The e-bill of lading contract: An e-standard form contract of carriage or merely an evidential document

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1. Introduction

Bills of lading, or bills of "loading" as they were once called, have existed for centuries and are one of the oldest and most international forms of contract under both the common law and the civil law[1]. Transportation contracts began to appear in the form of independent bills of lading of the master or shipowner in the thirteenth century, although the earliest published versions he refers to date from 1337 and 1390[2]. At the beginning was a bailment receipt for goods, it has developed into a receipt containing the contract of carriage between shipper and carrier and acquired in time the third characteristic, that of a negotiable document of title[3]. Thus, time, convenience and mercantile practice saw the incorporation of terms of carriage in the bill of lading and its elevation to a document of title, such that possession of the bill of lading was deemed constructive possession of the goods. Consequently, it could be argued that merchants and shippers have introduced and established the bill of lading as their written contract of carriage rather than remaining in the old tactic to have only oral contracts of carriage. Private carriage is customarily by charterparty and takes place when a special contract is entered into for the transportation of particular goods. Common or public carriage is a contract of carriage arranged after public offers and advertisements and is usually by a liner bill of lading[4]. W Tetley[5] describing the

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

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

[3] UNCTAD " Bills of lading Report " 1971 United Nations, New York at 23 " Beginning as a bailment receipt for goods, it has developed into a receipt containing the contract of carriage and acquired in time a third characteristic, that of a negotiable document of title". A Knawth " The American Law of Ocean Bills of Lading" 4th ed 1953 American Maritime Cases Inc. Baltimore at 134 " **Beginning as a bailment receipt for goods to be carried on common law terms, it developed into a receipt plus a contract of carriage**.." (Stress added). C. Powers " A Practical Guide to Bills of Lading" 1966 Oceana Publications Inc. at 3 " The bill of lading was primarily a bailee's receipt for the merchandise to be delivered to the bailer or his designated agent, later it became a contract between shipper and carrier" (Stress added).

[4] *Associated Metals & Minerals Corp.* v. *S.S. Jasmine* 983 F.2d 410 at p. 412, 1993 AMC 957 at p. 960 (2 Cir. 1992): "Charter Parties are said to be roughly synonymous with private carriage." *I.N.A.* v. *Blue Star* (*North America*), *Ltd*. 1997 AMC 2434 at p. 2440 (S.D. N.Y. 1997): "The *Columbia Star* was being operated in the liner trade and was engaged in the common carriage of cargo." *General Glass v. Livorno* 1977 AMC 2050 (S.D. N.Y. 1977), where carriage under bills of lading was deemed common carriage despite the shipper's undertaking to pay stowage and discharging costs on FIOS (free in and out) terms.

bill of lading says that "A bill of lading is not merely a contract of carriage of goods but also a receipt and a document of title as well". The bill of lading is a commercial document issued in one jurisdiction and the delivery of the goods under its terms completed in another while any resulting dispute is litigated in a third jurisdiction. Stability which arises out of a uniform legal functioning of a bill of lading is the primary concern of merchants[6]. Moreover, bills of lading or "bills of loading" are the classic contract of carriage of goods (in French "*contrat de transport*"), while charterparties or the mediaeval Latin "*carta partita*" are the classic contract of hire of a ship and so the bill of lading is a contract in respect to the *goods*, the charterparty is a contract in respect to the *ship*[7].

The initial purpose of the International Conventions was to regulate the bill of lading contract, because the carriers incorporated many exception clauses in the bills of lading contracts and excluded their liability, although the International Rules failed to give a standard definition of the bill of lading and its characteristics. This absence of any definition has resulted into inconsistency about its contractual role. The Hague Rules were adopted in 1924, the Hague/Visby Rules in 1968 and 1979 and the Hamburg Rules in 1978 and they attempted to broaden its application encompassing all contracts of carriage as well as bills of lading. The general principle regarding the application of the Hague Rules is that they apply by their own force (*ex proprio vigore*) to contracts of carriage covered by a bill of lading or any similar document of title[8].The Hague and

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[5] CHAPTER 9. PROVING THE CONTRACT OR TORT, p3 http://tetley.law.mcgill.ca/ at p4 The contract of carriage is usually deemed to be the bill of lading but, as has been pointed out on numerous occasions the bill of lading is a one-sided document5 and is only excellent evidence of the contract. The real contract of carriage is the offer, the arrangements for shipment, the advertisements of the carrier, the booking note, the acceptance of the shipper, the statements of agents, etc., as well as the bill of lading itself, all taken together. At 14 The carrier and the shipper are parties to the bill of lading contract of carriage, as is the person named on the bill of lading as consignee. At 15 The bill of lading contract of carriage is thus a tripartite contract60 involving the shipper, the carrier and the consignee. At 16 It implies that all bill of lading contracts can be extended in meaning.

[6] *The Carso*, 43 F.2d 736 AMC 'A bill of lading is a document of dignity, and courts should do everything in their power to preserve its integrity in international trade, for there, especially, confidence is of the essence'

[7] CHAPTER 45, WAYBILLS, p 4 http://tetley.law.mcgill.ca/ For centuries goods have been carried at sea under one or other of two basic contracts - bills of lading or charterparties. The bill of lading has three characteristics: it is a receipt, a contract of carriage and a document of title.

[8] "Art. 1(b) -'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same." *The European Enterprise* [1989] 2 Lloyd's Rep. 185 at p. 188, which held that the Hague/Visby Rules did not apply, unless the contract of carriage was one under which the shipper was entitled to demand a bill of lading at or after shipment, and therefore did not govern a non-negotiable consignment note. That holding was really an *obiter dictum*, however, as the decision related primarily to the interpretation of sect. 1(6)(b) of the U.K.'s *Carriage of Goods by Sea Act 1971*, U.K. 1971, c. 19, a particular provision permitting the extension of the Rules to non-negotiable receipts by

Hague/Visby Rules apply not only to public or common carriage but also may apply to private carriage, by an incorporating clause[9]. W Tetley says that 'the word "covered" indicates that a bill of lading need not be issued when the carriage commences; in fact the bill of lading is usually issued afterwards'. On the other hand, it could be said that it is an indication that the international legislator wanted the bill of lading to be the contract of carriage where there the terms of the international conventions will be incorporated as the terms of the carriage in order to achieve international harmonisation and uniformity. According to UNCTAD Secretariat[10] "Existing mandatory liability Conventions do not apply to charterparty contracts, primarily because these contracts are, in contrast **to bill of lading contracts**" (Stress Added). If a charteparty bill of lading had been validly transferred or endorsed for value into the hands of a third party who was not the charterer, then the bill of lading is the contract between the parties[11]. Law and conventions formed the right of the carrier and shipper to contract in ways which would not unduly favour the carrier and so the bill of lading as a free contract has been circumscribed by legislation[12]. Aim of the analysis is the investigation of the emergence of the bill of lading as a standard form contract or merely an evidential document which means that consequently there will be a need for a whole market research in order to discover the terms of the final contract of carriage.

