UNIVERSITY OF KWAZULU-NATAL

BILLS OF LADING AND THE USE OF MARITIME LETTERS OF INDEMNITY

By

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DECLARATION

I, **Tanya Henry (215082287)** declare that:

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Abstract

The bill of lading is a piece of paper first used hundreds of years ago and has evolved over time to become a key document involved in the carriage of goods by sea. It is able to serve as a receipt for cargo, as evidence of the contract of carriage for the cargo and ultimately as a document of title enabling the holder to claim delivery of the cargo by simply presenting it to the carrier at the destination port.

The twentieth century saw the shift to bigger, better, faster logistic processes! Bigger and faster ships means that the paper bill of lading (B/L) does not always arrive on time leaving ship owners in a difficult position. As a result, a practice developed in which cargo carriers would accept letters of indemnity (LOI) instead of Bs/L and thereby disregarding the presentation rule.

This study first examines the B/L as a document of title and how the holder's right operates against the carrier. It then looks at the acceptance of the LOI in lieu of Bs/L and the risks associated with such practice. In particular the study explores the kind of risks that a ship owner is exposed in instances where the B/L is unavailable at the port of discharge and the owner accepts an LOI. As a possible solution to minimising risks and upholding the presentation rule, the study looks at the use of electronic bills of lading (E-bill) as an alternative to accepting an LOI.

The study then expands to the emergence of the E-bill which is a recent development in the maritime industry seen as a possible way of replicating the traditional paper B/L. The question therefore turns on whether or not E-bills can satisfactorily replicate the functions of a paper B/L. The dissertation suggests that in the absence of legislation governing their use, E-bills will be treated with reservation. As a result it is unlikely that E- Bills will, in anytime soon gain universal usage especially of a kind witnessed in the use of traditional paper Bs/L.

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"For I know the plans I have for you," declares the LORD, "plans to prosper you and not to harm you, plans to give you hope and a future.

Jeremiah 29:11

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BILLS OF LADING AND THE USE OF MARITIME LETTERS OF INDEMNITY

CHAPTER 1:

INTRODUCTION

"God must have been a ship owner. He placed the raw materials far from where they were needed and covered two thirds of the earth with water." – Arne Naess[1]

International trade facilitated by means of the carriage of goods by sea made it possible for raw materials to reach those parts of the world where they are needed. Bills of lading are legal documents issued by the carrier to the shipper after the cargo has been loaded on board the ship through which the carrier commits to deliver the cargo to the named destination and contains details of the shipper and consignee, ports of loading and discharge, description and quantity of cargo shipped as well as the date of shipment.[2] The courts perceived the bill of lading (B/L) to be a 'document of dignity', the key element of effectual international trade[3], the 'life blood of international commerce'[4], so to speak. Where the cargo is sold in transit, it is usually financed by means of a letter of credit (L/C). In such transactions, the bill of lading becomes a physical manifestation of the cargo and is often transferred from the shipper to the seller through the banking system.[5] The importance of the bill of lading in the movement of cargo can therefore not be overstated.

1.1 Evolution of the bill of lading over time

As trade between Mediterranean ports began to grow in the 11th century, the B/L was still unknown and shippers would travel with their merchandise.[6] The ship's mate would record details of the

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[1] Cassidy, WB. "Shipowner Arne Naess Dies." (2004) *JOC.com* [Onlline] Available at: https://www.joc.com/shipowner-arne-naess-dies_20040125.html [Accessed 2 April 2019].

[2] Checks when signing a bill of lading – bulk carrier guide Bulk Carrier Guide http://bulkcarrierguide.com/signing-a-bill-of-lading.html [Accessed 4 September 2019].

[3] J Hare. *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) p. 540.

[4] Shipulina, A. "Recent Court of Appeal judgement on "the life blood of international commerce" – letters of credit" (2014) *Thomas Cooper* [Online] Available at: https://www.thomascooperlaw.com/recent-court-appeal-judgment-life-blood-international-commerce-letters-credit/ [Accessed 22 May 2019].

[5] The Legal Status of Electronic Bills of Lading A report for the ICC banking Commission, Clyde & Co LLP (2018) *ICC International Chamber Of Commerce* [Online] Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2018/10/the-legal-status-of-e-bills-of-lading-oct2018.pdf [Accessed 15 April 2019].

[6] R Aikens, R Lord and M Bools. *Bills of Lading*. (2006) p.1.

merchandise shipped in the ship's register.[7] The earliest B/L can be traced back to 1390.[8] Accuracy was paramount as was evident by the law of merchants applied during the 14th century which provided that only the ship's clerk was to have possession of the ship's register and that if anything was recorded by another party, or if the same clerk recorded anything untrue, then his punishment was to include loss of his right hand, branding on his forehead and the loss of all his possessions irrespective of whether the untrue entry was made by someone else.[9] The ship's register fulfilled what today is known as the receipt function of the B/L. With time, shippers started sending letters to their business associates informing them of the arrival of the cargo in the future. They also provided details of how the cargo should be dealt with once received.[10] These shippers began to request that a copy of the ship's register be sent to these associates as well.[11] The party at the discharge port demanding delivery of the cargo would need to prove that he was entitled to delivery of the cargo.[12] A copy of the ship's register signed by the captain would serve as an indication of title.[13]

