establishing the

148. C.P.R. 24.2(a)(ii).
149. [2001] 1 W.L.R. 1800, 1812 [31].
150. [2000] C.L.C. 252.
151. I.e., Rules of the Supreme Court, prior to the Civil Procedure Rules.
152. Though not necessarily at the time of demand. See para. 9.108ff.

relevant criteria for summary judgment on its counterclaim. Waller L.J. continued by suggesting that:

> "If the evidence is powerful but not quite sufficient to enable Order 14 judgment to be entered in favour of the surety on the basis that the demand was fraudulent, then either judgment would be entered with a stay of execution or probably no judgment would be entered at all until what is in effect the counterclaim had been fought out."

9.131 The juridical basis for this assertion was not made clear, but even leaving aside the absurdly tortuous nature of this counterclaim reasoning, this is the wrong result. Quite apart from the fact that it shifts the knowledge requirement of the bank from payment to demand, the bank should in any case be able to defend the claim, if it can establish a real prospect of defending on the fraud issue, using any evidence that has become available by the time of the summary judgment proceedings. There is no reason why it should have to go further, and mount the additional hurdle of showing that the beneficiary has no reasonable prospect of defending its own counterclaim.

9.132 The problem arises from Waller L.J.'s perceived need to distinguish *Edward Owen* and *United Trading*, because of a failure to appreciate that distinguishing those cases is entirely unnecessary. Since this is not a claim on the contract between bank and applicant, the bank's mandate should be irrelevant, and so also therefore, should the question of when it obtained notice. The bank should be entitled, in its defence, to use any evidence of fraud available at any time up to the trial, simply to invoke the *ex turpi causa* principle. Once it is appreciated that its mandate is irrelevant, the complexities of counterclaim reasoning are rendered entirely unnecessary.[153]

9.133 In the event, there was insufficient evidence, even by the date of the action, that the beneficiary had acted dishonestly, and the claim for summary judgment therefore succeeded.

Disputes on the underlying contract

9.134 The underlying contract provides alternative actions to the parties to it, in respect of the matters already considered. If the beneficiary of a credit is in breach of the sale contract, the applicant can sue for damages. If the beneficiary under a performance bond makes an unjustified claim, there will be a later accounting.[154] If the applicant unjustifiably interferes with a payment, he will himself be in breach of contract. The underlying contract allows all claims to be finally resolved, at any rate in principle. The problem is that these disputes are resolved only at the end of the process. If a party, having obtained money to which he should not have been entitled, becomes insolvent prior to the final action, the innocent party will have no redress, but arguably he has willingly taken that risk. *Mareva* protection (freezing order) is, however, available, against removal of funds from the jurisdiction, and in cases where fraud is suspected, there may be other limitations placed upon the movement of money.

9.135 As with the other actions considered, not all disputes arise only at the stage of the final action. An applicant may try to restrain a beneficiary from claiming on a credit or bond. *The Siskina*, which (I suggest) applies as between bank and applicant, places no limits on the availability of injunctions against beneficiaries. If the beneficiary is claimed to be acting fraudulently, then he is surely committing unconscionable

153. As was later pointed out in *Solo Industries UK Ltd.* v. *Canara Bank* [2001] 1 W.L.R. 1800, [21], above.

154. Above, para. 9.95ff.

conduct, and the courts have jurisdiction within the principles in *South Carolina Co.* v. *Assurantie NV*.[155] In any case, it must surely be a breach of the underlying contract to make a fraudulent claim on a credit or guarantee. *American Cyanamid* also applies differently to this claim, because the claim against the beneficiary should not require the notice of the bank, the action being on the sale contract, to which the bank's mandate is irrelevant, and because balance of convenience arguments work quite differently. Indeed, both *The Siskina* and *American Cyanamid* apply more favourably to the claimant than in an action against the bank.

9.136 In *Group Josi* v. *Walbrook Insurance Co. Ltd.*, Staughton L.J. observed that the "effect on the lifeblood of commerce will be precisely the same whether the bank is restrained from paying or the beneficiary is restrained from asking for payment",[156] the implication being that the legal principles applicable to each claim should be the same. It should not be possible to subvert the lifeblood by claiming against the beneficiary, rather than the bank. But this is to elevate the effect on the lifeblood of commerce to a paramount principle. It is important, certainly, but only as part of the factual matrix upon which the contracts making up the guarantee are made. There is no justification for elevating it to a more exalted status. The reason that it is easier for the applicant to intercede against the beneficiary is that the terms of the underlying contract differ from those under which his bank derives its mandate.

9.137 Clearly, a beneficiary acts in breach of the underlying contract if he makes a fraudulent claim. It is less clear whether he commits a breach merely by making an unjustified demand, or a demand which he knows he is not entitled to make. But in any case, unlike the situation considered earlier, the knowledge of the bank should be irrelevant, and its lack of knowledge therefore no bar to the success of the claim. The balance of convenience also operates differently, because the beneficiary will not normally be demonstrably solvent, unlike the bank.

9.138 Despite Staughton L.J.'s observations, there is authority in support of this analysis (differentiating between the two contracts). In *Themehelp Ltd.* v. *West*,[157] the Court of Appeal was prepared to allow buyers to restrain a beneficiary from presenting under a performance guarantee, having satisfied the normal *American Cyanamid* test that a seriously arguable case that fraud was the only realistic inference. It was accepted that the test applicable under the contract between applicant and bank was not applicable when the issue arose between applicant and beneficiary. It was also emphasised that the action was brought at an unusually early stage (obviously, prior to presentation), and that not a "slightest threat is involved to the autonomy of the performance guarantee if the beneficiary is injuncted from enforcing it in proceedings to which the guarantor is not a party".[158] The action did not represent a risk to the integrity of the performance guarantee.

Disputes between banks

9.139 The position between the banks is complicated only to the extent that a confirming or advising bank which has negotiated a bill of exchange drawn on the

155. [1987] A.C. 24.
156. [1996] 1 W.L.R. 1152, 1161–1162, citing Sir John Donaldson M.R. in *Bolivinter Oil SA* v. *Chase Manhattan Bank NA (Practice Note)* [1984] 1 Lloyd's Rep. 251, 254, Donaldson L.J. in *Intraco Ltd.* v. *Notis Shipping Corp.* [1981] 2 Lloyd's Rep. 256, and Lloyd L.J. in the *Dong Jin Metal* case, 13 July 1993.
157. [1996] Q.B. 84.
158. *Ibid.*, *per* Waite L.J. at 99.

issuing bank is entitled to enforce the bill of exchange in its own right, taking free of equities. The effect of this is that the bank will be entitled to payment from the issuing bank, even if fraud on the part of the beneficiary comes to light between the time the bill of exchange is negotiated and the time of presentation to the issuing bank.

9.140 Where a bill of exchange is not negotiated, the issuing bank can, in principle, refuse payment if fraud on the beneficiary's part comes to light at any time up to payment. As we saw in chapter 2, however, UCP 600 puts the confirming or advising bank into the same position as if a bill of exchange had been used.[159] In effect, therefore, the time at which the bank must have notice of the fraud is brought forward to the time payment is made by the confirming or advising bank.

Other public policy considerations

9.141 The beneficiaries did not succeed in their entirety in *United City Merchants*. The price in the credit was double that of the goods, a scheme whose sole purpose was the evasion of Peruvian exchange control regulations, made under the Bretton Woods Agreement, an international convention which had force of law in the UK. The House of Lords would not lend itself to the enforcement of such a scheme; the court would refuse to lend its aid to enforce the contract, and the beneficiary succeeded only to the extent of half the value of the credit.[160] This has been held to be another application of the *ex turpi causa* principle.[161]

9.142 This opens the possibility of challenging a credit on the basis of the illegality of the underlying transaction. Obviously this erodes the autonomy of the credit, and an illegality claim will avoid the rigours of the fraud exception. Nonetheless, a challenge to the underlying transaction has succeeded in a number of recent cases.[162] Another possibility is to challenge the enforceability of the bond itself, as for example in *Solo Industries (UK)* v. *Canara Bank*,[163] where the allegation was that the bond itself had been obtained by fraudulent misrepresentation, and was therefore voidable. It was held sufficient for Canara to show that its defence had a real prospect of success; it did not need to satisfy any additional criteria, should these be demanded by the limits to the fraud exception considered above.

Nullities

9.143 In *United City Merchants* v. *Royal Bank of Canada*, the document that was tendered could properly be described as a bill of lading, though it did not accurately state the shipment date. It was not a nullity, and Lord Diplock said[164]:

> "I would prefer to leave open the question of the rights of an innocent seller/beneficiary against the confirming bank when a document presented by him is a nullity because unknown to him it was forged by some third party; for that question does not arise in the instant case."

159. See para. 2.32ff., UCP 600 reversing the consequences of *Banco Santander SA* v. *Bayfern Ltd.* [2000] Lloyd's Rep. Bank. 165.

160. See generally [1983] 1 A.C. 168, 188 *et seq.*

161. *Mahonia Ltd.* v. *JP Morgan Chase Bank* [2003] 2 Lloyd's Rep. 911.

162. E.g., *Mahonia Ltd.* v. *JP Morgan Chase Bank* [2003] 2 Lloyd's Rep. 911. See also Enongchong, *The autonomy principle of letters of credit: an illegality exception?* [2006] L.M.C.L.Q. 404.

163. [2001] 2 Lloyd's Rep. 578.

164. [1983] 1 A.C. 168, 188.

9.144 Though Lord Diplock therefore refused to say what view he would have taken, had the bill of lading been a nullity, it is surely obvious that the decision would not have been the same, had the document tendered, though having the appearance of a conforming bill of lading, could not in reality have been described as a bill of lading at all. There have to be limits to the decision, in other words. What is tendered must be something that can meaningfully be described as a bill of lading (or whatever other document the credit calls for). Nonetheless, it is clear that a document must be very seriously defective indeed, before it will be regarded as not being a bill of lading at all.

Nullity doctrine narrow at best

9.145 In *United City Merchants* itself, it will be remembered that the goods (manufacturing plant, manufactured by the sellers) had been shipped one day late, and the bill of lading fraudulently altered (though not by the seller/beneficiary) to show shipment within the contract period.[165] The bill of lading therefore contained a false statement relating to the goods. It also lied about itself, the issue date also being false.[166] It may therefore arguably have been a forgery.[167] Nonetheless, it was not regarded as a nullity, either in the Court of Appeal or in the House of Lords.[168] The confirming bank failed to pay against presentation, and subject to the Bretton Woods point, the sellers successfully sued.

9.146 In *United City Merchants*, Lord Diplock also cited *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine*,[169] "where the customer was held liable to reimburse the issuing bank for honouring a documentary credit upon presentation of an apparently conforming document which was an ingenious forgery".[170] Clearly then, a document does not become a nullity, merely because it lies about the goods, or even because it lies about itself. Even a forgery is not necessarily a nullity.

9.147 In *United City Merchants* itself, Lord Diplock said this of the document tendered[171]:

> "The bill of lading with the wrong date of loading placed on it by the carrier's agent was far from being a nullity. It was a valid transferable receipt for the goods giving the holder a right to claim them at their destination . . . and was evidence of the terms of the contract under which they were being carried."

9.148 In the case of a bill of lading, therefore, the concept of nullity implies at least that the document gives no rights against the carrier to claim the goods at their destination.

165. The facts are set out by Lord Diplock, *ibid.*, at 181–182. Also Stephenson L.J. in the C.A.: [1982] Q.B. 208, 215, 230–231. Shipment was to be on or before 15th December. Received for shipment bills were issued on 16th, but were later altered to show that the goods were loaded on 15th.

166. The bill was issued on 16th, but this was fraudulently altered to 15th: Stephenson L.J. [1982] Q.B. 208, 232.

167. Certainly, it told a lie about the time of its making: see Stephenson L.J., *ibid.*, at 231–232. The C.A. (whose *decision* was reversed in the H.L.) did not decide whether it was a forgery, refusing to distinguish between a forged document and one which was fraudulently completed. It would now clearly be a forgery under s. 9(1)(g) of the Forgery and Counterfeiting Act 1981, which replaced the 1913 provisions.