2. The bill of lading contract versus the e-bill of lading contract

It has to be taken into consideration that a bill of lading has commonly been said to have three characteristics: 1) a contract for the carriage of the goods 2) an

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express stipulation. *The Happy Ranger* [2002] 2 Lloyd's Rep. 357 at p. 363 (C.A.), where Tuckey, L.J., albeit in an *obiter dictum*, questioned the traditional view of English textbook writers that "straight" (i.e. non-negotiable) bills of lading are not bills of lading or similar documents of title subject to the Rules. *The Chitral* [2000] 1 Lloyd's Rep. 529 at pp. 532-533, where a "straight consigned bill of lading" (i.e. a nominative bill of lading, requiring the delivery of the goods to a named consignee, rather than to order or to bearer) was assimilated to a sea waybill, as defined in the U.K.'s *Carriage of Goods by Sea Act 1992*, U.K. 1992, c. 50. U.K.'s *Carriage of Goods by Sea Act 1971*, U.K. 1971, c. 19, as amended, at sect. 1(6)(b), which provides that the Rules shall have the 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. (Stress Added). Devlin J. held, in *Pyrene Co. v. Scindia Steam Navigation Co.*: [1954] 1 Lloyd's Rep. 321 at p. 329, [1954] 2 Q.B. 402 at p. 419. "... whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its creation 'covered' by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply." *The Happy Ranger* [2002] 2 Lloyd's Rep. 357 at p. 362 (C.A.). "even where a preliminary document other than a bill of lading exists containing many of the terms of the contract, the Hague/Visby Rules still apply if the issue of a bill is contemplated by the parties to that document."

[9] *Shell Oil Co.* v. *M/T Gilda* 790 F.2d 1209 at p. 1212 (5 Cir. 1986). *Instituto Cubano v. TIV Golden West* 246 F.2d 802, 1957 AMC 1481 (2 Cir. 1957).

[10] Draft instrument on transport law Comments submitted by the UNCTAD Secretariat

[11] Moscow V/0 Exportkhleb v. He1mville Ltd. (The Jocelyne) [1977] 2 Lloyd's Rep. 121.

[12] *The Harter Act* Act of February 13, 1893, c. 105; 27 Stat. 445; 46 US Code Appx., 190-196.

acknowledgement of their receipt and 3) documentary evidence of title. However, there is an uncertainty and dispute about its contractual nature.[13] It is argued that a bill of lading is not necessarily the contract of carriage, but is generally the best of evidence of the contract and the contract is the advertisements, the booking note, the freight tariff, (and on occasion, certain practices of the carrier known and accepted by the shipper) all taken together[14]. So, if a shipper wants to know the terms of his/her contract must read and examine all the papers issued prior the issue of the carrier's bill of lading and the whole history of the carrier's terms and practices which does not come into terms with the historical entrance of bills of lading in maritime carriage and the established practice. W Tetley argues that The Hague and Hague/Visby Rules apply to a contract of carriage covered by a bill of lading or similar document of title, whether or not a bill of lading was in fact issued because the bill of lading is not essentially the contract of carriage but usually the best evidence of it and so the contract includes the booking note, the tariff, the carrier's advertisements, and practices known and accepted by the shipper, etc., all taken together. On the other hand, Devlin J. in *Pyrene Co. v. Scindia Steam Navigation Co*[15] *says* "In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation 'covered' by a bill of lading, and is therefore from its inception a contract of carriage within the

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

[14] *The Ardennes* [1951] 1 K.B. 55 at p. 59, (1950) 84 Ll. L. Rep. 340 at p. 344. *Cho Yang Shipping Co. Ltd.* v. *Coral* (UK) *Ltd.* [1997] 2 Lloyd's Rep. 641 at p. 643 (C.A.); *King Ocean Central America, S.A.* v. *Precision Cutting Services, Inc.* 717 So.2d 507 at p. 510.

[15] *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* [1954] 2 QB. 402 at pp. 419-420, [1954] 1 Lloyd's Rep. 321 at p. 329. *Parsons Corp.* v. *The Happy Ranger*, [2002] E.W.J. No. 2245 (C.A., May 17, 2002). COGSA applies to bill of lading contracts made outside the United States for carriage to the United States. In *Shackman v. Cunard White Star* 31 F. Supp. 948, 1940 AMC 971 (S.D. N.Y. 1940), a United States District Court held that COGSA is a part of the terms of every outward bill of lading, even if not incorporated by reference. In *Kurt Orban Co. v. S.S. Clymenia* 318 F. Supp. 1387, 1971 AMC 778 (S.D. N.Y. 1970), COGSA was held to govern a shipment inbound from Australia to the United States, although the bill of lading was issued in Australia and referred to the Australian *Sea-Carriage of Goods Act, 1924*. Sect. 1(6)(b) of *Carriage of Goods by Sea Act 1971*

makes a non-negotiable receipt (waybill) subject to the Rules by force of law if: (a) it is marked non-negotiable; (b) it constitutes a contract of carriage of goods by sea, and (c) it contains an express provision that the Rules are to govern as if the receipt were a bill of lading; Art. 1(b) where "contract of carriage" is defined as including any bill of lading: "issued under or pursuant to a charterparty from the moment at which such bill of lading ... regulates the relations between a carrier and a holder of the same." *Nichimen Co.* v. *M/V Farland* 462 F.2d 319 at p. 328, 1972 AMC 1573 at p. 1584 (2 Cir. 1972), stating: "... where there is a voyage or... a time charter, a bill of lading issued to the charterer-shipper, so long as it remains in [the charterer's] hands, usually is a mere receipt as between the parties to the charter and does not perform the additional function of a contract for the carriage of goods."

meaning of the Rules and to which the Rules apply", which does not mean that the bill of lading is merely part of the contract of carriage. Moreover, it could be said that the orally agreed contract of carriage under the terms of the carrier's bill of lading is illustrated, superseded and incorporated in the accepted bill of lading contract. In other words, it is the mercantile practice that has established the bill of lading as the expression of the final contract of carriage. C McLaughlin[16] argued that it is unsound to consider the bill of lading only evidence of the contract of carriage rather than the original contract of carriage between the shipper and the carrier. Moreover, J Spanogle[17] and F Potamianos[18] said that the bill of lading is a contract with the carrier. The author[19] supports the view that a bill of lading accepted by the shipper, without any complaint and in absence of a clause within its content that the bill of lading is not the contract, is the original contract of carriage transferred by the endorsement of a negotiable bill of lading. According to the Greek law the bill of lading is the conclusive evidence of the contract of carriage[20]. As since 1887[21] specified the general principles of contract law should not apply to bills of lading contracts but emphasis must be given to their historical usage and necessity for their entrance in maritime transport that was to make certain the terms of the contract of carriage balancing the weak position of the shippers against carriers. In other words, a written contract in the form of a bill of lading was preferred to an oral one. Furthermore, the bill of lading as a legal document

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[16] C McLaughlin "The Evolution of Ocean Bills of Lading" 35 *Yale L J* 548 p. 555, p. 556 "When became customary, however, to engage space on a vessel, instead of engaging the whole vessel, the bill of lading became the only evidence of the contract ... Accordingly, the view that a bill of lading does not constitute the contract, but is evidence of it, would seem to be unsound and it may safely be said that since the bill of lading involves a promise to perform on the part of the carrier in both ocean and railway shipments, it is a contract."

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

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

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

[20] A Yiannopoulos "*Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems*", 1995, Kluwer Law International. p. 200 A Kiantou-Pampouki "According to Greek law ... From this viewpoint, the bill of lading is the carriage contract itself", p. 4 Yiannopoulos "The bill of lading is evidence of the contract of carriage between the parties", p. 229 R. Japikse "Section 412 provides that a bill of lading should... state or indicate the terms of carriage", p.90 K Bernaw "A bill of lading on the contrary requires a written document, p. 91 "The courts hold by accepting the bill of lading, the shipper agrees with its stipulations".

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

is invented as being a formal contract[22] with the special characteristic of being at the same time, both a receipt and a document of title, and the bill of lading can be transferred to any third party.