A ship's captain was able to determine who was entitled to delivery of the cargo by referring to the ship's register.[14] There were times when the shipper was unable to name the consignee at the time of shipment because the cargo had perhaps not been sold.[15] Thus it became necessary for the party laying claim to delivery of the cargo to present a document that showed his identity and his right to claim delivery of the cargo.[16] The 16th century saw a change to the form and function of the B/L and the need for transferability.[17] It was at this time that the B/L served as a means of proving entitlement to delivery of the cargo.[18] Bs/L from this period contained wording that imported transferability and also contained a protective clause which typically read: "*one accomplished, the others to stand void*".[19] The holder of these Bs/L was regarded as enjoying some rights against the carrier.[20] The clause also granted the carrier some protection from multiple claims against the same consignment.[21] For example, it would carry words such as below:

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[7] Ibid
[8] Ibid
[9] Ibid
[10] Ibid
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid
[16] Ibid
[17] Ibid
[18] Ibid
[19] Ibid
[20] Ibid
[21] Ibid

"IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order."[22]

This attestation clause appears on the face of the B/L and serves to protect the carrier in that once cargo is delivered against one original B/L, the remaining Bs/L are rendered void.[23]

In *Duyn v Shangming International (Pty) Ltd*[24] the remaining two out of a set of three original Bs/L were found to be void after the first B/L holder had presented the B/L and was thus entitled to delivery of the cargo.

The first Bs/L served to confirm receipt of the goods loaded on board and there was no reason why the document would have been construed as the charter party.[25] The B/L then began to assume a contractual function.[26] The B/L of the time would include reference to the governing charter party and this inclusion could be understood to either integrate the terms of the said charter party or that the contract for the carriage of the goods was to be regulated by the charter party alone, with the latter being more plausible.[27]

1.2 Types of bills of lading

As the B/L has evolved, the maritime industry sees the utilisation of the following three most common types:

> A negotiable B/L made out '"To Order"' which is transferred by endorsement, similar to a cheque. The symbolic possession of the cargo described can be transferred many times by mere endorsement and delivery of the B/L.[28] Endorsement and delivery of a negotiable B/L facilitates trading of the cargo during the voyage before the ship has arrived at the discharge

[22] Spanjaart, M. The Surrender of the Bill of Lading 'Duly Endorsed' (2014) *TRANSPORT, INSURANCE & COMMERCIAL LAW* [Online] Available at: https://www.trainsco.nl/publications/the-surrender-of-the-bill-of-lading-duly-endorsed/#_ftn14 [Accessed 17 October 2019].
[23] Ibid at 6.
[24] [2003] 1 All SA 173 (C)
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid p.19.

port.[29] This trading of cargo and repeated transferring of the bill of lading whilst the cargo is in transit often results in the ship arriving at the discharge port before the B/L;[30]

Straight consigned Bs/L obligate the carrier to deliver the cargo only to the named consignee and is therefore not negotiable; and[31]

The holder of a bearer B/L is entitled to delivery from the carrier without necessarily being named in the B/L.[32]

The negotiable B/L will form the focal point of this dissertation.

1.3 Functions of the bills of lading

The B/L typically embodies these three distinct functions. It serves as a receipt, evidence of the sea carriage contract and as a document of title.

The **receipt** function serves to the confirm that the carrier has received a specific quantity of cargo for shipment, the description and an attestation of the general condition of the cargo received, as well as the date on which the cargo was loaded;

The B/L is normally issued on the basis that a contract for the carriage of goods by sea has been concluded prior to shipment therefore it serves as **evidence of the contract**;

The B/L entitles a *bona fide* holder to delivery of the cargo described therein at the port of destination. However, such entitlement does not necessarily equate to ownership of the cargo. Upon surrender of the original B/L to the carrier, the B/L holder is entitled to take delivery of the cargo.

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[29] Bills of Lading 5 – Cargo Claimants' Rights and Liabilities (March 2018) *Claim Guides West of England* [Online] Available at: https://www.westpandi.com/globalassets/about-us/claims/claims-guides/woe_claims-bills-of-lading-5---cargo-claimants-rights-and-liabilities.pdf [Accessed 09 April 2019].

[30] The missing bill of lading (December 1998) *GARD* [Online] Available at: http://www.gard.no/web/updates/content/52588/the-missing-bill-of-lading [Accessed 14 August 2019].

[31] R Aikens, R Lord and M Bools. *Bills of Lading*. (2006) 1 p.20.

[32] Ibid p.20.

1.4 The Presentation Rule

At the discharge port, the carrier is not obligated to deliver the cargo to any other person other than the person who presents the B/L.[33] This is known as the presentation rule. At the discharge port, the carrier is not obligated to deliver the cargo to any other person other than the person who presents the B/L.[34] which describes the cargo concerned to the consignee who is the person that is the receiver but not necessarily the owner of the cargo.