168. Stephenson L.J. above. Ackner L.J., *ibid.*, at 246–247. Lord Diplock [1983] 1 A.C. 168, 188.

169. [1974] 1 W.L.R. 1234.

170. [1983] 1 A.C. 168, 184.

171. *Ibid.*, at 188.

9.149 In *United City Merchants* in the Court of Appeal, though the fraudulently completed document was not regarded as a nullity,[172] it was regarded as non-genuine, the bank therefore being entitled to reject it.[173] No similar distinction appears in the House of Lords, and indeed the implication is that even if the concept has any meaning at all, it is irrelevant in a documentary credit context. This is the argument of the bank against the sellers, that was rejected in the House of Lords[174]:

> "that a confirming bank is not under any obligation, legally enforceable against it by the seller/ beneficiary of a documentary credit, to pay to him the sum stipulated in the credit against presentation of documents, if the documents presented, although conforming on their face with the terms of the credit, nevertheless contain some statement of material facts that is not accurate."

9.150 The implication must be that mere falsity does not affect the validity of a document for these purposes.[175]

9.151 In *United City Merchants*, Lord Diplock said that he " . . . would not wish to be taken as accepting that the premise as to forged documents is correct [that a confirming bank could refuse to pay against a document that it knew to be forged], even where the fact that the document is forged deprives it of all legal effect and makes it a nullity, and so worthless to the confirming bank as security for its advances to the buyer".[176] This suggests, first that a nullity is a forged document which has no legal effect, and secondly that he is at best neutral on whether a nullity exception exists at all, as far as documentary credits are concerned. In *Montrod Ltd.* v. *Grundkötter Fleischvertriebs GmbH*, Judge Raymond Jack Q.C. went so far as to say that[177]:

> "In my judgment the 'nullity exception' should and does form no part of English law. It is unsupported by authority. It provides a further complication where simplicity and clarity are needed. There are problems in defining when a document is a nullity. The exception could have unfortunate consequences in relation to the rights of third parties."

9.152 Nonetheless, it is possible to mount quite a strong argument that at least a minimal nullity exception is required, as a matter of logic. If, for example, a bill of lading is a required document, there must come a point where something that purports to be a bill of lading is so defective that it cannot be regarded as being a bill of lading at all. If it is not a bill of lading at all, the bank should be required to accept it, only if it is taken to have agreed to accept documents that *appear to be* genuine bills of lading. For example, suppose a "shipper" prints out a document that looks like a bill of lading, sitting at his computer. The ship and cargo could both be invented, but the document could conform on its face with the terms of the credit. On no reasonable definition could it be described as a bill of lading, however. Of course it has been produced fraudulently, but a seller in a chain need not be aware of its origin, and might tender it innocently.

9.153 Even if logic requires the recognition of at least a minimal nullity exception, nevertheless it is inconsistent with the autonomy principle. A bank, dealing in documents and not in goods, and being unconcerned with breaches of the underlying sale

172. Stephenson L.J. [1982] Q.B. 208, 231; Ackner L.J. at 246–247.

173. Stephenson L.J. [1982] Q.B. 208, 239.

174. [1983] 1 A.C. 168, 184, cited in *Montrod Ltd.* v. *Grundkötter Fleischvertriebs GmbH* [2002] 1 W.L.R. 1975, at [45].

175. The rejection of the "halfway house" argument, [1983] 1 A.C. 168, 186–187, also necessarily encompasses mere falsity.

176. [1983] 1 A.C. 168, 187, cited in *Montrod*, above, at [50].

177. [2000] All E.R. (D.) 2011 (at first instance).

contract, will not necessarily know whether the document is a nullity or not, and the general logic of Lord Diplock's reasoning in *United City Merchants* extends to such a document. When *Montrod* reached the Court of Appeal, Potter L.J. resisted the recognition of a general nullity exception, with the following observation[178]:

> "The creation of a general nullity exception . . . involves making undesirable inroads into the principles of autonomy and negotiability universally recognised in relation to letter of credit transactions. In the context of the fraud exception, the courts have made clear how difficult it is to invoke the exception and have been at pains to point out that banks deal in documents and questions of apparent conformity. . . . If a general nullity exception were to be introduced as part of English law it would place banks in a further dilemma as to the necessity to investigate facts which they are not competent to do and from which UCP 500 is plainly concerned to exempt them. Further such an exception would be likely to act unfairly upon beneficiaries participating in a chain of contracts in cases where their good faith is not in question. Such a development would thus undermine the system of financing international trade by means of documentary credits."

9.154 A reluctance is shown here to accept a nullity exception at all, though (because the document tendered was not in any case a nullity) it was not necessary to go this far in *Montrod* itself. It is clear, however, that no enthusiasm was expressed for any extension of the doctrine.

9.155 Moreover, even if it might seem reasonable for a bank not to be required to accept a document (or rather, something that purports to be a document) that is a nullity, the logic of *Gian Singh* in para. 9.23ff. suggests that if it does so in ignorance, it should not be in breach of its mandate. It may be that like the fraud exception, therefore, the nullity concept therefore applies differently between the contracts making up the documentary credit.

What is a nullity?

9.156 For the purposes of this section it is assumed that *United City Merchants* does not apply to documents which are nullities. A bill of lading for an invented ship and cargo would be an extreme example of this. In *Heskell* v. *Continental Express*,[179] Devlin J. regarded the bill of lading issued there as a nullity, where though both ship and cargo existed, the cargo had been left behind. Because the goods had not been shipped, the document also evidenced no carriage contract.[180] In a breach of warranty of authority claim by the shippers against the loading broker, for issuing a bill of lading where no goods had been shipped, Devlin J. held that the breach occasioned no loss, since even if the bill of lading had been issued at a board meeting of the carriers, or passed by a resolution of the company in general meeting, it would still have given the shippers no contractual rights against the carriers.[181]

9.157 In *United City Merchants*, Lord Diplock talked of a nullity depriving a document of all legal effect. He also thought that a bill of lading would be a nullity if it did not give the holder a right to claim the goods at their destination. This would include, for example, not only the bill of lading in *Heskell*, but also a bill of lading with a forged master's signature, since clearly such a document could not bind the carrier. In *Kwei*

178. *Montrod Ltd.* v. *Grundkötter Fleischvertriebs GmbH* [2002] 1 W.L.R. 1975, at [58]. The comments would be equally apposite to UCP 600.

179. [1950] 1 All E.R. 1033, in para. 5.131ff.

180. *Ibid.*, at 1043–1044.

181. For a criticism of this reasoning see para. 5.131ff.

Tek Chao v. *British Traders and Shippers Ltd.*, Devlin J. apparently accepted that any document whose signature was forged would be a nullity.[182] However, the authority cited for this proposition, and distinguished in the case itself, was *Kreditbank Cassel GmbH* v. *Schenkers Ltd.*,[183] where a forged signature relieved the apparent signatory of liability, simply because the document was signed without his authority. To extend the reasoning to *any* forged signature is not justified. Devlin J.'s actual test was whether the nature of the alteration "goes to the whole or to the essence of the instrument or not".[184] In the context of a bill of lading, this would clearly cover a forged signature, but in other documents, if the signature is not central to the imposition of liability, its forgery need not render the document a nullity. A signature which was not authorised by the apparent signatory did not render the certificate a nullity in *Montrod*. The purpose of that document was simply to delay the provision of funding, and it had no consequences for the legal liability of the signatory.

9.158 It is clear from our analysis of the cases, however, and indeed from *United City Merchants* itself, that a document is not a nullity just because it contains a falsehood, either about itself or as to its contents. That in *United City Merchants* contained falsehoods about both. So did that in *Kwei Tek Chao*, but in Devlin J.'s view, it too was not a nullity.[185] It is possible that such a document could be described as non-genuine, but doubtful that there would be any point in affixing such a label. At any rate, such a document must be accepted, assuming that it conforms with the credit requirements and in the absence of fraud by the beneficiary, by a bank under a documentary credit.

9.159 It must be concluded that, even if a nullity exception exists in a documentary credit context, its scope is very narrow.

Fraud potential

9.160 It is clear from the discussion above of *United City Merchants* that the law insulates banks from any concern over disputes under the sale contract. Equally clearly, however, it does very little to protect buyers and banks from the consequences of frauds by sellers.[186]

9.161 It is true that *United City Merchants* allows documents to be rejected where it can be proved that the seller/beneficiary is fraudulent, but we have seen that the onus of proof is very much on the buyer or his bank, and that proof of fraud is difficult. Even where fraud is proved, it will often not be that of the beneficiary. In practice, therefore, documents which conform on their face to the contract description must be accepted, whether they actually represent goods shipped or not.[187]

9.162 Obviously this opens up possibilities for fraud by sellers, or collusive fraud by sellers and carriers, and indeed maritime fraud is increasingly becoming a matter for concern. The most extreme form is where no goods are shipped at all, the documents

182. [1954] 2 Q.B. 459, 476. See also Stephenson L.J. in *United City Merchants* [1982] Q.B. 208, 231. An argument was unsuccessfully advanced in *Kwei Tek* that the bill of lading there tendered was a nullity.

183. [1927] 1 K.B. 826, 835, *per* Bankes L.J.

184. [1954] 2 Q.B. 459, 476.

185. *Ibid.*

186. The law protects the parties against bankruptcy but not fraud, as we have already seen in paras 1.10ff., and 6.2ff.

187. There is, of course, the final accounting in para. 9.91ff., but it would be somewhat theoretical, where money had been paid to a fraudster.

tendered being forgeries. In *Etablissement Esefka International Anstalt* v. *Central Bank of Nigeria*,[188] for example, apparently conforming documents were tendered in respect of 94,000 tonnes of cement said to be aboard eight vessels, although there was considerable doubt whether the vessels ever existed at all, and fraud was suspected. If the obligation to insure is on the seller (as in a c.i.f. contract) and all the documents are forgeries, then the buyer obtains nothing at all, since obviously there will be no valid insurance policy. Nor, of course, does the bank obtain any security for its advance. Even if the buyer has taken out his own marine insurance his position is no better, as this is not a marine risk.

9.163 Alternatively, cargo may be lost or stolen in the loading process, so that a bill of lading may be issued for a greater quantity than is actually loaded.[189] Or goods which have been loaded may be unloaded again after shipped bills of lading have been issued. This type of fraud usually involves collusion between seller and carrier, or between seller and master (or someone else involved in cargo-handling). Or the carrier could steal the goods for which bills of lading have been issued, sail to a different destination and re-sell them to a third party.[190]

9.164 Where cargo is in drums, bags, sacks or containers, it is possible for a seller to ship rubbish, and obtain clean documents because the master is unaware of what is contained inside. The goods are indeed shipped in apparent good order and condition, the requirement for a clean bill of lading. In *Discount Records Ltd.* v. *Barclays Bank Ltd.*,[191] for example, the plaintiffs were purchasers of a consignment of records and cassettes, payment to be by confirmed irrevocable credit. Conforming documents[192] were tendered, but by then it had become clear that the cartons shipped contained largely rubbish.[193] Nevertheless clean shipping documents were obtained and the plaintiffs failed to restrain the defendant bank from paying under the credit. It was alleged, but not proved, that the sellers were fraudulent. The case is simply an early application, by Megarry J., of the principles discussed in this chapter.

9.165 The principles in *United City Merchants* do nothing to discourage fraudsters. Countervailing principles take priority. The parties should be aware of the risks, and take appropriate measures to protect themselves.

THE DOCTRINE OF STRICT COMPLIANCE

9.166 The effect of the doctrine of strict compliance is that the beneficiary must tender the exact documents stipulated in the credit, and that the bank must accept only

188. [1979] 1 Lloyd's Rep. 445 (C.A.).

189. See, for example, *V/O Rasnoimport* v. *Guthrie & Co. Ltd.* [1966] 1 Lloyd's Rep. 1, where some of the cargo was stolen after mate's receipts had been signed, but before it was loaded on board. The loading broker did not know, and issued bills of lading for the entire cargo.

