

**TITLE TO SUE AT THE DAWNING OF THE SEA  
TRANSPORT DOCUMENTS, ACT NO 65 OF 2000:**

A Comparative Analysis

by

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This work is dedicated to my loving parents,

*Keith and Smiljana Atkins*

... thank you for making my dreams come true.

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# TITLE TO SUE AT THE DAWNING OF THE SEA TRANSPORT DOCUMENTS ACT, NO 65 OF 2000:

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## 1. INTRODUCTION

Bills of lading are documents of great importance in international transactions relating to the carriage of goods by sea. They have over centuries developed from mere receipts for goods on board vessels to complex documents of title with which ownership of goods can be transferred. Current South African law relating to bills of lading has been described as inadequate and out of date.<sup>1</sup> The Sea Transport Documents Act, No. 65 of 2000, signed by the South African State President on 5 December 2000, was drafted in an effort to address those areas in the law left wanting in respect of bills of lading. The Act functions to, *inter alia*, regulate the transfer of rights of suit under a contract of carriage from the shipper to the lawful holder of a bill of lading. The Sea Transport Documents Act is currently however of no force and effect. In order to become law, its provisions and effective date are required to be made known to the public by way of publication in the Government Gazette.

This study shall focus on the rights embodied in the traditional bill of lading as a document of title as well as modern sea transport documents which have emerged as alternatives to the bill of lading. More particularly, it shall concentrate on the transfer of the rights of suit in such documents to those who are not parties to the original contracts of carriage. It shall consider current South African law on title to sue and furthermore, the developments in England that led to the enactment of the United Kingdom Carriage of Goods by Sea Act, 1924 which in turn served as the impetus for reform in South Africa and the drafting of the Sea Transport Documents Act. A comparative analysis of the two Acts shall therefore be drawn with a view to establishing the extent of the progress made in this particular field of law.

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<sup>1</sup> See *Government Gazette* No.18541 of 12 December 1997 *Draft Sea Transport Documents Bill - Invitation to Comment*.

## 2. THE BILL OF LADING AS A DOCUMENT OF TITLE

The role played by the bill of lading in the international carriage of goods by sea has since the earliest recordings of its use in the fourteenth century been a vital one. The demands of mercantile custom have resulted in the transformation of the bill of lading from the mere receipt of goods for which it was first used into the modern, complex ‘document of dignity’<sup>2</sup> which today functions as evidence of the contract of carriage as well as a document of title with which rights in the goods that it represents may be transferred.<sup>3</sup>

The description of the bill of lading as a ‘document of title’ has always been problematic to the extent that although the bill has come to symbolize the goods described in it, it does not necessarily transfer ownership of the cargo when it is transferred from the shipper to the consignee.<sup>4</sup> There is little agreement as to what constitutes a document of title. *Scrutton* describes a ‘document of title’ as a document ‘by indorsement of which the property in the goods for which it is a receipt may be transferred, or the goods pledged or mortgaged’.<sup>5</sup> *Hare*<sup>6</sup> suggests that the expression ‘document of title’ may be too broad a description because a bill of lading more accurately evidences the right of possession to the cargo and not necessarily ownership thereof. *Carver*<sup>7</sup> similarly places an emphasis on the right of the holder of the bill of lading to demand possession of the goods and similarly to transfer that right.<sup>8</sup> Whether the transfer of the bill of lading will result in the transfer of rights of ownership is dependent

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<sup>2</sup> See *Hare Shipping Law & Admiralty Jurisdiction in South Africa* Juta & Co, 1999 at 540 fn 1 where the author quotes the following extract from the decision in *The Carso* 1930 AMC 1743 at 1758:

‘A bill of lading is a document of dignity, and the courts should do everything in their power preserve its integrity in international trade for there, especially, confidence is of the essence’.

<sup>3</sup> For more information regarding the historical development of the bill of lading see *Hare, op cit* at 540 – 542; Carol Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* Interlegal, 1997 at 18;

<sup>4</sup> NJJ Gaskell C Debattista and RJS Swatton *Chorley and Giles' Shipping Law* 8th Edition Pitman, 1988 at 251; *Proctor, op cit* at 55; *Hare, op cit* at 550; Gaskell *Bills of Lading: Law and Contracts* LLP, 2000 at 118; Halsbury's *Laws of England* Butterworths Vol. 43(2).- 1 May 1997 at para 1534.

<sup>5</sup> *Scrutton Charterparties & Bills of Lading* (19<sup>th</sup> Edition), Sweet & Maxwell, 1984 at 1.

<sup>6</sup> See *Hare, op cit* at 550.

<sup>7</sup> *Carver Carriage by Sea* (13<sup>th</sup> Edition), Stevens, 1982 at 1113.

upon the underlying intentions of the parties which may appear from the terms and conditions of the purchase and sale contract.<sup>9</sup> In terms of South African law, delivery of possession with the *animus possidendi* is a prerequisite for passing ownership of goods.<sup>10</sup> See, for example, the case of *The Mariannina*,<sup>11</sup> where the Supreme Court of Appeal found that the shipper must relinquish its *animus possidendi* in favour of the indorsee in order for the shipper to divest itself of possession of the goods through the indorsement of a bill of lading.

The English Court of Appeal in *The Delfini*<sup>12</sup>, provides a useful explanation of the meaning of ‘document of title’ when it is applied in relation to bills of lading:

‘it does not in this context bear its ordinary meaning. It signifies that in addition to its other characteristics as receipt for the goods and as evidence of the contract of carriage between the shipper and the shipowner, the bill of lading fulfills two distinct functions. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by indorsement and transfer: it is a transferable ‘key to the warehouse’. 2. It is a document which, although not itself capable of directly transferring the property in the goods which it represents, merely by indorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed’(inserted).<sup>13</sup>

Similarly, the use of the expression ‘negotiability’ in the context of bills of lading should also be applied with caution.<sup>14</sup> Although often described as ‘negotiable’, a bill of lading is not strictly speaking a negotiable instrument primarily because the transferee in good faith does

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<sup>8</sup> See Wilde *International Transactions*, The Law Book Company, 1993 at 97 where the author comments that Carver ‘is probably more correct in placing the emphasis on the bill of lading as a symbol of the goods which enables a transfer of possession’.

<sup>9</sup> Tetley *Marine Cargo Claims* Third Edition, Blais, 1988 at 220. See also *Hare, op cit* at 550 and *Gaskell, op cit* at 118.

<sup>10</sup> See *Hare, op cit* at 550.

<sup>11</sup> *The Mariannina* 1976 (4) SA 464 (SCA).

<sup>12</sup> *The Delfini* [1990] 1 Lloyd’s Rep. 252.

<sup>13</sup> *The Delfini* [1990] 1 Lloyd’s Rep. 252 at 268.

<sup>14</sup> See *Gaskell, op cit* at 118.

not acquire better title than the transferor.<sup>15</sup> This position accords with the view of the House of Lords in *Lickbarrow v Mason*,<sup>16</sup> which held the following:

‘It has never been decided that a bill of lading is a negotiable instrument, but merely assignable, and therefore an indorsement or assignment of such bill of lading cannot convey to the indorsee or assignee thereof, greater rights or property in the goods to which the bill relates, than the original possessor or indorser of such bill had: and the right or property of the original holder or consignee of the bill in the goods to which it relates, being the subject to the rights of the vendor to stop such goods *in transitu*, it follows that the right or property of the assignee or indorsee of such bill of lading, must also be subject to the same right’.

*Carver* similarly makes the following comment:

‘Mere possession does not enable the holder to give any title to the goods to a transferee; even though he may himself have shipped the goods, and obtained the bill of lading from the shipper. His power to convey a title to the goods by means of the bill of lading is no greater than it would be if the goods themselves were in his possession. The document is not a negotiable instrument, or a document of title, in the sense of carrying title with it, even to a buyer who may take it honestly and give full value for it’.<sup>17</sup>

A bill of lading is therefore ‘negotiable’ to the extent that it is transferable.<sup>18</sup> The transferability of a bill will be determined by the manner or form in which it is issued. A bill of lading issued ‘to order or assigns’ of the shipper is transferable by simply naming the consignee or, where it is issued to a named consignee ‘or his order’, by indorsement.<sup>19</sup> A bearer bill is similarly a transferable ‘document of title’. A straight bill of lading issued to a named consignee without the words ‘or order’ lacks transferability and as such merely functions as a non-negotiable receipt issued by the carrier in terms of which it acknowledges

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<sup>15</sup> This is confirmed by FR Malan in *Malan on Bills of Exchange, Cheques & Promissory Notes* (2<sup>nd</sup> Edition), Butterworths, 1994 at 10 where the author states that:

‘A bill of lading is not a negotiable instrument but does constitute commercial paper because the exercise of the rights evidenced by it generally presupposes possession’.

See also *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 189; *Proctor*, *op cit* at 72; *Hare*, *op cit* at 552; *Wilson*, *op cit* at 97; *Carver*, *op cit* at para 1599.

<sup>16</sup> *Lickbarrow v Mason* [1793] 4 Brown PC 57.

<sup>17</sup> *Carver*, *op cit* at par 1599.

<sup>18</sup> See *Hare*, *op cit* at 552; *Gaskell*, *op cit* at 118; *Proctor*, *op cit* at 72.

<sup>19</sup> See *Hare*, *op cit* at 553; *Proctor* at 63; *Gaskell*, *op cit* at 118; *Wilson Carriage of Goods by Sea* (3<sup>rd</sup> Edition), Pitman Publishing, 1998. See *Halsbury's*, *op cit* at par 1552.



receipt of the goods into its charge.<sup>20</sup> The further transfer of a bill of lading may also be limited by the form in which it is indorsed.<sup>21</sup>

A transferable bill of lading will continue to enjoy its status as a means of transferring be it ownership or possession until the contract of carriage is discharged by the delivery of the cargo against the bill of lading.<sup>22</sup> A bill of lading therefore ceases to be transferable once it is accepted by carrier against delivery of the cargo described therein.

In terms of South African common law, the principle of *clavium traditio* is broad enough to accommodate the delivery of a bill of lading as a symbol of the goods therein described.<sup>23</sup> As held in *The Mariannina*:

'The holder of the bill, ie, the person in whose favour it was originally made out or the indorsee thereof, is entitled, to the exclusion of others, to receive the goods from the ship at the place of destination. He is thus in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognized as a symbol of the goods and the transfer of the bill is regarded as a form of symbolical delivery'.<sup>24</sup>

The ability of the bill of lading to function as a document of title is of importance to this study particularly in relation to the rights which are thereby transferred from the shipper to the consignee or indorsee. The manner in which these rights are protected under South African and English law shall be discussed in the ensuing paragraphs.

### 3. CURRENT SOUTH AFRICAN LAW ON TITLE TO SUE

South African law and more particularly its shipping and admiralty law, is as colourful and complex as is the country's history. Its roots may be traced back in time to the arrival of the Dutch in 1652 and the implementation of the Dutch civilian law system, primarily the laws of

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<sup>20</sup> See *Proctor, op cit* at 64; *Hare, op cit* at 553; *Halsbury's, op cit* at par 1552.

<sup>21</sup> See *Halsbury's, op cit* at par 1552.

<sup>22</sup> See *Proctor, op cit* at 77 and *Hare, op cit* at 551.

<sup>23</sup> See Sonnekus and Neels *Sakereg Vonnisbundel (2<sup>nd</sup> Edition)*, Butterworths, 1994 at 398; Kleyn and Boraine *Silberberg and Schoeman's The Law of Property (3<sup>rd</sup> Edition)*, Butterworths, 1992.at 258; *Hare, op cit* at 553; LAWSA Vol 27 at par 171. See also *Standard Bank v Efroiken and Newman* 1924 AD 171 at 190; *The Mariannina* 1976 (4) SA 464 (A).

<sup>24</sup> *The Mariannina* 1976 (4) SA 464 (A) at 491 - 492.

Holland. A developed European law with strong Dutch maritime influence became the order of the day.

The turn of the nineteenth century saw the collapse of Dutch rule in the Cape and the advent of British occupation; with it the implementation of the English common law system.<sup>25</sup> The colonization of the Cape in 1815 resulted in the establishment of the first Cape Supreme Court in 1827 presided over by three British judges. The Supreme Court was required to apply 'the laws now in force within our said colony, and all other laws as shall at any time hereafter be made'.<sup>26</sup> As a result, Roman-Dutch law stood its ground but as can be expected, did not go uninfluenced by English court procedure and practice.

Towards the end of the nineteenth century, the Supreme Courts became Colonial Courts of Admiralty by virtue of the provisions of the English Colonial Courts of Admiralty Act of 1890<sup>27</sup> ("the 1890 Act") which was enacted 'to amend the Law respecting the exercise of the Admiralty Jurisdiction in Her majesty's Dominions and elsewhere out of the United Kingdom'.<sup>28</sup> Section 2(2) of this Act provides that:

'The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over like places, persons, matters, and things, as the Admiralty jurisdiction of the High court of England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations.'

Furthermore,

'Any enactment in an Act of the Imperial Parliament referring to the admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British Possession, shall be read as if the name of that possession were therein substituted for England and Wales.'

The South African Supreme Court, by 1890, became a Colonial Court of Admiralty thereby confirming nineteenth century English Admiralty law to be a part of the law administered in the Cape and Natal as British possessions.

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<sup>25</sup> The first British occupation was in 1795; the second, in 1806.

<sup>26</sup> De Wet *Die Ou Skrywers in Perspectief* (1988) at 33.

<sup>27</sup> Came into force on 1 July 1891.

South Africa lost its colonial status with the formation of the Union of South Africa in 1910. It nevertheless remained a part of the British Empire until it became a Republic in 1961. Roman-Dutch law remained in place throughout this period of political change and continues to prevail today.

### 3.1 The Admiralty Jurisdiction Regulation Act, No 105 of 1983

Admiralty Jurisdiction Regulation Act of 1983 ("AJRA") came into operation in South Africa on 1 November 1983 and provided for:

'the vesting of the powers of the admiralty courts of the Republic in the provincial and local divisions of the Supreme Court<sup>29</sup> of South Africa, and for the extension of those powers; for the law to be applied by, and the procedure applicable in, those divisions ...'.<sup>30</sup>

Section 2 of this Act imbues the South African High court with admiralty jurisdiction to

'hear and determine any maritime claim, irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner'.

The doors of the High Court in Admiralty are therefore open to all claimants, be they foreign or South African nationals, who have a maritime claim. Section 1 of AJRA defines a maritime claim as 'any claim for, arising out of or relating to' various causes of action which are clearly listed in subsections (a) - (ff).<sup>31</sup>

The complainant must therefore allege a maritime claim to invoke the High Court's admiralty jurisdiction. Particularly in the case of a consignee or indorsee of a bill of lading seeking to

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<sup>28</sup> As per the preamble of the 1890 Act.

<sup>29</sup> The South African Supreme Court was renamed as the High Court in 1996.

<sup>30</sup> As per the preamble of AJRA.

<sup>31</sup> The court in *The Cargo ex General Santos* 1988 (3) SA 903 (D) described this list of maritime claims as a *numerus clausus* weakened substantially by the catch-all provisions of subsections (dd) and (ee). Subsection (dd) preserves the colonial admiralty jurisdiction in respect of 'any matter not falling under any of the previous paragraphs' of section 1 and (ee), more generally, provides for:

'any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs (of AJRA section 1)(inserted).

enforce its claim in admiralty against the carrier for damage to or loss of cargo or, for that matter, the carrier who wishes to sue for outstanding freight, the following 'maritime claims' may be relied upon:

- '(e) damage caused by or to a ship, whether by collision or otherwise;
- (g) loss of or damage to goods (including baggage and the personal belongings of the master, officers or seamen of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of agreement or otherwise;
- (h) the carriage of goods in ship, or any agreement for or relating to such carriage;
- (i) any container and any agreement relating to any container;
- (j) any charterparty or the use, hire, employment or operation of a ship, whether such a claim arises out of any agreement or otherwise.'