Is a bill of lading a complete or only a partial integration of the parties' agreement? Was right Goddard[23] CJ in considering a bill of lading merely evidence of the contract of carriage? If it is assumed that Goddard CJ was right and the bill of lading is merely evidence of the original contract of carriage then the endorsement of the bill of lading should transfer the merely evidenced original contract of carriage rather than being the original contract of carriage for every third party holder of the bill of lading contract. Thus, for every third party the original contract of carriage has to come out from the content of the bill of lading and the advertisements, the booking note, the freight tariff, (and on occasion, certain practices of the carrier known and accepted by the shipper) all taken together. We have a single original contract of carriage and not two original contracts of carriage for a single load. Lord Goddard in arguing that the bill of lading is merely evidence of the contract of carriage seems to rely mostly on the idea that the shipper " is no party to the preparation of the bill of lading; nor does he sign it" which is wrong because most shippers are merchants who keep a supply of various carriers' bills of lading, and it is often the merchant or his forwarding agent who types the description of cargo on the bill of lading before delivering it to the carrier for completion and signature[24]. Shippers, consequently, play a part in the bill of lading preparation, but not in the formulation of its terms. In fact, Bills of lading are better described as standard form contracts, rather than pure contracts of adhesion[25]. W

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

[23] *The Ardennes* [1951] 1 K.B. 55

[24] *Heskell v. Continental Express* (1950) 83 Ll. L. Rep. 438 at p. 449.

[25] *Vimar Seguros y Reaseguros, S.A.* v. *MV Sky Reefer* 515 U.S. 528 at p. 530, 1995 AMC 1817 at p. 1818 (1995); *Fireman's Fund Ins. Co.* v. *M/V DSR Atlantic* 131 F.3d 1336 at p. 1338, 1998 AMC 583 at p. 585 (9 Cir. 1997), cert. denied 525 U.S. 921 (1998). *Thyssen Canada Limited* v. *Mariana Maritime S.A.* [2000] 3 F.C. 398 at p. 412, 2001 AMC 769 at p. 776 (Fed. C.A., *per* Robertson, J.A.), application for leave to appeal dismissed without reasons, November 9, 2000, [2000] S.C.C.A No. 257: "Admittedly, *a bill of lading may be looked on as a contract of adhesion* (*the so-called "standard form contract"*) which does not fit within the classical model of a bargained agreement." (Emphasis added). *All Pacific Trading, Inc.* v. *M/V Hanjin Yosu* 7 F.3d 1427 at p. 1431, 1994 AMC 365 at p. 370 (9 Cir. 1993), cert. denied, 510 U.S. 1194 (1994): "Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore strictly construed against the carrier. Any ambiguity in the bill of lading must be construed in favor of the shipper and against the carrier." (Emphasis added). *Mori Seiki USA, Inc.* v. *M/V Alligator Triumph* 990 F.2d 444 at p. 448, 1993 AMC 1521 at p. 1524 (9 Cir. 1993). A close reading of such decisions, however, indicates that although referring to the bill of lading itself as a "*contract* of adhesion", the courts concerned are really referring to certain particular clauses in the standard-form bill as *clauses* of adhesion, which the parties to the bill do not negotiate freely. *John Deere & Co.* V. *Mississippi Shipping Co.,* 170 F. Supp. 479 at p. 481, 1959 AMC 480 at p. 482 (E.D. La. 1959). "Normally, the contract takes final form in a bill of lading issued by the carrier." *Automatic Tube Co. v. Adelaide SS.* Co. (*The Beltana*) [1967] 1 Lloyd's Rep. 531, where shipping receipts provided that goods were to be carried subject to conditions

Tetley[26] specifies that the bill of lading is an early example of the standard-form contract favouring the party who prepares and issues it and as such it was one of the first such contracts to be controlled by legislation.
It is expressed as the *ratio decidendi* in *the Ardennes*[27] case the fact that the bill of lading in the hands of the shipper contains the evidence of the contract. The author[28] has argued against the judge's view in this case because if the contract is concluded prior the issue of the bill of lading then all the terms of the contract should be oral and not half of them oral and the other half written in the bill of lading. If we accept that the contract is partly oral and partly written in the bill of lading then the written terms contained in the bill of lading are not posterior to the oral ones and their acceptance means alteration of the previous oral terms of the contract. So, prior negotiations and oral agreements between the parties are merged therein the content of the accepted bill of lading. It is submitted that if *the Ardennes* case were to be tried in a US court then the bill of lading would be found to be the contract of carriage, which has superseded any oral promises or agreements[29]. Moreover, in the preliminary note of the Carriage of goods by sea Act 1992[30] it is stated that: "S 2 allows the lawful holder of a bill of lading ... to sue the carrier under the original contract of carriage even though he may not have been party to the original contract". The 1992 Act does not seem to transfer new contract as the 1855 Act did either. Hence, the transferee steps into the shipper's shoes as if he had been a party to the original contract of carriage. It is well established

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of the usual form of bill of lading currently issued by defendants. It was held that the bill of lading terms were, in effect, the contract.

[26] CHAPTER 9, PROVING THE CONTRACT OR TORT, p24 http://tetley.law.mcgill.ca/ at 25 That the bill of lading has been deemed a contract at all is remarkable because only one party signs

[27] [1951] 1 KB 55.

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

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

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

that the bill of lading is the contract of carriage itself for the holder of the bill.[31] So, the holder becomes party to the contract of carriage contained in the bill of lading and not to the one merely evidenced by the bill of lading. The author[32] agrees with Mrs Justice Reed[33] and Henderson[34] in the distinction of the bill of lading being some times the contract and at other times merely evidence of it as "metaphysical" and anomalous. The 1992 Act specifies that the contract of carriage is contained in or evidenced by the bill of lading (S. 5(1)) indicating a political solution for the problem rather than a legal one where it has to be defined the single contractual role of the bill of lading (*ex proprio vigore*). An oral contract of carriage can be concluded prior the issue of the bill of lading but as posterior the final contract of carriage for the received and loaded cargo is expressed by the bill of lading contract that the shipper finally accepts and probably endorses many times to third parties. The various bills of lading statutes give to the endorsee the rights of action that the shipper originally had under the bill of lading contract[35]. Gaskell[36] argues that the bill of lading in the hands of the endorsee is conclusive evidence of the terms of the contract of carriage but at the same time "the third party's rights and obligations will be governed entirely by **the bill of lading contract**"(Stress Added). Is a bill of lading something different than a bill of lading contract? N. Gaskell has not explained how the endorsement of the bill of lading transforms the bill of lading merely part of the original contract of carriage into the

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[31] *Benjamin's Sales of Goods*, 4th ed, p. 930 sec 18-014 "Thus in the hands of a buyer to whom a bill of lading has been transferred by the seller the bill of lading will normally be the contract of carriage". T Howard "The Carriage of Goods Act 1992" 1993 *JMLC* 181 p. 188 "The lawful holder of a bill of lading is entitled to enforce the bill of lading contract".. T Howard, B Davenport "English Maritime Law Update 1992 "1993 *JMLC* 425 p. 426 "The receiver was not party to the original bill of lading contract ... The 1992 Act enables any lawful holder of the bill of lading to sue for breach of the bill of lading contract". P Dobson "*Charlesworth's Business Law*", 1997, Sweet & Maxwell p. 659 "The lawful holder until the COGSA 1992 the transferred contract is contained in the bill of lading". *Corpus Juris Secundum,* 1975, Vol. 13, West Publishing Co. p. 253 "As a contract with the carrier a bill of lading is a chose in action and as such is not assignable at common law".