190. For a notorious example see *Shell International Petroleum Co.* v. *Gibbs (The Salem)* [1983] 2 A.C. 375; [1983] 1 Lloyd's Rep. 342, where shipowners stole an entire cargo of 200,000 tons of crude oil. Another example is *Manchester Trust* v. *Furness, Withy & Co. Ltd., The Boston City* [1895] 2 Q.B. 282, where time charterers persuaded the master to divert an entire cargo of coal destined for Rio de Janeiro to Buenos Aires, where they sold it to a third party.

191. [1975] 1 W.L.R. 315, [1975] 1 Lloyd's Rep. 444.

192. Or at any rate, documents which were eventually accepted as conforming by an official of the plaintiffs.

193. The purchasers had ordered 8,625 records and 825 cassettes. The cargo was packed in 94 cartons, but of these two were found to be empty, five were filled with rubbish or packing, and 28 were only partly filled. 275 records and 518 cassettes were actually delivered, but of the 518 cassettes only 25 per cent were delivered to contract specification.

those exact documents. The position as between bank and beneficiary is the same as that regarding the bank's own reimbursement, i.e., that between confirming and issuing bank, and between issuing bank and customer.

9.167 This section should be seen as the corollary of the last. In the last, we saw that banks must generally accept conforming documents, whether or not they genuinely represent the goods. Here we see that they must generally reject non-conforming documents, even if the discrepancies are not of substance. The rationales are also similar. The bank's job is to determine conformity, not to investigate whether non-compliance is substantial; to do that they would have to delve into the substance of the sale contract. Moreover, their mandate is only to accept documents which conform.

9.168 Also, as in the previous discussion in this chapter, though the contracts involving the banks are in principle autonomous, they are interconnected and, assuming the documentary requirements under each contract are the same, the doctrine of strict compliance accordingly operates in exactly the same way for each contract. Thus, in any situation where a confirming bank is obliged to accept documents and pay the beneficiary, it should be able to claim reimbursement from the issuing bank. Similarly, an issuing bank which has to make payment should in turn be able to claim reimbursement from its customer.

9.169 We have already seen that there is a high rate of discrepancies in documentary credits, and that this is disturbing because it reduces the value to the seller of an assurance that nothing will stop him receiving the price.[194] It might be thought that the discrepancy problem is exacerbated by the doctrine of strict compliance, and that a fairer system might result from relaxing the doctrine. No doubt, the rigour of the present doctrine allows buyers to use technicalities to avoid sale contracts on falling markets,[195] especially if the documentary requirements are very strict, and the sellers have difficulty in complying. Moreover, in respect of many other breaches of contract, the UK courts have tended to move away from treating terms as conditions, any breach of which, however trivial, allows the other party to repudiate, in favour of the innominate, or intermediate term, where the lawfulness of repudiation depends on the effect of the breach.[196] But when it comes to rejecting documents in international trade law, buyers can rely on trivial discrepancies, which have no substantial effect at all. There is no good faith requirement, as in some other jurisdictions, and the law takes no account of their motivation. It is acceptable, under UK law, to use technical defects to get out of a market situation that has turned sour.

9.170 Though relaxing the strict compliance doctrine may well enhance the security of the credit from the seller's viewpoint, I would argue that if there are other possibilities,[197] relaxation of the strict compliance doctrine is not a desirable method of achieving this goal. If the rule were changed to require rejection of documents only where discrepancies were material, the bank would have to judge materiality, but they do not have the relevant expertise. Both the general law and the UCP reflect the actuality, that whereas banks can check documents they probably have no knowledge

194. Above, para. 9.27ff.
195. The reason for the rejection, for example, in *Glencore* v. *Royal Bank of China*, in para. 9.41ff.
196. *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26.
197. E.g., para. 9.48ff.

of the goods underlying the transaction, nor of relations or disputes between buyer and seller.

9.171 There is a more fundamental reason for caution when considering relaxation of strict compliance. The international sales that are the underlying basis of many documentary credits are merely parts of a wider transaction, since multiple re-sales while the goods are at sea are commonplace. Since it is impossible to inspect the goods while they are at sea, even a buyer (who unlike a bank may well be presumed to have expertise in the goods themselves) can only form a judgment on the basis of inspection of documents. Moreover, it is vital that if (say) the (n)th buyer in a chain is required to accept the documents, he can use those same documents in his re-sale to buyer (n + 1). Yet the effect of a discrepancy on buyer (n + 1) may be totally different from its effect on buyer (n). This argues to disregard the effect of a discrepancy where there are likely to be multiple re-sales. For essentially the same reason, the prospect of multiple re-sales was a factor in requiring certainty, and hence a preference in international sale contracts for conditions over innominate terms, in the well-known House of Lords decision in Bunge Corporation, *New York* v. *Tradax Export SA*, Panama.[198] The rationales are similar, whether concerning a sale contract or a documentary credit. In *Seng Co. Ltd.* v. *Glencore Grain Ltd.*,[199] Mance J. adopted a test similar to common law strict compliance for documentation under a c. & f. sale contract, and in refusing leave to appeal,[200] Hobhouse L.J. was clearly unimpressed by the seller's contention that "there is a distinction to be drawn between a case which requires documents to be tendered to the Buyer, and where they are to be tendered to a bank under a letter of credit".

9.172 There are other arguments, perhaps of lesser substance, but which lend further support to retention of a strict doctrine. It may be a technicality, but the contract between confirming bank and beneficiary must be unilateral, since the beneficiary makes no undertaking to the bank.[201] Acceptance is tender of documents, and innominate terms reasoning simply has no place in unilateral contracts. The other contracts to which the bank are party are bilateral, but clearly the same documentary requirements must apply to all these contracts, if the credit is to be workable. A more convincing argument, perhaps, is that the courts do sometimes intervene to import requirements of fairness or good faith, whatever the contracting parties have stipulated, but usually only where there is an inequality of bargaining power between the parties; there is no reason to assume that this is normally the case in international trade transactions.

9.173 Before the UCP (and of course now, where the UCP does not apply), the common law adopted a very strict attitude, but this is one area where the UCP differs, and presumably in an attempt to prevent too many disputes over documentation, adopts a more relaxed position. The strict common law position continues to apply, however, not only where the credit is not governed by the UCP, but also to the commercial invoice.[202]

198. [1981] 1 W.L.R. 711.

199. [1996] 1 Lloyd's Rep. 398, applied in *Soules CAF* v. *PT Transap of Indonesia* [1999] 1 Lloyd's Rep. 917. See also *SIAT di dal Ferro* v. *Tradax Overseas SA* [1980] 1 Lloyd's Rep. 53, where Megaw L.J. also adopted a strict test as to documentation, subject only to a *de minimis* exception.

200. Unreported, C.A., 4 July 1996.

201. See further para. 1.67ff.

202. See below, para. 6.60ff.

The common law doctrine

9.174 The common law position is that an issuing bank's mandate derives from the instructions of its customer (the buyer), and that it has no authority to depart from these instructions in any particular. It follows that the mandate is to accept only the exact documents stipulated in the credit. If the beneficiary or confirming bank deviates at all from tendering the required documents, not only is the issuing bank under no obligation to pay, but unless the buyer expressly permits payment, it is under a positive obligation not to pay. It is immaterial that the goods conform to the contract description. These principles inform the other contracts, between the banks, and between issuing and/or confirming bank and beneficiary.

9.175 No doubt the courts are also influenced by the other factors described earlier in the chapter. Banks must act quickly, and in any case have no way of knowing whether slight variations are material. In the early case of *Equitable Trust Company of New York* v. *Dawson Partners Ltd.*, Viscount Sumner observed[203]:

"It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the manner of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially about the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it departs from the conditions laid down, it acts at its own risk."

9.176 The facts were not unlike those in *Discount Records Ltd.* v. *Barclays Bank Ltd.* in para. 9.160ff., in that sellers of vanilla beans fraudulently shipped a quantity of sticks, stones and old iron covered by only a thin layer of vanilla beans, whose sole purpose was to conceal the deception. By contrast with *Discount Records*, however, the certificate of quality did not comply. Whether or not the non-compliance was material, the bank should not have paid against it, and was unable to succeed in an action against its customer for reimbursement.

9.177 Exactly the same approach was taken, in an action between bank and beneficiary, in *JH Rayner & Co. Ltd.* v. *Hambros Bank Ltd.*,[204] a decision of the Court of Appeal. An irrevocable sight credit required the sight drafts to be accompanied by bills of lading for "Coromandel groundnuts". The sellers tendered bills of lading for "machine-shelled groundnut kernels", which were universally understood in the trade to be identical to "Coromandel groundnuts". The bank having refused payment, the seller sued and failed. MacKinnon L.J. took the view that the position between bank and beneficiary ought in principle to be the same as that between bank and customer. Having quoted Lord Sumner in the passage set out above from *Equitable Trust Co. of New York* v. *Dawson Partners Ltd.*, he continued[205]:

"The words in that bill of lading clearly are not the same as those required by the letter of credit. The whole case of the plaintiffs is, in the words of Lord Sumner, that 'they are almost the same, or they will do just as well'. The bank, if they had accepted that proposition, would have done so at their own risk. I think on pure principle that the bank were entitled to refuse to accept this sight draft on the ground that the documents tendered, the bill of lading in particular, did not comply precisely with the terms of the letter of credit which they had issued."

203. (1926) 27 Ll. L. Rep. 49, 52, followed in numerous later cases, and approved, e.g., by Lord Diplock in *Gian Singh & Co. Ltd.* v. *Banque de l'Indochine* [1974] 1 W.L.R. 1234.
204. [1943] 1 K.B. 37; (1943) 74 Ll. L. Rep. 10.
205. [1943] 1 K.B. 37, 40.

9.178 Nor did he think the bank ought to be assumed to know the customs and customary terms of the trade, so as to know that "machine-shelled groundnut kernels" meant the same as "Coromandel groundnuts".[206] Similar sentiments can be found at the beginning of Goddard L.J.'s judgment[207]:

"It seems to me that Atkinson J. [whom the court reversed] has based his judgment on the consideration that the bank was affected in some way by this custom of the trade, and, secondly, that he has considered whether what the bank required was reasonable or unreasonable. I protest against the view that a bank is to be deemed affected by knowledge of the trade of its various customers . . . ".

9.179 A similar position was adopted by the Court of Appeal in *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhuori Islami Iran.*[208] There was an express requirement in the credit that the documents presented should be listed in the sense that each of them was to contain the letter of credit number and the name of the defendants' principal.[209] The Court of Appeal took the view that the absence of the letter of credit number and the name of the buyer from the *procès verbal* entitled Bank Melli (who acted as an advising, or in UCP terminology, nominated bank, the credit being unconfirmed) to reject the documents. It was not for the bank to enquire into the reasons for the requirement. Lloyd L.J. observed that[210]:

"There is no dispute between the parties as to the doctrine of strict compliance, and the reasons for it. . . . It is no good asking why the credit required the letter of credit number and the buyer's name to appear on each of the documents."

9.180 As we have seen earlier in the chapter, the doctrine does not apply to very trivial defects, but this was not a defect of that type.[211]

9.181 The same position was held to obtain as between the banks, by McNair J. in *Bank Melli Iran* v. *Barclays Bank DCO.*[212] A confirmed irrevocable credit required a delivery order and other documents to be tendered for "100 new Chevrolet trucks", accompanied by a USA government undertaking confirming that the trucks were new. The invoice tendered to the confirming bank (Barclays), described the trucks as "in a new condition", the USA government undertaking referred to "100 new, good" trucks, and the delivery order described the trucks as "new-good". Barclays accepted and paid against the documents, and forwarded them to Bank Melli Iran, the issuing bank. McNair J., having referred to the passage from *Equitable Trust Co. of New York* v. *Dawson Partners Ltd.* set out above, held that each of the documents tendered was faulty, and that Bank Melli should not be required to accept them. Of the invoice, the phrase "in a new condition" did not mean the same as "new", at any rate when applied to a motor-vehicle. Nor did "new, good" in the undertaking necessarily mean the same

206. *Ibid.*, at 41.