The presentation rule possesses a dual function[35]:

Firstly, a carrier is obliged to deliver the cargo only to the party holding and presenting the B/L.[36]

Secondly, once delivery has been effected, the carrier would have discharged its obligation under the carriage contract.[37] Therefore, it must be noted that the carrier's obligation relates to delivery of cargo to the correct consignee described on the B/L. The carrier is not obligated to ensure delivery to the owner unless such owner is designated by the B/L as the person who has title to collect the cargo.[38] Ownership is determined by the sales contract concluded prior to the issue of the B/L and to which the carrier is not likely a party.[39] For purposes of the presentation rule, it is important not to conflate title to delivery and title to cargo.

Unless aware of any valid reason not to, the carrier, represented by the master, is obliged to deliver the cargo to the party presenting the original B/L at the discharge port.[40] The original B/L however, is very often unavailable for presentation to the carrier when the ship arrives at the discharge port. Various reasons contribute to the B/L arriving after the ship. Common factors leading to this phenomenon have been associated with the advent of faster ships, documentary delays occasioned the

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[33] Ibid at 28.
[34] Anon., n.d. "Presentation of a Bill of Lading" *HandyBulk.* [Online] Available at: https://www.handybulk.com/presentation-of-a-bill-of-lading [Accessed 28 January 2020].
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Bills of Lading 1 – Functions of a Bill of Lading (March 2018) *Claims Guides West of England* [Online] Available at: https://www.westpandi.com/globalassets/about-us/claims/claims-guides/woe_claims-bills-of-lading-1---functions-of-a-bill-of-lading.pdf [Accessed 09 April 2019].
[39] Ibid.
[40] The missing bill of lading (01 December 1998) *GARD* [Online] Available at: http://www.gard.no/web/updates/content/52588/the-missing-bill-of-lading [Accessed 04 September 2019].

onward sale of the cargo whilst the ship is still in transit,[41] bank hold ups especially if the B/L is held as collateral for payment under a letter of credit (L/C). The B/L may also simply be lost.

In order to observe the presentation rule which is a time honoured tradition, a ship owner who reaches the destination port before the B/L does would have to wait for the arrival of the original B/L if the carrier wishes to afford itself the greatest safeguard under the presentation rule. However, it is not commercial feasible for the carrier to wait for the B/L.[42] Costs of lying idle at any port that include increased berth dues and failure to earn freight, in addition to port congestion are prohibitive for the carrier. The absence of the original B/L under these circumstances therefore present difficulties for the carrier.

In an effort to obviate such difficulties, it has become common practice for cargo receivers to establish a practical method through which the carrier can release the cargo to the consignee while safeguarding itself against the consequence of delivering cargo against the presentation rule. The consignee issues what is known as a maritime letter of indemnity (LOI) which, as the name suggests, indemnifies the carrier who delivers cargo to the consignee who does not present a B/L to collect the cargo.

1.5 Letters of Indemnity

An indemnity may be described as a form of security or protection offered against loss or other financial burden.[43] Accepting an LOI is considered a deviation from the carriage contract but has become the norm and is not in itself unlawful.

There are instances where LOIs are considered unlawful and such an example would be when the carrier is presented with an LOI in exchange for issuing clean Bs/L with full knowledge that the cargo was defective.[44] Clean Bs/L may be a requirement under an L/C.[45] The bank, consignee or receiver will have had no idea of the condition of the cargo being loaded and will depend upon the description

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[41] Delivery of cargo without bills of lading (2017) *UK P & I CLUB* [Online] Available at: https://www.ukpandi.com/knowledge-publications/article/delivery-of-cargo-without-bills-of-lading-140871/ [Accessed 10 April 2019].
[42] Ibid at 32.
[43] *English Oxford Living Dictionaries* [Online] Available at: https://en.oxforddictionaries.com/definition/indemnity [Accessed 09 April 2019].
[44] Anon. "Clean Bills, Dirty Bills and LOI's - Be Very Careful!" (2019) *Maritime Mutual.* [Online] Available at: https://maritime-mutual.com/blog/2019/01/24/clean-bills-dirty-bills-and-lois-be-very-careful/ [Accessed 28 January 2020].
[45] Ibid.

of the cargo in the B/L.[46] The carrier may be seen to have conspired with the shipper to disguise the condition of the cargo. This form of LOI is considered unlawful and will not be enforceable as the parties will have effectively perpetrated fraud.[47]

Accepting an LOI for non-presentation of the original B/L is not unlawful even though considered a deviation of the carriage contract. The delayed or lost B/L has necessitated the need for carrier to accept an LOI in the absence of the B/L. By issuing a maritime letter of indemnity (LOI), the charterer promises to indemnify the ship owner against consequences that may arise in exchange for the ship owner agreeing to permit the delivery of the cargo without presentation of the original B/L and/or discharging the cargo at a different port to the one stated on the B/L:

> "*In consideration of your complying with our above request, we hereby agree as follows:-*
>
> *To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.*"[48]

Unless court ordered or positively agreed thereto in a charter party[49], a ship owner would never be duty-bound to accept an LOI where the original B/L is not available and the decision to accept the LOI does not make the order to allow discharge and delivery of the cargo justifiable.[50]