[32] G Zekos "The Bill of Lading Contract: is it the contract of carriage or a metaphysical phenomenon?" 2002 IL Diritto Marittimo 161, Italy

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

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

[35] Carriage of Goods by Sea Act 1992, U.K. 1992, c. 50, sect. 2(1)(a); Bills of Lading Act (Canada), R.S.C. 1985, c. B-4; Pomerene Act 1916/1994, 49 U.S. Code sects. 80105(a) (U.S.). Effort Shipping Co. Ltd. v. Linden Management S.A. (The Giannis N.K.) [1996] 1 Lloyd's Rep. 577 at p. 586 (C.A.), upheld [1998] 1 Lloyd's Rep. 337 at pp. 343-344, 1998 AMC 1050 at pp. 1058-1060 (H.L.), holding in effect that the liabilities of the shipper and consignee are concurrent. This rule, as it concerns the shipper, is now reflected in the U.K. in the Carriage of Goods by Sea Act 1992, U.K. 1992, c. 50, sect. 3(3): "This section [sect. 3], 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."

[36] N Gaskell "Transport document and the CMI draft outline Instrument 2000", 2001 Il Diritto Marittimo 573. 592-3.

original contract of carriage. It is worth mentioning here that judges and scholars regardless that consider the bill of lading as merely evidence and part of a contract of carriage in their effort to define the contract of carriage refer to the bill of lading contract, which for the author is not understandable when they must identify and refer to the contract of carriage (the advertisements, conversations, the booking note, the freight tariff, certain practices of the carrier known and accepted by the shipper all taken together). It is worth mentioning that the US legal system has arisen from the common law tradition[37] and the leading cases of *Delaware*[38] and *Pollard v Vinton*[39] before the supreme court of the United States illustrate the position occupied by the bill of lading as the contract of carriage from its first steps in the world trade under the interpretation given by the American courts.

Under the common law the bill of lading contract still requires an offer, an acceptance and a consideration. Under the civil law there must be: two parties, a legal object,

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

[38] 20 Led 779. *The Delaware* 20 Led 779 pp. 781-784. Mr Justice Clifford delivered the opinion of the court where it is stated that:
"Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgement, signed by the master, that he has received the goods therein described, from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated .... but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing and cannot be contradicted or varied by parol evidence ... Verbal agreements, however, between the parties to a written contract made before or at the time of the execution of the contract, are, in general, inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract ...". *Pollard v Vinton* 26 Led 998 p. 999, *Corpus Juris Secundum* (CJS), 1975, West Publishing Co Vol. 13 Carriers p. 233 "A bill of lading is twofold in its character ... and a contract to transport and deliver the goods to the consignee or other person therein designated on the terms specified in such instrument". The supreme court of the United States delivered its decision in *The Thames,* where it has consolidated the incorporation of the contract of carriage in bills of lading 20 Led 804 p. 805 "the contract between the ship and the shipper is that which is contained in the bills of lading delivered", *Hundai Corp v The Hull Insurance Proceeds of M/V Vulca* (1992) 800 F Sup 124 Shipper brought action against charterer to recover for loss of cargo. p. 127 "A bill of lading ... provides a contract of carriage between the shipper of cargo and the carrier of the cargo". *EF Operating Corporation v American Buildings* . 993 F2d 1046"The bill of lading operates as both the receipt and the basic transportation contract between the shipper-consignor and the carrier, and its terms and conditions are binding ... As a contract, it is subject to general rules of construction under contract law ... And as a contract of adhesion between the carrier and shipper, it is strictly construed against the carrier". *US v M/V Santa Clara* (1995) 887 F Sup 825 p. 832 "A bill of lading is a contract governing the rights of the cargo owner and the shipowner ... It is well recognized that bills of lading are contracts of adhesion" *Vimar Seguros v M/V Sky Reefer* [1995] 132 Led2d 462, p. 483 Justice Kennedy held that "a bill of lading, besides being a contract of carriage, is a negotiable instrument that controls possession of the goods being shipped ... Disuniformity in the interpretation of bills of lading will impair their negotiability".

[39] 26 Led 998

consent and a cause. In order to have the conclusion of a contract there is a need for the agreement upon all its terms. Any posterior agreement containing further terms supersedes and prior one. Can the bill of lading contract be concluded prior its issue and acceptance by the shipper since its final terms as contained in the context of the bills of lading contract are never negotiated and are posterior to any previous oral ones? It is supposed that the contract is consummated when the goods are delivered by the shipper to the carrier and the bill of lading is issued[40]. Moreover, a bill of lading contract does not fit within the classical model of a bargained agreement. Is there a parties' consent upon the terms of carriage as expressed by the bill of lading contract when the shipper delivers its cargo for loading to the carrier and accepts the bill of lading contract? The coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation[41]. In the civil law, offer and acceptance constitute the mechanism through which the contracting parties express consent to be bound. Every civil law contract requires *consent* so as to establish a meeting of the minds which happens when the shipper accepts the carrier's bill of lading contract and the carrier receives the cargo for loading. An agreement between parties can rescind an earlier agreement between the same parties[42] which means that even if an oral contract of carriage is conclude prior the issue and acceptance of the bill of lading then it is superseded by the bill of lading contract containing the terms of carriage which are never negotiated and so the final contract of carriage in the form of a bill of lading contract emerges.

It is argued that bills of lading should be construed or interpreted by the courts in the same manner as any other contract[43]. Can a bill of lading merely part of a half written

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[40] See Notes " Ocean bills of lading and some problems of conflict of laws" 1958 Columbia LR 212 at 217

[41] *G. Percy Trentham Ltd.* v. *Archital Luxfer Ltd.*, [1993] 1 C.A. 25 at p. 27 (C.A.). *Fontana* v. *Skandia Life Assurance Ltd.* [2000] EWCA No. 325 at para. 34 (C.A.).

[42] *West India Inds. v. Tradex*, 664 F.2d 946. at p. 950 The clause was upheld by Rubin Ct. J., who pointed out that an agreement between parties can rescind an earlier agreement between the same parties and that furthermore there was consideration for the new contract evidenced by the bill of lading. *Corat International, Inc.* v. *Global International Underwriters, Inc.*, 1984 AMC 1268 (Cir. Ct. Fla. 1983). "Plaintiff's reliance on this letter ... is inadmissible as parol evidence to show an agreement to carry below deck when the contract of carriage ... is integrated into a clean bill of lading calling for on-deck stowage.... Plaintiff may not now rely on its self-serving letter to alter the terms of the contract of carriage in order to avail itself of a deviation defense."

[43] *Amoco Overseas Co. v. S.T. Avenger* 387 F. Supp. 589 at p. 594, 1975 AMC 782 at p. 789 (S.D. N.Y. 1975): "The bill of lading, in addition to being a negotiable instrument, is the contract governing the rights of the cargo owner vis-à-vis the shipowner. As such it is to be interpreted according to principles of contract law." *Williams v. Humble Oil & Refining Company* 432 F.2d 165 at p. 179 (5 Cir.1970), held that: "In the law of contracts (conventional obligations) a proper distinction exists between the 'interpretation' of written instruments and their 'construction'. 'Interpretation' refers to the process of determining the meaning of the words used; that process is traditionally thought to be a function of the jury. On the other hand, the process of determining the legal effect of the words used - once we know their meaning - is properly labelled 'construction'; it is peculiarly a function of the court" *Chatenay v. The Brazilian Submarine Telegraph Co. Ltd.* [1891] 1 Q.B. 79 at p. 85 (C.A.): "The expression

and half oral contract or a different percentage of oral and written terms be interpreted and treated as a contract? A bill of lading a standard form contract printed by the carrier, is normally interpreted against the carrier[44]. The bill of lading is a contract of carriage and its terms cannot be varied by parol evidence[45]. Interpretation rules apply if the bill of lading[46] is ambiguous. Courts construe bills of lading in the same manner as they do other contracts[47]. Ambiguity in a contract involves language which is: "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.[48]" A record may be said to be ambiguous when it has two (or more) primary meanings, each of which may be adopted without distortion of language[49]. W Tetley argues that "Of course, because the bill of lading is not in itself

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'construction' as applied to a document, at all events as used by English lawyers, includes two things: first the meaning of the words, and secondly their legal effect, or the effect which is to be given to them." *Union Steel America Co.* v. *M/V Sanko Spruce* 14 F. Supp. 2d 682 at p. 685, 1999 AMC 344 at p. 347 (D. N.J. 1998): "... since the bills of lading constitute a contract, the question of who the parties meant to identify by 'the carrier' in the forum selection clause is one concerning the expessed contractual intent."