It is clear from the above that South African admiralty jurisdiction is wide enough to encompass all cargo claims including those of disgruntled consignees and/or indorsees.

Having invoked the admiralty jurisdiction of the South African court, it becomes important to determine the law applicable to dispute, more particularly the consignee's title to sue under the contract of carriage. Section 6 of AJRA determines the law to be applied to admiralty matters in South Africa. It provides that:

- '6(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-
- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
  - (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.
- (2) the provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection;
- ...
- (5) The provisions of subsection (1) shall not supersede any agreement relating to the system of law to be applied in the event of a dispute'.

More simply put, the South African High Court in Admiralty will first apply mandatory South African statute law if appropriate in the circumstances; then give effect to the disputing parties' choice of law, if such a clause exists by virtue of an agreement between them. Where the matter is one in respect of which the Colonial Court of Admiralty had jurisdiction, so-called *old* jurisdiction,<sup>32</sup> English law as at 1 November 1983 (at the commencement of AJRA) shall apply. And where the jurisdiction is *new*, Roman-Dutch common law applies.<sup>33</sup>

### 3.2 English Law as at 1 November 1983

The jurisdiction of the Colonial Courts of Admiralty remained prescribed by the 1890 Act.<sup>34</sup> Section 6(1)(a) has the effect of directing the South African maritime lawyer to investigate and unravel the admiralty jurisdiction of the High Court as it was in 1891, which task has been described as a 'mammoth' one.<sup>35</sup>

Section 2(2) of the 1890 Act provides that the Colonial Court shall have jurisdiction over 'like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise'.

The Admiralty Courts Acts of 1840 and 1861 are two of a number of pre-existing statutes referred to in section 2(2).<sup>36</sup> 'Otherwise' in that section,<sup>37</sup> refers to the pre-existing, inherent jurisdiction of the English High Court and its predecessor, the Admiralty Court, which court's jurisdiction and practice the 1840 and 1890 Acts sought to 'improve' and 'extend'.<sup>38</sup> English case law between 1891 and 1983 is therefore also directly applicable in South Africa.<sup>39</sup>

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<sup>32</sup> See *Hare, op cit* at 18.

<sup>33</sup> See *Hare, op cit* at 18, and at 25 for a comprehensive list of claims subject to *old* English jurisdiction and those subject to *new* South African jurisdiction.

<sup>34</sup> The Colonial Courts of Admiralty Act, 1890, which came into effect on 1 July 1891.

<sup>35</sup> See *Hare, op cit* at 22.

<sup>36</sup> See *Hare, op cit* at 19, more particularly fn 92, where the writer gives numerous examples of other pre-existing statutes.

<sup>37</sup> See discussion on page 6 above.

<sup>38</sup> As per the Preambles of both the 1840 and the 1861 Acts.

<sup>39</sup> See *Hare, op cit* at 22.

### 3.3 The Law Applicable to Bill of Lading Disputes

Section 6 of the 1861 Act provides that:

'Any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England ... for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the Owner, Master or Crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England'.

By virtue of this provision, the Colonial Court's admiralty jurisdiction, in the South African context, is limited to cargo claims for goods carried under bills of lading into South Africa by a foreign ship.<sup>40</sup> *Hare* indicates that section 16 of the 1861 Act limits the Colonial Court's admiralty jurisdiction to carrier's claims for unpaid freight in respect of cargo carried into South Africa.<sup>41</sup> Claims in relation to non-bill of lading consignments such as sea waybills, non-negotiable receipts or charterparties concluded in England or any cargo carried under bills of lading into South Africa by a South African ship or cargo carried into another country shall, as a consequence of section 6 of AJRA, be subject to Roman Dutch law.<sup>42</sup>

The impractical, arbitrary effect of section 6 of AJRA where, *inter alia*, the nationality of a shipowner dictates the law to be applied in South Africa is by no means satisfactory nor does it promote legal certainty.

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<sup>40</sup> See *Hare, op cit* at 25.

<sup>41</sup> See *Hare, op cit* at 26.

<sup>42</sup> See *Hare, op cit* at 26. Under Roman Dutch law, the bill of lading is described as a *cognoscement* or acknowledgment and is described by *van der Linden* as follows:

'The master gives the shipper a written acknowledgement of the goods loaded on board, containing a statement of the goods, their quantity, marks and numbers, the place of destination, the name of the freighter and often also the consignee and the freight stipulated for'.<sup>42</sup>

See further *Hare, op cit* at 542 where the author doubts whether the application of Roman Dutch law, as opposed to English law, would produce different results if one takes into consideration the fact that modern law relating to bills of lading developed predominantly in England and has been applied extensively in a number of South African carriage of goods cases. See for example *The Dien Danielson* 1982 (3) SA 534 (N).

### 3.4 The Bills of Lading Act, 1855

The Bills of Lading Act, 1855 ("the 1855 Act") was still a part of English law at 1 November 1983 and, by virtue of section 6 of AJRA, applies in South Africa to very limited heads of jurisdiction.<sup>43</sup> The main purpose of this Act is to transfer to the consignee or indorsee of a bill of lading the shipper's rights of suit against the carrier.<sup>44</sup>

Prior to the enactment of the 1855 Act, commercial difficulties arose where a third party cargo receiver suffered loss or damage at the hands of the carrier. Because of the well established English common law principle of privity of contract that only parties to a contract may sue or be sued on its terms, a transferee such as a consignee or indorsee had no rights of recourse against the carrier for such loss.

In *The Sophia Moffat*<sup>45</sup>, Maule, J *in casu* denied an indorsee the right to sue the carrier for the loss of a shipment of 27 casks of cochineal which was carried under a bill of lading and stated emphatically that 'a contract cannot be transferred so as to enable the transferee to sue upon it'.<sup>46</sup>

The 1855 Act was therefore enacted to overcome the difficulties faced by the buyer of a bill of lading. Section 1 of the 1855 Act provides the following:

'Every consignee named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him.'

Section 1 creates a statutory exception to the doctrine of privity of contract by transferring to the consignee or indorsee the shipper's rights of suit 'as if the contract contained in the bill of lading had been made with him'. However, the transfer of rights shall only take place in instances where 'property' (ownership) in the goods passes 'upon or by reason of the consignment or indorsement'. In effect, a causal link is established between the transfer of contractual rights of suit and the transfer of 'property' in the goods. The wording of this

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<sup>43</sup> See *Hare, op cit* at 519.

<sup>44</sup> See *Hare, op cit* at 519.

<sup>45</sup> *The Sophia Moffat: Howard v Shepherd* 137 ER 907.

<sup>46</sup> See *Hare, op cit* at 519.

section was only a partial solution to the title to sue problem as will be discussed in more detail below.

Section 1 operates differently in respect of the shipper's liabilities. It provides for the consignee or indorsee to be 'subject to the same liabilities' as the shipper. The shipper may not avoid liability on the bill of lading where his rights of suit have been transferred. This position was confirmed in the recent English decision of *The Giannis NK*.<sup>47</sup> The House of Lords ruled:

'Whereas the rights under the contract of carriage were to be transferred, the liabilities were not. The shippers were to remain liable, but the holder of the bill of lading was to come under the same liability as the shipper. His liability was to be by way of addition, not substitution.'

Due to the fact that *The Giannis NK* is a post 1 November 1983 decision, *Hare* is of the opinion that later decisions may be persuasive to the extent that they amend earlier decisions on the basis of them being wrongly expounded at the time.<sup>48</sup>

Section 2 of the 1855 Act expressly preserves the carrier's right to claim freight and the shipper's right of stoppage *in transitu*.<sup>49</sup>

Section 3 of the 1855 Act provides:

'Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such a holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without the default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.'

This provision creates a statutory estoppel in favour of the consignee or indorsee but only as against the master or 'other persons signing the same'. Section 3 effectively makes the bill of lading conclusive evidence against the signatory of the bill who was often the duly authorized

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<sup>47</sup> *The Giannis NK* [1998] 1 Lloyd's Rep. 337 (HL). See *Hare*, *op cit* at 521.

<sup>48</sup> See *Hare*, *op cit* at 23.



master who seldom contracted in his personal capacity and was often not worth suing. Its application again very limited and ineffective as against the principle established in *Grant v Norway*<sup>50</sup> in which it was decided that the Master had no authority to sign for goods not actually shipped at the time the bill of lading was issued.<sup>51</sup>

The provisions of the 1855 Act were partially effective to the extent that consignees or indorsees of bills of lading went unprotected as against the carrier in instances where they did not acquire ownership 'upon or by reason of such consignment or indorsement'. In *Scruttons Ltd v Midland Silicones Ltd*,<sup>52</sup> the House of Lords decided against stevedores who sought to rely on limitation provisions in a contract of carriage to which they were not a party on the basis that it is a fundamental principle of English law that only parties to a contract may sue on its terms.<sup>53</sup> In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*<sup>54</sup> the court confirmed that English law 'knows nothing of a *jus quasitum tertio* arising by way of contract'.<sup>55</sup> In the circumstances, it is quite clear that English law has difficulty in recognizing the rights of parties extraneous to contracts. It similarly finds difficulty in recognizing the assignment of rights of action in instances where the consignee buyer is not only reliant upon the shipper's co-operation but is also required to give notice to the carrier on each assignment<sup>56</sup> which becomes extremely impractical in a long line of sales involving a chain of buyers from around the globe.<sup>57</sup>

Roman Dutch law does not experience the same technical difficulty as English law in that it will recognise a contract in favour of a third party, commonly known as a *stipulatio alteri*.<sup>58</sup> A *stipulatio alteri* is a form of agency in terms of which a shipper can be regarded retrospectively as having acted for the third party consignee, but only once the latter has

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<sup>49</sup> See *Hare, op cit* at 521.

<sup>50</sup> *Grant v Norway* [1851] 20 LJCP 93.

<sup>51</sup> See *Hare, op cit* at 544.

<sup>52</sup> *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1.

<sup>53</sup> *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1 at 6. See *Hare, op cit* at 554 and Gaskell *Bills of Lading: Law and Contracts* LLP, 2000 at 389.

<sup>54</sup> *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

<sup>55</sup> *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853. See *Hare, op cit* at 554.

<sup>56</sup> See section 136 of the English Law of Property Act, 1925.

<sup>57</sup> See Beatson & Cooper, *Rights of Suit in Respect of Carriage of Goods Sea* (1990) LMCLQ 196 at 198. See also *Government Gazette* No.18541 of 12 December 1997 *Draft Sea Transport Documents Bill - Invitation to Comment* at 2.

<sup>58</sup> Van der Merwe, van Huyssteen, Reinecke, Lubbe & Lotz *Contract: General Principles* Juta & Co Ltd, 1993 at 186. See *Hare, op cit* at 555.

accepted the benefits of the bill of lading.<sup>59</sup> The shipper should under a *stipulatio alteri* fall out of the picture which is not the case in bill of lading transactions where the shipper retains rights and obligations.<sup>60</sup> The *stipulatio alteri* is therefore not the complete solution to the title to sue problem.<sup>61</sup>

The limited application of the 1855 Act became problematic in the face of modernized shipping, especially with the increase of bulk cargo transport towards the end of the 20th century. The practical implications and inadequacies thereof will be discussed in detail below.

#### **4. DEVELOPMENTS IN ENGLAND SINCE 1983**

Modernization of the shipping industry, the increase in the size of ships, their speed and the advent of containerization has revolutionised the carriage of goods by sea. Bulk cargoes are commonly traded on highly competitive markets. The increased commercial use of non-negotiable sea waybills, ship's delivery orders and electronic bills of lading, all documents to which the Bills of Lading Act, 1855, did not apply, motivated the need for change of the laws relating to bills of lading which had become outdated and inadequate.

##### **4.1 Inadequacies of the Bills of Lading Act, 1855**

The 1855 Act operated on the basis of 'property' in the goods covered by a bill of lading. The shipper's rights of suit as against the carrier were transferred to the consignee or indorsee of a bill of lading provided that 'property' in the goods passed upon or by reason of the consignment or indorsement. A causal link between the passing of property and the indorsement had to be established. The particularity in the wording of the Act has the result that where indorsement takes place after delivery of the goods or where delivery has already

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<sup>59</sup> See *Hare, op cit* at 520 fn 207 and 555.

<sup>60</sup> See *Hare, op cit* at 555.

<sup>61</sup> See *Hare, op cit* at 555.

been made to the consignee or indorsee but 'property' has yet to pass in accordance with an underlying purchase and sale agreement, there is no transfer of rights of suit.

It became common practice for bills of lading to be indorsed to banks or other like institutions as security for loans advanced for the purpose of financing the purchase of cargo. As pledgees, banks had no intention of dealing with cargo offered as security nor acquiring 'property' in the cargo and could thereby avoid liability under section 1 of the 1855 Act. This was the view of the court in *Sewell v Burdick*.<sup>62</sup> In the words of Lord Selbourne L.C.,

'It would be strange if the Bills of Lading Act has made a person whose name has never been upon the bill of lading and who (as between himself and the shipowner) has never acted upon it, liable to an action by the shipowner upon a contract to which he was never a party'.<sup>63</sup>

However, the position is different where the pledgee-bank, in an effort to protect its interests, deals with the cargo by making payment of all outstanding freight and takes delivery thereof. In these circumstances the court will imply a contract of carriage between the pledgee and the shipowner, thereby entitling the pledgee-bank to sue on the bill of lading. This near legal fiction was the result of the *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. Ltd*<sup>64</sup> decision. *In casu*, Brandt financed the purchase of the goods against taking possession of the bills of lading as security. In order to protect its interest, Brandt presented the bills of lading to the carrier on discharge, paid all outstanding freight and took delivery of the goods. The Court of Appeal decided that an implied contract was created between Brandt and the shipowners, with the result that Brandt could sue the shipowners for breach of the bill of lading contract.

The bulk cargo trade suffered particularly at the hands of the 1855 Act for it too fell prey to both the notion of 'property' and section 16 of the English Sale of Goods Act 1979. Section 16 provides that where there is a contract for the sale of unascertainable goods (like parts of bulk cargo) no property in the goods is transferred unless and until the goods are ascertained. This position was confirmed by the District Court at Rotterdam in *The Gosforth*.<sup>65</sup> The Dutch court

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<sup>62</sup> *Sewell v Burdick* [1884] 10 App. Cas. 74 (H.L).

<sup>63</sup> *Sewell v Burdick* [1884] 10 App. Cas. 74 (H.C.) at 83.

<sup>64</sup> *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. Ltd* [1924] 1 K.B. 575.

<sup>65</sup> *S en S* 1985 Nr. 981. See Davenport, *Owners of Bulk Cargoes* [1986] LMCLQ 4.

decided the case according to English law<sup>66</sup> and held that the buyers of parts of the bulk cargo of citrus pellets to whom merchant's delivery orders were issued had no contract with the sea carrier which would entitle them to assert any rights of delivery. This decision caused great concern amongst commodity traders and subsequently prompted the Grain and Feed Trade Association (GAFTA) to request an investigation of the law by the English Law Commission of the rights of buyers of goods at sea which form part of a larger bulk.<sup>67</sup>

The decisions of *The Delfini*<sup>68</sup> further exemplified the need for reform in England. Indorsement of a bill of lading to a buyer after discharge of goods from a vessel left the buyer unprotected as against the carrier under the 1855 Act. In *The Delfini*, the court of first instance denied the final indorsees of a bill of lading their claim for short delivery against the shipowners on the basis that the contract of carriage was discharged when the cargo was unloaded. The Court of Appeal upheld the judgment but for a different reason. Rights of suit were transferred in terms of the 1855 Act to the indorsees only when 'property' in the goods passed 'upon or by reason of the indorsement' and since property had passed before indorsement and not by reason of it, their claim was rejected.

