

# THE LEGAL STATUS OF FREIGHT FORWARDERS' BILLS OF LADING

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## Introduction

The traditional role of the freight forwarder has been that of an agent of the cargo-owner<sup>1</sup> who makes the arrangements for the transport of goods and enters into contracts of carriage with shipowners, road hauliers, and other carriers on behalf of his customer.<sup>2</sup> In the oft-quoted,<sup>3</sup> but out-dated, words of Rowlatt J in *Jones v European & General Express Co*:

It must be clearly understood that a forwarding agent is not a carrier. He does not obtain possession of the goods and he does not undertake to deliver them. All he does is to act as agent for the owner of the goods, and make the necessary arrangements with the people who do carry — steamship, railways, and so on — and to make arrangements, as far as they are necessary, for the intermediate steps between the ship and the rail, the Customs or anything else.<sup>4</sup>

The forwarding agent's duties have been identified as being to ascertain the place and time of sailing, reserve space on board the vessel, arrange for the goods to be brought alongside the vessel, prepare the bill of lading and forward it to the ship's agent or loading broker for signature, make the customs entry and pay any dues, and collect the signed bill of lading after shipment.<sup>5</sup>

In recent years, however, the freight forwarder has assumed greater responsibilities. The freight forwarder may agree to pack, warehouse, and even carry the goods of the cargo-owner to their destination. Containerisation has facilitated the practice of freight forwarders consolidating a number of cargoes belonging to different owners into one consignment which is then shipped under a groupage bill of lading issued by the shipowner to the freight forwarder.<sup>6</sup>

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<sup>1</sup> The expression 'cargo-owner' is used in this article as a general term for those persons having some proprietary or possessory interest in the cargo.

<sup>2</sup> Scrutton, *Charterparties and Bills of Lading* (London: Sweet & Maxwell, 1984), p 42; *Jones v European & General Express Co* (1920) 15 Asp RMC 138.

<sup>3</sup> *Moto Vespa SA v Mat (Britannia Express) Ltd* [1979] 1 Lloyd's Rep 175, 179; I C Holloway, 'Troubled Waters: The Liability of a Freight Forwarder as a Principal under Anglo-Canadian Law' (1986) *Journal of Maritime Law and Commerce* 243, 244; *Bowstead on Agency* (London: Sweet & Maxwell, 14th ed 1976), p 9; *Halsbury's Laws of England* (4th ed), vol 43, para 447.

<sup>4</sup> *Jones v European & General Express Co* (note 2 above), p 138-9.

<sup>5</sup> *Heskell v Continental Express* (1950) 83 Ll L R 438, 449; Scrutton (note 2 above), p 42.

<sup>6</sup> C M Schmitthoff, *Export Trade* (London: Stevens & Sons, 9th ed 1990), p 579; D Yates (ed), *Contracts for the Carriage of Goods* (London: Lloyd's of London Press, 1993), para 6.1.3.10; D J Hill, *Freight Forwarders* (London: Stevens & Sons, 1972), p 195.

Although the freight forwarder is not usually the owner or the charterer of the vessel on which it books space and ships the cargo, it is not unusual for the freight forwarder to issue its own bill of lading to its customers, the cargo-owners. The question addressed by this article is: What is the legal status of such bills of lading issued by freight forwarders?

There is no simple answer to this question. The causes of the uncertainty of the law in this area are the large variety of transport documents currently in use by freight forwarders, the dearth of relevant case law, and the delay in the ratification of an international convention<sup>7</sup> which would serve to regulate the rights and liabilities of the multimodal transport operator in general and, the freight forwarder in particular.

It will be argued that, notwithstanding conventional analysis to the contrary and depending on the precise facts of each case, bills of lading issued by freight forwarders ought to be considered as genuine bills of lading. Because this field remains largely unexplored by the courts, support for this thesis will be based on the nature of the bill of lading and the legal position of through and combined transport bills of lading.

### Transport documents issued by freight forwarders

When attempting to assess the legal effect of a document issued by a freight forwarder, the crucial issue is to determine whether the freight forwarder has assumed responsibility toward the cargo-owner as an agent or a principal. Where the freight forwarder simply handles the arrangements for and enters into contracts with carriers on behalf of the cargo-owner, then the freight forwarder will be held to be acting as an agent of the cargo-owner. The law of agency applies and the general rule is that the carriers will be held to have entered into direct contractual relations with the cargo-owner (as principal), and not with the freight forwarder.<sup>8</sup> Where the freight forwarder agrees to provide other services, such as the packing, warehousing, or carriage of the goods, then he will be directly responsible to the cargo-owner for the performance of those services. And this is so even if he sub-contracts the performance of the service to a third party.<sup>9</sup> It can be seen, then, that the difficulties of specifying precisely the legal relationships between the parties to the transaction (that is, the cargo-owner, the freight forwarder, and the actual carrier) stem from the difficulty in determining whether it was the intention of the

<sup>7</sup> The United Nations Convention on International Multimodal Transport of Goods (UN Doc TD/MT/Conf/16 1980), which is not yet in force. See also *UNCTAD/ICC Rules for Multimodal Transport Documents* (ICC Publication No 481, 1992). The purpose of the convention and the rules is to produce a standardised regime of liability with respect to multimodal transport. The precise mechanics of these regimes are outside the scope of this article and a fuller discussion may be found in Yates (note 6 above), para 6.5.

<sup>8</sup> *Bowstead on Agency* (London: Sweet & Maxwell, 15th ed 1985), art 75.