[44] *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro* 775 F.2d 476 at p. 482, 1986 AMC 826 at 832 (2 Cir. 1985): "...bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier;" *Crowley American Transport, Inc. v. Richard Sewing Machine Corp.* 1997 AMC 1798 at p. 1802 (S.D. Fla. 1996): "The terms and conditions of a bill of lading are terms of adhesion, as they are a standard part of the contract between the parties and are not subject to negotiation." *The Caledonia* 157 U.S. 124 at p. 137 (1895); *Navieros Oceanikos, S.A.* v. *S.T. Mobil Trader* 554 F.2d 43 at p. 47, 1977 AMC 739 at p. 746 (2 Cir. 1977); *Vistar S.A.* v. *M/V Sea Land Express* 792 F.2d 469 at p. 471, 1986 AMC 2382 at p. 2384 (5 Cir. 1986).

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

[46] *The Helvetia* [1960] 1 Lloyd's Rep. 540 at p. 546: "... One refers to rules of construction... in the last resort, if one cannot arrive at a clear view on the proper construction otherwise."

[47] *Associated Metals & Minerals Corp. v. M.V. Arktis Sky* 1991 AMC 1499 at p. 1507 (S.D.N.Y. 1991), rev'd on other grounds, 978 F.2d 47, 1993 AMC 509 (2 Cir. 1992); *Union Steel America Co. v. M/V Sanko Spruce* 14 F. Supp. 2d 682 at p. 685, 1999 AMC 344 at p. 347 (D. N.J. 1998): "... since the bills of lading constitute a contract, the question of who the parties meant to identify by 'the carrier' in the forum selection clause is one concerning the expressed contractual intent."(Emphasis Added)

[48] *Walk-In Medical Centers, Inc.* v. *Breuer Capital Corp.* 818 F.2d 260 at p. 263 (2 Cir. 1987). *International Knitwear Company Limited* v. *M.V. Zim Canada* 1997 AMC 1290 at p. 1292 (S.D. N.Y. 1994).

[49] *Schuler (L.) A.G.* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 at p. 261 (H.L. per Lord Wilberforce dissenting on other grounds): "But ambiguity ... is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as to meaning has differed."

the contract of carriage, but only the best evidence of it, when construing the contract of carriage between the shipper (or consignee) and the carrier, "it may be necessary to inquire what the actual contract between them was; merely to look at the bill of lading may not in all cases suffice""[50]. By contrast two pages later in the same chapter of his work W Tetley argues that a bill of lading being a standard form contract printed by the carrier is interpreted against the carrier[51]. Moreover, in *Mormaclynx* (*Leather's Best v. S.S. Mormaclynx*)[52], Judd D.J. held that: "A bill of lading, as a contract of adhesion is construed strictly against the carrier." Normally a superseding clause in a bill of lading is valid and in *Apex (Trinidad) Oilfields v. Lunham & Moore Shipping*[53], the superseding clause in a bill of lading was held to be valid because "it is the bill of lading which constitutes the contract of carriage and it provides expressly that all agreements or freight engagements for the shipment of the goods are superseded by the bill of lading." The superseding clause may be overcome by circumventing the "parol evidence rule" - under which oral evidence may not be used to add to, subtract from,

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[50] CHAPTER 4, INTERPRETATION OF BILLS OF LADING AND SUPERSEDING CLAUSES, p4 http://tetley.law.mcgill.ca/ "In addition to the bill of lading, the contract may comprise such components as the booking note, the carrier's advertisement and tariff, the oral arrangements and correspondence between the parties, and even customs and usages of the ports of loading and discharge which are known to, and accepted by, the shipper." *Cho Yang Shipping Co. Ltd. v. Coral (UK) Ltd.* [1997] 2 Lloyd's Rep. 641 at p. 643 (C.A. per Hobhouse L.J.).

[51] CHAPTER 4, INTERPRETATION OF BILLS OF LADING AND SUPERSEDING CLAUSES, p6 http://tetley.law.mcgill.ca/ *Ontario Bus Lines v. The Federal Calumet*, (1992) 47 F.T.R. 149 at p. 156 (Fed. C. Can.). "the defendants drafted this bill of lading any inconsistency between paragraph 3 and paragraph 18 must be interpreted against them and in favour of the plaintiff."

[52] 313 F. Supp. 1373 at p. 1380, 1970 AMC 1310 at p. 1322, [1970] 1 Lloyd's Rep. 527 at p. 534 (E.D. N.Y. 1970). In *Royal Exchange Assur. v. S. S. President Adams*, where parol evidence was admitted to contradict a clean bill of lading which was not an integrated document: "An integrated writing is a document intended by the parties to be the complete and final embodiment of the terms of their agreement. The court finds that there was no integration here, and that none was intended. While the contract of carriage was the subject of negotiation, the terms printed on the bill of lading were not. In fact, there is no evidence that the bill of lading was even mentioned in the negotiations. The parol evidence rule is therefore inapplicable." 510 F.Supp 581 at p. 585 (W.D. Wash. 1981). *U.S.* v. *Central Gulf Steamship Corp*., 340 F.2d 473, 1973 AMC 252 (E.D. La. 1972).

[53] [1962] 2 Lloyd's Rep. 203 (Ex. Ct. of Can. 1962). In *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196, a clause in the bill of lading read that "... all agreements or freight engagements... are superseded by this bill of lading." The Court added: "... the days when wooden application of the parol evidence rule was allowed to produce results contrary to the parties' intention have long since passed" (F.2d at p. 1209,). "Absent evidence that it is the custom in the shipping industry that prior agreement on other particulars in the contract of carriage can be preserved only by express entry on the bills of lading, we hold that the bills of lading did not supersede the booking notes. See 3 Corbin, *Contracts*, sec. 583, at 471-75 (1960); *Restatement of Contracts*, 2d sec. 236, Tent. Draft No. 5 (1970)." *Corat International, Inc. v. Global International Underwriters, Inc.* 1984 AMC 1268 at p. 1272 (Cir. Ct. Fla. 1983), where the bill of lading superseding clause was held valid and overcame a letter of the shipper sent before the bill of lading was issued.

vary or contradict a written instrument[54]. The U.K. Law Commission states categorically that: "... there is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a *complete* contract depends upon the intention of the parties, objectively judged, and not on any rule of law [55]" but as discussed earlier the bill of lading is introduced as the expression of the contract of carriage between shipper and carrier and so it is the whole contract which is endorsed as the original contract of carriage. It is argued that all the oral arrangements with the agent or the freight forwarder comprise a collateral contract and so there is another contract apart from the bill of lading occurred in *The Ardennes*, where the contract was held to be more than just the bill of lading but the collateral contract is not allowed to stand if it is inconsistent with the main contract[56].