Further problems arose in *The Aliakmon*,<sup>69</sup> where property did not pass at all because of the reservation of the right of disposal and, in *The Aramis*,<sup>70</sup> where there was no delivery under one of the bills of lading and so no passing of property. The 1855 Act also does not apply to documents other than a bill of lading such as a sea waybill which is used widely in container transport, ship's delivery orders and paperless transactions by way of electronic data interchange.

The original shipper, provided the holder of the bill of lading is able to identify him, may sue for the transferee but he too faces the difficulty of having to prove loss of or damage to goods which are no longer in his care. The indorsee or present holder of the bill may pursue its claim against the carrier in tort (delict) in which case the carrier would have no recourse to

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<sup>66</sup> The pellets of citrus were sold on the terms of the Grain and Feed Trade Association (GAFTA) which provide that English Law shall govern the contract.

<sup>67</sup> See Pratter, *Selected Bibliography on the Carriage of Goods by Sea, 1975 - 1992* Vol. 24, (1993) *Journal of Maritime Law and Commerce*, 181 at 184 where the sensation in the commodity trades is said to have been caused by reason of the risk of the buyers being uninsurable.

<sup>68</sup> *The Delfini* [1990] 1 Lloyd's Rep. 252 (C.A.).

<sup>69</sup> *The Aliakmon* [1986] AC 785.

<sup>70</sup> *The Aramis* [1989] 1 Lloyd's Rep. 213.

the terms of carriage originally agreed to with the shipper. The carrier itself may wish to pursue a claim against the current bill of lading holder where the original shipper has disappeared or gone into liquidation. However, where the bill of lading has been transferred down a long line of buyers, there is no incentive for each transferee to assist the carrier in its attempts with the result that it too is prejudiced by the operation of the 1855 Act.

Towards the end of the twentieth century, problems under the 1855 Act reached serious proportions. On 19 March 1991, and in an effort to address the issues of an unsatisfied mercantile community, the Law Commission published a report on *Rights of Suit in Respect of Carriage of Goods by Sea* to which a draft Carriage of Goods by Sea Bill was appended.<sup>71</sup> The report focused on the shortcomings of the 1855 Act and made recommendations for reform of the then current law regulating the carriage of goods by sea. It did not recommend any change to the Sale of Goods Act. The Law Commissioners' recommendations were fully implemented and the United Kingdom Carriage of Goods by Sea Act, 1992, was enacted.

A subsequent enactment of the Contracts (Rights of Third Parties) Act, 1999,<sup>72</sup> altered the general law on privity of contract and the extent to which a third party may claim the benefits of a contract.<sup>73</sup> Section 6(5)–(7) however confers no general rights on third parties in relation to contracts for the carriage of goods by sea, which includes contracts of carriage evidenced by bills of lading, sea waybills and ship's delivery orders or their corresponding electronic transactions.<sup>74</sup> The rationale behind the exclusion appears to be the intention to avoid an overlap with the provisions of the United Kingdom Carriage of Goods by Sea Act of 1992, which shall be discussed in detail below.<sup>75</sup>

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<sup>71</sup> See Beatson & Cooper, *Rights of Suit in Respect of Carriage of Goods by Sea* (1990) LMCLQ 196 for greater insight on the principles of reform upon which the English Carriage of Goods by Sea Act was based.

<sup>72</sup> The Contracts (Rights of Third Parties) Act came into force on 11 November 1999 but only applies to contracts made after the lapse of six months from that date; ie. 11 May 2000.

<sup>73</sup> See *Gaskell, op cit* at 27 and 380.

<sup>74</sup> See *Gaskell, op cit* at 716.

<sup>75</sup> See *Gaskell, op cit* at 381.

5. **COMPARATIVE ANALYSIS: SEA TRANSPORT DOCUMENTS ACT 65 OF 2000<sup>76</sup>**  
**& UNITED KINGDOM CARRIAGE OF GOODS BY SEA ACT, 1992, (C. 50)**

In light of recent developments in the shipping industry and in view of the enactment of the United Kingdom Carriage of Goods by Sea Act, 1992, current South African maritime law on the transfer of rights of suit from shipper to indorsee or consignee of a bill of lading, which arguably still includes the partially effective provisions of the 1855 Act, is out of date and inadequate. Motivated by the reform in the United Kingdom, the South African legislature prepared a draft Sea Transport Documents Bill in an attempt to address issues left wanting in the law as it stands today.

The South African Sea Transport Documents Act, No. 65 of 2000, was assented to by the State President on 5 December 2000 and published in *Government Gazette* No. 21884 (Vol 426) of 13 December 2000; its purpose being 'to regulate the position of certain documents relating to the carriage of goods by sea; and to provide for incidental matters'. It comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

By virtue of the operation of section 6(1) of AJRA, South African maritime law has to a large extent developed parallel to English law. And, since the UK Carriage of Goods by Sea Act, 1992, served as the starting point for the drafting of the Sea Transport Documents Act, 2000, a comparative analysis shall be drawn between the provisions of the two Acts.

The United Kingdom Carriage of Goods by Sea Act, 1992, received royal assent on 16 July 1992 and came into force on 16 September 1992. The main purpose of this Act is to replace the 1855 Act with new provision in respect of bills of lading and certain other shipping documents.

As already mentioned in Chapter 4 above, the Law Commissions' recommendations in *Rights of Suit*<sup>77</sup> (to which a draft Carriage of Goods by Sea Bill was annexed) were enacted in their entirety. This report is an excellent source of information and provides for greater insight on the principles of reform upon which the United Kingdom Carriage of Goods by Sea Act,

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<sup>76</sup> This being the short title of the Sea Transport Documents and Title to Sue Act.

<sup>77</sup> See *Rights of Suit* at 196.

1992 is based. This Act is a relatively short piece of legislation, comprising of only six sections; each of which shall be analysed in detail below.

For purposes of convenience, this work shall make reference to the Sea Transport Documents Act as the STDA and, in order to avoid any confusion with its South African namesake, the United Kingdom Carriage of Goods by Sea Act of 1924 and 1925, shall hereinafter be referred to as the UK COGSA '92 and '71 respectively. Any reference to the 'Act' shall refer to the statute under discussion in that particular section.

## **5.1 Transfer of Rights and Obligations**

The provisions of the STDA and UK COGSA '92 are novel to the extent that they both provide for the statutory transfer of rights and/or obligations<sup>78</sup> to the lawful holder of a bill of lading regardless of whether property passed to him 'upon or by reason of ... consignment or indorsement'.

### **5.1.1 Transfer of Rights and Obligations under UK COGSA '92**

The UK COGSA '92 separates the transfer of rights from the transfer of obligations. The manner in which this is achieved as well as the purpose for doing so, shall be discussed in the paragraphs to follow.

#### **5.1.1.1 Section 2: Rights under Shipping Documents**

The primary purpose for the enactment of the UK COGSA '92, particularly in relation to bills of lading, was to remove the connection between the passing of property and the transfer of contractual rights. Described as the 'key clause',<sup>79</sup> section 2(1) of this Act provides that:

'2(1) Subject to the following provisions of this section, a person who becomes-

(a) a lawful holder of a bill of lading;

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<sup>78</sup> "and/or" is used primarily because UK COGSA '92 separates the transfer of rights and obligations unlike the STDA which simultaneously provides for the transfer of rights and obligations- distinction shall be discussed in more detail below.

<sup>79</sup> See *Rights of Suit* at 202.

- (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'.<sup>80</sup>

In terms of section 2(1), the lawful holder of a bill of lading as well as the person entitled to delivery under a sea waybill or a ship's delivery order may therefore assert contractual rights of suit against the carrier.<sup>81</sup> What constitutes a 'lawful holder' of a bill of lading shall be discussed in paragraph 5.3.1 below. The transfer of rights in respect of sea waybills and ship's delivery orders shall be discussed in more detail in paragraphs 5.6.3 and 5.6.2 respectively.

Section 1(2)(a) specifically provides that any reference to the term 'bill of lading' in the Act shall 'not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement'. The so-called straight bill of lading (not made out 'to order') which is incapable of transfer does not therefore fall within the definition of bill of lading in section 1(2)(a) and cannot operate to transfer rights under section 2. *Gaskell* makes the following comment in this regard,

'Nevertheless, it was intended that holders of such documents should be entitled to sue the carrier and the straight bill would be treated, in effect, as a sea waybill in section 1(3) of the Carriage of Goods by Sea Act, 1924. A straight bill is certainly one which identifies the consignee as the person to whom delivery is to be made within section 1(3)(b).'<sup>82</sup>

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<sup>80</sup> The similarity in the wording of this provision and section 1 of the 1855 Act is quite clear. See further *Rights of Suit* at 203.

<sup>81</sup> See *Gaskell, op cit* at 122.

<sup>82</sup> See *Gaskell, op cit* at 147. Section 1(3) provides that any references to 'sea waybill' in the Act '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'.



The Law Commissions placed a general emphasis on the ‘transfer of rights’ as opposed a ‘creation of new rights’ in favour of third parties simply because the mechanism of ‘transfer of rights’ provides for more commercial certainty.<sup>83</sup> In this way the holder of a bill of lading acquires an accrued claim and the carrier need not be concerned about the actions of previous holders of the bill.<sup>84</sup>

In instances where the carrier has delivered the cargo to the transferee and the bill is transferred to a subsequent holder after the bill ceases to be a transferable document of title, section 2(2)(a) allows such holder to acquire contractual rights provided it became holder pursuant to a contractual arrangement (for example a pledge) made before the bill ceased to be an effective document of title.<sup>85</sup> Section 2(2)(b) provides for the transfer of rights to a holder in pursuance of a re-indorsement of a bill of lading after the rejection of the goods or the documents.<sup>86</sup>

Under the 1855 Act, property has to pass to the person who wishes to sue on the terms of the contract of carriage. However, under UK COGSA '92, rights of suit are dependent upon the lawful possession of a bill of lading, irrespective of ownership in the goods. Section 2(4) envisages the situation where loss or damage is sustained by a party who owns or bears the risk in relation to the goods described in the bill of lading but who does not lawfully possess the bill and subsequently does not have rights of suit against the carrier. It empowers the holder of the bill to sue for and on behalf of that person.<sup>87</sup> There is however no obligation on the lawful holder to sue on behalf of the owner of the goods.<sup>88</sup> *Gaskell* suggests that where the lawful holder refuses to sue on behalf of the owner under section 2(4), the owner may have to proceed in tort.<sup>89</sup>

Section 2(5) of UK COGSA '92 confirms that the bill of lading shipper and all those parties intermediately entitled under the bill of lading lose their contractual rights against the carrier when someone else acquires them. This subsection shall be discussed in more detail in paragraph 5.2.1 below.

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<sup>83</sup> See *Rights of Suit* at 203.

<sup>84</sup> See *Rights of Suit* at 203.

<sup>85</sup> See *Rights of Suit* at 203. See further *Halsbury's, op cit* at par 1561.

<sup>86</sup> See *Rights of Suit* at 204.

<sup>87</sup> See *Rights of Suit* at 204.

<sup>88</sup> See *Gaskell, op cit* at 129.

<sup>89</sup> See *Gaskell, op cit* at 129.

In general, the transfer of a bill of lading to an agent merely to allow him to deal with the goods on behalf of the owner and for example to take delivery of them or to stop the goods in transit is of no effect because there is no intention on the part of the owner to have that effect.<sup>90</sup> The agent cannot thereafter divest the owner of his rights to and in the goods by subsequently transferring the bill of lading to another. Rights may however be transferred where the agent is duly authorized by the owner to do so.

### 5.1.1.2 Section 3: Liabilities under Shipping Documents

Section 3(1) of UK COGSA '92 effectively separates the transfer of rights and liabilities and provides that a holder of a bill of lading shall only be subject to the same obligations where he:

- '3(1)(a) takes or demands delivery from the carrier of any 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 the contract as if he had been a party to that contract'.

The Law Commissions, in splitting the rights from the liabilities, sought to preserve the position of banks and other institutions which, in exchange for advancing money for the purchase of cargo, held security in bills of lading and other shipping documents.<sup>91</sup> Banks in most instances had no intention of acquiring ownership of the goods and as a result generally

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<sup>90</sup> See *Halsbury's*, *op cit* at 1555.

<sup>91</sup> See *Halsbury's*, *op cit* at par 1568; *Rights of Suit* at 205; Reynolds *The Carriage of Goods by Sea Act 1992 Put to the Test* 1999 LMCLQ 161; In *The Berge Sisar* [1998] 4 All ER 821 at 832 the Court of Appeal makes the following comment in this regard:

'One sees therefore that ... it was the policy of those who were responsible for drafting the 1992 Act to restrict the person who were subject to liabilities under the bills of lading to a narrower class than those who obtained rights under the bills'.

went unaffected by the provisions of the 1855 Act. The Law Commissions make the following comment in their report:

‘Given the decision to divorce the acquisition of contractual rights from the passing of property, it became apparent that contractual rights and liabilities could not be linked in the way which obtains under the 1855 Act, since banks and others who merely hold bills of lading as security would without more be liable in respect of substantive obligations such as freight and demurrage’.<sup>92</sup>

Despite the fact that one may possess a bill of lading but not be subject to the liabilities thereunder, it goes without saying that one cannot, under section 3(1) of the Act, make a demand where there is no right to claim delivery. It is therefore a precondition of section 3(1) that the person who makes the demand is the person in whom rights have vested under section 2(1).<sup>93</sup>

The liabilities will attach from the moment the demand is made as opposed to the time of delivery. The Law Commissions considered this to be fair especially if one considers that the demand may cause the ship to berth at a particular dock where demurrage may be incurred.<sup>94</sup> Furthermore, if the carrier delivers the cargo to the lawful owner who is not also the lawful holder of the bill of lading, *Gaskell* believes that the owner cannot be held liable under section (3), if rights did not vest in it by operation of section 2(1).<sup>95</sup> He comments further on the unlikelihood of the carrier delivering the cargo without the owner presenting some form of identification and sees no reason why a *Brandt v Liverpool* contract could not be implied in the circumstances.<sup>96</sup>

The English court in *The Aegean Sea*<sup>97</sup> (which case is discussed in more detail in paragraph 5.3.1 below) was called upon to decide, *inter alia*, whether or not liabilities under a bill of lading could pass to the cargo receiver where it had issued a letter of indemnity to the carrier in respect of liabilities which the carrier might incur for delivery of the cargo without production of the relevant bill of lading.<sup>98</sup> The court held, albeit arguably *obiter*, that the letter of indemnity did not constitute a demand for delivery of the cargo nor did it oblige the cargo

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<sup>92</sup> See *Rights of Suit* at 205.

<sup>93</sup> See *Gaskell, op cit* at 132.

<sup>94</sup> See *Gaskell, op cit* at 133.

<sup>95</sup> See *Gaskell, op cit* at 133.

<sup>96</sup> See *Gaskell, op cit* at 133.

<sup>97</sup> *The Aegean Sea* [1998] 2 Lloyd's Rep. 39.