<sup>9</sup> *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197, 202.

parties that the freight forwarder had agreed either to perform a particular service or to arrange for its performance.<sup>10</sup>

The following factors have been identified as relevant to the issue of whether a freight forwarder agreed to act as a principal and to perform the carriage:<sup>11</sup>

- 1 Whether the freight forwarder held itself out as a carrier, although not owning or having chartered any vessels.<sup>12</sup>
- 2 The construction of the contract between the cargo-owner and the freight forwarder.<sup>13</sup> Did the freight forwarder agree 'to collect' rather than 'to arrange for the collection of' the goods, 'to carry' rather than 'to arrange for the carriage of' the goods?
- 3 The mode of the freight forwarder's remuneration agreed upon by the parties.<sup>14</sup> Was the freight forwarder's profit on the transaction derived from a lump sum freight charged to the cargo-owner rather than from a commission based on the actual cost of the transport?
- 4 Whether the freight forwarder had contracted for a lien over the goods in its own name.
- 5 The extent to which the cargo-owner was to be informed of the arrangements made as to the carriage.<sup>15</sup>
- 6 Whether the freight forwarder issued its own bill of lading to the cargo-owner and took a bill of lading from the actual carrier naming itself as the shipper.<sup>16</sup>

The varied nature of these factors means that the outcome in the determination as to whether a freight forwarder is acting as an agent or a principal will depend on the precise facts of each case. Indeed, the freight forwarder has been held in a number of cases to have acted in a hybrid capacity, that is, as a principal with

<sup>10</sup> DA Glass and C Cashmore, *Introduction to the Law of Carriage of Goods* (London: Sweet & Maxwell, 1989), p 71.

<sup>11</sup> For a more complete discussion, see Scrutton (note 2 above), pp 42-3; Glass and Cashmore (note 2 above), pp 72-3; *Halsbury's Laws of England* (4th ed reissue), vol 5(1), para 575. See also *Ocean Projects Inc v Ultratech Pte Ltd* [1994] 2 SLR 369, 375-6.

<sup>12</sup> *Marston Excelsior Ltd v Arbuckle Smith & Co* [1971] Lloyd's Rep 306, 311; *Elektronska Industrija Oour TVA v Transped Oour Kintimentalna Spedicna* [1986] 1 Lloyd's Rep 49, 52; *Harlow & Jones Ltd v PJ Walker Shipping & Transport Ltd* [1986] 2 Lloyd's Rep 141, 144.

<sup>13</sup> *Marston v Arbuckle* (note 12 above), p 309; *Elektronska v Transped* (note 12 above), p 51; see also *Blue Nile Co v Emery Customs Brokers (S) Pte Ltd* [1992] 1 SLR 296, 310-11 where the Singapore High Court held that bills of lading fraudulently issued by an employee of the defendant freight forwarders were held to constitute 'carrier's bills of lading' on the grounds that 'they bore all the indicia of a carrier's bill of lading,' namely that they were titled 'bill of lading' and were marked 'port to port shipment' and 'shipped on board' a named vessel.

<sup>14</sup> *Marston v Arbuckle* (note 12 above), pp 310, 311; *Elektronska v Transped* (note 12 above), p 52.

<sup>15</sup> *Ocean Projects Inc v Ultratech Pte Ltd* (note 11 above), p 376.

<sup>16</sup> *Platzhoff v Lebean* (1865) 4 F & F 545; *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297; *Hair & Skin Trading Co v Norman Airfreight Carriers Ltd* [1974] 1 Lloyd's Rep 443; *Hoffman-Laroche Inc v M/V TFL Jefferson* [1990] LMLN 274 (US Dist Ct).

respect to that part of the carriage which it undertook personally and as an agent with respect to the remainder of the voyage.<sup>17</sup>

*The freight forwarder acting as an agent*

It is clear that the 'house bill of lading' issued by the freight forwarder in its capacity as an agent of the cargo-owner to arrange for the carriage of the latter's goods is a mere receipt for the goods and an authority to enter into a contract of carriage on behalf of the cargo-owner. It is not a bill of lading and has the equivalent effect of a merchant's delivery order.<sup>18</sup> The reasoning is clear. By acting as an agent, the freight forwarder facilitates direct contractual relations between the cargo-owner and the actual carrier. The bill of lading relating to the carriage of goods is thus that issued by the actual carrier.

*The freight forwarder acting as a principal*

Where the freight forwarder acts as a principal and assumes toward the cargo-owner the liabilities of a 'carrier,' the law is more unsettled. Freight forwarders have been held by the courts to have acted as, and thus incurred toward the cargo-owner the liabilities of, a carrier.<sup>19</sup> However, it does not necessarily follow that a freight forwarder, held to have assumed contractual liability as a carrier, is capable of issuing a bill of lading which the law considers as genuine. Recognition of the document issued by a freight forwarder as a bill of lading is relevant to (a) its use in documentary credit transactions, (b) its usefulness as security for loans, and (c) the rights and liabilities of the parties associated with the carriage of the goods, taking into account (i) the applicability of the old Bills of Lading Ordinance<sup>20</sup> and the new Bills of Lading and Analogous Shipping Documents Ordinance<sup>21</sup> to the transport document, and (ii) the applicability of the Hague-Visby Rules<sup>22</sup> to the contract of carriage.

<sup>17</sup> *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1; *The Maheno* [1977] 1 Lloyd's Rep 81; see generally *Halsbury's Laws of England* (4th ed reissue), vol 5(1), para 575.

<sup>18</sup> Scrutton (note 2 above), p 384; Schmitthoff (note 6 above), pp 579-82; Yates (note 6 above), para 1.6.1.3.1.8 and 1.6.4.4.5; W Tetley, *Marine Cargo Claims* (Montreal: Editions Blais, 3rd ed 1988), ch 33; *Freight Systems Ltd v Korea Shipping Corp*, HCt, No CL174 of 1988 (21 Nov 1990, Kaplan J); *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 NSWLR 745; *Emilio Clot & Co v Compagnie Commerciale du Nord SA* (1921) 8 Ll L Rep 380.

<sup>19</sup> See, eg, *Claridge, Holt & Co v King & Ramsay* (1920) 3 Ll L Rep 197; *Hellaby v Weaver* (1851) 17 LT (os) 271; *Troy v The Eastern Company of Warehouses* (1921) 8 Ll L Rep 17; *Landauer & Co v Smits & Co* (1921) 6 Ll L Rep 577; *Midland Rubber Co v Robert Park & Co* (1922) 11 Ll L Rep 119, 260; *Elaf Hansson Agency v Victor's Motor Haulage* (1938) 54 TLR 666; *Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251; *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep 57; *Elektronska v Transped* (note 12 above); see further Holloway (note 3 above), pp 245-7; *Bowstead on Agency* (London: Sweet & Maxwell, 14th ed 1976), p 9; N Singh & R Colinvaux, *British Shipping Laws*, vol 13 (London: Stevens & Sons, 1967), paras 635-43, 652-3.