Where the contract appears to embody the full agreement between the parties and is not ambiguous, the parol evidence rule has been applied to exclude extrinsic evidence contradicting or varying the written contract[57]. The parol evidence rule only applies

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[54] U.K. Law Commission, "The Law of Contract – The Parol Evidence Rule", Law Comm. Report No. 154, Cmnd. 9700, H.M.S.O., London, 1986, at para. 2.45: "Evidence will only be excluded when its reception would be inconsistent with the intention of the parties. While a wider parol evidence rule seems to have existed at one time, no such wider rule could, in our view, properly be said to exist in English law today."

[55] The Law of Contract. The Parol Evidence Rule, Law Commission Report No. 154, H.M.S.O., London, 1986, para. 2.17.

[56] *Hawrish v. Bank of Montreal* [1969] S.C.R. 515.

[57] *Itel Container Corporation v. M.V. Titan Scan*1997 AMC 1568 at p. 1581 (S.D.Ga. 1996). *Belize Trading Lim. Procs.* 1991 AMC 2947 (S.D. Fla. 1991) at p. 2951 "It is well settled that parol evidence may not be used to contradict the terms of an unambiguous written contract. Peterson v. Lexington Insurance Co., 1985 AMC 2215, 753 F.2d 1016 (11 Cir. 1985). The bill of lading is a contract of carriage and its terms cannot be varied by parol evidence. See, e.g., Internatio, Inc. v. M/V Yinka Folawiyo, 480 F.Supp 1245, 1252 (E.D. Pa. 1979). Neither Vianessa's nor El Pirata's bill of lading is ambiguous. Parol evidence is therefore inadmissible to change the terms of the bills." The *Uniform Commercial Code* in the United States contains the following provision at sect. 2-202: "Terms with respect to which the confirmatory memoranda of the parties agree, or which are otherwise set out in a writing intended by the parties as a final expression of their agreement with respect to the terms included in the writing, may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement." *Garza* v. *Marine Transportation Lines, Inc.* 861 F.2d 23 at p. 27, 1989 AMC 228 at p. 233 (2 Cir. 1988): "...when the obligations are not clearly stated -- when they are ambiguous -- the parol evidence rule does not prevent the introduction of extrinsic evidence to aid in interpretation of the contract. The rule excludes 'only evidence of prior understandings and negotiations which contradicts the unambiguous meaning of a writing which completely and accurately integrates the agreement of the parties.' [citation omitted]. When extrinsic evidence is considered for the purpose of interpretation, the parol evidence rule is inoperative. [citation omitted] Then, the evidence is not considered to vary or contradict the terms of an integrated agreement; rather, the parol is used to determine what the terms of the agreement are. [citation omitted]"

where the court is satisfied that the parties intended the bill of lading to contain the whole of the agreement between them[58].

Words read in the context of the contract as a whole are normally taken in their natural or ordinary sense, unless there is an indication that a special sense was intended, or unless they are technical terms. A contract is construed against the interest of the author of the contract[59]. American courts commonly apply the *contra proferentem* principle, by holding that bills of lading must be strictly construed against the carrier[60]. Exception clauses in bills of lading are to be strictly construed and the clear meaning of the exemption, the nature and object of the contract read as a whole, and the surrounding circumstances can all be taken into account in construing such clauses[61]. Handwritten or typewritten clauses as posterior to printed clauses in a bill of lading take precedence over printed clauses[62]. Extrinsic evidence of custom and usage is admissible to exaggerate and supplement written contracts in matters with respect to which they are silent[63]. A bill of lading, like every other contract, must be construed in relation to the circumstances in which it was entered into, of course as long as there is ambiguity[64]. To that extent in *Francosteel Corporation v. M.V. Pal Marinos*[65], Carter

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[58] *Fleet Express Lines Ltd.* v. *Continental Can. Co.* (1969) 4 D.L.R. (3d) 466 (Ont. High C.) (trucking bill of lading).

[59] *The Caledonia* 157 U.S. 124 at p. 137 (1895).

[60] *Mitsui & Co. Ltd.* v. *American Export Lines, Inc.* 636 F.2d 807 at pp. 822-823, 1981 AMC 331 at p. 354 (2 Cir. 1981); *West India Industries, Inc.* v. *Tradex* 664 F.2d 946 at p. 951 note 9, 1983 AMC 1992 at p. 1999 note 9 (5 Cir. 1981); *Allied Chemical International Corp.* v. *Companhia de Navegacao Lloyd Brasileiro* 775 F.2d 476 at p. 482, 1986 AMC 826 at p. 832 (2 Cir. 1985). *All Pacific Trading, Inc.* v. *M/V Hanjin Yosu* 7 F.3d 1427 at p. 1431, 1994 AMD 3565 at p. 370 (9 Cir. 1993); *Fox and Associates, Inc.* v. *M/V Hanjin Yokohama* 977 F. Supp. 1022 at p 1030, 1998 AMC 1090 at pp. 1099-1100 (C.D. Cal. 1997).

[61] *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827, [1980] 1 Lloyd's Rep. 545 (H.L.), in favour of regarding "fundamental breach" as a mere principle of construction. *The Raphael* [1982] 2 Lloyd's Rep. 42 (C.A.).

[62] *Burdines Inc. v. Pan-Atlantic S.S. Corp.* 199 F.2d 571 at p. 573, 1952 AMC 1942 at p. 1944 (5 Cir. 1952): "It is a well established general rule that when a contract is partly printed and partly written, the writing controls. This rule extends to the use of a rubber stamp as a means of writing". *Hof van Beroep te Brussel,* February 10, 1966, [1966] ETL 432, where special conditions stamped on a bill of lading and agreed to after the settling of the general provisions were given precedence over printed clauses by the Belgian Court of Appeal; *Crowley American Transport, Inc. v. Richard Sewing Machine Corp.*1997 AMC 1798 at p. 1802 (S.D. Fla. 1996) (typed term on face of bill of lading stating freight payable "collect" – i.e. on delivery - prevailed over printed clause on rear of bill stating freight earned on loading). *Finagra* v. *O.T. Africa Line* [1998] 2 Lloyd's Rep. 622 at p. 629; *The Starsin* [2000] 1 Lloyd's Rep. 85 at pp. 89-90.

[63] *Great American Insurance Companies v. M.V. Romeral* 1999 AMC 2542 at pp. 2549-50. *Kum v. Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439 at p. 445 (P.C.): "The rule is plain and clear that inconsistency with the document defeats the custom." Despite a finding that a mate's receipt was, by custom, treated as a negotiable document of title equivalent to a bill of lading in trade between Sarawak and Singapore, the custom could not make such receipts, marked "non-negotiable", into negotiable instruments.