207. *Ibid.*, at 42.

208. [1993] 1 Lloyd's Rep. 236. *Seaconsar* was later reversed, but on procedural grounds only: [1994] 1 A.C. 438. The case then came back to the courts on the issue whether rejection had occurred within a reasonable time: [1999] 1 Lloyd's Rep. 36, and see above, para. 9.41ff.

209. The defendants were the issuing bank, and their principal the buyer.

210. [1993] 1 Lloyd's Rep. 236, 239 (col. 2)–240 (col. 1). Lloyd L.J. cited Lord Diplock in *Commercial Banking Co. of Sydney Ltd.* v. *Jalsard Pty Ltd.* [1973] A.C. 279, 286, who emphasised the need for a quick decision to be made by the banks. See further below on this case, para. 9.183ff.

211. The case was contrasted with the example given in *Bankers Trust* v. *India*: see para. 9.41ff.

212. [1951] 2 Lloyd's Rep. 367. It is possible that the case arose because the trucks were left in the open in Belgium before shipment, during the very severe winter of 1947. Probably they had deteriorated.

as "new", because "it may have a special trade meaning in relation to motor vehicles".[213] On the question of the delivery order, McNair J. did not think "new-good" meant the same as "new".[214]

Strict compliance in practice

Same type of document required

9.182 It should be reasonably obvious from the discussion in the previous paragraph that the documents tendered must at any rate be the same type as those specified in the credit. This will apply even if the documents tendered give better protection than the credit requires. In *National Bank of South Africa* v. *Bank Italiana Di Sconto*,[215] Bankes L.J. thought that if the credit specified delivery orders, then the sellers could not tender bills of lading instead unless on its construction the credit also gave them that option.[216]

Ambiguity resolved in favour of bank

9.183 There is also a principle that the customer's mandate must be precise,[217] and that if it is ambiguous the bank is entitled to rely upon any reasonable interpretation of an ambiguous expression. In *Commercial Banking Co. of Sydney Ltd.* v. *Jalsard Pty Ltd.*,[218] one of the documents required by the credit was a "Certificate of Inspection". The certificates tendered showed that the goods (decorative battery-operated Christmas lights) had been visually but not physically inspected, whereas in fact they suffered from serious defects which could have been discovered only by physical inspection. Lord Diplock, in the Privy Council, held that in the absence of better particulars, "Certificate of Inspection" should bear its ordinary meaning, which required only a visual inspection. If a particular type of inspection was required then the instructions should expressly so specify[219]:

> "It is a well-established principle in relation to commercial credits that if the instructions given by the customer to the issuing banker as to the documents to be tendered by the beneficiary are ambiguous or are capable of covering more than one kind of document, the banker is not in default if he acts upon a reasonable meaning of the ambiguous expression or accepts any kind of document which fairly falls within the wide description used."[220]

9.184 We saw in para. 9.9ff. that UCP 600 defines a number of terms in Art. 3, which will help to resolve some ambiguities.

213. [1951] 2 Lloyd's Rep. 367, 375 (col. 2).

214. In the event, however, although the documents were clearly faulty, Bank Melli Iran must, from its conduct, be taken to have accepted them. It had not rejected them immediately, and indeed authorised Barclays to increase the credit.

215. (1922) 10 Ll. L. Rep. 531.

216. *Ibid.*, at 534. The passage is *not* altogether clear, because it appears to confuse the credit with the sale contract. In principle, however, this view must be correct.

217. See also para. 9.9ff.

218. [1973] A.C. 279; [1972] 2 Lloyd's Rep. 529.

219. [1973] A.C. 279, 285–286.

220. Lord Diplock cites *Midland Bank Ltd.* v. *Seymour*, a case dealt with in detail in the following section.

Linking of documents

9.185 An application of the principle enunciated in the last section is that if a number of documents are specified, if the buyer requires each document to contain all the particulars, he must say so expressly, otherwise it will be enough that all the documents between them (i.e., the set of documents) contain all the particulars.

9.186 *Midland Bank Ltd.* v. *Seymour*[221] was another case where the sellers had shipped rubbish, but managed to obtain shipping documents, against which the bank paid. When the bank claimed reimbursement Seymour (the buyer) cast around "to find some good reason in law for throwing the loss upon the bank rather than upon himself . . . ".[222] In so casting around, he discovered that although the shipping documents as a whole contained all the requirements of the credit, the same could not be said of each individual shipping document. So, for example, although the invoice stated that the goods were "85 per cent clean", the bill of lading did not.

9.187 The problem for Seymour was that his instructions were ambiguous, in that they did not clearly state whether each document must contain all the particulars, or that it was enough that all the documents between them (i.e., the set of documents) must contain all the particulars. Making it clear that any ambiguity would be resolved against Seymour, Devlin J. concluded that on the construction of this particular documentary credit, it was enough that the set contained the particulars, and there was no additional requirement for each document to do so. It follows that if the customer requires the particulars to be included in each of the shipping documents he should expressly so state.

9.188 However, even where the customer does not so stipulate, there is a second principle which applies whenever a set of documents is required, namely that the particulars in the various documents in the set must be consistent between themselves, "otherwise they would not be a good set of shipping documents".[223] Another qualification can be found in *Banque de l'Indochine et de Suez* v. *JH Rayner (Mincing Lane) Ltd.*,[224] where the Court of Appeal took the view that where the principle in *Seymour* applies, each document must nevertheless unequivocally identify the goods.

9.189 Where the credit does require linking of documents it is not open for the beneficiary to argue that a discrepancy in one document may be cured by another. Such an argument was also unsuccessfully advanced in *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhuori Islami Iran*.[225]

Strict compliance and the UCP

9.190 The UCP relaxes the strict rules of the common law, at any rate to a limited extent. UCP 600, Art. 14(e) allows the description of the goods to be in general terms, not conflicting with their description in the credit, in documents other than the commercial invoice. Commercial invoice requirements are then provided for separately in UCP 600, Art. 18, Art. 18(c) requiring that "The description of the goods, services

221. [1955] 2 Lloyd's Rep. 147, applied in the Court of Appeal in *Glencore International AG* v. *Bank of China* [1996] 1 Lloyd's Rep. 135, 154.

222. [1955] 2 Lloyd's Rep. 147, *per* Devlin J. at p. 153 (col. 2).

223. [1955] 2 Lloyd's Rep. 147, 153 (col. 1). In the particular case, however, there was no inconsistency between the documents in the set, so that the bank had acted in accordance with the instructions in the credit, and had not exceeded its mandate.

224. [1983] Q.B. 711.

225. [1993] 1 Lloyd's Rep. 236, 240 (col. 1).

or performances in a commercial invoice must correspond with that appearing in the credit". These provisions are substantively identical (at least for the present discussion) to those in earlier versions of the UCP. Even for the commercial invoice, the position probably represents a relaxation of that at common law, since Art. 18(c) requires only that the description corresponds with that in the credit, not that it is identical.[226]

9.191 An earlier version of the UCP provision was considered by McNair J. in *Soproma SpA* v. *Marine & Animal By-Products Corp.*[227] The facts of this case have already been set out in chapter 4.[228] It will be recalled that the buyer agreed to buy a quantity of Chilean fish full meal from the seller c. & f. Payment was to be by documentary credit, to which the UCP (1951 revision) applied. Documents were tendered which did not conform to the credit in a number of respects. The bill of lading described the goods as "Fishmeal", not "Fish Full Meal", was marked "freight collect", not "freight prepaid", and named the confirming bank as consignee, rather than being issued to order. A quality certificate was also tendered certifying a minimum protein content of 67 per cent, rather than 70 per cent as required. The buyers instructed the bank to reject the documents, and the bank did so. The sellers sued the buyers on the contract of sale.

9.192 McNair J. held that the buyers were entitled to require the bank to reject, and by implication that had the issue arisen between seller and bank, the bank would have been entitled to reject. The common law position was clear enough, but the question was what was the effect of the UCP. The provision before McNair J. was virtually identical to the UCP 600 provisions. He held that if the only fault had been the description in the bill of lading as "Fishmeal", the tender would have been valid,[229] but that the UCP did not cure the faults in the certificate of quality and the certificate of analysis.[230] It was also clear, of course, that there is nothing in the wording of what is now Art. 14(e) that was capable of curing the other discrepancies in the bill of lading, namely that it was not made out to order, and that it was a freight collect bill. The argument as to whether these were acceptable tender rested on the common law alone.[231]

9.193 In *Glencore International AG* v. *Bank of China*,[232] the credit required the origin to be stated as "ORIGIN: Any Western brand". The certificate of origin, certified in addition to stating that the cargo (of aluminium ingots) was of "Any Western brand", that it "is of Indonesian origin (Inalum brand)". This was held by the Court of Appeal to comply with the equivalent UCP 500 provision (Art. 37(c)), on the grounds that the purpose of the additional words was "to indicate the precise brand of the goods, it being implicit that that brand fell within the broad generic description which was all that was required".[233]

9.194 UCP 600, Art. 14(e) allows for the description of the goods, in all documents apart from the commercial invoice, to be in general terms not conflicting with their description in the credit. In *Banque de l'Indochine* v. *JH Rayner Ltd.*,[234] however,

226. It must, however, not be inconsistent: see also Bennett [1997] L.M.C.L.Q. 7, 9–11.
227. [1966] 1 Lloyd's Rep. 367.
228. Para. 4.21ff.
229. [1966] 1 Lloyd's Rep. 367, 389 (col. 2).
230. *Ibid.*, at 389 (col. 2)–390 (col. 1). These were not descriptions in general terms, but positively contrary descriptions.
231. They were not: see para. 4.21ff.
232. [1996] 1 Lloyd's Rep. 135.
233. *Ibid.*, at 154 (col. 1).
234. [1983] Q.B. 711; [1983] 1 Lloyd's Rep. 228.

the Court of Appeal held that this provision (or rather the equivalent provision of the 1974 revision) gave no latitude as to identification. In the particular case there were defects in an EUR certificate and a certificate of origin, and in respect of these UCP did not alter the common law position, requiring *exact* compliance. The documents did not exactly comply, and could therefore be rejected. Sir John Donaldson M.R. said[235]:

> "There is, in my judgment, a real distinction between an identification of 'the goods', the subject matter of the transaction, and a description of those goods. The [UCP] gives latitude in description, but not in identification. For example, the EUR certificate or certificate of origin could identify 'the goods' by reference to marks on the bags or by reference to a hold in the vessel which they occupied provided that no other goods were in the hold. Having so identified 'the goods' they could then describe them as 'sugar' simpliciter since this description is not inconsistent with [the detailed description in the credit]. But however general the description, the identification must, in my judgment, be unequivocal. . . . This seems to me to be the proper and inevitable construction to place on [the UCP provisions] if the specified documents are to have any value at all."

9.195 The description in the invoice must be accurate (even if not necessarily identical). In *Kydon Compania Naviera SA* v. *National Westminster Bank (The Lena)*,[236] a standby letter of credit, to which the 1962 revision of the UCP applied, was provided to finance the acquisition of a ship. The description of the ship in the invoice did not correspond in a number of respects, including discrepancies regarding gross and net register tonnage, and Parker J. held that the bank was entitled to reject the documents tendered on these and other grounds.

235. [1983] Q.B. 711, 732.
236. [1981] 1 Lloyd's Rep. 68.

CHAPTER 10

CONCLUSION

10.1 The bill of lading's functions, as we know them today, developed in the nineteenth century, at around the same time as the c.i.f. contract. The documentary credit is a creature of the early twentieth century, somewhat later but nonetheless from an era when trading conditions were different from today. The bill of lading and bankers' documentary credit are ideally suited to sales where the buyer's standing is uncertain, and where a paramount concern of all the parties, including the banks, is security against bankruptcy of one of the other parties. Such markets continue to exist today, where there is no satisfactory alternative to the traditional bill of lading and bankers' documentary credit. Quite apart from the security provided by the documentation, which has been significantly increased, in the UK at least, by the Carriage of Goods by Sea Act 1992, the system is very flexible. Bills of lading can be issued by carriers to traders anywhere in the world, with no need for complex infrastructures, and documentary credits can be issued by any concern with sufficient financial standing to be relied upon.