<sup>20</sup> Repealed by s 9 of the Bills of Lading and Analogous Shipping Documents Ordinance 1993.

<sup>21</sup> *Ibid.*

<sup>22</sup> The Hague-Visby Rules are applicable in Hong Kong by virtue of the Carriage of Goods by Sea (Hong Kong) Order 1980 (app III, p BSI) and now the Carriage of Goods by Sea Ordinance (ord no 104 of 1994).

The courts have in general been reluctant to hold that transport documents issued by a freight forwarder who has assumed the liabilities of a carrier constitute bills of lading. For example, in *Freight Systems Ltd v Korea Shipping Corp*<sup>23</sup> the plaintiff, Freight Systems Ltd, was a freight forwarder who arranged for the carriage of goods belonging to Marianne Trading Ltd ('Marianne') from Hong Kong to Seattle on board the defendant's vessel, the 'Korea Wonis-Sun.' The plaintiff issued to Marianne an 'Intermodal B/L' and received from the defendant shipowner a bill of lading stating that the shipper/exporter was 'Freight Systems Ltd o/b Marianne Trading Ltd.' The letter of credit called for a 'Full set of original Freight Systems Ocean Bills of Lading.' The goods arrived at the final destination in a damaged condition and the plaintiff paid compensation to Marianne under its bill of lading. The plaintiff then commenced proceedings against the defendant claiming an indemnity for the amount paid on the grounds that the plaintiff had entered into the contract of carriage with the defendant as a principal. The High Court of Hong Kong held that the plaintiff had no standing to sue the defendant under the bill of lading issued by the defendant because the plaintiff had entered into contractual relations with, and accepted the bill of lading from, the defendant as an agent of Marianne.

This decision is open to the criticism that it does not reflect the commercial reality of the transaction. The plaintiff had contracted with Marianne as a principal and had accordingly incurred towards Marianne the liabilities of a contractual carrier. However, the plaintiff was held incapable of securing an indemnity for damage to the goods from the defendant, the actual carrier, because of the court's literal interpretation of the expression 'o/b' (held to stand for 'on behalf of') appearing in the defendant's bill of lading.

A similar decision was reached in *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd*,<sup>24</sup> a case involving the issuance of two bills of lading in respect of the same cargo loaded on board a vessel. Here the plaintiff purchased two diesel engines from a seller in Japan and instructed a freight forwarder, Pacific Austral Pty Ltd ('Pacific') which also operated under the name Peace Line, to arrange for the carriage of the engines to Australia. The letter of credit arranged by the plaintiff in favour of the seller stated that the bill of lading be made out to shipper's order and that 'Peace Line Bill of Lading only acceptable.' After the goods were loaded on board the vessel, the 'Cape Comorin,' the freight forwarder issued to the plaintiff a bill of lading ('the Peace Line bill') which held out the freight forwarder as the carrier. The Himalaya clause in this bill may not have protected the stevedore employed by the carrier. The charterer of the vessel issued to the freight forwarder another bill of lading ('the Simsmetal bill') which named the freight forwarder as consignee. The plaintiff had no knowledge of this bill. The Himalaya clause in this second bill protected

<sup>23</sup> Note 18 above.

<sup>24</sup> Note 18 above.

the stevedore employed by the carrier. The cargo was damaged while being unloaded by stevedores, and the issue for determination was on which of the two bills was the stevedore entitled to rely. The New South Wales Court of Appeal held that the freight forwarder was not authorised by the plaintiff to contract with it as principal for the carriage of the goods to Sydney and was simply the agent of the plaintiff to arrange for the carriage.<sup>25</sup> The Peace Line bill, issued by a freight forwarder, was not a bill of lading and, accordingly, was not a document of title and did not fall within the Bills of Lading Act 1855. It merely evidenced the contract of carriage between the plaintiff and the freight forwarder. On the other hand, the Simsmetal bill was an ocean bill of lading issued by the operator of a vessel. The Simsmetal bill of lading was issued to the freight forwarder as agent for the plaintiff who was thus the undisclosed principal in the transaction. The court concluded that the relevant bill of lading was the Simsmetal bill and the stevedore was protected by the Himalaya clause in that bill.

The conventional analysis followed in the foregoing cases is based on the implicit assumption that there can be only one valid bill of lading covering goods carried by sea and that that bill of lading, recognised as a document of title by the custom of merchants, must be issued by or on behalf of the vessel carrying the goods. Accordingly, the bill of lading is taken to represent 'the key to the warehouse' in that its surrender to the vessel or its agent is a prerequisite for obtaining delivery of the goods. Notwithstanding this conventional analysis, it will be argued here that, where the freight forwarder contracts as a principal and assumes toward the cargo-owner the liabilities of a carrier, the bill of lading issued by it to the cargo-owner ought to be considered as a genuine bill of lading if it shares the same qualities as the traditional marine or ocean bill of lading. In order to test the correctness of this proposition, it is necessary to examine in greater detail the nature of the bill of lading and to draw parallels with the legal position of through and combined transport bills of lading.

### The nature of the bill of lading

There are many transport documents which are titled or described as 'bills of lading.' It is well established that a document cannot be a bill of lading simply because the parties refer to it as such.<sup>26</sup> In determining whether a document

<sup>25</sup> Ibid, p 753. S Hetherington, 'Freight Forwarders and House Bills of Lading' [1992] LMCLQ 32 is of the view that the Court of Appeal in *Carrington Slipways* held that the freight forwarder, vis-à-vis the plaintiff, was acting as a principal, but that in carrying out the plaintiff's instructions to ship the goods it issued the bill of lading from the actual carrier in its capacity as an agent of the plaintiff. I see no support in the judgment for this view.