The practice of agreeing to deliver cargo to a party that has not presented an original B/L is not recommended without prior consultation with their Protection and Indemnity (P&I) Club.[51]

A P&I Club is a non-governmental and non-profit mutual insurance society unique to the maritime industry aimed at providing cover for those risks that are inherent with owning and operating ships including, amongst others, loss of life, loss and damage to cargo sustained during transit as well as damage to the environment.[52] Membership ordinarily consists of ship owners and operators,

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[46] Ibid.
[47] Ibid.
[48] International Group Standard Letters of Indemnity *UK P&I Club* [Online] Available at: https://www.ukpandi.com/knowledge-publications/industry-issues/international-group-of-pi-clubs/international-group-standard-letters-of-indemnity/ [Accessed 09 April 2019].
[49] Ibid at 32.
[50] Nielsen H. Electronic Bills of Lading *BIMCO* [Online] Available at: https://www.bimco.org/contracts-and-clauses/chartering-help-and-advice/bills-of-lading-advice/electronic_bills_of_lading [Accessed 16 April 2019].
[51] Ibid at 30.
[52] What is protection and indemnity insurance? (2019) *HELLENIC SHIPPING NEWS WORLDWIDE* [Online] Available at: https://www.hellenicshippingnews.com/what-is-protection-and-indemnity-insurance/ [Accessed 08 September 2019].

charterers, and in recent times, freight forwarders and warehouse operators.[53] P&I insurance is indispensable due to the risk associated with the transporting of cargo on a ship by the crew.[54]

By agreeing to deliver the cargo against an LOI, the carrier elects to operate outside of his duty under the B/L[55], effectively negating his rights, defences and any limitation of liability afforded under the B/L, opening himself up to claims for mis-delivery of cargo by the lawful B/L holder.[56] Mis-delivery claims can bankrupt a ship owner and are therefore categorically excluded from the scope of P & I cover given the mutual character of the insurance provided.[57]

The UK P&I Club is one of 13 members of the International Group (IG) of P&I Clubs[58] and all references to the P&I Club in this dissertation will refer to the UK P&I Club.

As per Rule 2, s17, (c) (i) and (ii) of the UK P&I Club's List of Rules & Bye-laws, delivery of cargo without presentation of an original B/L or at a different port or place than that stated in the B/L is an excluded liability so owners risk their P&I cover when they take the decision to accept an LOI.[59]

The four leading risks associated with agreeing to the delivery of cargo in the absence of an original B/L are:

i. Mis-delivery of cargo

   The lawful B/L holder could proceed against the ship owner for the mis-delivery of the cargo to which he is entitled by virtue of holding the original B/L.[60] Owners may not enjoy the support of their P&I Club in defending the claim and have the added concern over whether

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[53] Moorcraft B. What is protection and indemnity insurance? (2019) *INSURANCE BUSINESS ASIA* [Online] Available at: https://www.insurancebusinessmag.com/asia/guides/what-is-protection-and-indemnity-insurance-164294.aspx [Accessed 10 September 2019].

[54] Anish. The Importance of P&I club in shipping (2017) *MARINE INSIGHT* [Online] Available at: https://www.marineinsight.com/marine-safety/the-importance-of-p-i-club-in-shipping/ [Accessed 10 September 2019].

[55] Ibid at 35.

[56] Delivery Without Bills of Lading – Can Owners Enforce Receivers' LOI to Charterers? (2005) *STEAMSHIP MUTUAL* [Online] Available at: https://www.steamshipmutual.com/publications/Articles/Articles/Laemthong0805.asp [Accessed 10 September 2019].

[57] Ibid.

[58] GROUP CLUBS Full list of Principal Clubs, Affiliated Associations and reinsured subsidiary *INTERNATIONAL GROUP OF P&I CLUBS* [Online] Available at: https://www.igpandi.org/group-clubs [Accessed 10 September 2019].

[59] Contacts & Rules 2014 List of Correspondents and Rules and Bye-laws UK P&I CLUB.

[60] Delivery of cargo without bills of lading (2017) *UK P & I CLUB* [Online] Available at: https://www.ukpandi.com/knowledge-publications/article/delivery-of-cargo-without-bills-of-lading-140871/ [Accessed 10 April 2019].

the LOI provided will yield the necessary protection to the ship owner.[61] An owner could always decide not to permit delivery without an original B/L but the subsequent delays would not make any sense commercially. It has now become common place to have owners consent to permit discharge against an LOI incorporated into the charter party.[62]

ii. Insurance cover

Rule 2 s17 (c) (ii) of the UK P&I Club Rules provides that any liabilities that may arise due to mis-delivery claims are not covered.[63] The LOI effectively replaces the ship owner's P&I cover in these circumstances.[64]

iii. Adherence to the LOI wording

To ensure that the indemnity provided by the charter under the LOI can be enforced, owners need to be particularly attentive to the wording of the clauses contained in the LOI.[65] The owners must ensure that they do not deviate from the instruction contained in the LOI as to whom the cargo must be delivered.[66] Failure to deliver the cargo in strict conformity with the charterers' instructions will result in the inability to enforce the indemnity.[67]

iv. Creditworthiness of the LOI provider

It is not possible to secure a claim under an LOI by means of exercising a lien over the cargo.[68] A charterer under a charter party may well be able to pay hire and other incidentals that arise during the course of the charter party but this does not mean that the same charterer would be able to meet the significant value of a cargo mis-delivery claim.[69] The party issuing the LOI could be called upon to provide security more than once where multiple parties claim to be the lawful holder of the original B/L. [70] The LOI would not be worth the paper is it written on where it is found that the charterer lacks the necessary solvency to put up the money for the LOI.