10.2 Today's trading conditions, in some but not all parts of the world, are very different. Containerisation has increased the speed of ships and cargo-handling, making the traditional documentary handling processes seem very slow. The trading parties may be substantial concerns in developed economies, where fears about their solvency are less of an issue. If the cargo is unlikely to be sold on the voyage the carrier is less concerned about the problems of identifying the consignee, and delivery without presentation of a document of title may therefore be more appropriate. Documentary credits have adapted to these changes, and as we have seen, particularly since 1992 the waybill can provide good security for the parties, while to some extent resolving the speed issue for handling of documents.

10.3 The problems of multiple re-sales, particularly for oil cargoes, are probably more difficult, and seem to have been resolved by use or standby credits, and delivery against indemnities, rather than original documentation. While the system seems to work, in the sense at least that it has been used for 30 years or more, it does not provide the parties with the security of the bill of lading and bankers' documentary credit, as they were originally developed. But the traditional system dates from when speed of documentary processes were less of an issue, and can probably not be adapted, any better than it already has been, to a world where bills of lading do not arrive until weeks or months after the cargo itself.

10.4 Bills of lading and bankers' documentary credits have not really adapted to the online era. Neither the eUCP nor pilot schemes for electronic bills of lading have caught on, and in any case, what we have seen so far in this regard is probably not the

way forward.[1] Single-carrier based electronic schemes probably will catch on, but present documentary credit systems are not well-adapted to them. Since security is often less of an issue with this type of operation, we probably will see the erosion of the documentary credit in this area, and its replacement with online alternatives, coupled with credit insurance. They are probably better-suited to this type of trade, as well as being faster and less cumbersome.

10.5 Bills of lading and bankers' documentary credits can be expected to survive, and indeed thrive, in difficult markets, where the infra-structure for online bills of lading is not in place, and where security against the bankruptcy of one or more of the parties continues to be a major issue. For such trades, it is difficult to see what can realistically replace them.

1. See paras 3.67ff. and 8.51ff.

APPENDIX A

UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (2007 REVISION)*

Article 1 Application of UCP

The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

Article 2 Definitions

For the purpose of these rules:

Advising bank means the bank that advises the credit at the request of the issuing bank.

Applicant means the party on whose request the credit is issued.

Banking day means a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed.

Beneficiary means the party in whose favour a credit is issued.

Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.

Confirming bank means the bank that adds its confirmation to a credit upon the issuing bank's authorization or request.

Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.

Honour means:

(a) to pay at sight if the credit is available by sight payment.
(b) to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment.
(c) to accept a bill of exchange ("draft") drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

Issuing bank means the bank that issues a credit at the request of an applicant or on its own behalf.

Negotiation means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or

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agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.

Nominated bank means the bank with which the credit is available or any bank in the case of a credit available with any bank.

Presentation means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered.

Presenter means a beneficiary, bank or other party that makes a presentation.

Article 3 Interpretations

For the purpose of these rules:

Where applicable, words in the singular include the plural and in the plural include the singular.

A credit is irrevocable even if there is no indication to that effect.

A document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication.

A requirement for a document to be legalized, visaed, certified or similar will be satisfied by any signature, mark, stamp or label on the document which appears to satisfy that requirement.

Branches of a bank in different countries are considered to be separate banks.

Terms such as "first class", "well known", "qualified", "independent", "official", "competent" or "local" used to describe the issuer of a document allow any issuer except the beneficiary to issue that document.

Unless required to be used in a document, words such as "prompt", "immediately" or "as soon as possible" will be disregarded.

The expression "on or about" or similar will be interpreted as a stipulation that an event is to occur during a period of five calendar days before until five calendar days after the specified date, both start and end dates included.

The words "to", "until", "till", "from" and "between" when used to determine a period of shipment include the date or dates mentioned, and the words "before" and "after" exclude the date mentioned.

The words "from" and "after" when used to determine a maturity date exclude the date mentioned.

The terms "first half" and "second half" of a month shall be construed respectively as the 1st to the 15th and the 16th to the last day of the month, all dates inclusive.

The terms "beginning", "middle" and "end" of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th and the 21st to the last day of the month, all dates inclusive.

Article 4 Credits v. Contracts

(a) A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.

(b) An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.

Article 5 Documents v. Goods, Services or Performance

Banks deal with documents and not with goods, services or performance to which the documents may relate.

Article 6 Availability, Expiry Date and Place for Presentation

(a) A credit must state the bank with which it is available or whether it is available with any bank. A credit available with a nominated bank is also available with the issuing bank.

(b) A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation.

(c) A credit must not be issued available by a draft drawn on the applicant.

(d) (i) A credit must state an expiry date for presentation. An expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.

(ii) The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.

(e) Except as provided in sub-article 29(a), a presentation by or on behalf of the beneficiary must be made on or before the expiry date.

Article 7 Issuing Bank Undertaking

(a) Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:

(i) sight payment, deferred payment or acceptance with the issuing bank;
(ii) sight payment with a nominated bank and that nominated bank does not pay;
(iii) deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
(iv) acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
(v) negotiation with a nominated bank and that nominated bank does not negotiate.

(b) An issuing bank is irrevocably bound to honour as of the time it issues the credit.

(c) An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

Article 8 Confirming Bank Undertaking

(a) Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must:

(i) honour, if the credit is available by
  (a) sight payment, deferred payment or acceptance with the confirming bank;
  (b) sight payment with another nominated bank and that nominated bank does not pay;
  (c) deferred payment with another nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
  (d) acceptance with another nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
  (e) negotiation with another nominated bank and that nominated bank does not negotiate.
(ii) negotiate, without recourse, if the credit is available by negotiation with the confirming bank.

(b) A confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit.

(c) A confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not another nominated bank prepaid or purchased before maturity. A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary.

(d) If a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.

Article 9 Advising of Credits and Amendments

(a) A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate.

(b) By advising the credit or amendment, the advising bank signifies that it has satisfied itself as to the apparent authenticity of the credit or amendment and that the advice accurately reflects the terms and conditions of the credit or amendment received.

(c) An advising bank may utilize the services of another bank ("second advising bank") to advise the credit and any amendment to the beneficiary. By advising the credit or amendment, the second advising bank signifies that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and conditions of the credit or amendment received.

(d) A bank utilizing the services of an advising bank or second advising bank to advise a credit must use the same bank to advise any amendment thereto.

(e) If a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, without delay, the bank from which the credit, amendment or advice has been received.

(f) If a bank is requested to advise a credit or amendment but cannot satisfy itself as to the apparent authenticity of the credit, the amendment or the advice, it must so inform, without delay, the bank from which the instructions appear to have been received. If the advising bank or second advising bank elects nonetheless to advise the credit or amendment, it must inform the beneficiary or second advising bank that it has not been able to satisfy itself as to the apparent authenticity of the credit, the amendment or the advice.

Article 10 Amendments

(a) Except as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary.

(b) An issuing bank is irrevocably bound by an amendment as of the time it issues the amendment. A confirming bank may extend its confirmation to an amendment and will be irrevocably bound as of the time it advises the amendment. A confirming bank may, however, choose to advise an amendment without extending its confirmation and, if so, it must inform the issuing bank without delay and inform the beneficiary in its advice.

(c) The terms and conditions of the original credit (or a credit incorporating previously accepted amendments) will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment. The beneficiary should give notification of acceptance or rejection of an amendment. If the beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance by the beneficiary of such amendment. As of that moment the credit will be amended.

(d) A bank that advises an amendment should inform the bank from which it received the amendment of any notification of acceptance or rejection.

(e) Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.

(f) A provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded.

Article 11 Teletransmitted and Pre-Advised Credits and Amendments

(a) An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded.

If a teletransmission states "full details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit or amendment without delay in terms not inconsistent with the teletransmission.

(b) A preliminary advice of the issuance of a credit or amendment ("pre-advice") shall only be sent if the issuing bank is prepared to issue the operative credit or amendment. An issuing bank that sends a pre-advice is irrevocably committed to issue the operative credit or amendment, without delay, in terms not inconsistent with the pre-advice.

Article 12 Nomination

(a) Unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.

(b) By nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank.

(c) Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation.

Article 13 Bank-to-Bank Reimbursement Arrangements

(a) If a credit states that reimbursement is to be obtained by a nominated bank ("claiming bank") claiming on another party ("reimbursing bank"), the credit must state if the reimbursement is subject to the ICC rules for bank-to-bank reimbursements in effect on the date of issuance of the credit.

(b) If a credit does not state that reimbursement is subject to the ICC rules for bank-to-bank reimbursements, the following apply:

- (i) An issuing bank must provide a reimbursing bank with a reimbursement authorization that conforms with the availability stated in the credit. The reimbursement authorization should not be subject to an expiry date.
- (ii) A claiming bank shall not be required to supply a reimbursing bank with a certificate of compliance with the terms and conditions of the credit.
- (iii) An issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit.
- (iv) A reimbursing bank's charges are for the account of the issuing bank. However, if the charges are for the account of the beneficiary, it is the responsibility of an issuing bank to so indicate in the credit and in the reimbursement authorization. If a reimbursing bank's charges are for the account of the beneficiary, they shall be deducted from the amount due to a claiming bank when reimbursement is made. If no reimbursement is made, the reimbursing bank's charges remain the obligation of the issuing bank.

(c) An issuing bank is not relieved of any of its obligations to provide reimbursement if reimbursement is not made by a reimbursing bank on first demand.

Article 14 Standard for Examination of Documents

(a) A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

(b) A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

(c) A presentation including one or more original transport documents subject to articles 19, 20, 21, 22, 23, 24 or 25 must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment as described in these rules, but in any event not later than the expiry date of the credit.

(d) Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.

(e) In documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.

(f) If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14(d).

(g) A document presented but not required by the credit will be disregarded and may be returned to the presenter.

(h) If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it.

(i) A document may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation.

(j) When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address will be disregarded. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.

(k) The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.

(l) A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.

Article 15 Complying Presentation

(a) When an issuing bank determines that a presentation is complying, it must honour.

(b) When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.

(c) When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.

Article 16 Discrepant Documents, Waiver and Notice

(a) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

(b) When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14(b).

(c) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

(i) that the bank is refusing to honour or negotiate; and

(ii) each discrepancy in respect of which the bank refuses to honour or negotiate; and

(iii) (a) that the bank is holding the documents pending further instructions from the presenter; or

(b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or

(c) that the bank is returning the documents; or

(d) that the bank is acting in accordance with instructions previously received from the presenter.

(d) The notice required in sub-article 16(c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.

(e) A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16(c) (iii) (a) or (b), return the documents to the presenter at any time.

(f) If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

(g) When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made.

Article 17 Original Documents and Copies

(a) At least one original of each document stipulated in the credit must be presented.

(b) A bank shall treat as an original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not an original.

(c) Unless a document indicates otherwise, a bank will also accept a document as original if it:

(i) appears to be written, typed, perforated or stamped by the document issuer's hand; or

(ii) appears to be on the document issuer's original stationery; or

(iii) states that it is original, unless the statement appears not to apply to the document presented.

(d) If a credit requires presentation of copies of documents, presentation of either originals or copies is permitted.

(e) If a credit requires presentation of multiple documents by using terms such as "in duplicate", "in two fold" or "in two copies", this will be satisfied by the presentation of at least one original and the remaining number in copies, except when the document itself indicates otherwise.

Article 18 Commercial Invoice

(a) A commercial invoice:

(i) must appear to have been issued by the beneficiary (except as provided in article 38);

(ii) must be made out in the name of the applicant (except as provided in sub-article 38(g));

(iii) must be made out in the same currency as the credit; and

(iv) need not be signed.