<sup>26</sup> *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (note 18 above), p 751; *Gagniere & Co v Eastern Co of Warehouses, Insurance and Transport of Goods with Advances Ltd* (1921) 7 Ll L Rep 188, 189; cf *The Marlborough Hill* [1921] 1 AC 444, 452-3; CM Schmitthoff, 'The Development of the Combined Transport Document' in C-J Cheng (ed), *Schmitthoff's Select Essays on International Trade Law* (Dordrecht: Martinus Nijhoff Publishers, 1988), p 376.

indeed constitutes a bill of lading, the law must look beyond the nomenclature. The task of making this determination is rendered difficult by the absence of a straightforward or accepted definition of a bill of lading. No statutory definition is provided in the Hague or the Hague-Visby Rules, the old Bills of Lading Ordinance, or the new Bills of Lading and Analogous Shipping Documents Ordinance. Article 1 of the Hamburg Rules<sup>27</sup> provides the following definition of the bill of lading:

'Bill of lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.'

This definition, however, is unsatisfactory in that only obliquely does it distinguish the bill of lading from other transport documents such as the sea waybill or the ship's delivery order, and that it does not specify whether the status of the issuer of the transport document is relevant to its determination as a bill of lading.

The bill of lading is thus usually defined by reference to its principal functions<sup>28</sup> or characteristics.<sup>29</sup> Accordingly, a bill of lading has been described as being:

- 1 A receipt by the carrier acknowledging that the goods have been taken into his possession or shipped on board a vessel and containing statements as to their quantity and condition when loaded on board;
- 2 Evidence of the contract of carriage between the shipper of the goods and the carrier;
- 3 A document of title (a) which represents the goods and may transfer constructive possession and property in the goods, (b) which is quasi-negotiable, thus allowing the transfer of rights and duties associated with the contract of carriage, and (c) the surrender of which is necessary for the delivery of the goods by the carrier at destination.

All of these functions and characteristics are easily identifiable in the traditional marine or ocean bill of lading issued by or on behalf of a shipowner or charterer. The issue under examination is whether these functions and char-

<sup>27</sup> The UN Convention on the Carriage of Goods by Sea 1978 (UN General Assembly A/Conf/89/13-30 Mar 1978), which is not yet in force.

<sup>28</sup> Scrutton (note 2 above), art 2; P Todd, *Modern Bills of Lading* (Oxford: Blackwell Law, 2nd ed 1990), p 16.

<sup>29</sup> Schmitthoff (note 26 above), p 377.

acteristics are shared by the bill of lading issued by a freight forwarder in its capacity as a carrier.

*The freight forwarder's bill of lading as a receipt*

The freight forwarder's bill of lading may certainly be considered a receipt for the goods, acknowledging that the goods have been received by or on behalf of the freight forwarder. On the face of the 'Negotiable FIATA Combined Transport Bill of Lading',<sup>30</sup> for example, it states that the goods have been 'taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.' On the reverse of the bill, para 3(2) of the printed terms states that the bill of lading shall be prima facie evidence of the taking in charge by the freight forwarder of the goods described on the face of the bill, and that proof to the contrary is inadmissible when the bill has been transferred for valuable consideration to a third party acting in good faith.<sup>31</sup> Thus, any damage sustained to the goods before their receipt by the freight forwarder must be noted on the face of the bill.

The freight forwarder's bill of lading is similar to the 'received for shipment' bill of lading, acknowledged in *The Marlborough Hill*<sup>32</sup> to constitute a genuine bill of lading.

*The freight forwarder's bill of lading as evidence of the contract of carriage*

There is also little doubt that a freight forwarder's bill of lading may be evidence of the contract of carriage between the cargo-owner and the freight forwarder. The bill of lading cannot be the contract of carriage itself, since the contract has usually been formed at some previous time.<sup>33</sup> Yet the understanding of the parties on entering into a contract for the carriage of goods will almost always be taken to be that the contract will be subject to the carrier's standard terms and conditions.<sup>34</sup>

*The freight forwarder's bill of lading as a document of title*

**The bill of lading as a document of title**

For purposes of the present discussion, the bill of lading as a document of title and thus negotiable or transferable is its most important function. Through mercantile custom, the bill of lading has developed into a symbol representing,

<sup>30</sup> Issued subject to *ICC Uniform Rules for a Combined Transport Document* (ICC Publication No 298, 1975).

<sup>31</sup> Thus tracking art 3, r 4 of the Hague-Visby Rules.

<sup>32</sup> Note 26 above.

<sup>33</sup> Eg, when the freight forwarder agreed to carry the goods and the cargo-owner agreed to pay for the carriage; see in general *Heskell v Continental Express* (note 5 above), pp 448-9.

<sup>34</sup> *Parker v South Eastern Railway Co* (1877) 2 CPD 416, 422.



or equivalent to constructive possession of, the goods themselves. Thus, the transfer of the bill of lading by indorsement and delivery (in the case of 'order' bills) transfers constructive possession in the goods or, more precisely, the right to demand delivery of the goods from the carrier by production of the bill. However, describing the bill of lading as 'the key to the warehouse' does not mean that the bill of lading is capable by indorsement of directly transferring property in the goods. Rather, the bill may be made part of the mechanism by which property is passed.<sup>35</sup> The reason is that property in the goods passes according to the intention of the parties.