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[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Shepherd S. UK: Letters Of Indemnity Against Discharge Without Bills Of Lading – Seeking To Minimise The Trader's Risk (2011) *Mondaq* [Online] Available at: http://www.mondaq.com/uk/x/142016/Marine+Shipping/Letters+of+Indemnity+against+discharge+without+Bills+of+Lading+seeking+to+minimise+the+Traders+risk [Accessed 10 April 2019].

There are six types of maritime letters of indemnity commonly found in the maritime trade:[71]

- LOI for non-presentation of the original bill of lading (Appendix 1);
- LOI for non-presentation of the original bill of lading with bank guarantee (Appendix 2);
- LOI for change of destination with presentation of at least one original bill of lading;
- LOI for change of destination with presentation of at least one original bill of lading including bank guarantee;
- LOI for change of destination and non-presentation of the original bill of lading;
- LOI for change of destination and non-presentation of the original bill of lading including bank guarantee

1.6 The electronic bill of lading: a potential alternative to dealing with the risks associated with the use of the LOI

The drawbacks associated with the long-established paper Bs/L have been identified as delays, increased expenditure and security risks, etc.[72] The risks associated with the carrier's acceptance of an LOI are mis-delivery claims, loss of insurance cover, failure of the LOI to be enforced in the case of a mis-delivery claim as well as the insolvency of the party issuing the LOI.

The electronic bill of lading (E-bill) is a digital replication of the paper B/L and could be defined as a robust blend of technology coupled within a legal framework that seeks to mirror the three functions of the long-established paper B/L mentioned above, namely i) receipt for cargo, ii) evidence of the contract of carriage and iii) document of title[73] binding the parties by means of a user agreement.[74] The benefits associated with switching to E-bills includes time saved, a reduction of administration burdens and may dispense with the need for owners to accept an LOI for delivery of cargo without production of the original B/L at the discharge port because there would be no delayed arrival of the E-bill.[75]

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[71] Ibid at 37.
[72] Tan J. Legal Briefing: Electronic Bills of Lading (2017) *UK P&I CLUB* [Online] Available at: https://www.ukpandi.com/knowledge-publications/publications/article/legal-briefing-electronic-bills-of-lading-138374/ [Accessed 15 April 2019].
[73] Electronic Bills of Lading (eBL) *BOLERO* [Online] Available at: http://www.bolero.net/home/electronic-bills-lading/ [Accessed 15 April 2019].
[74] Ibid at 30.
[75] Ibid.

The document of title function is the one least capable of digital replication because it no longer involves the maritime tradition of a physical hand-written or stamped endorsement followed by the physical transfer of the B/L and the concurrent transfer of title in the cargo.

At the time of writing there are no international cargo conventions that regulate the use of the E-bill.[76] Parties wishing to make use of the E-bill would be required to contractually incorporate the provision into their sea carriage contract.[77] Additionally, parties to the carriage contract would need to sign a multilateral contract agreeing to treat the E-bill as the functional equivalent of a paper B/L.

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules") enjoys the benefit of hindsight and provides that a transport document may be published in an electronic form with the permission of the shipper and the carrier.[78] The Rotterdam Rules have not come into force as only four (Cameroon, Congo, Spain and Togo) out of the required 25 maritime countries have ratified the convention to date.[79]

The IG of P&I Clubs has analysed and endorsed the use of five electronic trading systems, namely Bolero, ESS, the e-title™ solution, GlobalShare S.A. (edoxOnline) and WAVE .[80] The IG has advised that liabilities that arise out of the use of E-bills under a sea carriage contract will be covered as would be the case of a paper B/L, provided that the parties to the contract make use of one of the five approved electronic trading systems mentioned above.[81] The prevailing P&I cover exclusions applicable to paper Bs/L will extend to the E-bill for example, where the cargo is discharged without the production of an original B/L.[82]

The Baltic and International Maritime Council (BIMCO) is the biggest global shipping association boasting more than 2,100 members internationally including ship owners, managers, operators, agents and brokers.[83] BIMCO is known around the world for the precision, certainty and consistency of their

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[76] Ibid.
[77] Ibid.
[78] The Rotterdam Rules *UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT* [Online] Available at: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/Rotterdam-Rules-E.pdf [Accessed 16 April 2019].
[79] Status United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) *UNCITRAL* [Online] Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html [Accessed 16 April 2019].
[80] Ibid at 45.
[81] Ibid.
[82] Ibid.
[83] About Us *BIMCO* [Online] Available at: https://www.bimco.org/about-us-and-our-members/about-us [Accessed 16 April 2019].

customary maritime contracts.[84] BIMCO has supported the notion of the E-bill and has now incorporated the electronic B/L clause into the most recent New York Produce Exchange (NYPE 2015) time charter party form:[85]

"*(a) At the Charterers' option, bills of lading, waybills and delivery orders referred to in this Charter Party shall be issued, signed and transmitted in electronic form with the same effect as their paper equivalent.*

(b) For the purpose of Sub-clause (a) the Owners shall subscribe to and use Electronic (Paperless) Trading Systems as directed by the Charterers, provided such systems are approved by the International Group of P&I Clubs. Any fees incurred in subscribing to or for using such systems shall be for the Charterers' account.