(b) A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit.

(c) The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.

Article 19 Transport Document Covering at Least Two Different Modes of Transport

(a) A transport document covering at least two different modes of transport (multimodal or combined transport document), however named, must appear to:

(i) indicate the name of the carrier and be signed by:
—the carrier or a named agent for or on behalf of the carrier, or
—the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

(ii) indicate that the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by:
—pre-printed wording, or
—a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.

The date of issuance of the transport document will be deemed to be the date of dispatch, taking in charge or shipped on board, and the date of shipment. However, if the transport document indicates, by stamp or notation, a date of dispatch, taking in charge or shipped on board, this date will be deemed to be the date of shipment.

(iii) indicate the place of dispatch, taking in charge or shipment, and the place of final destination stated in the credit, even if:

(a) the transport document states, in addition, a different place of dispatch, taking in charge or shipment or place of final destination, or

(b) the transport document contains the indication "intended" or similar qualification in relation to the vessel, port of loading or port of discharge.

(iv) be the sole original transport document or, if issued in more than one original, be the full set as indicated on the transport document.

(v) contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back transport document). Contents of terms and conditions of carriage will not be examined.

(vi) contain no indication that it is subject to a charter party.

(b) For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance (whether or not in different modes of transport) during the carriage from the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit.

(c) (i) A transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.

(ii) A transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

Article 20 Bill of Lading

(a) A bill of lading, however named, must appear to:

(i) indicate the name of the carrier and be signed by:
—the carrier or a named agent for or on behalf of the carrier, or
—the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

(ii) indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
—pre-printed wording, or
—an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

(iii) indicate shipment from the port of loading to the port of discharge stated in the credit.

If the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.

(iv) be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading.

(v) contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back bill of lading). Contents of terms and conditions of carriage will not be examined.

(vi) contain no indication that it is subject to a charter party.

(b) For the purpose of this article, transhipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.

(c) (i) A bill of lading may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same bill of lading.

(ii) A bill of lading indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading.

(d) Clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.

Article 21 Non-Negotiable Sea Waybill

(a) A non-negotiable sea waybill, however named, must appear to:

(i) indicate the name of the carrier and be signed by:
—the carrier or a named agent for or on behalf of the carrier, or
—the master or a named agent for or on behalf of the master.

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

(ii) indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
—pre-printed wording, or
—an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the non-negotiable sea waybill will be deemed to be the date of shipment unless the non-negotiable sea waybill contains an on board notation

indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the non-negotiable sea waybill contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

(iii) indicate shipment from the port of loading to the port of discharge stated in the credit.

If the non-negotiable sea waybill does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the non-negotiable sea waybill.

(iv) be the sole original non-negotiable sea waybill or, if issued in more than one original, be the full set as indicated on the non-negotiable sea waybill.

(v) contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back non-negotiable sea waybill). Contents of terms and conditions of carriage will not be examined.

(vi) contain no indication that it is subject to a charter party.

(b) For the purpose of this article, transhipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.

(c) (i) A non-negotiable sea waybill may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same non-negotiable sea waybill.

(ii) A non-negotiable sea waybill indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the non-negotiable sea waybill.

(d) Clauses in a non-negotiable sea waybill stating that the carrier reserves the right to tranship will be disregarded.

Article 22 Charter Party Bill of Lading

(a) A bill of lading, however named, containing an indication that it is subject to a charter party (charter party bill of lading), must appear to:

(i) be signed by:

—the master or a named agent for or on behalf of the master, or
—the owner or a named agent for or on behalf of the owner, or
—the charterer or a named agent for or on behalf of the charterer.

Any signature by the master, owner, charterer or agent must be identified as that of the master, owner, charterer or agent.

Any signature by an agent must indicate whether the agent has signed for or on behalf of the master, owner or charterer.

An agent signing for or on behalf of the owner or charterer must indicate the name of the owner or charterer.

(ii) indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:

—pre-printed wording, or
—an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the charter party bill of lading will be deemed to be the date of shipment unless the charter party bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

(iii) indicate shipment from the port of loading to the port of discharge stated in the credit. The port of discharge may also be shown as a range of ports or a geographical area, as stated in the credit.

(iv) be the sole original charter party bill of lading or, if issued in more than one original, be the full set as indicated on the charter party bill of lading.

(b) A bank will not examine charter party contracts, even if they are required to be presented by the terms of the credit.

Article 23 Air Transport Document

(a) An air transport document, however named, must appear to:

(i) indicate the name of the carrier and be signed by:
—the carrier, or
—a named agent for or on behalf of the carrier.

Any signature by the carrier or agent must be identified as that of the carrier or agent.

Any signature by an agent must indicate that the agent has signed for or on behalf of the carrier.

(ii) indicate that the goods have been accepted for carriage.

(iii) indicate the date of issuance. This date will be deemed to be the date of shipment unless the air transport document contains a specific notation of the actual date of shipment, in which case the date stated in the notation will be deemed to be the date of shipment.

Any other information appearing on the air transport document relative to the flight number and date will not be considered in determining the date of shipment.

(iv) indicate the airport of departure and the airport of destination stated in the credit.

(v) be the original for consignor or shipper, even if the credit stipulates a full set of originals.

(vi) contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage. Contents of terms and conditions of carriage will not be examined.

(b) For the purpose of this article, transhipment means unloading from one aircraft and reloading to another aircraft during the carriage from the airport of departure to the airport of destination stated in the credit.

(c) (i) An air transport document may indicate that the goods will or may be transhipped, provided that the entire carriage is covered by one and the same air transport document.

(ii) An air transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

Article 24 Road, Rail or Inland Waterway Transport Documents

(a) A road, rail or inland waterway transport document, however named, must appear to:

(i) indicate the name of the carrier and:
—be signed by the carrier or a named agent for or on behalf of the carrier, or
—indicate receipt of the goods by signature, stamp or notation by the carrier or a named agent for or on behalf of the carrier.

Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent.

Any signature, stamp or notation of receipt of the goods by the agent must indicate that the agent has signed or acted for or on behalf of the carrier.

If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier.

(ii) indicate the date of shipment or the date the goods have been received for shipment, dispatch or carriage at the place stated in the credit. Unless the transport document contains a dated reception stamp, an indication of the date of receipt or a date of shipment, the date of issuance of the transport document will be deemed to be the date of shipment.

(iii) indicate the place of shipment and the place of destination stated in the credit.

(b) (i) A road transport document must appear to be the original for consignor or shipper or bear no marking indicating for whom the document has been prepared.
(ii) A rail transport document marked "duplicate" will be accepted as an original.
(iii) A rail or inland waterway transport document will be accepted as an original whether marked as an original or not.

(c) In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set.

(d) For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.

(e) (i) A road, rail or inland waterway transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.
(ii) A road, rail or inland waterway transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

Article 25 Courier Receipt, Post Receipt or Certificate of Posting Courier

(a) A courier receipt, however named, evidencing receipt of goods for transport, must appear to:
(i) indicate the name of the courier service and be stamped or signed by the named courier service at the place from which the credit states the goods are to be shipped; and
(ii) indicate a date of pickup or of receipt or wording to this effect. This date will be deemed to be the date of shipment.

(b) A requirement that courier charges are to be paid or prepaid may be satisfied by a transport document issued by a courier service evidencing that courier charges are for the account of a party other than the consignee.

(c) A post receipt or certificate of posting, however named, evidencing receipt of goods for transport, must appear to be stamped or signed and dated at the place from which the credit states the goods are to be shipped. This date will be deemed to be the date of shipment.

Article 26 "On Deck", "Shipper's Load and Count", "Said by Shipper to Contain" and Charges Additional to Freight

(a) A transport document must not indicate that the goods are or will be loaded on deck. A clause on a transport document stating that the goods may be loaded on deck is acceptable.

(b) A transport document bearing a clause such as "shipper's load and count" and "said by shipper to contain" is acceptable.

(c) A transport document may bear a reference, by stamp or otherwise, to charges additional to the freight.

Article 27 Clean Transport Document

A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The word "clean" need not appear on a transport document, even if a credit has a requirement for that transport document to be "clean on board".

Article 28 Insurance Document and Coverage

(a) An insurance document, such as an insurance policy, an insurance certificate or a declaration under an open cover, must appear to be issued and signed by an insurance company, an underwriter or their agents or their proxies.

Any signature by an agent or proxy must indicate whether the agent or proxy has signed for or on behalf of the insurance company or underwriter.

(b) When the insurance document indicates that it has been issued in more than one original, all originals must be presented.

(c) Cover notes will not be accepted.

(d) An insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover.

(e) The date of the insurance document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment.

(f) (i) The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit.

(ii) A requirement in the credit for insurance coverage to be for a percentage of the value of the goods, of the invoice value or similar is deemed to be the minimum amount of coverage required.

If there is no indication in the credit of the insurance coverage required, the amount of insurance coverage must be at least 110% of the CIF or CIP value of the goods.

When the CIF or CIP value cannot be determined from the documents, the amount of insurance coverage must be calculated on the basis of the amount for which honour or negotiation is requested or the gross value of the goods as shown on the invoice, whichever is greater.

(iii) The insurance document must indicate that risks are covered at least between the place of taking in charge or shipment and the place of discharge or final destination as stated in the credit.

(g) A credit should state the type of insurance required and, if any, the additional risks to be covered. An insurance document will be accepted without regard to any risks that are not covered if the credit uses imprecise terms such as "usual risks" or "customary risks".

(h) When a credit requires insurance against "all risks" and an insurance document is presented containing any "all risks" notation or clause, whether or not bearing the heading "all risks", the insurance document will be accepted without regard to any risks stated to be excluded.

(i) An insurance document may contain reference to any exclusion clause.

(j) An insurance document may indicate that the cover is subject to a franchise or excess (deductible).

Article 29 Extension of Expiry Date or Last Day for Presentation

(a) If the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed for reasons other than those referred to in article 36, the expiry date or the last day for presentation, as the case may be, will be extended to the first following banking day.

(b) If presentation is made on the first following banking day, a nominated bank must provide the issuing bank or confirming bank with a statement on its covering schedule that the presentation was made within the time limits extended in accordance with sub-article 29(a).

(c) The latest date for shipment will not be extended as a result of sub-article 29 (a).

Article 30 Tolerance in Credit Amount, Quantity and Unit Prices

(a) The words "about" or "approximately" used in connection with the amount of the credit or the quantity or the unit price stated in the credit are to be construed as allowing a tolerance not to exceed 10% more or 10% less than the amount, the quantity or the unit price to which they refer.

(b) A tolerance not to exceed 5% more or 5% less than the quantity of the goods is allowed, provided the credit does not state the quantity in terms of a stipulated number of packing units or individual items and the total amount of the drawings does not exceed the amount of the credit.

(c) Even when partial shipments are not allowed, a tolerance not to exceed 5% less than the amount of the credit is allowed, provided that the quantity of the goods, if stated in the credit,

is shipped in full and a unit price, if stated in the credit, is not reduced or that sub-article 30(b) is not applicable. This tolerance does not apply when the credit stipulates a specific tolerance or uses the expressions referred to in sub-article 30(a).

Article 31 Partial Drawings or Shipments

(a) Partial drawings or shipments are allowed.

(b) A presentation consisting of more than one set of transport documents evidencing shipment commencing on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering a partial shipment, even if they indicate different dates of shipment or different ports of loading, places of taking in charge or dispatch. If the presentation consists of more than one set of transport documents, the latest date of shipment as evidenced on any of the sets of transport documents will be regarded as the date of shipment.

A presentation consisting of one or more sets of transport documents evidencing shipment on more than one means of conveyance within the same mode of transport will be regarded as covering a partial shipment, even if the means of conveyance leave on the same day for the same destination.

(c) A presentation consisting of more than one courier receipt, post receipt or certificate of posting will not be regarded as a partial shipment if the courier receipts, post receipts or certificates of posting appear to have been stamped or signed by the same courier or postal service at the same place and date and for the same destination.