Negotiability refers to the ability of the holder of the bill of lading to transfer the right to delivery of the goods from the carrier to successive buyers by indorsement of the bill. The bill of lading has been described as 'quasi-negotiable,' and is not truly negotiable. Were the bill of lading truly a negotiable instrument, like a cheque or a bank note, then the bona fide transferee of the bill of lading could obtain a title to the goods better than that of the transferor.<sup>36</sup> The bill of lading is capable of transferring only as good a title as that possessed by the transferor, and resembles a negotiable instrument in that its indorsement transfers to the subsequent holder of the bill (i) the right to demand delivery of the goods from the carrier and (ii) the contract of carriage<sup>37</sup> evidenced by the bill without the invocation of the doctrine of assignment.<sup>38</sup>

Although the concepts are interrelated, a distinction may be drawn between the function of the bill of lading as a document of title and its characteristic as quasi-negotiable. Thus, a 'straight' or non-negotiable bill of lading cannot be transferred to a third party yet is a document of title in that it must be produced by the named consignee to the carrier in order to receive delivery of the goods.<sup>39</sup>

It is evident from the foregoing discussion that the bill of lading is an imperfect document developed over time to meet the changing requirements of the business community. Although described as a document of title, the bill of lading cannot of itself transfer property in the goods it represents. While it resembles a negotiable instrument, the bill of lading is not in the strict sense negotiable. It will be argued below that the evolutionary nature of the bill of lading ought to provide the flexibility necessary for its extension beyond the traditional marine bill of lading. Such flexibility has been evident in the development of the through and the combined transport bill of lading. Strong parallels can be drawn between the bill of lading issued by a freight forwarder acting as a principal and the combined transport bill of lading.

<sup>35</sup> *The Delfini* [1990] 1 Lloyd's Rep 252, 268.

<sup>36</sup> J F Wilson, *Carriage of Goods by Sea* (London: Pitman Publishing, 2nd ed 1993), p 143.

<sup>37</sup> Thus permitting the transferee of the bill of lading to sue the carrier in contract for damage to or loss of the goods.

<sup>38</sup> *Halsbury's Laws of England* (4th ed), vol 43, para 494; Yates (note 6 above), para 1.6.5.1.7.

<sup>39</sup> Schmitthoff (note 6 above), p 593.

### Through and combined transport bills of lading

A through bill of lading is a document relating to the carriage of goods in separate stages, one stage being a sea voyage, where the carrier issuing the document acts as a principal only when he has control of the goods and as an agent for the cargo-owner at all other times. The combined transport bill of lading is a document also relating to the carriage of goods in separate stages, but where the party issuing the document (usually called the combined transport operator) acts as a principal, and hence is liable to the cargo-owner as the carrier, throughout all the stages of the carriage.<sup>40</sup> The difference between these two forms of documents is thus the extent of the liability assumed by the issuer of the document.

Under both types of bills of lading, there will usually be different carriers responsible for the separate stages of the voyage. In general, however, the through bill of lading is less convenient than the combined transport bill of lading to the shipper. Under the through bill of lading, the issuing carrier contracts with the shipper as a principal only for the stage that it personally performs and as an agent for the other stages. The issuing carrier usually attempts to disclaim liability for loss of or damage done to goods when those goods are in the possession of the other carriers. The shipper, who is in direct contractual relations with the issuing carrier as well as the other carriers, may have to sue under these separate contracts of carriage in order to recover its losses. On the other hand, under a combined transport bill of lading, the issuing carrier or combined transport operator makes himself responsible for any loss of or damage to the goods occurring throughout the entire voyage. The shipper, in direct contractual relations only with the combined transport operator, has only one party to sue to recover its losses.

The combined transport bill of lading is usually made subject to the ICC Uniform Rules for a Combined Transport Document.<sup>41</sup> These Rules do not apply automatically to combined transport bills of lading, and must be incorporated by reference into the contract of carriage evidenced by the bills. It has not been authoritatively decided whether through or combined transport bills of lading can be considered as legitimate extensions of the traditional marine bill of lading and thus within the scope of the old Bills of Lading Ordinance.<sup>42</sup> Academic opinion has been divided on this issue which encompasses two aspects: the status of the issuer of the bill, and the bill of lading as a document of title. The traditional view is that a bill of lading must be signed by the

<sup>40</sup> 'Rights of Suit in Respect of Carriage of Goods by Sea,' Law Commission Report No 196, 19 March 1991, p 19.

<sup>41</sup> Note 30 above. The ICC Rules are the basis for the Combidoc combined transport document issued by BIMCO, and the FIATA combined transport bill of lading. See Schmitthoff (note 6 above), p 615; FJJ Cadwallader, 'Uniform Rules for Combined Transport' [1974] JBL 193. See now the UNCTAD/ICC Rules for Multimodal Transport Documents (note 7 above).

<sup>42</sup> Yates (note 6 above), para 1.6.4.4.9.

shipowner or his agent<sup>43</sup> in order to bind the operator of a vessel in some way.<sup>44</sup> Adhering to this traditional view, Schmitthoff has written:

According to the understanding of English law and practice, a bill of lading is a shipment document. It can only be issued by a sea carrier in his capacity of carrier and it evidences the terms of a contract of carriage by sea. If authority for this rather elementary proposition is required, a reference to the great case of *The Julia* may suffice.<sup>45</sup>

Other authorities define the status of the issuer of the bill of lading in more general terms. Scrutton, for example, refers to the bill of lading as a document signed by 'the carrier or his agent.'<sup>46</sup>

It is accepted that through or combined transport bills of lading may constitute genuine bills of lading when issued by a shipowner.<sup>47</sup> Schmitthoff, for example, has written that through bills of lading issued by a sea carrier 'can be tolerated [as bills of lading] because the on- and off-carriage is subordinated to the carriage by sea,<sup>48</sup> and that combined transport bills of lading issued by a shipping line are 'genuine bills of lading.'<sup>49</sup> Does it follow, then, that through and combined transport bills of lading issued by persons other than a shipowner cannot be genuine bills of lading?

It is submitted for the following reasons that the status of the issuer of a document ought not to be determinative as to whether that document constitutes a bill of lading. First, the authority supporting the traditional view is merely a reflection of the bill of lading as a document historically and commonly issued by shipowners or their agents. These authorities<sup>50</sup> do not purport to draw a distinction between the legal effect of bills of lading issued by shipowners and those issued by other persons and, as a result, it is uncertain whether references to the 'shipowner' are intended positively to exclude such other persons. These concerns are evident in the ambiguity of the language

<sup>43</sup> D M Sassoon, *CIF and FOB Contracts* (London: Stevens & Sons, 1984), para 92 defines the bill of lading as 'a document which is signed by the shipowner or his agent acknowledging that goods have been shipped on board a particular vessel'; *Benjamin's Sale of Goods* (London: Sweet & Maxwell, 3rd ed 1987), para 1994 states that transport documents issued by a forwarding agent are not bills of lading 'since (unless the agent also fills the role of a loading broker) they are not issued by or on behalf of the sea carrier'; see further *Halsbury's Laws of England* (4th ed), vol 43, para 490; *The Maurice Desgagnes* [1977] 1 Lloyd's Rep 290; *The Marlborough Hill* (note 26 above); *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (note 18 above).