(c) The Charterers agree to hold the Owners harmless in respect of any additional liability arising from the use of the systems referred to in Sub-clause (b), to the extent that such liability does not arise from Owners' negligence."[86]

The future of the E-bill seems positive now having obtained the support and backing of IG and BIMCO but whether it can truly match the success and longevity achieved by the long-established paper B/L is yet to be seen.

This dissertation will focus on "document of title" function of the B/L and the impact of accepting an LOI before proceeding to examine whether the E-bill is a suitable replicate for the paper B/L thereby eliminating the need for a ship owner to accept an LOI when the paper B/L is not available.

Chapter 2 will expand upon the B/L as a document of title and the rights transferred to the *bona fide* holder under a B/L.

Chapter 3 will examine the risks associated with the acceptance of an IG approved LOI (notably the UK P & I Club) where the original B/L is unavailable for presentation to the carrier at the discharge port.

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[84] Ibid.
[85] Electronic Bills Of Lading Clause *BIMCO* [Online] Available at: https://www.bimco.org/contracts-and-clauses/bimco-clauses/electronic-bills-of-lading-clause [Accessed 16 April 2019].
[86] Ibid.

Chapter 4 will analyse whether the E-bill can successfully compete with the success and longevity of the long-standing paper B/L as a document of title and thereby eliminate the need for ship owners to assume the risks associated with accepting an LOI.

Chapter 5 will summarise the findings of chapters 2, 3 and 4 and provide the author's opinion on whether the E-bill can successfully alleviate the risks associated with the use of maritime letters of indemnity.

CHAPTER 2:

THE BILL OF LADING AS A DOCUMENT OF TITLE

2.1 Introduction

This chapter will explore the B/L as a document of title and the corresponding rights that flow from it. The discussion will begin with how the title initially acquired its importance through mercantile practice and how the function of a B/L as a document of title thereafter evolved into the traditional B/L. The document of title function is intrinsically connected to the presentation rule because the holder who presents the document of title to the carrier is authorised to claim delivery of the cargo described therein. Some cases have been cited to show examples of what happens when the function of the B/L as a document of title is overlooked and what that does to the presentation rule when cargo is delivered without the presentation of a B/L.

The significance of the B/L lies in what it can do as opposed to what it is.[87] When referring to a B/L, title confers upon the holder a claim to possession of the cargo from the carrier.[88] Title does not automatically confer ownership in the cargo, this is normally ascertained by terms of the sales contract in place or the transferor's intentions.[89] Parties are free to decide against the use of a B/L and may elect to use another document form to pass possession, ownership or rights under the contract. However, the intention would need to be stated explicitly.[90] Herein lies the significance of a B/L, the document of title function, transfer of possession, ownership or rights under a contract is universally accepted, without the need for any such explicit provision.[91]

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[87] P Todd. Principles of the Carriage of Goods by Sea (eBook). (2015)
[88] Gard Guidance on Bills Of Lading (2000) *GARD* [Online] Available at: http://www.gard.no/web/publications/document/chapter?p_subdoc_id=6144&p_document_id=6138 [Accessed 29 April 2019].
[89] LawTeacher. November 2013. Despite a Bill of Lading Sometimes Being Stamped. [Online] Available at: https://www.lawteacher.net/free-law-essays/international-law/the-function-of-the-bill-of-lading-with-regard-to-its-negotiability-international-law-essay.php?vref=1 [Accessed 21 October 2019].
[90] Ibid at 87.
[91] Ibid.

2.2 Early history and development of the document of title function

The trading methods of merchants during the 16th and 17th centuries saw the B/L evolve to where the B/L in the hand of a *bona fide* holder meant he was granted the right of delivery of those goods represented in the B/L.[92]

The eighteenth century saw the B/L's operation as a document of title sanctioned in the case of *Lickbarrow v. Mason*.[93] The historical ruling passed in the 1786 case concerned trover, which is described as an action to recoup the value, for a consignment for corn.[94] In modern law trover has been succeeded by the action for conversion[95] which occurs when one party deprives another of his right to possess or use his property.[96]

The shipper Turing & Sons at Middlebourg arranged for the carriage of the corn on board the *MV Endeavour* for delivery at Liverpool.[97] The B/L was issued in a set of four and consigned to "unto order or assigns".[98] Four Bs/L were duly signed by Captain Holmes, the master of the vessel.[99] The shipper, Turing & Sons endorsed two bills of lading in blank and sent them to Freeman who passed them to the plaintiff who was responsible to trade them on for Freeman.[100] Captain Holmes received and carried one bill of lading on board.[101] The fourth B/L remained in the custody of the shipper Turing & Sons.[102] Three days post shipment, the shipper, Turing & Sons, raised four bills of exchange against Freeman for the cost of the cargo of corn.[103]