<sup>98</sup> See *Gaskell, op cit* at 135.

receiver to take delivery.<sup>99</sup> It constituted nothing more than an undertaking to provide an indemnity for certain claims if delivery was in fact made.<sup>100</sup> Notwithstanding the letter of indemnity, the carrier remained under an obligation to deliver the cargo to the lawful holder of the bill of lading and was not bound to deliver under the indemnity.<sup>101</sup>

The House of Lords in *The Berge Sisar*<sup>102</sup> recently held that 'delivery in terms of pars. (a) and (c) means ... the voluntary transfer of possession from one person to another. This is more than just co-operating in the discharge of the cargo from the vessel'.<sup>103</sup> *In casu*, the interim holder of the relevant bills of lading directed the master of the vessel to its import jetty in order to take routine samples of the cargo before clearing the vessel for discharge. Upon discovering that the cargo was not of contractual quality the interim holder rejected the cargo and on-sold it to a subsequent buyer and holder of the bills. The court held that the interim holder's assistance in the discharge of the cargo or the fact that it directed the master to its import jetty did not constitute 'taking or demanding of delivery' of the cargo as envisaged in section 3 of UK COGSA '92.

In relation to ship's delivery orders, section 3(2) provides that 'the liabilities ... shall exclude liabilities in respect of any goods to which the order does not relate'. Similar therefore to a bill of lading holder, the person identified in a ship's delivery order may become subject to the same liabilities under that contract as if it had been a party to the contract of carriage.<sup>104</sup> The person identified in a ship's delivery order may therefore also incur liabilities under the contract of carriage in the same way as the lawful holder of a bill of lading, in other words, by taking or demanding delivery from the carrier but only in relation to the goods described in the order.<sup>105</sup>

Section 3(3) of UK COGSA '92 provides that:

'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'.

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<sup>99</sup> See *Gaskell, op cit* at 135 fn 112.

<sup>100</sup> *The Aegean Sea* [1998] 2 Lloyd's Rep. 39 at 62. See also *Gaskell, op cit* at 135.

<sup>101</sup> See *Gaskell, op cit* at 135.

<sup>102</sup> *The Berge Sisar* [2001] 1 Lloyd's Rep. 663 which is discussed in more detail in par 5.2.1.

<sup>103</sup> *The Berge Sisar* [2001] 1 Lloyd's Rep. 663 at 675.

<sup>104</sup> See *Gaskell, op cit* at 145.

<sup>105</sup> See *Gaskell, op cit* at 144. See also *Rights of Suit* at 206.

The Law Commissions maintained the view that under the 1855 Act the original shipper remained liable under the bill of lading despite any subsequent transfer of rights to an indorsee.<sup>106</sup> Section 3(3) was therefore recommended with a view to retaining the position under the 1855 Act. This view is confirmed by the decision in *The Giannis NK*.<sup>107</sup> The court *in casu* held that the liabilities were concurrent in that the holder of the bill of lading came under the same liabilities as the shipper; more particularly, the holder's liability 'was to be by way of addition, not substitution'.<sup>108</sup>

### 5.1.2 Section 4 of the STDA: Transfer of Rights and Obligations

Section 4 embodies the very essence of the STDA in that it seeks to remedy the problems of the 1855 Act and provides for the transfer of contractual rights of suit to a holder of a 'negotiable or transferable' sea transport document regardless of whether the holder acquires property in the goods or not. Title to sue is now derived from a claimant's status as holder of a sea transport document.<sup>109</sup> Section 4 reads as follows:

- '4(1) The holder of a sea transport document –
- (a) is subject to the same obligations and entitled to the same rights against the person by whom or on whose behalf the document was issued or who is responsible for the performance of the contract of carriage evidenced by or contained in the document as if the holder were a party to a contract with that person on the terms of the document; and
  - (b) must be regarded as the cessionary of all rights of action for the loss of or damage to the goods referred to in the document, whether arising from contract or the ownership of the goods or otherwise.
- (2) A holder who has transferred a sea transport document must be regarded as having ceded his, her or its rights and as having delegated his, her or its obligations to the new holder except in so far as those rights or obligations arise from a *delectus personae* relating to the holder'.

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<sup>106</sup> See *Rights of Suit* at 206. See also *Gaskell, op cit* at 139. Section 2 of the 1855 expressly preserved the shipper's liability for freight but also did not relieve him of any liability to which he was subject in terms of the common law.

<sup>107</sup> *The Giannis NK* [1998] Lloyd's Rep. 337.

<sup>108</sup> See *Hare, op cit* at 521; as well as *Gaskell, op cit* at 139.

<sup>109</sup> See discussion in par 5.3 below.

This provision is therefore similar to section 2 of UK COGSA '92 in that there is no longer the requirement for ownership or 'property' in the goods to be transferred 'upon or by reason of the consignment or indorsement' of a bill of lading, in order for contractual rights of suit to be transferred to the consignee or indorsee.

A sea transport document is defined under section 1 of the STDA as 'a bill of lading; a through bill of lading; a combined transport bill of lading; a sea waybill; or any consignment note, combined transport document or other similar document, relating to the carriage of goods either wholly or partly by sea, irrespective of whether it is transferable or negotiable'. Section 2(2) however provides that section 4 (including 3,5 and 6) shall only apply in respect of sea transport documents that are 'transferable and negotiable'. The transfer of rights provisions under the STDA therefore find no application in the case of sea waybills and non-negotiable receipts which are by definition not transferable. Although there is no express reference to a ship's delivery order in the STDA, it is arguable that 'sea transport document' as a general term envisages a ship's delivery order as 'any other similar document relating to the carriage of goods either wholly or partly by sea'. Whether or not any rights therein may be transferred shall depend upon the manner in which the document is drawn and whether it is 'transferable or negotiable' as required under section 2(2) of the STDA.

Similar to the UK COGSA '92, the STDA works with the concept of transferring existing rights as opposed to creating new rights in favour of the holder.<sup>110</sup>

In relation to the wording of section 4(1), *Hare* states that this section:

'finally dispel(s) any doubts which may exist as to the efficacy of the transfer provisions of the Bills of Lading Act, 1855, and would extend equally to claims based upon jurisdiction new to the Admiralty Jurisdiction Regulation Act, 1983'(inserted).<sup>111</sup>

Section 4 of the STDA makes reference to cession as the means by which rights are transferred under the STDA. In terms of South African common law all contractual rights are, in principle, freely cedable except where the relationship between the debtor and the creditor is of such a nature that it involves the element of *delectus personae* or the contract contains a

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<sup>110</sup> See discussion under par 5.1.1.

<sup>111</sup> See *Hare, op cit* at 524.

valid *pactum de non cedendo*.<sup>112</sup> Hiemstra and Gonin in their *Trilingual Legal Dictionary* define the expression ‘*delectus personae*’ as a ‘choice of an irreplaceable person (bound to a specific performance of the undertaking)’.<sup>113</sup> It implies that a contractual right cannot be ceded without the debtor’s consent in instances where the debtor’s performance would ‘differ in character’ from the performance which he is to render to his original creditor.<sup>114</sup> In the words of Innes, CJ in *Eastern Rand Exploration Co. Ltd v AJT Nel and Others*,<sup>115</sup>:

‘... the question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may, in our law, be freely ceded.’

The test for determining whether a right arising from a contract involving a *delectus personae* is cedable is therefore determined with reference to the debtor’s obligation to the creditor. As stated by Botha, JA in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*:

‘The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent’s obligation *vis-à-vis* the debtor, which remains unaffected by the cession, but to the nature of the debtor’s obligation *vis-à-vis* the cedent, which is the counterpart of the cedent’s right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by the lecture-room example of a contract between a master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party without the servant’s consent because of the nature of the latter’s obligation to render the services; but a common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master’s corresponding obligation to pay for them, and despite the nature of the servant’s obligation to render them’.<sup>116</sup>

In the context of the STDA, the shipper is upon transfer of the sea transport document regarded as having ceded all his rights under the contract of carriage to the consignee or

<sup>112</sup> See Christie *op cit* at 513; *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A); *Trust Bank of South Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A) at 181 and 189; *Britz NO v Sniegocki and Others* 1989 (4) SA 372 (D) at 382; *Eastern Rand Exploration Co Ltd v Nel and Others* 1903 TS 42 at 53; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

<sup>113</sup> Hiemstra and Gonin, *Trilingual Legal Dictionary*, Juta & Co. 1992 at 17. See *Hare op cit* at 523 fn 217 where the author comments on the use of the term ‘*delectus personae*’ as being ‘somewhat puzzling and not in accord with the policy of using plain language in statutes to which South African legislature should now aspire’.

<sup>114</sup> See LAWSA Vol 2 at 257. See also *Goodwin Stable Trust v Duohex (Pty) Ltd and Another* 1998 (4) SA 606 at 617, where the expression ‘*delectus personae*’ was described as ‘simply a manifestation of the general principle that the cession should not disadvantage the debtor’.

<sup>115</sup> *Eastern Rand Exploration Co. Ltd v AJT Nel and Others* 1903 TS 42.

<sup>116</sup> *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) at 112.

subsequent holder. Where the contract of carriage is of such a personal nature that it involves a *delectus personae*, the test for determining whether the shipper's rights are cedable is determined with reference to the carrier's obligation to the shipper; for example, to deliver the goods in the condition in which they were received, which more often than not would not involve a *delectus personae*.

Section 4(2) appears to reflect an intention to prevent the shipper or any subsequent holder of a transferable sea transport document from avoiding any obligations *vis-à-vis* the carrier by simply ceding the relevant document over to a third party.<sup>117</sup>

Delegation is a form of novation and, in terms of our common law, requires the consent of the creditor in order to effect a true delegation of the debtor's obligations.<sup>118</sup> Delegation has the effect of irrevocably transferring obligations from an original debtor to a new debtor with the result that the creditor can sue the new but not the original debtor.<sup>119</sup> In terms of section 4, the transfer of obligations takes place by operation of law and, unless the nature of the relationship between the shipper and the carrier is so personal in nature that it involves a *delectus personae*, the obligations of the shipper to pay for example freight pass to the transferee or consignee without the carrier's consent. A shipper's obligation not to deliver dangerous cargo to the carrier without fully disclosing the nature of the cargo to the carrier may have the effect that the shipper's obligations, at least in this instance, are not transferable.

Unlike section 3 of UK COGSA '92 where there is a split between the transfer of rights and liabilities, section 4 provides for the simultaneous transfer of both rights and obligations. Interim holders such as banks who merely hold sea transport documents as security for monies advanced to buyers of cargo may find themselves exposed to a claim by the carrier under the STDA.

The question arises as to whether the original party to whom the 'transferable' sea transport document was issued remains liable under the contract of carriage despite the transfer of rights of suit. The STDA is by no means as clear on the issue as UK COGSA '92. Section

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<sup>117</sup> See *Hare, op cit* at 524.

<sup>118</sup> See *Randcoal Services Ltd and Others v Randgold and Explorations Co Ltd* 1998 (4) SA (SCA) 826 at 837.

<sup>119</sup> See *Christie, op cit* at 513.



4(1), employing similar wording to that of the 1855 Act, provides that the holder is 'subject to the same obligations' against the carrier as if the holder were a party to the contract of carriage. As discussed above,<sup>120</sup> the House of Lords in *The Giannis NK*,<sup>121</sup> having considered the wording of the 1855 Act, held that the holder of the bill of lading came, by way of addition, under the same liability as the shipper; the shipper remaining liable to the carrier under the contract. In view of similarity of the wording in the STDA to the 1855 Act, the decision of *The Giannis NK* and *Hare*'s comment thereon that as a post 1 November 1983 decision, it is persuasive to the extent that it amends earlier decisions on the basis of them being wrongly expounded at the time, it is arguable that the original party to whom a transferable sea transport document has been issued remains liable after the document has been transferred, despite the use of the words 'delegation of obligations' in the STDA which should effectively result in the complete transfer of obligations from one debtor to the next.<sup>122</sup>

The provisions dealing with the transfer of rights and obligations under UK COGSA '92 not only provide more clarity in some respects but are clearly more extensive than those of the STDA.

## 5.2 The Interim Holder

### 5.2.1 Section 2(5) of UK COGSA '92

Section 2(5) of UK COGSA '92 provides that:

'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

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<sup>120</sup> See par 3.4 above.

<sup>121</sup> *The Giannis NK* [1998] 1 Lloyd's Rep. 337 (HL).

<sup>122</sup> See *Hare*, *op cit* at 23.

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'.

Section 2(5) confirms in relation to the bill of lading shipper and all intermediate persons entitled under the bill that all rights of suit are lost when someone else acquires them.<sup>123</sup> The Law Commissions make the following comment in this regard:

'In the case of those who at some time were entitled to delivery under a bill of lading, sea waybill or ship's delivery order, but in circumstances where someone else has subsequently become entitled to delivery, there are no compelling reasons why such people should retain contractual rights of suit, and under the 1855 Act previous holders of bills of lading lost their rights of suit when they were transferred in the way stipulated by section 1'.<sup>124</sup>

Subsections (a) and (b) similarly apply to those intermediately entitled under sea waybills and ship's delivery orders. However, section 2(5) does not extinguish the contractual rights against the carrier of the original party to a sea waybill and ship's delivery order upon transfer.<sup>125</sup> The Law Commissions felt that the rights of a sea waybill shipper should not be prejudiced on the basis that the sea waybill shipper, unlike the bill of lading holder which loses its rights to control the goods when the bill is transferred, retains its rights of disposal until delivery and since the sea waybill is 'primarily a contract between a shipper and a carrier which happens to benefit a third party, it is important that a waybill shipper should be able to retain contractual rights if he wishes'.<sup>126</sup>

The question of whether an intermediate holder of a bill of lading remained liable under the contract of carriage after having transferred its rights to a subsequent holder came before the English High Court in the matter of *The Berge Sisar*.<sup>127</sup> The facts of the case are briefly as follows: During October 1993, Borealis purchased a cargo of 43,000 tonnes of field grade propane from Stargas. It was an express term of the contract of sale that the cargo should not

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<sup>123</sup> See *Rights of Suit* at 205.

<sup>124</sup> See *Title to Sue* at 205.

<sup>125</sup> See *Halsbury's*, *op cit* at 1563; *Rights of Suit* at 205.

<sup>126</sup> See *Rights of Suit* at 205.