<sup>44</sup> Yates (note 6 above), para 7.2.6.14.

<sup>45</sup> Schmitthoff (note 26 above), p 376, making reference to *Comptoir d'Achat v Luis de Ridder (The Julia)* [1949] AC 293.

<sup>46</sup> Scrutton (note 2 above), p 54.

<sup>47</sup> In *Carrington Slipways* (note 18 above), p 751, Handley JA stated: 'This requires consideration of the nature of a so-called bill of lading issued by a forwarding agent which is neither the owner nor the charterer of the vessel in question.'

<sup>48</sup> Schmitthoff (note 26 above), p 376.

<sup>49</sup> Schmitthoff (note 6 above), p 615.

<sup>50</sup> Including *The Julia*, the case cited by Schmitthoff (note 45 above).

used by, for example, Schmitthoff<sup>51</sup> and Scrutton<sup>52</sup> in the references above to the 'sea carrier' and the 'carrier.' It is unclear whether these expressions mean that the person issuing the bill of lading must be a shipowner or his agent, or merely a person who accepts liability for the sea carriage as a carrier.

Second, the law ought not to take so narrow a view of commercial documents. Just as there can be no difference in principle between a carrier acknowledging that he has received the goods at his warehouse and his acknowledging that the goods have actually been shipped on board the vessel,<sup>53</sup> there ought not to be any difference between the through or combined transport bill of lading issued by a shipowner and that issued by some other party accepting the liabilities of a carrier. Third, the traditional view is contrary to the cases which hold that bills of lading issued (i) by a charterer in his own name and assuming responsibility toward the cargo-owner as carrier,<sup>54</sup> and (ii) by a company which held itself out as having a regular line of steamers when in fact it did not own any vessel,<sup>55</sup> constitute genuine bills of lading.

Finally and most importantly, the traditional view is not founded on any rational basis. The status of a party as a shipowner or charterer is relevant only to the issue of whether in rem proceedings may be instituted against the vessel<sup>56</sup> owned or chartered by that party. It does not, and ought not to, affect whether the document issued is capable of satisfying the three principal functions of the bill of lading, especially that of a document of title.

Controversy also exists as to whether through and combined transport bills of lading are documents of title.<sup>57</sup> Earlier commentators<sup>58</sup> took the view that these documents are not documents of title and would therefore not fall within the scope of the Bills of Lading Act 1855. More recent commentators<sup>59</sup> have, however, adopted the contrary position. For example, Scrutton<sup>60</sup> submits that 'there would now be little difficulty in establishing that all three types of document [that is, through, combined transport, and "received for shipment" bills of lading] are by custom treated as transferable documents of title and within the meaning of the expression "bill of lading" as used in the Bills of

<sup>51</sup> Note 45 above.

<sup>52</sup> Note 46 above.

<sup>53</sup> *The Marlborough Hill* (note 26 above), p 451. As summarised by the in the Law Commission Report No 196 (note 40 above), p 19, the fact that a document states that the goods have been received for shipment 'merely indicates that the bailment of the goods has commenced at an earlier stage than in the case of a shipped bill of lading.'

<sup>54</sup> *Samuel v West Hartlepool Co* (1906) 11 Com Cas 115; *Elder, Dempster & Co v Paterson, Zochonis & Co* [1924] AC 522; *The Venezuela* [1980] 1 Lloyd's Rep 393; Scrutton (note 2 above), art 38; Yates (note 6 above), para 1.6.1.3.1.10.

<sup>55</sup> *Luigi Riva Di Fernando v Simon Smits Co* (1920) 2 Ll L Rep 279.

<sup>56</sup> Or its sister-ship: s 12B(4) of the Supreme Court Ordinance.

<sup>57</sup> See, in general, the Law Commission Report No 196 (note 40 above), p 19.

<sup>58</sup> H D Bateson, 'Through Bills of Lading' (1889) 5 LQR 424, 425; T G Carver, 'On some Defects in the Bills of Lading Act 1855' (1890) 6 LQR 289, 294.

<sup>59</sup> Eg, *Benjamin's Sale of Goods* (note 43 above), para 1994.

<sup>60</sup> Scrutton (note 2 above), p 383.

Lading Act 1855.' The English Law Commission<sup>61</sup> has concurred with this modern view. It placed emphasis on the finding that these documents are treated by traders like traditional bills of lading and that the tender of through and combined transport bills of lading is now sanctioned under the Uniform Customs and Practice for Documentary Credits.<sup>62</sup> This conclusion is consonant with the Hague-Visby Rules, art 1(b) of which stipulates that the Rules are applicable to contracts of carriage covered by a 'bill of lading or similar document of title,' thus contemplating that transport documents other than the traditional marine bill of lading issued by a shipowner may constitute documents of title, and art 1(a) of which states that the "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper', thus recognising that issuers of bills of lading do not have to be either shipowners or charterers.

In proposing the legislation which was to be enacted as the Bills of Lading and Analogous Shipping Documents Ordinance, the Law Commission concluded that, since the new ordinance<sup>63</sup> is 'expressed to cover any bill of lading, including "received for shipment" bills, multimodal documents are capable of falling within its ambit.'<sup>64</sup> This conclusion is significant because it provides support for an expansive definition of the bill of lading and means that rights and obligations under a contract of carriage set out in a through or combined transport bill of lading may be transferred, thus reinforcing the negotiability of these documents.