[64] *Reardon Smith Line v. Hansen-Tangen (The Diana Prosperity)* [1976] 2 Lloyd's Rep. 621 at p. 624, [1976] 3 All E.R. 570 at p. 574 (H.L.) "I think that all of their Lordships are saying, in different words, the same thing - what the Court must do must be to place itself in thought in the same factual matrix as that in which the parties were." In *M.B. Pyramid Sound M.V. v. Briese Schiffahrts G.M.B.H. and Co. K.G. M.S. 'Sim' and Latvian Shipping Association Ltd. (The Ines)* [1995] 2 Lloyd's Rep. 144 at p. 149, Clarke J. said: "...in order to ascertain who the true contracting parties were it is necessary to examine the whole

D.J. stated: "To resolve the ambiguity in the bill of lading, the court must first turn to the extrinsic evidence offered by the parties regarding their intent in signing it." Courts have been unsympathetic to clauses appearing on the backs of bills of lading in minuscule type, which terms regardless that fail to give adequate notice to the shipper of the provisions they contain[66] are not always rejected as unlawful by courts[67]. The

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document and indeed consider the whole context in which it came into existence." *The Flecha* [1999] 1 Lloyd's Rep. 612 at p. 618, insisting on the need to look at the bill of lading as a whole and "its wider context", in determining whether it was an owner's or a charterer's bill. The non-negotiable receipt or waybill is a contract of carriage and receipt and not a document of title. Waybills have often replaced bills of lading, especially when the consignee is the shipper's overseas agent or is a subsidiary or associated company. The ocean waybill is a non-negotiable contract of carriage of goods by sea, dependent on the terms and conditions found in the waybill. W. J. Coffey, "Multimodalism and the American Carrier" (1989) 64 Tul. L. Rev. 569 at p. 588-589: "The waybill is not substantially different from the nonnegotiable ocean bill of lading. It too serves as a receipt for the goods and as the contract of carriage, albeit typically in a shorter form than the ocean bill itself. The straight bill of lading defined by the Pomerene Act is really nothing more than a waybill." *The Rafaela S* [2003] 2 Lloyd's Rep. 113 at p. 133, 2003 AMC 2035 at p. 2073 (C.A.), citing the U.K. Law Commission's Report No. 196, and Scottish Law Commission Report No. 130, Rights of Suit in Respect of the Carriage of Goods by Sea, H.M.S.O., London 1991 at para. 2.50: "... a sea waybill will not normally be presented to the ship to obtain delivery.... 'straight' bills of lading and sea waybills are much the same type of document save that the sea waybill is not required to obtain delivery." See also Wilson, *Carriage of Goods by Sea*, 4 Ed., 2001 at p. 167. *Peer Voss* v. *APL Co. Pte. Ltd*. [2002] 2 Lloyd's Rep. 707 at p. 722 (Singapore C.A.): "The sea waybill is retained by the shipper and all the consignee need show to take delivery is proof of his identity." *Sea-Land Service, Inc.* v. *Lozen International, LLC* 285 F.3d 808, 2002 AMC 913 (9 Cir. 2002). *Pomerene Act* 1916, at sects. 2 and 6. Straight bills were in use in the U.S. for many years and even before the *Pomerene Act*, 1916, however. In the recodification of the *Pomerene Act* in 1994, the term "straight bill of lading" was replaced by "nonnegotiable bill of lading". See 49 U.S.C. 80103(b), although the term "straight bill" is still commonly used (*Project Hope* v. *M/V Ibn Sina* 250 F.3d 67 at p. 71, 2001 AMC 1910 at p. 1913 (2 Cir. 2001)). The term "straight bill" (or "straight consigned bill") is also sometimes used in England, where it is treated as a waybill. See *The Chitral* [2000] 1 Lloyd's Rep. 529 at p. 532.

[65] 885 F.Supp. 86 at p. 88, 1995 AMC 2327 at p. 2331 (S.D.N.Y. 1995).

[66] *Crooks* v. *Allan*, (1879) 5 Q.B. 38 at p. 41. "The clause in question comes in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice. If a shipowner wishes to introduce in his bill of lading so novel a clause as one exempting him from general average contribution-... he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it."

[67] *Paterson, Zochonis & Co. v. Elder, Dempster & Co.* (1922) 13 Ll. L. Rep. 513 at p. 517, [1923] 1 K.B. 420 at p. 441 (C.A.). "Like many other Judges, I desire to protest against the extremely illegible condition of this bill of lading. Shipowners have had a good deal of warning from the courts; and some day they will find themselves deprived of the protection of their exceptions on the ground that they have not given reasonable notice of them as terms of the contract." *P.S. Chellaram & Co. Ltd. v. China Ocean Shipping Co. (The Zhi Jiang Kau)* [1991] 1 Lloyd's Rep. 493 (N.S.W. C.A.). *EM Chemicals v. Sloman Najade* 1987 AMC 1689 (S.D. N.Y. 1987), where the Court held that it was immaterial that the ocean carrier's long-form bill of lading was printed in small type since its short-form bill of lading contained a clearly legible COGSA package limitation clause. *Tribunal de Commerce de Marseille,* Oct. 15, 1976, DMF 1977, 295 at p. 296 where a jurisdiction clause printed on the bill of lading was rejected because it was "almost totally illegible". In *The Iran Vojdan,* [1984] 2 Lloyd's Rep. 380, the court held that, under applicable German law, the exclusive jurisdiction clause in the bill of lading would be treated as invalid because the conditions were not decipherable.

Bundesgerichtsho[68]*f*, for instance, has ruled that bill of lading clauses which can only be read with the aid of a magnifying glass do not form part of **the bill of lading contract** even if they are standard clauses in the trade. Ambiguity in a bill of lading is sometimes resolved by applying the "*ejusdem generis*" rule of contractual construction.[69](Stress Added).

The paper bill of lading can be replaced by recording the relevant information by other means[70] and the current legal regime surrounding bills of lading and their transfer does not seem, on the face of it, to preclude a computerised system. In the Hamburg Rules it is only stated that the signature on the bill of lading may be in handwriting or made by any other electronic means.[71] The primary advantage of electronic documents lies, in the ease and speed with which they can be exchanged. The speed in the exchange of the electronic documents has made the standardisation of content and format necessary which means that the e-bill of lading contract will have a standard format and so being a standard form contract as already has been established in international maritime transportation rather than being a contract negotiated and formed individually every time. American scholars, who have written about electronic bills of lading, considered that the paper bill of lading is the contract of carriage, which means that the electronic bill of lading has to implement this function as well.[72] It is worth mentioning that some scholars, writing about electronic bills of lading and following the English Literature, still state that the bill of lading is merely evidence of

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[68] May 30, 1983, [1984] ETL 217; February 3, 1986, [1987] ETL 105.

[69] *Rainbow Navigation, Inc.* v. *U.S.* 741 F. Supp. 171 at p. 188, 1990 AMC 1828 at p. 1852 (D. N.J. 1990), where a carrier failed to recover extra costs resulting from its vessel being strikebound at a discharge port under a specific clause in the bill of lading providing for the vessel being unable to discharge because of strikes or work stoppages. *Gooch* v. *United States* 297 U.S. 124 at p. 128 (1936), stating that *ejusdem generis* serves as "an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified."

[70] G Zekos "EDI and the contractual role of computerized (electronic) bills of lading" 1999 Managerial Law, Number 6.

[71] J Gliniecki, C Ogada "Symposium: Current Issues in Electronic Documents, Writings, Signatures and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce" 1992 *Journal of International Law and Business* 117

[72] R Merges, G Reynolds "Toward a Computerised System for Negotiating Ocean Bills of Lading" 1986 *JMLC* 23 p. 26 "The bill of lading is a receipt for the goods and a contract of carriage". R Kelly "Comment: The CMI Charts a Course on the Sea of Electronic Data Interchange: Rules for Electronic Bills of Lading" 1992 *Tulane Maritime Law Journal* 349 p. 351 "it may represent the contract of carriage between the shipper and the carrier". M Glisson, W Cooper "The Ins and Outs of Shipping Documents" 1991 *CPA Journal* 66 "The bill of lading is a widely used shipping document ... identifying contracting parties and stating terms and conditions of agreement". J Steinfeld, Jr "When Is a Third Party Liable?" 1991 *Distribution (DWW)* 90 "The beginning point must be the bill of lading contract". R Price, J Whelan "Gulf States: Carrier Responsibility for Carriage Stowage" 1989 *Middle East Executive Reports* 16 "depending on the terms of the bill of lading contract". W Farrall, A Parker "Piecing Together the Liability Puzzle" 1988 *Transportation & Distribution* 46 "The key contract between shipper and carrier is the bill of lading" (ABI Information CD Room Abstracts).