<sup>127</sup> *Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd and another (Bergesen DY A/S, third party)* [1998] 4 All ER 821 and the House of Lords decision at [2001] 1 Lloyd's Rep. 663. See

contain more than a certain degree of corrosive compounds. The cargo was shipped under 5 bills of lading from Saudi Arabia to Sweden on board the “Berge Sisar” which was chartered out to Stargas by the vessel’s owners, Bergesen. Stargas had purchased part of cargo directly from Saudi Aramco and in part from intermediate sellers who themselves either directly or indirectly purchased the cargo from Saudi Aramco. On arrival of the cargo in Stenungsund,, Borealis directed the master of the vessel to its import jetty in order to take samples of the cargo. The samples revealed that the propane was not of contractual quality. Borealis immediately rejected the cargo and sold it to Dow Europe. It subsequently also indorsed the bills of lading to Dow Europe. Borealis thereafter commenced action against Stargas claiming damages for breach of contract. Stargas in turn issued a third party notice against Bergesen claiming an indemnity in respect of any claim for which it may be held liable to Borealis. Bergesen served a counterclaim against Stargas for damage caused to the vessel by the corrosive compounds in the cargo. Furthermore, and most important to this study, Bergesen instituted claims against both Saudi Aramco and Borealis on the basis that both parties were liable under the bills of lading. More particularly, that Borealis, by virtue of section 3(1) of UK COGSA ’92, was liable as lawful holder of the bills of lading on the basis that it demanded or requested delivery of the cargo from Bergesen and having done so, became subject to the same liabilities under the contracts of carriage as if it had been a party to the contracts. As already discussed above,<sup>128</sup> the court found that the actions of Borealis ‘fell far short of amounting to the making of any demand for delivery’ as required under section 3.<sup>129</sup> As to the question of the liability of an interim holder, the court relied upon the decision of *Smurthwaite v Wilkins*<sup>130</sup> where an intermediate holder was found not to be liable for freight and held the following:

‘In the Act section 2(1) and section 3(1) adopt the crucial wording of the 1855 Act which formed the basis of *Smurthwaite v Wilkins* and other similar cases: ‘shall have transferred to and vested in him all rights of suit under the contract of carriage if ...’ – ‘shall become subject to the same liabilities under that contract as if ...’. Those words having been previously construed as having a certain effect, their repetition in the 1992 Act implies that the draftsman expected them to continue to be construed in the same way. *Smurthwaite v Wilkins* is referred to in the report and is adopted rather than criticized. There is no provision in the Act which contradicts the intention that that decision should still have force’.

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further Reynolds, *The Carriage of Goods by Sea Act 1992 Put to the Test* (1999) *Lloyd's Maritime & Commercial L.Q.* 161.

<sup>128</sup> In par 5.1.1.2.

<sup>129</sup> *The Berge Sisar* [2001] 1 Lloyd’s Rep. 663 at 676.

<sup>130</sup> *Smurthwaite v Wilkins* [1862] 11 CB (NS) 842. See also *Gaskell, op cit* at 140.

In the circumstances, interim holders, under English law, do not remain liable under the contract of carriage where the bill of lading has been transferred to a subsequent holder. *Reynolds* makes the following comment in respect of the Court of Appeal's decision in which the same view was expressed:

'it is obviously rather undignified that such a carefully drafted modern Act, far longer and more elaborate than its three-section predecessor, should require to be salvaged by a case of 1862 on an Act of 1855, in which it is said that the drafting of that Act otherwise gave rise to a 'manifest unjust' result'.<sup>131</sup>

### 5.2.2 Interim Holder under the STDA

Unlike UK COGSA '92, there is no express provision in the STDA relating to interim holders.

Section 4(1)(b) specifically provides that the holder of a sea transport document 'must be regarded as the cessionary of all rights of action' and 'must be regarded as having ceded ... its rights'. Under a true cession, the cedant is required to be divested of his rights of suit against the debtor.<sup>132</sup> Although there is no provision in the STDA similar to section 2(5) of UK COGSA '92, it is arguable that this principle echoes the provisions of that section which extinguishes the rights of the shipper, as an original party to the contract of carriage, and intermediate holders of bills of lading (or, in the language of the STDA, intermediate holders of 'transferable or negotiable' sea transport documents) when they are transferred to someone else. Furthermore, the use of the words 'must' in section 4, the intention of the South African legislature in drafting the STDA to 'clarify the position'<sup>133</sup> and the fact that this was the position under the 1855 Act, supports the view that the position under the STDA with regards to the transfer of 'all rights of suit' is similar to the position under UK COGSA '92. It is therefore submitted that an interim holder, like the original party to whom the transferable sea transport was issued, loses rights upon transfer of the document to another.

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<sup>131</sup> Reynolds, *The Carriage of Goods by Sea Act 1992 Put to the Test* (1999) *Lloyd's Maritime & Commercial L.Q.* 161 at 163.

<sup>132</sup> Christie *The Law of Contract* Butterworths 1996 at 515.

<sup>133</sup> See *Government Gazette* No.18541 of 12 December 1997 *Draft Sea Transport Documents Bill - Invitation to Comment*.

In regard to whether or not the interim holder remains liable after transfer of the sea transport document, it is arguable that the interim holder does not remain liable if one has regard to the rationale behind the decisions in *The Berge Sisar*, more particularly *Smurthwaite v Wilkins* above, and the fact that the STDA uses similar language to that of the 1855 Act. In other words, the STDA speaks of a cession ‘of all rights of action’ and the holder becomes subject to the ‘same obligations’ as under the 1855 Act.

The STDA similarly does not split the transfer of rights from liabilities with the result that interim holders may find themselves exposed to a claim by the carrier under the STDA.

### **5.3 Holder of a Sea Transport Document**

By virtue of section 2 of UK COGSA '92 and section 4 of the STDA, the transfer of contractual rights of suit in a bill of lading, under English and South African law (to be enacted), no longer depends upon ‘property’ in or ownership of the goods described in the bill, but whether or not the holder of the bill is the lawful holder.

#### **5.3.1 ‘Lawful Holder’ under UK COGSA '92**

In terms of section 5(2), a 'lawful holder' is defined as:

- ‘(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;

... wherever he has become the holder of the bill in good faith’.

By virtue of section 5(2), the term ‘lawful holder’ therefore not only embraces a consignee or indorsee in possession of a bill of lading in good faith, including the holder of a bearer bill,

but furthermore includes the holder of a bill of lading which has ceased to be a document of title; ie. a spent bill.<sup>134</sup>

In the fairly recent decision of *The Aegean Sea*<sup>135</sup>, the English High Court was called upon to decide whether a cargo receiver in possession of a bill of lading, erroneously indorsed and delivered to him, qualified as a 'holder' of the bill under section 5(2)(b) of UK COGSA '92. The facts of this case are briefly as follows. An oil tanker fully laden with cargo ran aground on the Torre de Hercules rocks in Spain resulting in the loss of the vessel in the subsequent explosion, including most of her cargo. The vessel's owners faced substantial claims for both pollution and salvage and therefore sought to claim an indemnity from the vessel's voyage charterers, ROIL, who allegedly committed breach of the charterparty for having nominated an unsafe port. In addition thereto, the vessel's owners claimed an indemnity from Repsol, the parent company of ROIL, who purchased the cargo from the latter on 20 November 1992, on the basis of it being the lawful holder of the bill of lading and as such became subject to the liabilities by reason of the provisions of UK COGSA '92. ROIL initially purchased the cargo from Louis Dreyfus on or about 18 November 1992. The bill, which was drawn to the order of Louis Dreyfus, was however indorsed to Repsol on 17 December 1992. The indorsed bill was thereafter sent to ROIL, who in turn forwarded the bill to Repsol. The bill was erroneously indorsed to the Repsol instead of ROIL. Upon becoming aware of the error, Repsol returned the bill to Louis Dreyfus for cancellation and re-indorsement to ROIL. The vessel's owners argued that Repsol became the holder of the indorsed bill of lading by virtue of it having received the bill; it was of no consequence to them that Repsol had no intention of accepting the bill in the circumstances.

The court *in casu* rejected the owners' argument and found that in order for an indorsee to qualify as a 'holder' for purposes of the COGSA '92 (UK), a consensual element must be present. The indorsee must not only receive the bill of lading physically but he is also required to accept delivery before he can become a 'holder', as defined in section 5(2). Thomas J, decides as follows:

'I do not consider that a person satisfies the requirements under s. 5 (2)(b) and becomes the holder of a bill of lading if that person obtains the bill of lading merely in consequence of someone endorsing it and sending it to him. The section requires

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<sup>134</sup> See *Title to Sue* at 207. See further *Gaskell*, *op cit* at 123.

<sup>135</sup> *The Aegean Sea: Aegean Sea Traders Corporation v. Repsol Petroleo SA and Another* [1998] 2 Lloyd's Rep. 39. See *Gaskell*, *op cit* at 123.

him to have possession as a result of the completion of an indorsement by delivery. Although the sending and receipt of a document through the post often constitutes service of a document, the sending of a bill of lading through the post does not without more constitute delivery; the person receiving it has to receive it into his possession and accept the delivery before he becomes the holder. Moreover the bill of lading was never delivered to Repsol by Louis Dreyfus; Louis Dreyfus sent the bill to ROIL under cover of a letter addressed to ROIL. It was sent to ROIL as principles; it was not delivered by Louis Dreyfus to ROIL to receive as Repsol's agents as it was intended for ROIL and the covering letter was addressed to them. There was therefore no delivery by Louis Dreyfus to Repsol, only a delivery to ROIL. ... In my view Repsol never obtained possession of the bill of lading as the result of completion by delivery of the bill by indorsement. There was never any delivery of the bill of lading by Louis Dreyfus to Repsol to complete the indorsement. Even if Repsol had obtained possession of the bill of lading from Louis Dreyfus, they never accepted delivery of it as the indorsee or transferee. As soon as they saw the indorsement to them, they sent it back to be indorsed to the rightful indorsee and transferee'.<sup>136</sup>

Regarding the concept of 'good faith', *Gaskell* makes the following comment:

'It is probably true to say that English law has not developed a general overriding contractual principle of 'good faith' as other countries have, but there are examples of the expression appearing in statutes. Essentially the requirement is one of honesty, at least. Broader principles of good faith (particularly in the formation of contract) might require a 'principle of fair and open dealing' but it may be that the requirement in section 5(2) is somewhat narrower, requiring concentration simply on how the bill of lading was acquired. This will, perhaps, more usually be an issue between the holder and the previous holder, rather than between the holder and the carrier'.<sup>137</sup>

### 5.3.2 'Holder' and *MalaFide* Possessor under the STDA

In terms of section 3(2) of the STDA, a 'holder' of a sea transport document is defined as any person who is in possession of an original sea transport document and that person is the person to whom the document was issued, the consignee named in the document or the transferee.<sup>138</sup>

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<sup>136</sup> *The Aegean Sea* [1998] 2 Lloyd's Rep. 39 at 59 – 60.

<sup>137</sup> See *Gaskell*, *op cit* at 126.

<sup>138</sup> See *Hare*, *op cit* at 523.

The concept of possession is not defined in the STDA. According to the South African common law possession can only be acquired *corpore et animo*.<sup>139</sup> In order to acquire possession of a thing, physical control must be accompanied by the *animus possidendi* or the intention to possess.<sup>140</sup> Physical control, or even mere awareness of possession, is insufficient to constitute possession.<sup>141</sup> Similar therefore to the position under English law, as expounded by Thomas, J in *The Aegean Sea*,<sup>142</sup> one cannot, in terms of the South African common law, possess a sea transport document and qualify as a 'holder' where one has control but lacks a particular subjective state of mind.<sup>143</sup>

Possession need not necessarily be lawful.<sup>144</sup> A thief could therefore qualify as a 'holder' of, for example, a bearer bill for purposes of the STDA. The extent to which such a thief would obtain any rights under the bill is determined by section 8 of the STDA which deals with the acquisition of possession of sea transport documents in instances where possession is obtained in bad faith. Section 8(1)(a) provides that no person shall be entitled to any rights or defences under the STDA in instances where that person, at the time of acquiring possession, knew or had reasonable grounds for believing that –

- 'i) the goods to which the document related had not been shipped or received for shipment; or
- ii) the person from whom possession was acquired had no right to transfer the document or any right thereunder'.

The South African courts have repeatedly described contracts as acts involving good faith.<sup>145</sup> There is, however, in terms of the South African common law, like the English law, no general overriding requirement for contracts to be concluded or exercised in good faith.<sup>146</sup> In

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<sup>139</sup> See *Kleyn and Boraine, op cit* at 118; *Sonnekus and Neels, op cit* at 132.

<sup>140</sup> See *Kleyn and Boraine, op cit* at 118; *Sonnekus and Neels, op cit* at 132.

<sup>141</sup> See *Kleyn and Boraine, op cit* at 118. See also the decision of the South African Supreme Court of Appeal in *The Mariannina* 1976 (4) SA 464 (SCA) where it was held that the shipper must relinquish its *animus possidendi* in favour of the indorsee to whom the relevant bill of lading is indorsed in order to divest itself of possession of the goods.

<sup>142</sup> *The Aegean Sea* [1998] 2 Lloyd's Rep. 39.

<sup>143</sup> See *Hare, op cit* at 550.

<sup>144</sup> See *Sonnekus and Neels, op cit* at 165.

<sup>145</sup> *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) at 802; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) at 652; *Mutual & Federal Insurance Company Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) at 433.

<sup>146</sup> See van der Merwe, van Huyssteen, Reinecke, Lubbe & Lotz *Contract: General Principles* Juta & Co Ltd, 1993 at 233. See also *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) where the then Appellate Division decided that the *exceptio doli generalis*, as a technical remedy (instrument of equity) was not a part of our law.



order to ensure the fair operation of contracts between parties, *van der Merwe et al*, like *Gaskell*, suggest the following:

‘A better approach would be to accept that good faith, as a value or principle which underlies and informs the more technical rules of the law of contract and in which must be given concrete content when applied in particular instances (such as how the bill of lading was acquired), also applies to the operation of a contract’ (inserted).<sup>147</sup>

Section 8(1)(a)(ii) of the STDA reflects well known South African common law principle *nemo plus iuris ad alium transferre potest quam ipse habuit*. In terms of this principle, ‘no one can transfer more rights to another than he himself has’.<sup>148</sup>

Section 3(3) contemplates lost sea transport documents and requires that a person ‘must be regarded as being in possession ... of an original sea transport document’ in instances where the document is lost and that person would have been entitled to possession of the original document if it could be produced.<sup>149</sup> This clause was apparently inserted into the STDA in order to provide for some degree of flexibility and to cater for those instances where only a faxed copy of the relevant sea transport document could be produced.<sup>150</sup>

## 5.4 Representations in Bills of Lading and Other Sea Transport Documents

### 5.4.1 Section 4 of UK COGSA '92

Section 4 of UK COGSA '92 provides that a bill of lading, signed by the master of a ship or a person with authority to sign the bill of lading, shall in the hands of the holder be conclusive evidence as against the carrier of the receipt for shipment or actual shipment of the goods concerned.<sup>151</sup> The Law Commissions saw it fit to introduce this provision in order to deal

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<sup>147</sup> See *van der Merwe et al*, *op cit* at 233.

<sup>148</sup> Hiemstra and Gonin, *Trilingual Legal Dictionary*, Juta & Co. 1992 at 236.

<sup>149</sup> See *Hare*, *op cit* at 523.

<sup>150</sup> See *Government Gazette* No.18541 of 12 December 1997 *Draft Sea Transport Documents Bill - Invitation to Comment* at 6, cl 30.3.

<sup>151</sup> See *Halsbury's*, *op cit* at par 1565. See Humphries & Higgs, *An Overview of the Implications of the Carriage of Goods by Sea Act 1992* (1993) *J. of Business Law* 61 at 64; Howard, *The Carriage of Goods by Sea Act 1992* (1993) 24 *Journal of Maritime Law and Commerce* 181 at 189; Reynolds, *The Carriage of Goods by Sea Act 1992* (1993) *Lloyd's Maritime & Commercial L.Q.* 436 at 443; See also *Rights of Suit* at 206; .

with the inadequacies of the rule in *Grant v Norway*<sup>152</sup> and the subsequent attempt to put things right by way of section 3 of the 1855 Act.<sup>153</sup> As discussed above, section 3 of the 1855 Act was effective only as against the Master or ‘other person so signing’.<sup>154</sup> Section 4 creates a statutory estoppel in favour of the bill of lading holder effectively disposing, to some extent, of the rule in *Grant v Norway*.<sup>155</sup>

The right of estoppel shall not apply where the bill of lading has not been transferred.<sup>156</sup> Section 5(5) of UK COGSA ’92 provides that the Act:

‘shall have effect without prejudice to the application ... of the rules (the Hague-Visby Rules which for the time being have force of law by virtue of section 1 of the [1971 c.19] Carriage of Goods by Sea Act 1971’.