It may be argued, however, that the Bills of Lading and Analogous Shipping Documents Ordinance will apply only to the designated transport documents which have been issued by a shipowner or his agent. This argument would proceed as follows. The transport documents covered by the ordinance, namely bills of lading, sea waybills, and ship's delivery orders, are usually issued by and bind the actual carrier of the goods. Accordingly, the merchant's delivery order, binding only the shipper and lacking the necessary attornment by the ship, has been specifically excluded from the ordinance. It follows that only those documents which bind the vessel in some way will fall within the scope of the ordinance, and that through and combined transport bills of lading not issued by a shipowner or his agent will fall outside its scope.

This argument, although superficially attractive, must be wrong for two reasons. First, the ordinance scrupulously avoids mention of the words 'shipowner' or 'charterer,' preferring instead the wider term 'carrier.' The word 'carrier' is not defined in the ordinance and, as we have seen above, it is possible for a person other than a shipowner or charterer to be considered as the carrier.

<sup>61</sup> Law Commission Report No 196 (note 40 above), p 19.

<sup>62</sup> Art 26 entitled 'Multimodal Transport Documents,' *Uniform Customs and Practice for Documentary Credits* (ICC Publication No 500, 1993).

<sup>63</sup> By s 3 of the Bills of Lading and Analogous Shipping Documents Ordinance.

<sup>64</sup> Law Commission Report No 196 (note 40 above), p 20.

Thus, there is no link under the ordinance between the transport documents and the status of the issuer as a shipowner. Rather, the transport documents will be held to fall within the scope of the ordinance when they are issued by a person who has evinced an intention to act as a carrier. Second, the argument lacks internal consistency in that the ordinance is capable of covering transport documents which are not binding on the vessel. For example, a bill of lading may be issued by a shipowner which permits the transshipment of the goods. Where transshipment takes place, production of the original bill of lading may not necessarily result in the delivery of the goods from the on-carrier who has probably issued his own bill of lading to the original carrier.<sup>65</sup> This bill of lading would certainly fall within the scope of the ordinance although it is not one which is binding on the relevant vessel, that is, the on-carrier who is to release the goods at their destination.

In the light of the foregoing discussion, there is little justification for restricting the parameters of the bill of lading to those traditional marine or ocean bills of lading issued by or on behalf of shipowners or their agents. The bill of lading's historical connection with the shipowner ought not to hinder its evolution consonant with technological developments in the shipping industry and hence its continued utility. Thus, it is submitted that, by means of mercantile custom, the Bills of Lading and Analogous Shipping Documents Ordinance and the law of contract, and depending on the precise facts of each case, a strong argument may be advanced that through and combined transport bills of lading are documents of title and may properly fall within the definition of a bill of lading.

Finally, it must be noted that a number of significant disadvantages would flow from a contrary conclusion. The Bills of Lading and Analogous Shipping Documents Ordinance would not apply to transfer rights and liabilities to the holder of the through or combined transport bill, thus restricting the scope of persons entitled to sue the carrier in contract. The Hague or the Hague-Visby Rules would not apply to the sea voyage of the carriage covered by the through or combined transport bill, thus defeating the purpose of the Rules to standardise, throughout the world, the code regulating the responsibilities of the sea carrier.<sup>66</sup>

#### The bill of lading issued by the freight forwarder as 'carrier'

If the foregoing analysis is accepted, then the bill of lading issued by the freight forwarder acting as a principal ought to be capable of constituting a genuine bill of lading. This conclusion is based on the view that a bill of lading

<sup>65</sup> As in the case of, eg, *The Pioneer Container* [1994] 3 WLR 1.

<sup>66</sup> Note Holloway (note 3 above), pp 249–50, who argues that, even where the freight forwarder assumes the liabilities of a carrier, the Canadian Carriage of Goods by Water Act (incorporating the Hague Rules) would not apply as between the freight forwarder and the cargo-owner to the sea voyage because the contract between these two parties is not a contract for the carriage of goods by sea.

issued by a freight forwarder acting in the capacity of a carrier oftentimes is simply a combined transport bill of lading issued by a non-vessel owning carrier, and ought to be considered as a bill of lading if it shares the qualities of a bill of lading. It has already been demonstrated that the freight forwarder's bill of lading can satisfy the functions of a receipt for the goods and evidence of the contract of carriage. It will now be shown that it may also contain the three characteristics of a document of title.<sup>67</sup>

The first characteristic of negotiability is satisfied by, for example, the FIATA Combined Transport Bill of Lading. On the face of the FIATA bill, the word 'negotiable' is clearly marked and a box is provided to be filled in naming the person to whom the goods are 'consigned to the order of.' On the reverse of the bill, paragraph 3.1 of the printed terms stipulates that 'the Merchant<sup>68</sup> and his transferees agree with the Freight Forwarder that, unless it is marked "non-negotiable," it shall constitute title to the goods and the holder, by endorsement of this Bill of Lading, shall be entitled to receive or to transfer the goods herein mentioned.' Furthermore, article 30 of UCP 500<sup>69</sup> affirms the negotiability of bills of lading issued by the freight forwarder when it acts in the capacity of 'a carrier or multimodal transport operator.'

Whether the second characteristic, that of the transferability of the rights and obligations under the contract of carriage, is satisfied depends on whether the freight forwarder's bill of lading falls within the scope of the new Bills of Lading and Analogous Shipping Documents Ordinance. There is only one difference between a combined transport bill of lading and the freight forwarder's bill of lading: the former may be issued by or on behalf of a shipowner, while the latter is always issued by a non-vessel owning carrier. If the foregoing discussion on the irrelevance of the status of the issuer of the bill of lading is accepted, then the bill of lading issued by the freight forwarder who has evinced an intention to act as the carrier ought to fall within the Bills of Lading and Analogous Shipping Documents Ordinance and the second characteristic of transferability is satisfied.

Finally, the FIATA bill on its face stipulates that 'One of these Combined Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods.' The production of one of the original bills has thus been made a contractual prerequisite to the delivery of the goods. The carrier will have fulfilled his duty if he delivers the goods to the first person who presents an original bill. The third characteristic of a document of title is accordingly satisfied.

<sup>67</sup> Depending, of course, on the precise terms of the bill.