the contract.[73] It is time for an electronic document such as the e-bill of lading able to be circulated in cyberspace among many jurisdictions to have the role of being the standard form contract of carriage, a role for which is introduced to play in its traditional paper form as Duhe[74], circuit judge, in the court of appeal said that the paper bill of lading is the contract of carriage.
The two steps of conclusion a contract is directly applicable to electronic contracts and the only difference is focused on the different way of expression of offer and acceptance rather on the substance of the notions of offer and acceptance. The exchange of electronic messages makes it very difficult to establish the time of the conclusion of the contract. It is even more difficult to find out when the last shot for the conclusion of the contract has gone off and who fired it. The whole process is slowed down if the contracting parties do not know the final expression of their contract. The electronic bill of lading is the offer under which the contract of carriage is concluded. The electronic conclusion of the electronic contract of carriage means that the possibility of an oral contract of carriage concluded prior the issue of the paper bill of lading is history and the electronic bill of lading contract can be concluded electronically simultaneously with the delivery of the goods for carriage taking into consideration that the electronic standard contract of carriage expressed by the electronic bill of lading contract is not formed with the bargaining between a shipper and a carrier in a port of loading. Remarkably, electronic contracts, like transactions in the paper world, remain dominated by standard-form contract terms.[75] Hence, electronic commerce has relied as heavily on standard form contracts as the paper world.[76] The commercial reality is that in standard form contracts one party, the other having no real choice but to accept them or go without, imposes the terms. Electronic documents and signatures are admissible for the purpose of proving authenticity or integrity of the message[77] and a lot of progress has made regarding

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[73] K Burden "EDI and Bills of Lading" 1992 *The Computer Law and Security Report* 269 p. 269 "A bill of lading ... evidence of the terms of the contract of carriage".

[74] *Metropolitan Wholesale Supply Inc v M/V Royal Rainbow* (1994) 12 F3d 58 p. 61 "A bill of lading, the contract of carriage between the shipper and the carrier, continues to govern the rights and obligations of the parties until the delivery of the cargo".

[75] Laura McNeill Hutcheson, The Exclusion of Embedded Software and Merely Incidental Information from the Scope of Article 2B: Proposals for New Language Based on Policy and Interpretation, 13 Berkeley Tech. L.J. 978, 982-84 (1998) (discussing the challenge that the practice of embedding software in conventional products presents for the legal system). E. Scott Reckard, WhyRunOut Outlasts Larger Rivals Internet: A liation with Stater Bros. Chain May Represent Industry's Latest Business Model, Los Angeles Times, July 14, 2001, at C1, available at 2001 WL 2502806. Debora Vrana, California Dealin': Financing the State's Emerging Companies Buy.com, Palm Inc. IPOs to Highlight 1st Quarter, Los Angeles Times, Jan. 3, 2000, at C1, available at 2000 WL 2197202.

[76] Shawn E. Tuma & Christopher R. Ward, Contracting Over the Internet in Texas, 52 Baylor L. Rev. 381, 389-95 (2000) (asserting that "electronic contracts should be considered valid and enforceable under the same principles as verbal agreements so long as there existed mutual assent, consent, or agreement.").

[77] G Zekos "E-MNEs ,Cyberspace and E-commerce" 2004 Barmarick Publications, England. G Zekos "MNEs, Globalization and Digital Economy" 2003 Managerial Law issues ½, www.emeraldinsight.com

electronic contracting, e-commerce and regulating the use of electronic technology in jurisdictions such as USA and EU. The development and introduction of the handwritten electronic signature will revolutionize the development and use of electronic documents[78] not mentioning the use of an electronic negotiable bill of lading and so many complex current systems of electronic bill of lading contract will be used easily and more efficiently[79].
At the moment, only the Hamburg Rules state the signature by electronic means.[80] The relevant article of the Hamburg Rules is insufficient to permit the rules to apply to electronic bills of lading contract, since other parts of the Rules require a document and it relates only to the method of signature. Thus, the Rules require amendment in order to define and cover the electronic bill of lading contract in all contracting states and this would have to be done by an International Convention. It is worth mentioning that the CMI Draft Instrument on Transport Law 2001 makes an effort to introduce a new transport document and the author has argued for the need to promote the e-bill of lading contract in a negotiable or a non-negotiable form as the document circulating in international carriage of goods[81] and not experimenting with the danger to postpone the expansion of electronic contracting and documentation in maritime carriage of goods and its finance.

3. Conclusion

In the electronic era, there should be a uniform perception of the contractual feature of e-bill of lading contract. W Tetley says that "The ocean bill of lading is a tripartite contract: involving the shipper, the carrier and the consignee. It is a three-purpose document: a contract of carriage, a receipt, and a document of title. It is really not *the* contract of carriage but the best evidence of the contract[82]" and so this approach shows a major contradiction in the used terminology and understanding of the contractual role of bills of lading causing a major problem in the use of an e-bill of lading contract

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G Zekos "Legal Problems in Cyberspace" 2002 Managerial Law 45, Number 5. G Zekos, "EDI: Electronic Techniques of EDI, Legal Problems and European Union Law"1999, webjcli.ncl.ac.uk/1999/issue2/zekos2.html

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

[79] *G Zekos "Electronic Bills of Lading and Negotiability" 2001 Journal of World Intellectual Property 977, No6 www.wernerpubl.com*

[80] The Hamburg Rules, Article 14.3 "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, or in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued".

[81] G Zekos, Bills of Lading and Charter-parties in CMI Draft Instrument on Transport Law 2001 and Cyberspace, 2005 The ICFAI journal of international Business Law 25 **www.icfaipress.org** G Zekos, Contractual role of documents issued under the CMI Draft Instrument on Transport Law 2001, 2004 Journal of maritime Law and Commerce 99, USA. **www.jmlc.org**

[82] CHAPTER 9, PROVING THE CONTRACT OR TORT, p30 http://tetley.law.mcgill.ca/

in international maritime transportation and international financial market. The issue of the bill of lading marks the formation of the contract of carriage in such a form which is able to transfer the contractual rights to any consignee or endorsee and also which allows it to function as the title for the goods in transit. Can be imagined an e-bill of lading contract, circulated electronically in cyberspace, for an electronic contract of carriage being merely evidence of the contract and not the e-standard contract of carriage? The e-bill of lading as merely evidence of part of the original e-contract of carriage cannot be endorsed electronically as the original contract of carriage to any third party rather than it has to be endorsed as merely evidence of the original contract of carriage as well. The legal principle of endorsement does not transform a merely evidential document into an original contract of carriage. Parties can agree differently by introducing a clause but this does not diminish the characteristic of paper or e-bill of lading as being a contract in general by its legal nature. A bill of lading cannot be mentioned by judges and scholars as a bill of lading contract with the sense of being merely evidence of the contract of carriage because of the need for accuracy in the used terminology.

Finally, there is a need for simplification of the present complex electronic systems in order to accommodate not only the contractual role of electronic bills of lading but also the function of endorsement of electronic negotiable bills of lading as documents of title. The electronic signature has to become an electronic individual signature rather than an electronic programme prepared and sold by a company as it has established at the moment. The perception of electronic possession of a document of title (bill of lading) has to be introduced and understood as equivalent to physical possession of a paper bill of lading having the same functions of the paper bill of lading as a document of title regarding the transfer of property and the finance of international carriage of goods by sea and the international commerce.