Therefore, in the absence of transfer, Art III Rule 4 of the Hague-Visby Rules provides that the bill of lading shall only be *prima facie* evidence of receipt for shipment.<sup>157</sup>

Furthermore, section 4 applies specifically to bills of lading and not to any other non-transferable document such as a sea waybill. The party identified in a sea waybill will therefore not benefit from the statutory estoppel created under this section.<sup>158</sup>

So-called ‘claused’ or ‘qualified’ bills of lading that contain statements such as ‘weight and quantity unknown’ will be conclusive of very little. Similarly, bills indorsed with the words ‘shipper’s count’ or ‘STC (said to contain)’ will only be evidence of a single package and the

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<sup>152</sup> *Grant v Norway* [1851] 10 CB 665.

<sup>153</sup> See discussion in section 3 above.

<sup>154</sup> *V/O Rasnoimport v. Guthrie & Co* [1996] 1 Lloyd’s Rep. 1. See also Reynolds, *The Carriage of Goods by Sea Act 1992* (1993) *Lloyd’s Maritime & Commercial L.Q.* 436 at 443.

<sup>155</sup> Although some writers are of opinion that this section has displaced the *Grant v Norway* principle in its entirety, *Hare, op cit* at 546 expresses the view that until such time as the decision is overturned or repealed, the principle still enjoys some measure of application to shipments not subject to the Hague-Visby Rules. See *Hare, op cit* at 546 fn 30 where the author refers to Hill *Maritime Law* 4<sup>th</sup> Edition at 496 shares the same view. See contrary view in Howard, *The Carriage of Goods by Sea Act 1992* (1993) 24 *Journal of Maritime Law and Commerce* 181 at 189.

<sup>156</sup> See Humphries & Higgs, *An Overview of the Implications of the Carriage of Goods by Sea Act 1992* (1993) *J. of Business Law* 61 at 65.

<sup>157</sup> See Humphries & Higgs, *An Overview of the Implications of the Carriage of Goods by Sea Act 1992* (1993) *J. of Business Law* 61 at 65.

<sup>158</sup> See Humphries & Higgs, *An Overview of the Implications of the Carriage of Goods by Sea Act 1992* (1993) *J. of Business Law* 61 at 65.

shipper will bear the onus of proving the quantity of goods shipped in terms of the bill of lading.

Although there is merit in the argument that carriers should be bound by their representations no matter what documents they sign, the Law Commissions believed that they had no mandate to legislate and extend the Hague-Visby Rules to other documents like the sea waybill. Under section 1(6)(b) of the UK COGSA '71, where the Rules apply to non-negotiable documents such as sea waybills, the second sentence of Art III Rule 4 shall be expressly disapplied with the result that sea waybills are merely *prima facie* evidence of the receipt by the carrier of the goods to which the sea waybill relates.<sup>159</sup>

Of particular interest, the P & O Nedlloyd Non-Negotiable Waybill contractually extends the application of Art III Rule 4 to waybills in order to bridge the gap left by section 1(6)(b) of UK COGSA '71 and UK COGSA '92.<sup>160</sup>

#### 5.4.2 Section 6 of STDA: Evidence of Shipment

Section 6 of the STDA provides as follows:

‘A sea transport document that-

- (a) represents that goods have been shipped on board a vessel or have been received for shipment on board a vessel; and
- (b) has been signed by the master of the vessel or by another person who had the actual authority, whether express or implied, or the ostensible authority of the carrier to sign that document,

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<sup>159</sup> Section 1(6)(b) of COGSA '71 (UK) provides that:

“... the Rules shall have force of law in relation to ... 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 ... 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”.

For ease of reference, the ‘second sentence of paragraph 4’ of Article III Rule 4 of the Hague-Visby Rules states that ‘proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith’. See also Humphries & Higgs, *An Overview of the Implications of the Carriage of Goods by Sea Act 1924* (1993) *J. of Business Law* 61 at 65.

<sup>160</sup> See *Gaskell, op cit* at 732.

is, as against the carrier-

- (i) *prima facie* evidence in favour of a holder of the document, who is the shipper or other person to whom it was issued; and
- (ii) conclusive evidence in favour of a subsequent holder,

of the shipment of the goods or of their receipt for shipment, as the case may be.’

The similarity in the wording of section 6 of the STDA and section 4 of UK COGSA '92 is clearly evident. Both Acts contain the conclusive evidence provisions in favour of the ‘subsequent holder’ and dispel, to a certain extent, the application of the *Grant v Norway* principle. No proof to the contrary may be tendered except possibly that the subsequent holder was not bona fide, as required by section 8, and is therefore debarred from relying on the representation under this section.<sup>161</sup>

Section 2(2) of the STDA provides that section 3,4,5 and 6 shall apply only to sea transport documents that are ‘transferable or negotiable’. Therefore, the conclusive evidence provision in section 6 of the STDA, like UK COGSA '92, only applies in relation to subsequent holders of transferable bills of lading. Sea waybills and non-negotiable receipts do not benefit from the statutory estoppel. The South African Carriage of Goods by Sea Act, No 1 of 1986 ("SA COGSA '86") which makes the Hague-Visby Rules applicable in South Africa contains in section 1(1)(c),<sup>162</sup> similar wording to that which appears in section 1(6)(b) of the UK COGSA '71, and also provides for the non-application of the second sentence of Art III Rule 4 where the Hague-Visby Rules apply to non-negotiable documents such as sea waybills. Sea waybills are therefore only *prima facie* evidence of the receipt by the carrier of the goods to which the sea waybill relates.

Unlike the clarity given in section 5(5) of UK COGSA '92, it is unclear under South African law as to what extent the STDA will supersede the provisions of SA COGSA '86. As *Hare*

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<sup>161</sup> See *Government Gazette* No.18541 of 12 December 1997 *Draft Sea Transport Documents Bill - Invitation to Comment* at par 30.5.

<sup>162</sup> Section 1(1)(c) provides:

‘any receipt which is a non-negotiable document marked as such if the contract contained in it or evidenced by it or pursuant to which it is issued 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 to the necessary modifications and in particular with the omission of Art III of the Rules of the second sentence of paragraph 4 and paragraph 7.’

suggests, this will only be possible to the extent that the STDA does not lessen the carrier's minimum liability laid down in the Hague-Visby Rules.<sup>163</sup>

## 5.5 Application of the Acts in General

The manner in which the UK COGSA '92 and STDA differ in their general application shall be discussed below.

### 5.5.1 General Application of UK COGSA '92

First and foremost, the UK COGSA '92 repeals the 1855 Act in section 6(2). It further provides in section 6(3) that 'nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act'.<sup>164</sup>

Finally, section 5(5) of UK COGSA '92 provides that the provisions of the 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 [1971 c 19] Carriage of Goods by Sea Act 1971'.<sup>165</sup>

### 5.5.2 General Application of the STDA

Unlike UK COGSA '92, section 2(1) of the STDA provides that the Act shall apply to sea transport documents issued before and after the commencement of the STDA – the decision of the legislature being to clarify any uncertainty in this field of law.<sup>166</sup>

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<sup>163</sup> See *Hare, op cit* at 524.

<sup>164</sup> See *Title to Sue, op cit* at 208. See also Reynolds, *The Carriage of Goods by Sea Act 1992* (1993) *Lloyd's Maritime & Commercial L.Q.* 436 at 440.

<sup>165</sup> See *Rights of Suit* at 207.

<sup>166</sup> See *Government Gazette* No.18541 of 12 December 1997 *Draft Sea Transport Documents Bill - Invitation to Comment* at 6, cl 27.

The STDA shall also apply to goods ‘consigned to a destination in the Republic or landed, delivered or discharged in the Republic’.<sup>167</sup> In respect of proceedings, section 2(1)(c) provides that the STDA applies to:

‘any proceedings instituted in the Republic in any court or before any arbitration tribunal after the commencement of this Act in respect of any sea transport document or goods contemplated in paragraph (a) or (b), irrespective of whether those proceedings relate to a cause of action arising before or after the commencement of this Act.’

The intention of the South African legislature is clear. The STDA effectively applies to all sea transport documents that are in issue with regard to matters in the Republic. *Hare* makes the following comment:

‘The intention of this section 2(1)(c) is to bind the *lex fori* to the terms of the Bill, thereby regulating both present and future cargo claims based upon all forms of sea transport documents and in relation to all goods’.

In relation to the interplay between the STDA and the Hague-Visby Rules made applicable by virtue of the SA COGSA ’86, the position is not as clearly ‘spelt’ as in English law (more specifically section 5(5) of UK COGSA ’92). Although the STDA may supercede the SA COGSA ’86 when it comes into force, it may do so arguably only to the extent that it does not lessen the carrier’s minimum liability laid down in the Hague-Visby Rules.<sup>168</sup>

## 5.6 Application to Certain Other Sea Transport Documents

With the advent of containerization and other significant developments in the transport industry in the last thirty plus years, the shipping industry has witnessed an increased usage in alternative shipping documents such as the sea waybill and the non-negotiable receipt which are often employed not only for their convenience in overcoming the delays caused by ‘slow’ bills of lading but because of their suitability to electronic communication.<sup>169</sup> The extent and manner in which the UK COGSA ’92 and the STDA deal with other forms of bills of lading and sea transport documents shall be analysed in more detail below.

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<sup>167</sup> Section 2(1)(b) of the STDA.

<sup>168</sup> See *Hare, op cit* at 524.

<sup>169</sup> See *Proctor, op cit* at 83.

### 5.6.1 'Received for Shipment' Bills of lading

A carrier will issue a 'received for shipment' bill of lading where the goods have been received into its charge but have not yet been loaded on board.<sup>170</sup> The manner in which English law dealt with 'received for shipment' bills of lading in the past caused doubt as to the applicability of the 1855 Act to such bills and whether valid title therein could be transferred.<sup>171</sup> For example, the Privy Council in *The Marlborough Hill v Alex Cowen and Sons Ltd*<sup>172</sup> interpreted the reference to 'bill of lading' in section 1 of the 1855 Act so as to include a 'received for shipment' bill of lading.<sup>173</sup> The contrary view was expressed in *Diamond Alkali Export Corp. v Fl Bourgeois*<sup>174</sup> where it was held that a 'received for shipment' bill of lading, in the context of the international sale of goods, is not a bill of lading for purposes of a CIF<sup>175</sup> contract unless the contract expressly provides for a bill of lading in that form.<sup>176</sup>

The Hague-Visby Rules do however make provision for a 'received for shipment' bill of lading to be converted to a 'shipped bill' when the goods are loaded on board ship by giving the shipper the right to demand that the date of actual shipment be noted on the bill.<sup>177</sup>

#### 5.6.1.1 Section 2(1)(b) of UK COGSA '92

Section 2(1)(b) of UK COGSA '92 dispels any doubt as to the transferability of a 'received for shipment' bill of lading and specifically confirms that any reference to a bill of lading in

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<sup>170</sup> See further *Tetley, op cit* at 228; *Proctor, op cit* at 47; and Chuah *Law of International Trade* Sweet & Maxwell, 1998 at 144.

<sup>171</sup> Glass and Cashmore *Introduction to the Law of Carriage of Goods* Sweet & Maxwell, 1989 at par 5.39. See further Gaskell, Debattista and Swatton *Chorley and Giles' Shipping Law* 8th Edition Pitman, 1988 at 251.

<sup>172</sup> *Marlborough Hill v Alex Cowen and Sons Ltd* [1921] 1 AC 444.

<sup>173</sup> A view preferred by *Carver, op cit* at para. 1613. See also *Hare, op cit* at 525 fn 222.

<sup>174</sup> *Diamond Alkali Export Corp. v Fl Bourgeois* [1921] 3 KB 443. See further *Halsbury's, op cit* at par 1532, fn 3. See further *Gaskell, Debattista and Swatton, op cit* at 251.

<sup>175</sup> Incoterm: Cost, Insurance and Freight. See *Hare, op cit* at 454.

<sup>176</sup> See also *Yelo v SM Machado & Co Ltd* [1952] 1 Lloyd's LR 183 where the court held that a 'received for shipment' bill of lading was not good tender under a FOB ('Free on Board') contract. See *Hare, op cit* at 452.

<sup>177</sup> Article III, Rule 4. See further *Gaskell, Debattista and Swatton, op cit* at 251; and *Proctor, op cit* at 47.

the Act includes references to ‘received for shipment’ bills of lading.<sup>178</sup> The Law Commissions sought to resolve the issue by confirming the status of container bills which ‘were all invariably in ‘received for shipment’ form’.<sup>179</sup> In the circumstances, rights and liabilities embodied in ‘received for shipment’ bills of lading are clearly transferable under UK COGSA ’92.<sup>180</sup>

### 5.6.1.2 ‘Received for Shipment’ Bills of Lading under the STDA

The position of the ‘received for shipment’ bill of lading is less clear under the STDA than under UK COGSA ’92. The STDA does not include a definition for the term ‘bill of lading’.<sup>181</sup> The STDA further does not specifically incorporate ‘received for shipment’ bills in the term ‘bill of lading’ as done in UK COGSA ’92. The STDA does however make reference to ‘received for shipment’ bills in section 6(a) which provides that a sea transport document which ‘represents that goods ... have been received for shipment on board a vessel ... shall be prima facie evidence in favour of the holder of the document, who is the shipper ... and conclusive evidence in favour of a subsequent holder’.

Current South African law would look to English law as at 1 November 1983 which includes those decisions that cast doubt over the ability of rights in ‘received for shipment’ bills to be transferred. However, in view of the reference to ‘received for shipment’ bills in section 6 as well as the very wide definition of ‘sea transport document’ in section 1 of the STDA, it is doubtful whether a ‘received for shipment’ bill would not be regarded as a sea transport document for purposes of the STDA.<sup>182</sup> The transferability of the rights in a ‘received for shipment’ bill would arguably only be limited by section 2(2) of the STDA which makes the

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<sup>178</sup> See *Halsbury’s, op cit* at par 1560 fn 3. See further Reynolds, *The Carriage of Goods by Sea Act 1992* (1993) *Lloyd’s Maritime & Commercial L.Q.* 436 at 443 where it is argued that the Hague-Visby Rules do not attach to contracts where the goods have not been shipped at all.

<sup>179</sup> *Rights of Suit* at 201.

<sup>180</sup> See *Gaskell, op cit* at 140.

<sup>181</sup> See Government Gazette Notice No. 18541 of 12 December 1997: *Draft Sea Transport Documents Bill – Invitation to Comment* at par 30.1 in which it is stated that the phrase ‘bill of lading’ was left undefined in the draft STDA on the basis that it has ‘an established meaning’ and that any attempt at defining it ‘might obscure rather than clarify the position’.

<sup>182</sup> Section 1 of the STDA defines a sea transport document as ‘(a) a bill of lading; (b) a through bill of lading; (c) a combined transport bill of lading; (d) a sea waybill; or (e) any consignment note, combined transport document or other similar document, relating to the carriage of goods either wholly or partly by sea, irrespective of whether it is transferable or negotiable’.



relevant transfer provisions of the Act applicable only to 'transferable' or negotiable' sea transport documents.