Article 32 Instalment Drawings or Shipments

If a drawing or shipment by instalments within given periods is stipulated in the credit and any instalment is not drawn or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalment.

Article 33 Hours of Presentation

A bank has no obligation to accept a presentation outside of its banking hours.

Article 34 Disclaimer on Effectiveness of Documents

A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.

Article 35 Disclaimer on Transmission and Translation

A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.

If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

A bank assumes no liability or responsibility for errors in translation or interpretation of technical terms and may transmit credit terms without translating them.

Article 36 Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.

Article 37 Disclaimer for Acts of an Instructed Party

(a) A bank utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant does so for the account and at the risk of the applicant.

(b) An issuing bank or advising bank assumes no liability or responsibility should the instructions it transmits to another bank not be carried out, even if it has taken the initiative in the choice of that other bank.

(c) A bank instructing another bank to perform services is liable for any commissions, fees, costs or expenses ("charges") incurred by that bank in connection with its instructions.

If a credit states that charges are for the account of the beneficiary and charges cannot be collected or deducted from proceeds, the issuing bank remains liable for payment of charges.

A credit or amendment should not stipulate that the advising to a beneficiary is conditional upon the receipt by the advising bank or second advising bank of its charges.

(d) The applicant shall be bound by and liable to indemnify a bank against all obligations and responsibilities imposed by foreign laws and usages.

Article 38 Transferable Credits

(a) A bank is under no obligation to transfer a credit except to the extent and in the manner expressly consented to by that bank.

(b) For the purpose of this article:

Transfe rable credit means a credit that specifically states it is "transferable". A transferable credit may be made available in whole or in part to another beneficiary ("second beneficiary") at the request of the beneficiary ("first beneficiary").

Transferring bank means a nominated bank that transfers the credit or, in a credit available with any bank, a bank that is specifically authorized by the issuing bank to transfer and that transfers the credit. An issuing bank may be a transferring bank.

Transferred credit means a credit that has been made available by the transferring bank to a second beneficiary.

(c) Unless otherwise agreed at the time of transfer, all charges (such as commissions, fees, costs or expenses) incurred in respect of a transfer must be paid by the first beneficiary.

(d) A credit may be transferred in part to more than one second beneficiary provided partial drawings or shipments are allowed.

A transferred credit cannot be transferred at the request of a second beneficiary to any subsequent beneficiary. The first beneficiary is not considered to be a subsequent beneficiary.

(e) Any request for transfer must indicate if and under what conditions amendments may be advised to the second beneficiary. The transferred credit must clearly indicate those conditions.

(f) If a credit is transferred to more than one second beneficiary, rejection of an amendment by one or more second beneficiary does not invalidate the acceptance by any other second beneficiary, with respect to which the transferred credit will be amended accordingly. For any second beneficiary that rejected the amendment, the transferred credit will remain unamended.

(g) The transferred credit must accurately reflect the terms and conditions of the credit, including confirmation, if any, with the exception of:

—the amount of the credit,

—any unit price stated therein,
—the expiry date,
—the period for presentation, or
—the latest shipment date or given period for shipment,
any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased to provide the amount of cover stipulated in the credit or these articles.

The name of the first beneficiary may be substituted for that of the applicant in the credit.

If the name of the applicant is specifically required by the credit to appear in any document other than the invoice, such requirement must be reflected in the transferred credit.

(h) The first beneficiary has the right to substitute its own invoice and draft, if any, for those of a second beneficiary for an amount not in excess of that stipulated in the credit, and upon such substitution the first beneficiary can draw under the credit for the difference, if any, between its invoice and the invoice of a second beneficiary.

(i) If the first beneficiary is to present its own invoice and draft, if any, but fails to do so on first demand, or if the invoices presented by the first beneficiary create discrepancies that did not exist in the presentation made by the second beneficiary and the first beneficiary fails to correct them on first demand, the transferring bank has the right to present the documents as received from the second beneficiary to the issuing bank, without further responsibility to the first beneficiary.

(j) The first beneficiary may, in its request for transfer, indicate that honour or negotiation is to be effected to a second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the credit. This is without prejudice to the right of the first beneficiary in accordance with sub-article 38(h).

(k) Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.

Article 39 Assignment of Proceeds

The fact that a credit is not stated to be transferable shall not affect the right of the beneficiary to assign any proceeds to which it may be or may become entitled under the credit, in accordance with the provisions of applicable law. This article relates only to the assignment of proceeds and not to the assignment of the right to perform under the credit.

SUPPLEMENT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS FOR ELECTRONIC PRESENTATION

Article e1 Scope of the eUCP

(a) The Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP") supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision ICC Publication No. 600) ("UCP") in order to accommodate presentation of electronic records alone or in combination with paper documents.

(b) The eUCP shall apply as a supplement to the UCP where the credit indicates that it is subject to eUCP.

(c) This version is Version 1.1. A credit must indicate the applicable version of the eUCP. If it does not do so, it is subject to the version in effect on the date the credit is issued or, if made subject to eUCP by an amendment accepted by the beneficiary, on the date of that amendment.

Article e2 Relationship of the eUCP to the UCP

(a) A credit subject to the eUCP ("eUCP credit") is also subject to the UCP without express incorporation of the UCP.

(b) Where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the UCP.

(c) If an eUCP credit allows the beneficiary to choose between presentation of paper documents or electronic records and it chooses to present only paper documents, the UCP alone shall apply to that presentation. If only paper documents are permitted under an eUCP credit, the UCP alone shall apply.

Article e3 Definitions

(a) Where the following terms are used in the UCP, for the purposes of applying the UCP to an electronic record presented under an eUCP credit, the term:

(i) appear on their face and the like shall apply to examination of the data content of an electronic record.
(ii) document shall include an electronic record.
(iii) place for presentation of electronic records means an electronic address.
(iv) sign and the like shall include an electronic signature.
(v) superimposed, notation or stamped means data content whose supplementary character is apparent in an electronic record.

(b) The following terms used in the eUCP shall have the following meanings:

(i) electronic record means
—data created, generated, sent, communicated, received or stored by electronic means
—that is capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
—is capable of being examined for compliance with the terms and conditions of the eUCP credit.
(ii) electronic signature means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.
(iii) format means the data organization in which the electronic record is expressed or to which it refers.
(iv) paper document means a document in a traditional paper form.
(v) received means the time when an electronic record enters the information system of the applicable recipient in a form capable of being accepted by that system. Any acknowledgement of receipt does not imply acceptance or refusal of the electronic record under an eUCP credit.

Article e4 Format

An eUCP credit must specify the formats in which electronic records are to be presented. If the format of the electronic record is not so specified, it may be presented in any format.

Article e5 Presentation

(a) An eUCP credit allowing presentation of:

(i) electronic records must state a place for presentation of the electronic records.
(ii) both electronic records and paper documents must also state a place for presentation of the paper documents.

(b) Electronic records may be presented separately and need not be presented at the same time.

(c) If an eUCP credit allows for presentation of one or more electronic records, the beneficiary is responsible for providing a notice to the bank to which presentation is made signifying when the presentation is complete. The notice of completeness may be given as an electronic record or paper document and must identify the eUCP credit to which it relates. Presentation is deemed not to have been made if the beneficiary's notice is not received.

(d) (i) Each presentation of an electronic record and the presentation of paper documents under an eUCP credit must identify the eUCP credit under which it is presented.

(ii) A presentation not so identified may be treated as not received.

(e) If the bank to which presentation is to be made is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date and/or the last day of the period of time after the date of shipment for presentation, as the case may be, the bank will be deemed to be closed and the date for presentation and/or the expiry date shall be extended to the first following banking day on which such bank is able to receive an electronic record. If the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunications or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record.

(f) An electronic record that cannot be authenticated is deemed not to have been presented.

Article e6 Examination

(a) If an electronic record contains a hyperlink to an external system or a presentation indicates that the electronic record may be examined by reference to an external system, the electronic record at the hyperlink or the referenced system shall be deemed to be the electronic record to be examined. The failure of the indicated system to provide access to the required electronic record at the time of examination shall constitute a discrepancy.

(b) The forwarding of electronic records by a nominated bank pursuant to its nomination signifies that it has satisfied itself as to the apparent authenticity of the electronic records.

(c) The inability of the issuing bank, or confirming bank, if any, to examine an electronic record in a format required by the eUCP credit or, if no format is required, to examine it in the format presented is not a basis for refusal.

Article e7 Notice of Refusal

(a) (i) The time period for the examination of documents commences on the banking day following the banking day on which the beneficiary's notice of completeness is received.

(ii) If the time for presentation of documents or the notice of completeness is extended, the time for the examination of documents commences on the first following banking day on which the bank to which presentation is to be made is able to receive the notice of completeness.

(b) If an issuing bank, the confirming bank, if any, or a nominated bank acting on their behalf, provides a notice of refusal of a presentation which includes electronic records and does not receive instructions from the party to which notice of refusal is given within 30 calendar days from the date the notice of refusal is given for the disposition of the electronic records, the bank shall return any paper documents not previously returned to the presenter but may dispose of the electronic records in any manner deemed appropriate without any responsibility.

Article e8 Originals and Copies

Any requirement of the UCP or an eUCP credit for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.

Article e9 Date of Issuance

Unless an electronic record contains a specific date of issuance, the date on which it appears to have been sent by the issuer is deemed to be the date of issuance. The date of receipt will be deemed to be the date it was sent if no other date is apparent.

Article e10 Transport

If an electronic record evidencing transport does not indicate a date of shipment or dispatch, the date of issuance of the electronic record will be deemed to be the date of shipment or dispatch. However, if the electronic record bears a notation that evidences the date of shipment or dispatch, the date of the notation will be deemed to be the date of shipment or dispatch. A notation showing additional data content need not be separately signed or otherwise authenticated.

Article e11 Corruption of an Electronic Record After Presentation

(a) If an electronic record that has been received by the issuing bank, confirming bank, or another nominated bank appears to have been corrupted, the bank may inform the presenter and may request that the electronic record be re-presented.

(b) If the bank requests that an electronic record be re-presented:

- (i) the time for examination is suspended and resumes when the presenter re-presents the electronic record; and
- (ii) if the nominated bank is not the confirming bank, it must provide the issuing bank and any confirming bank with notice of the request for re-presentation and inform it of the suspension; but
- (iii) if the same electronic record is not re-presented within thirty (30) calendar days, the bank may treat the electronic record as not presented, and
- (iv) any deadlines are not extended.

Article e12 Additional Disclaimer of Liability for Presentation of Electronic Records under eUCP

By satisfying itself as to the apparent authenticity of an electronic record, banks assume no liability for the identity of the sender, source of the information or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a commercially acceptable data process for the receipt, authentication and identification of electronic records.

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APPENDIX B

CARRIAGE OF GOODS BY SEA ACT 1992

(1992 c. 50)

An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents. [16th July 1992]

Shipping documents etc. to which Act applies

1.—(1) This Act applies to the following documents, that is to say—
- (a) any bill of lading;
- (b) any sea waybill; and
- (c) any ship's delivery order.

(2) References in this Act to a bill of lading—
- (a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but
- (b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—
- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
- (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—
- (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and
- (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to—
- (a) the issue of a document to which this Act applies;
- (b) the indorsement, delivery or other transfer of such a document; or
- (c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may—
- (a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and
- (b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Rights under shipping documents

2.—(1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) 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.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order—

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person 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.

(5) 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;

but the operation of that subsection shall be 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 and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

Liabilities under shipping documents

3.—(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(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 a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

Representations in bills of lading

4. A bill of lading which—

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

Interpretation etc.

5.—(1) In this Act—

"bill of lading", "sea waybill" and "ship's delivery order" shall be construed in accordance with section 1 above;

"the contract of carriage"—

(a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and

(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

"holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

"information technology" includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; and

"telecommunication system" has the same meaning as in the Telecommunications Act 1984.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by 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;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

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.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be

varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates—

(a) cease to exist after the issue of the document; or

(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

Short title, repeal, commencement and extent

6.—(1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

(2) The Bills of Lading Act 1855 is hereby repealed.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.