A bill of exchange is described as an instruction in writing obligating one party to compensate another on demand or at some future date.[104] As was the custom at the time, Freeman then dispatched the B/L

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[92] R Aikens, R Lord and M Bools. Bills of Lading. (2006) 1 p.7.
[93] All Answers ltd, "Bill of lading and functions" *LawTeacher* [Online] Available at: https://www.lawteacher.net/free-law-essays/international-law/bill-of-lading-functions-international-law-essay.php [Accessed 23 April 2019].
[94] (1787) 2 TR 63, 100 ER 35 http://maritimelawdigital.com/uploads/HTML/Lickbarrow_Mason_1787.htm (Accessed 22 April 2019).
[95] Civil Causes of Action - Trover and Conversion Law and Legal Definition *USLEGAL* [Online] Available at: https://definitions.uslegal.com/c/civil-causes-of-action-trover-and-conversion/ [Accessed 22 April 2019].
[96] STIMMEL, STIMMEL & ROESER, n.d. "Conversion – The Basic Tort" *Stimmel Law.* [Online] Available at: https://www.stimmel-law.com/en/articles/conversion-basic-tort [Accessed 15 February 2020].
[97] Ibid at 93 p.7.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Bill of Exchange *INVESTOPIA* [Online] Available at: https://www.investopedia.com/terms/b/billofexchange.asp [Accessed 02 May 2019].

to the plaintiff in order that he might trade the cargo on his behalf.[105] The bill of exchange raised by Freeman on the plaintiff was in excess of the cargo value. However, the plaintiff duly confirmed and reimbursed Freeman accordingly.[106] Freeman became insolvent before he was obligated to pay Turing & Sons.[107] As a result of not being paid, Turing & Sons exercised their right to *stoppage in transitu* and sent the remaining B/L in their custody to the defendant, their agent at Liverpool, mandating them to present it to the captain and thereby take possession of the cargo on their behalf.[108] The agent acted in accordance with the shipper's instructions and took possession of the cargo.[109] The plaintiff successfully brought an action in trover.[110] Judge Buller, in hearing the case at the first instance, decided that the ownership of the cargo passed with the B/L unless a defendant was able to show proof to the contrary.[111]

The B/L holder is able to trade the cargo described in the B/L whilst it is still at sea as though he were in physical possession of the cargo. This significant feature of "symbolic possession" began to evolve in the 19th century.[112] In 1870, the B/L was accepted as granting its holder symbolic possession of the cargo in *Barber v. Meyerstein* by Lord Hartley.[113] He alleged by referring to a previous judgement laid down by Martin B., that whilst cargo was being transported by sea from one country to another it was not possible to physically deliver the cargo, therefore the B/L was to be treated as the "*symbol of the goods*"[114] described therein.

The B/L holder is afforded this symbolic possession because, first the carrier commits to deliver the cargo to the holder only thereby affording the holder control over the cargo, and secondly, title passes as though he was actually in possession of the cargo. It is assumed that the transferor gives up any intention to continue to control the cargo, and that the holder now resolves to exercise control of the cargo to the exclusion of all others.[115]

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[105] Ibid at 93.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid at p.8.
[113] Ibid at p.10.
[114] Ibid.
[115] Ibid at p.107.

2.3 Transferring the bill of lading

Once the seller transfers the B/L to the transferee it is often thought that ownership or property in the cargo is thereby transferred as well.[116] Where this misconception is refuted, as is usually the case, property in the cargo remains with the seller until remittance of the purchase price has been effected or secured[117], even though he may have already transferred the B/L.[118] The seller usually holds on to the B/L in order to secure payment of the cargo under a documentary letter of credit (L/C),[119] the method by which payment is more commonly facilitated in modern international transactions. The buyer issues instructions to his bank (known as the issuing bank) to pay the seller or beneficiary (via the nominated bank where the credit is held) an agreed sum of money on presentation of stipulated documents (which would include a clean B/L) within a certain frame of time.[120] A clean B/L is one that denotes the condition of the cargo without making any reference to noted damage to the cargo.[121]

Possession of the B/L is equal to possession of the cargo it represents – a right which is germane in all jurisdictions throughout the world.[122] Dependent upon the intention of the shipper or transferor and the relevant jurisdiction, property in the cargo can pass simultaneously with the transfer of the B/L.[123] The *bona fide* holder of a B/L is granted the right to sue the carrier.[124]

2.3.1 Who is a valid holder of a bill of lading?

Section 3 (2) of the Sea Transport Documents Act 2000[125] (STD 2000) defines a holder as follows:

> *(2) A person is the holder of a sea transport document if that person is in possession of the original sea transport document, or possession of that document is held on that person's behalf, and that person is –*