## 5.6.2 Ship's Delivery Orders

Ship's delivery orders are documents commonly used in the bulk cargo trade in instances where consignments which are usually carried under one set of bills of lading are, with the issue of such delivery orders, split and sold in parts to more than one buyer.<sup>183</sup> A ship's delivery order may either be a document issued directly by or on behalf of the carrier whilst the cargo is in its possession and which contains an undertaking that the cargo will be delivered to the holder or to the order of a named person; or it may be a document issued by the seller of the cargo to the carrier ordering the carrier to deliver to the order of a named person (a so-called merchant's delivery order) and there is attornment (acknowledgement) by the carrier to that person.<sup>184</sup> Ship's delivery orders do not normally contain the terms of the contract of carriage but often incorporate the terms of the relevant bill of lading.

### 5.6.2.1 Ship's Delivery Orders under UK COGSA '92

As already mentioned above,<sup>185</sup> UK COGSA '92 has extended rights of suit in respect of ship's delivery orders by virtue of section 2(1)(c).<sup>186</sup> Section 1(4) of the Act defines a ship's delivery order as the following:

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<sup>183</sup> See *Halsbury's, op cit* at par 1586; *Rights of Suit* at 201; *Proctor, op cit* at 74.

<sup>184</sup> See *Gaskell, op cit* at 144; *Halsbury's, op cit* at par 1586; *Rights of Suit* at 201.

<sup>185</sup> See par 5.1.1.1 above.

<sup>186</sup> Section 2(1)(c) provides that:

'Subject to the following provisions of this section, a person who becomes –  
 ... 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 ... 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'.

See further *Gaskell, op cit* at 144.

'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'.

Prior to the enactment of UK COGSA '92, buyers of parts of bulk cargo at sea went unprotected due to the provisions of the English Sale of Goods Act, 1979, which did not allow for the ownership of unascertainable goods to be transferred in contracts of sale unless and until such time as the goods were ascertained.<sup>187</sup> Difficulties with the wording of section 1 of the 1855 Act complicated matters further. Section 1 of the 1855 Act provided for the transfer of rights of suit to consignees or indorsees of bills of lading 'upon by reason of the consignment or indorsement' which could not occur in the case of parts of bulk cargo where the goods were almost always ascertained at the port of discharge after the consignment or indorsement.<sup>188</sup> Section 2(1) of UK COGSA '92 was therefore enacted to alleviate the predicament of receivers of parts of bulk cargo.

The recipient under a ship's delivery order is, under section 2(3), limited to asserting rights of suit in respect of the goods described in the order and does not extend to other goods covered by the underlying contract of carriage.<sup>189</sup>

The person entitled to delivery under a delivery order may also by virtue of section 3(2) incur liabilities under the contract of carriage in the same way as the lawful holder of a bill of lading, in other words, by taking or demanding delivery from the carrier but only in relation to the goods described in the order.<sup>190</sup> In the words of section 3(2), 'the liabilities ... shall exclude liabilities in respect of any goods to which the order does not relate'. Similar to a bill of lading holder, the person identified in the delivery order may 'become subject to the same liabilities under that contract as if he had been a party to the contract of carriage'.<sup>191</sup>

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<sup>187</sup> See *Rights of Suit* at 196.

<sup>188</sup> See *Rights of Suit* at 196.

<sup>189</sup> See *Rights of Suit* at 204.

<sup>190</sup> See *Gaskell, op cit* at 144. See also *Rights of Suit* at 206.

<sup>191</sup> See *Gaskell, op cit* at 145.

*Gaskell* warns that care must be taken in drafting ship's delivery orders as a merchant's delivery order cannot pass rights of suit unless there is attornment by the carrier.<sup>192</sup>

### 5.6.2.2 Ship's Delivery Orders under the STDA

Although section 1 of the STDA appears to include quite a number of documents in the list of sea transport documents, no express mention is made of a ship's delivery order.<sup>193</sup> It is arguable that a ship's delivery order may constitute a 'similar document relating to the carriage of goods either wholly or partly by sea' under section 1(e), in which case the transfer of rights provisions of the STDA will be applicable to the extent that they are not excluded by section 2(2) which requires the sea transport document to be 'transferable or negotiable' in order for those provisions to apply.

However, in terms of the South African Roman Dutch law principle of *commixtio*, where two solids are mixed together to the extent that they are indistinguishable from one another, the buyers become joint owners of the whole bulk provided that the mixing took place with their consent.<sup>194</sup> In the absence of consent, there is no transfer of ownership from the seller but the buyer may vindicate that portion of the mixture which is proportionate to his contribution or purchase price paid.<sup>195</sup> In *Andrews v Rosenbaum & Co*<sup>196</sup> the court held the following:

'The case ... is similar to that mentioned by Voet (6.1.27), where articles belonging to two different owners have become mixed together, so that it is either impossible or difficult to identify and separate them again. Here the owner retains his right, where he can vindicate a definite and given portion of such mixed articles, and even an uncertain part when he is justly ignorant of the share actually belonging to him. Voet refers in support of this to the *Digest* (6.1, 113, 4 and 5), and to the familiar passage in the *Institutes* (2.1.28), where it is laid down that if the wheat of two persons is mixed with their consent, the mixed wheat becomes their common property; but if the wheat of two persons becomes mixed together by accident, or by one of them without the consent of the other, then the

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<sup>192</sup> See *Gaskell*, *op cit* at 144. And, *Halsbury's*, *op cit* at 1586.

<sup>193</sup> Section 1 of the STDA provides that a 'sea transport document' means (a) a bill of lading; (b) a through bill of lading; (c) a combined transport bill of lading; (d) a sea waybill; or (e) any consignment note, combined transport document or other similar document, relating to the carriage of goods either wholly or partly by sea, irrespective of whether it is transferable or negotiable'.

<sup>194</sup> See *Kleyn and Boraine*, *op cit* at 222; *Sonnekus and Neels*, *op cit* at 302.

<sup>195</sup> See *Kleyn and Boraine*, *op cit* at 222; *Sonnekus and Neels*, *op cit* at 302.

<sup>196</sup> *Andrews v Rosenbaum & Co* 1908 EDC 419.

mixed wheat is not common property, any more than a herd would be, where the cattle of two persons have become mixed together. If under the circumstances one of the two persons retains the whole of the mixed wheat, the other will have a real action for the recovery of the amount of wheat belonging to him. It shall be left to the discretion of the judge to determine and estimate the value of the wheat which belonged to each'.<sup>197</sup>

The position under the South African common law is therefore similar to the position under the English law prior to the enactment of the UK COGSA '92; ie. when the provisions of the Sale of Goods Act, 1979, and the 1855 Act applied. In the circumstances and without express statutory provision providing otherwise, it does not appear that the rights of suit in ship's delivery orders are transferable under the STDA as is the case under UK COGSA '92.

### 5.6.3 Sea Waybills

The sea waybill is particularly useful in container transport where sea voyages are relatively short and a document of title is unnecessary either to secure payment or to sell the goods in transit.<sup>198</sup> The carrier is ordered to deliver the goods to a named consignee who needs only to identify himself at the port of discharge in order to obtain delivery of the goods. It is therefore not necessary to transmit the sea waybill to the port of discharge. A sea waybill is evidence of the contract of carriage and functions as a receipt for the goods described in it but is not a document of title and as such is not a bill of lading.<sup>199</sup>

One of the difficulties experienced in utilizing sea waybills is that the international liability regimes of the Hague and Hague-Visby Rules do not apply to contracts of carriage which are not evidenced by bills of lading.<sup>200</sup> It is therefore possible for shipments under sea waybills not to fall under the mandatory application of the liability regimes and as such may exist in a

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<sup>197</sup> *Andrews v Rosenbaum & Co* 1908 EDC 419 at 425. See also *The Areti L* 1986 (2) SA 446 (C) where the court held that by virtue of the Roman Dutch law principle of *confusio* the mixture of two liquids is jointly owned by two parties and as such is amendable to attachment by the creditors of each party. See *Hare, op cit* at 76.

<sup>198</sup> See *Title to Sue* at 201 and 203. See Reynolds, *The Carriage of Goods by Sea Act 1992 LMCLQ* 436 at 438 where a sea waybill is described as 'evidence of the contract of carriage and functions as a receipt for the goods but is not a document of title and as such is not a bill of lading'. See *Proctor, op cit* at 83. See also *Gaskell, op cit* at 141 and 713 and *Hare, op cit* at 444.

<sup>199</sup> Reynolds, *The Carriage of Goods by Sea Act 1992 LMCLQ* 436 at 438.

<sup>200</sup> See *Hare, op cit* at 446.

'legislative vacuum, with no uniformity'.<sup>201</sup> The Comité Maritime International (CMI)<sup>202</sup> therefore, in an attempt to fill this gap, introduced the Uniform Rules for Sea Waybills which apply 'when adopted by a contract of carriage which is not covered by a bill of lading or similar document or title, whether the contract be in writing or not'.<sup>203</sup> The Uniform Rules provide for uniformity in the procedures and liabilities arising from the use of sea waybills and further, deal with the issue of transfer of rights from the shipper to the party identified in the sea waybill.<sup>204</sup> They are intended to be incorporated voluntarily into contracts of carriage evidenced by sea waybills.<sup>205</sup>

### 5.6.3.1 Relevant Provisions of UK COGSA '92

Motivated by the general increase in the usage of sea waybills in container transport and in anticipation of future problems, the Law Commissions sought to make UK COGSA '92 applicable to sea waybills. More particularly, to enable the consignee named in a sea waybill to sue on the contract of carriage without prejudice to the rights of the shipper.<sup>206</sup> In the words of the Law Commissions,

'The waybill is a typical case of a contract for the benefit of a third party and thus suffers from the familiar problem that the person who has suffered loss (the consignee) is unable to sue the person responsible for the damage (the carrier), whereas the person who is able to sue (the shipper) has suffered no loss, has no reason to sue and may in any event be unable to recover substantial damages. Hence, including sea waybills in the Bill is a further, commercially desirable, inroad into the doctrine of privity of contract'.<sup>207</sup>

By virtue of section 1(1)(b), UK COGSA '92 therefore applies to 'any sea waybill'. Section 1(3) defines a sea waybill as 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

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<sup>201</sup> See *Hare, op cit* at 447.

<sup>202</sup> The CMI is a non-governmental international organisation which strives towards 'the unification of maritime law in all aspects'.

<sup>203</sup> See *Hare, op cit* at 568 fn 122.

<sup>204</sup> See *Hare, op cit* at 447.

<sup>205</sup> See *Hare, op cit* at 447.

<sup>206</sup> See *Rights of Suit* at 199 - 200.

<sup>207</sup> See *Rights of Suit* at 201.

- (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract’.

More relevant to the plight of the sea waybill consignee is section 2(1)(b) which provides that a person:

‘who becomes 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 ... shall (by virtue of becoming ... 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’.

The Act treats sea waybills differently to bills of lading. Firstly, the Law Commissions created a different mechanism for the transfer of rights of suit under a sea waybill than that adopted for bills of lading due to the very nature of the sea waybill being non-transferable.<sup>208</sup> By virtue of section 2(1)(b), rights of suit under a sea waybill are transferred to the consignee identified in the sea waybill unlike the position of the bill of lading consignee who acquires rights by virtue of it being the lawful holder of the bill of lading. Secondly, section 2(5) provides that rights acquired under section 2(1) operate without prejudice to the rights of the sea waybill shipper. This is also contrary to the position of the bill of lading shipper whose rights, by virtue of the same sub-section, are extinguished upon transfer.<sup>209</sup>

*Gaskell* is of the opinion that the acquisition of rights by a sea waybill consignee under section 2(1)(b) is dependant upon the rights of the shipper to, for example, vary delivery instructions to the carrier.<sup>210</sup> The writer’s opinion is motivated by the use the words ‘delivery of the goods ... *in accordance with the contract*’ which seem to suggest that delivery as opposed to the fact that a person is named as a consignee in the sea waybill is the decisive factor. Furthermore, the use of the words ‘is the person to whom delivery ... *is to be made*’, in future tense, indicate that the rights must be capable of acquisition before delivery. The writer illustrates this by way of the following example. The shipper under a sea waybill may, whilst the goods are in transit and regardless of the fact that the sea waybill identifies X as the

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<sup>208</sup> See *Gaskell, op cit* at 142. See *The Chitral* [2000] 1 Lloyd's Rep. 529 where it was held that a bill of lading which contained a consignee box filled in with ‘if order state notify party’ and no notify party was stated therein, was a straight bill and it was the shipper who could sue on its terms.

<sup>209</sup> See *Gaskell, op cit* at 142. See further Law Com. No. 196, Notes of Partial Dissent to *Rights of Suit*, pp. 43 – 44 for a criticism of the way in which the UK COGSA '92 treats bills of lading shippers and sea waybill shippers differently.

consignee, instruct the carrier to make delivery to Y in which case X would not acquire any rights of suit, and Y would, despite not being named in the sea waybill.<sup>211</sup> Section 5(3) of the Act in any event provides as follows:

‘References in this Act to a person’s being identified in a document include reference 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’.

As a result of this subsection, the appearance of the word ‘identifies’ in section 1(3)(b) effectively means that the sea waybill consignee can include a person who is not originally named in the sea waybill but who is later identified as the consignee.

The consignees of both sea waybills and bills of lading are treated similarly under section 3. In terms of section 3(1), a sea waybill consignee vested with rights under section 2 who demands delivery or makes a claim under the contract of carriage shall, like a bill of lading consignee, ‘become subject to the same liabilities under the contract as if he had been a party to that contract’.<sup>212</sup> As with bills, section 3(3) does not affect the liability of the shipper under sea waybills.<sup>213</sup>

Regarding representations made in sea waybills, the conclusive evidence provisions of section 4 are drafted in favour of bills of lading holders only with the result that representations made in sea waybills are only *prima facie* evidence against the carrier.<sup>214</sup> The Law Commissions were reluctant to widen the application of section 4 to other documents such as the sea waybill on grounds of them having no mandate to extend Article III Rule 4 of the Hague-Visby Rules.<sup>215</sup> More specifically, section 1(6)(b) of UK COGSA ’71 which provides for the application of the Hague-Visby Rules to non-negotiable documents, also provides for the modification of Article III Rule 4 by deleting the second sentence which embodies the conclusive evidence provision.<sup>216</sup>

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<sup>210</sup> See *Gaskell, op cit* at 142.

<sup>211</sup> See *Gaskell, op cit* at 142.

<sup>212</sup> See *Gaskell, op cit* at 142.

<sup>213</sup> See *Gaskell, op cit* at 143.

<sup>214</sup> See *Rights of Suit* at 207 and *Gaskell, op cit* at 143.

<sup>215</sup> See *Rights of Suit* at 207.

<sup>216</sup> See *Rights of Suit* at 207 and *Gaskell, op cit* at 143.

### 5.6.3.2 Relevant Provisions of the STDA

There is a clear distinction between the STDA and UK COGSA '92 in the manner in which Acts approach sea waybills. Section 2(1) of the STDA provides for the application of the Act 'to any sea transport document issued in the Republic'. Section 1 defines a 'sea transport document' so as to include a sea waybill. However, section 2(2) of the STDA specifically provides that

'sections 3, 4, 5 and 6 apply only to sea transport documents that are transferable or negotiable, and any reference in those sections to a sea transport document must be construed accordingly'.