<sup>68</sup> Defined as including the shipper, the consignor, the consignee, the holder of the bill of lading, the receiver, and the owner of the goods.

<sup>69</sup> *Uniform Customs and Practice for Documentary Credits* (note 62 above), defined by Hetherington (note 25 above), p 33 as 'the ultimate determinant as to whether a document is negotiable or not.'

This conclusion may allow for the operation of two valid bills of lading covering one sea voyage: the bill issued to the cargo-owner by the freight forwarder in his capacity as the contracting carrier, and the bill issued to the freight forwarder by the actual carrier. As demonstrated by the *Freight Systems Ltd v Korea Shipping Corp* and the *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* cases discussed above, the courts in order to avoid this consequence have discounted the validity and effect of bills of lading issued by freight forwarders, preferring instead to hold that the bill of lading issued by the actual carrier was the bill of lading covering the sea voyage.

However, it is submitted that the courts do not have to be troubled by the co-existence of two bills of lading covering one voyage, each performing distinct roles within its sphere.<sup>70</sup> In the recent case of *The Pioneer Container*,<sup>71</sup> the Privy Council was not concerned that an on-carrier was entitled to choose between two mutually exclusive regimes in order to found its liability. These regimes were based either on the bill of lading issued by the on-carrier itself, or on the bill of lading issued by the original carrier. This case has served to develop rationally the system of actions available to parties whose goods have been lost or damaged while being carried by sea.

#### **Actions available where a freight forwarder's bill of lading has been issued**

The legal status of the freight forwarder's bill of lading determines the nature and extent of the actions available to the parties to the carriage of goods. If the freight forwarder's bill of lading is not considered a true bill of lading, then the bill of lading covering the sea transit is that issued by the actual carrier and the document issued by the freight forwarder is mere evidence of the freight forwarder's contract with its customer. This analysis would give rise to the following potential actions:

- 1 The shipper and any endorsee under the freight forwarder's bill of lading<sup>72</sup> would be entitled to sue the freight forwarder in contract under the freight forwarder's bill of lading.
- 2 The shipper would be entitled to sue the actual carrier in contract under the actual carrier's bill of lading.
- 3 The freight forwarder would not be entitled to sue the actual carrier in contract under the actual carrier's bill of lading.<sup>73</sup>

<sup>70</sup> Eg, the freight forwarder's possession of the bill of lading issued by the actual carrier represents its constructive possession and control over the goods bailed to the actual carrier.

<sup>71</sup> Note 65 above.

<sup>72</sup> Assuming that it is held to be assignable or negotiable.

<sup>73</sup> As in the *Freight Systems* case (note 18 above).



- 4 The party with legal ownership or a possessory title to the goods would be entitled to sue the actual carrier in tort.<sup>74</sup>
- 5 The party with legal ownership or a possessory title to the goods would be entitled to sue the actual carrier in bailment. When sued in bailment, the actual carrier would be entitled to rely on the exemption clauses in either the freight forwarder's bill of lading or the actual carrier's bill of lading.<sup>75</sup>

The undesirable consequence of this analysis is that it produces the anomalous situation whereby the shipper would be entitled, but the endorsee of the shipper's bill of lading<sup>76</sup> would not be entitled, to sue the actual carrier in contract under the actual carrier's bill of lading. The reason is that the contract assigned to the endorsee is that evidenced by the freight forwarder's bill of lading and not the actual carrier's bill of lading.

This anomaly is not present if the thesis of this article is accepted and the freight forwarder's bill of lading is considered a true bill of lading. Under this analysis, the sea transit would be covered by two bills of lading which would give rise to the following potential actions:

- 1 The shipper and any endorsee of the freight forwarder's bill of lading would be entitled to sue the freight forwarder in contract under the freight forwarder's bill of lading.
- 2 The freight forwarder, being in direct contractual relations with the actual carrier, would be entitled to sue the actual carrier in contract under the actual carrier's bill of lading.
- 3 Neither the shipper nor any endorsee of the freight forwarder's bill of lading would be entitled to sue the actual carrier in contract under the actual carrier's bill of lading.
- 4 The party with legal ownership or a possessory title to the goods would be entitled to sue the actual carrier in tort.
- 5 The party with legal ownership or a possessory title to the goods would be entitled to sue the actual carrier in bailment. Again, when sued in bailment, the actual carrier would be entitled to rely on the exemption clauses in either the freight forwarder's bill of lading or the actual carrier's bill of lading.

<sup>74</sup> *The Aliakmon* [1986] AC 785.

<sup>75</sup> *The Pioneer Container* (note 65 above); see also R Margolis, 'Bailment and sub-bailment on terms in marine cargo claims cases', unpublished paper, 1994.

<sup>76</sup> That is, the freight forwarder's bill of lading issued to the shipper.

## Conclusion

The legal position of the bill of lading issued by freight forwarders is by no means clear. The courts will be tempted to adhere to the traditional view that only those bills issued by or on behalf of the vessel carrying the goods constitute documents of title and thus bills of lading. Nonetheless, it has been argued that, where the freight forwarder issues a bill of lading to a cargo-owner whilst acting as principal and thus assuming the liabilities of a carrier, the bill of lading ought to be considered a genuine bill of lading notwithstanding that the freight forwarder is a non-vessel-owning carrier. Such a holding would meet the commercial expectations of the parties involved in the carriage of goods and would lead to a greater degree of uniformity in resolving disputes arising from goods lost or damaged during multimodal transport.

The ideal solution would be for the ratification of the United Nations Convention on International Multimodal Transport of Goods<sup>77</sup> which would serve to create a uniform system of liability in the event of damage to or loss of the goods carried under a multimodal transport document. Unfortunately, however, it is doubtful whether this convention will be ratified in the near future. It is nonetheless available for individual states to enact as law the provisions of the Convention,<sup>78</sup> and Hong Kong ought seriously to consider this avenue.

<sup>77</sup> Note 7 above.

<sup>78</sup> Eg, the Indian Multimodal Transportation of Goods Ordinance 1992; see Yates (note 6 above), para 1.6.4.4.12.