APPENDIX C

SALE OF GOODS ACT 1979, PARTS III AND V

(1979 c. 54)

AUTHOR'S COMMENT

The Sale of Goods Act 1979, as subsequently amended,[1] is relevant to this bankers' documentary credits because it determines the property and security rights of the parties to the sale contract, which also affect the rights of the bank, as described in section 3.3 of this book. The relevant sections (which are set out here in full) are in Parts III and V of the Act, and the interpretation section 61, in Part VII.

PART III

EFFECTS OF THE CONTRACT

Transfer of property as between seller and buyer

16. Goods must be ascertained

Subject to section 20A below[2] where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17. Property passes when intended to pass

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

18. Rules for ascertaining intention

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

1. For the purposes of this book the most important recent amendment was the Sale of Goods (Amendment) Act 1995, which came into force on 19 September 1995. This altered the previously-absolute rule in s. 16, making it subject to the new s. 20A, with other consequential additions (e.g., s. 20B) and amendments (e.g., in s. 61): see further the discussion of the passing of property in section 3.3.

2. This qualification was added by the Sale of Goods (Amendment) Act 1995, prior to which s. 16 operated as an absolute bar on the passing of property in unascertained goods.

Rule 1—Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

Rule 3—Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.

Rule 4—When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:—

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time.

Rule 5—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract.

(3) Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk—

(a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and

(b) the property in those goods then passes to that buyer.

(4) Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.[3]

19. Reservation of right of disposal

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* to be taken to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

3. Sub-paragraphs (3) and (4) were added by the Sale of Goods (Amendment) Act 1995, before which property in an unascertained bulk could not pass at all.

20. Risk **prima facie** *passes with property*

(1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

(2) But where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

(3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

20A. Undivided shares in goods forming part of a bulk

(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met—

(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and

(b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.

(2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree—

(a) property in an undivided share in the bulk is transferred to the buyer, and

(b) the buyer becomes an owner in common of the bulk.

(3) Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time.

(4) Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.

(5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made.

(6) For the purposes of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods.

20B. Deemed consent by co-owner to dealings in bulk goods

(1) A person who has become an owner in common of a bulk by virtue of section 20A above shall be deemed to have consented to—

(a) any delivery of goods out of the bulk to any other owner in common of the bulk, being goods which are due to him under his contract;

(b) any dealing with or removal, delivery or disposal of goods in the bulk by any other person who is an owner in common of the bulk in so far as the goods fall within that co-owner's undivided share in the bulk at the time of the dealing, removal, delivery or disposal.

(2) No cause of action shall accrue to anyone against a person by reason of that person having acted in accordance with paragraph (a) or (b) of subsection (1) above in reliance on any consent deemed to have been given under that subsection.

(3) Nothing in this section or section 20A above shall—

(a) impose an obligation on a buyer of goods out of a bulk to compensate any other buyer of goods out of that bulk for any shortfall in the goods received by that other buyer;

(b) affect any contractual arrangement between buyers of goods out of a bulk for adjustments between themselves; or

(c) affect the rights of any buyer under his contract.[4]

4. Sections 20A and 20B were added by the Sale of Goods (Amendment) Act 1995.

Transfer of title

21. Sale by person not the owner

(1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this Act affects—

(a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22. Market overt

[*This section has been substantively repealed by the Sale and Supply of Goods Act 1994.*]

23. Sale under voidable title

When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24. Seller in possession after sale

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

25. Buyer in possession after sale

(1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(2) For the purposes of subsection (1) above—

(a) the buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods, and

(b) "conditional sale agreement" means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.

(3) Paragraph 9 of Schedule 1 below applies in relation to a contract under which a person buys or agrees to buy goods and which is made before the appointed day.

(4) In subsection (3) above and paragraph 9 of Schedule 1 below references to the appointed day are to the day appointed for the purposes of those provisions by an order of the Secretary of State made by statutory instrument.

26. Supplementary to sections 24 and 25

In sections 24 and 25 above "mercantile agent" means a mercantile agent having in the customary course of his business as such agent authority either—

(a) to sell goods, or
(b) to consign goods for the purpose of sale, or
(c) to buy goods, or Sale of Goods Act 1979, s 26(d) to raise money on the security of goods.

PART V

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Preliminary

38. Unpaid seller defined

(1) The seller of goods is an unpaid seller within the meaning of this Act—
(a) when the whole of the price has not been paid or tendered;
(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
(2) In this Part of this Act "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid (or is directly responsible for) the price.

39. Unpaid seller's rights

(1) Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—
(a) a lien on the goods or right to retain them for the price while he is in possession of them;
(b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
(c) a right of re-sale as limited by this Act.
(2) Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies) a right of withholding delivery similar to and co-extensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.

40. Attachment by seller in Scotland

[*Repealed by the Debtors (Scotland) Act 1987.*]

Unpaid seller's lien

41. Seller's lien

(1) Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases—
(a) where the goods have been sold without any stipulation as to credit;
(b) where the goods have been sold on credit but the term of credit has expired;
(c) where the buyer becomes insolvent.
(2) The seller may exercise his lien or right of retention notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Part delivery

Where an unpaid seller has made part delivery of the goods, he may exercise his lien or right of retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43. Termination of lien

(1) The unpaid seller of goods loses his lien or right of retention in respect of them—

(a) when he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) when the buyer or his agent lawfully obtains possession of the goods;

(c) by waiver of the lien or right of retention.

(2) An unpaid seller of goods who has a lien or right of retention in respect of them does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transit

44. Right of stoppage in transit

Subject to this Act, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45. Duration of transit

(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee or custodier for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from the carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. How stoppage in transit is effected

(1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are.

(2) The notice may be given either to the person in actual possession of the goods or to his principal.

(3) If given to the principal, the notice is ineffective unless given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(4) When notice of stoppage in transit is given by the seller to the carrier or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller; and the expenses of there-delivery must be borne by the seller.

Re-sale etc. by buyer

47. Effect of sub-sale etc. by buyer

(1) Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it.

(2) Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, then—

(a) if the last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transit is defeated; and

(b) if the last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.

Rescission: and re-sale by seller

48. Rescission: and re-sale by seller

(1) Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit re-sells the goods, the buyer acquires a good title to them as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is rescinded but without prejudice to any claim the seller may have for damages.

PART VII

SUPPLEMENTARY

61. Interpretation

(1) In this Act, unless the context or subject matter otherwise requires—

"action" includes counterclaim and set-off, and in Scotland condescendence and claim and compensation;

"bulk" means a mass or collection of goods of the same kind which—

(a) is contained in a defined space or area; and

(b) is such that any goods in the bulk are interchangeable with any other goods therein of the same number or quantity[5];

"business" includes a profession and the activities of any government department (including a Northern Ireland department) or local or public authority;

"buyer" means a person who buys or agrees to buy goods;

"consumer contract" has the same meaning as in section 25(1) of the Unfair Contract Terms Act 1977; and for the purposes of this Act the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the seller;

"contract of sale" includes an agreement to sell as well as a sale;

"credit-broker" means a person acting in the course of a business of credit brokerage carried on by him, that is a business of effecting introductions of individuals desiring to obtain credit—

(a) to persons carrying on any business so far as it relates to the provision of credit, or

(b) to other persons engaged in credit brokerage;

"delivery" means voluntary transfer of possession from one person to another except that in relation to sections 20A and 20B above it includes such appropriation of goods to the contract as results in property in the goods being transferred to the buyer;

"document of title to goods" has the same meaning as it has in the Factors Acts;

"Factors Acts" means the Factors Act 1889, the Factors (Scotland) Act 1890, and any enactment amending or substituted for the same;

"fault" means wrongful act or default;

"future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale;

"goods" includes all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular "goods" includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and includes an undivided share in goods;

"plaintiff" includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counter-claiming;

"property" means the general property in goods, and not merely a special property;

"sale" includes a bargain and sale as well as a sale and delivery;

"seller" means a person who sells or agrees to sell goods;

"specific goods" means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid;

"warranty" (as regards England and Wales and Northern Ireland) means an agreement with reference to goods which are the subject of a contract of sale, Sale of Goods Act 1979, s. 61 but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

(2) [*Repealed by the Sale and Supply of Goods Act 1994*].

(3) A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not.

(4) A person is deemed to be insolvent within the meaning of this Act if he has either ceased to pay his debts in the ordinary course of business or he cannot pay his debts as they become due.

(5) Goods are in a deliverable state within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

(5A) References in this Act to dealing as consumer are to be construed in accordance with Part I of the Unfair Contract Terms Act 1977; and, for the purposes of this Act, it is for a seller claiming that the buyer does not deal as consumer to show that he does not.

(6) As regards the definition of "business" in subsection (1) above, paragraph 14 of Schedule 1 below applies in relation to a contract made on or after 18 May 1973 and before 1 February 1978, and paragraph 15 in relation to one made before 18 May 1973.

5. This definition was added by the Sale of Goods (Amendment) Act 1995, which also amended the definitions of "delivery", "goods" and "specific goods".

APPENDIX D

OTHER SELECTED STATUTORY PROVISIONS

Author's comment

The Carriage of Goods by Sea Act 1971 (as amended by the Merchant Shipping Acts 1981 and 1995) brought into force the Hague-Visby Rules in the UK, and the Contracts (Applicable Law) Act 1990 brought into force the Rome Convention on the law applicable to contractual obligations. Only sections and other provisions relevant to the discussion in this book are included.

Factors Act 1889

1. For the purposes of this Act—

(1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

(3) The expression "goods" shall include wares and merchandise:

(4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

(6) The expression "person" shall include any body of persons corporate or unincorporate.

2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods

represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

. . .

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or the documents of title under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

. . .

Carriage of Goods by Sea Act 1971 (as amended by the Merchant Shipping Acts 1981 and 1995)

. . .

1. *Application of the Hague Rules as amended*—(1) In this Act, "the Rules" means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and [inserted by the Merchant Shipping Act 1981, s. 2(1) and by the Merchant Shipping Act 1995, s. 314(2)] by the Protocol signed at Brussels on 21 December 1979.

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.

(3) Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different States within the meaning of Article X of the Rules.

(4) Subject to subsection (6) below, nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.

. . .

(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to—

(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and

(b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading,

but subject, where paragraph (b) applies, to any necessary modifications and in particular with the omission in Article III of the Rules of the second sentence of paragraph 4 and of paragraph 7.

(7) If and so far as the contract contained in or evidenced by a bill of lading or receipt within paragraph (a) or (b) of subsection (6) above applies to deck cargo or live animals, the Rules as given the force of law by that subsection shall have effect as if Article I(c) did not exclude deck cargo and live animals.

In this subsection "deck cargo" means cargo which by the contract of carriage is stated as being carried on deck and is so carried.

. . .

SCHEDULE

The Hague Rules as Amended by the Brussels Protocol 1968

Article I

In these Rules the following words are employed, with the meanings set out below:

. . .

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

. . .

(e) "Carriage of goods" covers the period from the time when the goods are loaded to the time they are discharged from the ship.

Article II

. . . under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

Article III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods.

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b), and (c). However, proof to the

contrary shall not be admissible when the bill of lading has been transferred to a third party in good faith.

. . .

6. . . . the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

. . .

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall previously have taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article IV

. . .

5. (a) [as amended by Merchant Shipping Act 1981, s. 2(3), and by the Merchant Shipping Act 1995, s. 314(2)] Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there is no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

(d) [as amended by Merchant Shipping Act 1981, s. 2(4), and by the Merchant Shipping Act 1995, s. 314(2)] The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case [at the date of the judgment in question: Merchant Shipping Act 1981, section 2(5)].

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

. . .

Article X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

(a) the bill of lading is issued in a contracting State, or
(b) the carriage is from a port in a contracting State, or
(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any States giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

. . .

Contracts (Applicable Law) Act 1990

SCHEDULE 1

THE ROME CONVENTION

. . .

Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

. . .

Article 4 Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the

performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

. . .

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

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