A sea waybill by definition is neither negotiable nor transferable. The party identified in a sea waybill acquires no rights or obligations in terms of STDA. Sections 1, 2, 7,8 and 9 which deal with definitions, general applicability of the STDA, delivery, persons acting in bad faith and the making of subsequent regulations, respectively, apply to sea waybills. At best, the representations in the sea waybill are prima facie evidence of the shipment of the goods by virtue of the provisions of SA COGSA '86.<sup>217</sup>

### 5.6.4 Electronic Bills of Lading and Other Sea Transport Documents

Commercial shipping has for centuries operated successfully on the basis of the physical exchange of paper bills of lading. The practical transfer of the bill of lading from shipper to receiver of cargo worked well during times of long sea voyages. However, the advent of containerization, general improvements in transport technology and the speed at which cargo is delivered today has rendered the use of a tangible bill of lading problematic in view of the modern reality of goods arriving at their discharge ports way before the bills of lading.<sup>218</sup> Increasingly, carriers are releasing goods to alleged cargo receivers without production of the original bills of lading against the security of letters of indemnity.<sup>219</sup> This practice undermines

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<sup>217</sup> See discussion under par 5.4.2 above.

<sup>218</sup> See Humphries & Higgs *An Overview of the Implications of the Carriage of Goods by Sea Act 1992* (1993) J. of Business Law 61 at 64; See further Proctor, *op cit* at xiv and 146; and Hare, *op cit* at 467. See further Faber *Electronic Bills of Lading* (1996) Lloyd's Maritime & Commercial L.Q 232.

<sup>219</sup> See Proctor, *op cit* at 146.



the very purpose for which bills of lading were first used; ie. the convenience of their physical transferability.<sup>220</sup> In an effort to speed up the documentary process and to avoid the payment of high demurrage costs, merchants are making more and more use of alternative transport documents, like sea waybills and ship's delivery orders, and modern electronic communication methods such as electronic data interchange (EDI) to facilitate the transmission of such documents.<sup>221</sup> Paperless international transactions are becoming increasingly common. Attempts at replacing the hard copy bill of lading with an electronic alternative and being able to negotiate it electronically challenges the traditional principles of contract formation which is why legislators are hard at work adapting the law in order to adequately deal with these recent commercial developments.<sup>222</sup>

In 1990, the CMI agreed the Rules for Electronic Bills of Lading - a set of voluntary rules which, in basic terms, operate on the basis of the shipper giving irrevocable instructions to the carrier to hold goods for a named consignee who, without production of a document, becomes entitled to receive the goods solely by virtue of the instruction.<sup>223</sup> These Rules make provision for successive transfers while the goods are still in transit and security is achieved by way of a 'private key' which puts the 'holder' in the same position as if it had possession of original bills of lading.<sup>224</sup>

On 16 December 1996, United Nations Commission on International Trade Law (UNCITRAL) produced a 'Model Law on Electronic Commerce with a Guide to Enactment' for the purpose of offering national legislators of trading nations:

'a set of internationally acceptable rules as to how a number of legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as "electronic commerce". The principles expressed in the Model Law are also intended to be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be

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<sup>220</sup> See *Proctor, op cit* at 146.

<sup>221</sup> See *Hare, op cit* at 467 and 564; Humphries & Higgs, *An Overview of the Implications of the Carriage of Goods by Sea Act 1992 (1993) J. of Business Law* 61 at 64; *Proctor, op cit* at 146; *Hare, op cit* at 468; See further Faber *Electronic Bills of Lading LMCLQ (1996) Lloyd's Maritime & Commercial L.Q* 232 at 233.

<sup>222</sup> See Siegfried Eiselen *Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods 1980* available on the following website: <[www.cisg.law.pace.edu/cisg/biblio/eiselen1.html](http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html)>. See further Howard, *The Carriage of Goods by Sea Act 1992 (1993) 24 Journal of Maritime Law and Commerce* 181-190

<sup>223</sup> See *Gaskell, op cit* at 23.

<sup>224</sup> See *Gaskell, op cit* at 23

needed to overcome the legal obstacles to the increased use of electronic commerce.<sup>225</sup>

The Model Law has no direct application but serves to provide a framework for national laws on legal aspects of EDI. It therefore has no direct effect on the application of international carriage conventions.<sup>226</sup> A number of countries have however based their domestic legislation on the Model Law for example Australia, Singapore and Bermuda. The extent to which both English and South African law cater for modern methods of transferring sea transport documents shall be analysed in more detail below.

#### 5.6.4.1 Section 1(5) and (6) of UK COGSA '92

In terms of section 1(5) of UK COGSA '92, the Secretary of State may by way of regulations make provision for the application of the Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to:

- '(1) the issue of a document to which the 1992 Act applies,
- (2) the indorsement, delivery or other transfer of such a document; or
- (3) the doing of anything else in relation to such a document'.<sup>227</sup>

Following on from section 1(5), section 1(6) empowers the Secretary of State to make such modifications to the Act in this regard as it deems appropriate.<sup>228</sup>

In light of the increased usage of sea waybills and paperless transactions, the Law Commissions thought it would be 'commercially desirable' to make provision for the enabling legislation in order not to limit the Act by 'the state of the art' at the time of the enactment.<sup>229</sup> It appears however that no regulations have as yet been issued.<sup>230</sup> Despite this, *Gaskell* still believes the provisions of UK COGSA '92 will apply in instances where an electronic bill of lading is used.<sup>231</sup>

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<sup>225</sup> See *Hare, op cit* at 468.

<sup>226</sup> See *Gaskell, op cit* at 24.

<sup>227</sup> See *Rights of Suit* at 202; *Halsbury's, op cit* at par 1587.

<sup>228</sup> See *Gaskell, op cit* at 27.

<sup>229</sup> See *Rights of Suit* at 199 and 202.

<sup>230</sup> See *Gaskell, op cit* at 27.

According to English law, most contracts do not need to be writing in order to be enforceable. Traditional forms of record keeping such as paper and the requirement of a signature have however caused most states to develop their laws around paper-based transactions. English legislation similarly makes countless reference to writing and signature.<sup>232</sup> An important development in English law is section 7 of the United Kingdom Electronic Communications Act 2000 (c. 7),<sup>233</sup> which allows for electronic signatures to be admissible in evidence without any presumption as to their validity.<sup>234</sup> In terms of section 8 of this Act, the appropriate Minister may modify the provisions of existing legislation, which presumably includes UK COGSA '92, for a number of purposes (listed in subsection (2)) designed for authorising or facilitating the use of electronic communications or electronic storage. For an example of such a purpose, section 2(a) provides for 'the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument'. *Gaskell* believes that section 8 is wide enough to allow for the modifications of UK COGSA '71 so as to apply the Hague-Visby Rules to electronic bills of lading.<sup>235</sup>

#### 5.6.4.2 Section 9 of the STDA: Regulations

Section 9 of the STDA similarly empowers the Minister of Transport to make regulations:

'prescribing the circumstances in which and the conditions subject to which a record or document produced by a telecommunication system or an electronic or other information technology system, and effecting transactions such as those effected by any sea transport document, is to be regarded as a sea transport document'.<sup>236</sup>

This provision contemplates the making of future regulations for electronic commerce in general which may be based on regimes such as the Model Law or the CMI Rules for

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<sup>231</sup> See *Gaskell, op cit* at 27.

<sup>232</sup> See *Gaskell, op cit* at 27 where mention is made of an estimate that there are over 40 000 statutory references to writing and signature.

<sup>233</sup> The Electronic Communications Act, 2000, received Royal Assent on 25 May 2000.

<sup>234</sup> See *Gaskell, op cit* at 27

<sup>235</sup> See *Gaskell, op cit* at 27.

<sup>236</sup> Section 9(2) of the STDA requires the Minister to publish all proposed regulations in the Government Gazette for comment at least three months before the date contemplated for their enactment.

Electronic Bills of Lading.<sup>237</sup> However, until the STDA comes into force, regard must be had to current South African law in this regard.

Under South African law, an agreement need not necessarily be in writing in order to be valid and enforceable, as is the case under English law. The South African legal system similarly also developed its laws around paper-based transactions. The ‘best evidence’ rule of South African law of evidence which requires the original of a document to be produced, is one such example. The law of evidence is in South African law the only area in which computer-specific legislation has been adopted in the form of an entire statute.<sup>238</sup> The Computer Evidence Act, No. 57 of 1983, was enacted to provide for the admissibility in civil proceedings of evidence generated by computers.<sup>239</sup> Section 1(1) defines a ‘computer print-out’ as:

‘the documentary form in which information<sup>240</sup> is produced by a computer or a copy or reproduction of it, and includes, whenever any information needs to be transcribed, translated or interpreted after its production by the computer in order that it may take documentary form and be intelligible to the court, a transcription, translation or interpretation of which is calculated to have that effect’.<sup>241</sup>

Similar to the wording of the English Interpretation Act of 1978, section 3 of the South African Interpretation Act, No 33 of 1957, provides the following interpretation in respect of expressions relating to ‘writing’:

‘In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form’.

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<sup>237</sup> See *Hare, op cit* at 526 and 570.

<sup>238</sup> LAWSA Vol 5(3) par 13, more particularly footnote 1 thereof which provides the ‘certain statutes have been amended in part to deal with computers: see eg the Copyright Act 98 of 1978’.

<sup>239</sup> The Computer Evidence Act was enacted in response to the decision in *Narlis v SA Bank of Athens* 1976 (2) SA 573 (A) where the court refused accept evidence extracted from the bank’s computerized records to indicate that the respondent had an overdraft with the bank. See LAWSA Vol 5(3) at par 13, fn 3.

<sup>240</sup> Section 1(1) further defines ‘information’ as:

‘any information expressed in or conveyed by letters figures, characters, symbols, marks, perforations, patterns, pictures, diagrams, sounds or any other visible, audible or perceptible sounds’.

<sup>241</sup> The Income Tax Act, No. 58 of 1962 (s 74(1)) has also been amended to so as to include ‘computer print-out as defined in section 1 of the Computer Evidence Act’ in its definition of ‘documents’.

In view of the above, it is unclear whether any reference to a 'bill of lading or other similar document of title' in the Hague-Visby Rules or in the STDA for that matter falls within this interpretation of 'writing'.<sup>242</sup> Although section 3 has never been amended since the Interpretation Act came into force, it is unlikely that this section would not apply to computer print-outs as a 'mode of representing or reproducing words in visible form'. *Hare* suggests that section 3 should, in the interests of certainty, be amended so as to include specific reference to computer data.<sup>243</sup>

Despite the fact that the STDA does not have force of law yet, *Hare* believes that:

'South African law even at this stage ... would be able to give judicial recognition and enforcement to such exchanges by way of computer print-outs as evidence. For even the most complex coded data exchange leaves a footprint which can be extracted and printed out for expert interpretation'.<sup>244</sup>

The South African parliament was recently presented with a Green Paper on Electronic Commerce with a view to developing a policy framework for electronic commerce.<sup>245</sup> Amongst the vast number of issues raised in the paper, Chapter 3, which is based upon the Model Law, deals with 'matters directly affecting the legality and enforceability of commercial transactions'. Attention is drawn to the need for legal recognition of electronic communications and the drawing up of legislation that recognises the validity and enforceability of contracts formed by way of electronic communication as well as the need for legislation which provides clear guidelines as to the admissibility and evidential weight of electronic records. However, *Hare* makes the comment that until legislation is enacted to recognise electronic interchanges, 'it is up to the parties to agree terms voluntarily to empower themselves'.<sup>246</sup>

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<sup>242</sup> See *Hare, op cit* at 569.

<sup>243</sup> See *Hare, op cit* at 569.

<sup>244</sup> See *Hare, op cit* at 571.

<sup>245</sup> The Green Paper on Electronic Commerce for South Africa is published on the following website: [www.polity.org.za/govdocs/green\\_papers/greenpaper/execsummary.html](http://www.polity.org.za/govdocs/green_papers/greenpaper/execsummary.html).

<sup>246</sup> *Hare, op cit* at 571.

## 5.7. Miscellaneous Provisions

### 5.7.1 Delivery in terms of the STDA

Delivery is treated differently under STDA. It functions to absolve the carrier of his obligations if done correctly. Under the UK COGSA '92, it serves to impose the same obligations under the contract of carriage on the holder of the bill of lading, where it takes or demand delivery of the goods to which the document relates.<sup>247</sup>

Section 7 of the STDA, at first glance, seems to deal with the right of a carrier to be regarded as having performed its obligations under the contract of carriage. More specifically, section 7(1) provides that the carrier 'is discharged from the obligation to deliver if that carrier makes delivery ... to the person entitled to such delivery in terms of subsection (2)'.

Following on, section 7(2) provides that he who presents the sea transport document to the carrier shall be entitled to delivery of the goods only in accordance with the contract and on the terms contained therein and, 'subject to subsection (3)', if that person is the first person presenting the document.

Section 7(3) provides that the carrier may require the person presenting the sea transport document to establish his right to delivery which person may do so either by application to court or by any other means acceptable to the carrier. The latter instance will however be at the carrier's risk and the carrier may require an indemnity in order to protect itself from the claims of the person lawfully entitled to delivery.

Finally, section 7(4) provides that unless the court on an application contemplated in subsection (3) orders otherwise, delivery made in terms of section 7 does not affect any right to damages. *Hare* makes the following comment in this regard:

'The section would appear therefore to give protection to the carrier on the one hand, but to take it away on the other, unless the carrier has been prudent enough to apply to court for an order authorising delivery'.<sup>248</sup>

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<sup>247</sup> See discussion in 5.1.1.2 above.

<sup>248</sup> *Hare, op cit* at 525.

The wording of subsection 4 is somewhat unclear for it would defeat the objectives of any commercial shipping line which strives to maximise its efficiency and cargo turn around time to insist that consignees turn to the courts in order to prove their right to delivery. Commercial liners operate a business. The use of letters of indemnity are common practice when bills fail to arrive on time. It is unlikely that carriers will insist that consignees or transferees demanding delivery should first approach the courts in order to do so.

Section 8(1)(b) provides that the carrier shall not be entitled to any defence or be discharged from any obligation if at the time of making delivery it 'knew or had reasonable grounds for believing that the person to whom delivery was made had no right to receive delivery'.<sup>249</sup> The onus would therefore be on the claimant to prove *mala fides* on the part of the carrier, as confirmed by section 8(2) of the STDA.<sup>250</sup>

## **6. CONCLUSION**

In conclusion, we have seen how the two Acts which were originally drafted for fundamentally the same purpose, ie. to update the law on title to sue, can in their own respective ways be quite distinct on a number of issues.<sup>251</sup> The UK COGSA '92 allows for contractual rights of suit to be transferred in documents such as sea waybills and ship's delivery orders. The STDA does not provide for the transfer of rights in sea waybills by virtue of such documents being non-transferable and is unclear in its application to ship's delivery orders. The UK COGSA '92 arguably provides more clarity in respect of the rights of interim holders of eg bills of lading, unlike the STDA which makes no direct reference interim holders. UK COGSA '92, in separating the transfer of rights from liabilities, appears to protect pledgee banks and other institutions holding bills of lading as security against claims by the carrier in instances where they have no intention of dealing with the goods. No such protection is afforded by the STDA which provides for the simultaneous transfer of rights and liabilities. The UK COGSA '92 is overall a more comprehensive piece of legislation and to a large extent provides more clarity on a number of issues. Despite this, it

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<sup>249</sup> See also discussion under par 5.3.2.

<sup>250</sup> Section 8(2) provides that 'the onus of proving that subsection (1)(a) or (b) applies is on the person alleging its application'.

<sup>251</sup> See discussion under 5.6.4 above on the different approaches adopted in STDA and UK COGSA '92 in respect of sea waybills.

can be said with confidence that the provisions of the STDA have improved on current South African law in respect of title to sue and any attempt at striving for legal certainty must be applauded. Both Acts are clearly welcomed and will no doubt give warm comfort (to a greater or lesser extent) to cargo interests who went unprotected by the common law and the 1855 Act.



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