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[116] Ibid at p.114.
[117] Ibid at p.115.
[118] Ibid at p.114.
[119] Ibid at p.115.
[120] Overview of UCP 600 Article 38 [Online] Available at: http://www.citigroup.com/transactionservices/home/trade_svcs/trade_u/docs/ucp600part2.pdf?lid=UCPP2engpdf (Accessed 02 May 2019).
[121] GLOBAL NEGOTIATOR, n.d. "Clean bill of lading" *Global Negotiator.* [Online] Available at: https://www.globalnegotiator.com/international-trade/dictionary/clean-bill-lading/ [Accessed 2020 February 2020].
[122] LawTeacher. (November 2013) Bill of Lading as a Negotiable or Transferable Document of Title. [Online] Available at: https://www.lawteacher.net/free-law-essays/commercial-law/bill-of-lading-as-a-negotiable-or-transferable-document-of-title.php?vref=1 (Accessed 2 May 2019).
[123] Ibid.
[124] Ibid.
[125] Act 65 of 2000.

(a) the person to whom the document was issued;

(b) the consignee named in the document; or

(c) a person to whom the document has been transferred in accordance with subsection (1). [126]

It is accepted that a holder of a B/L is granted the right to claim possession of the cargo from the carrier. Where the lawful meaning of the term "holder" is disregarded, this can result in the misconception that any person who "holds" the B/L is permitted to demand possession of the cargo under the B/L from the carrier.[127] The B/L is often in the possession of a party that acts an agent for the buyer or receiver of the cargo.[128]

By way of a simple illustration, a vessel will load a cargo at the port of loading. A B/L is issued to the shipper[129] who then deals with it by trading it on, by means of endorsement and dispatch to the buyer upon having received payment for the cargo. Endorsing the B/L in the absence of delivery is futile resulting in no transfer of symbolic possession to the buyer.[130] Endorsement of the B/L must be read to include delivery.[131]

It is a requirement that the transferor and the transferee must demonstrate the necessary resolve that the party to whom the B/L is endorsed and subsequently delivered intended that the recipient is to be the holder of the B/L.[132] The buyer must then present the B/L to the carrier at the port of discharge in order to claim possession of the cargo. Prior to arrival at the port of discharge, the carrier will have enquired with the appointed port agent as to the availability of the original B/L at the discharge port. The original B/L is normally handed to the port agent by the buyer's clearing and forwarding agent in exchange for a ship delivery order. The delivery order is essential to have the cargo cleared by

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[126] Ibid; s3 (2).
[127] LS Chan "Holder of a Bill of Lading" (September 1995) 7 *Singapore Academy of Law Journal* 355 [Online] Available at: https://heinonline-org.ukzn.idm.oclc.org/HOL/Page?public=true&handle=hein.journals/saclj7&div=24&start_page=355&collection=journals&set_as_cursor=0&men_tab=srchresults [Accessed 03 May 2019].
[128] The transfer of contractual rights (January 2016) *LAW EXPLORER* [Online] Available at: https://lawexplores.com/the-transfer-of-contractual-rights/ [Accessed 15 October 2019].
[129] The Hague-Visby Rules 1968; Art III rule 3.
[130] Ibid at 93 p.160.
[131] Ibid.
[132] Ibid at p.163.

Customs and released from the port or terminal.[133] Upon the vessel's arrival, the port agent will then relinquish the original B/L to the captain who represents the carrier.

Whilst the port agent is physically holding the B/L, he cannot demand possession of the cargo as he is not a "holder" falling within the concept of the word "holder".[134] The port agent is in possession of the B/L but he is not the person to whom the carrier has committed to deliver the cargo to under the B/L.

Closely related to South African shipping law, the English case of *Standard Chartered Bank v. Dorchester LNG (2) Limited (Erin Schulte)*[135], judgement was handed down concerning s5 (2) (b)[136] of the Carriage of Goods by Sea Act 1992[137] (The Act) regarding when an endorsee in possession of the B/L had recourse to file suit under the B/L.

> A cargo of gas oil was sold by Gunvor International BV (Gunvor) to United Infrastructure Development Corporation (UIDC) and shipped on board the Erin Schulte. The sale was facilitated by means of an L/C confirmed by Standard Chartered Bank (SCB). Presentation of documents, including Bs/L endorsed to SCB, was carried out by Gunvor on 4 June 2010. Presentation was subsequently rejected with SCB refusing to make payment. The vessel had arrived at the discharge port and was ready to commence discharge of the gasoil. Wanting to avert any delays, Gunvor elected to issue an LOI to the carrier allowing discharge of the gasoil without presentation of the original Bs/L that were still held by SCB to Gunvor's order. On 7 July 2010 SCB agreed to settle in full plus interest and costs after Gunvor had embarked on proceedings against them. In the meantime, SCB had agreed modifications to the L/C with the issuing bank without Gunvor's consent. SCB paid Gunvor but having no right of recourse against the issuing bank then proceeded against the owners of the Erin Schulte (Owners) for mis-delivery of the gasoil under the Bs/L. SCB alleged that they were the lawful B/L holders in terms of s5 (2) (b) of the Act as they had been endorsed to and received by them on 4 June 2010 and on 7 July 2010 when they had paid Gunvor in full.
>
> The first judge agreed that SCB had become the lawful Bs/L holder on 4 June 2010 when the Bs/L were presented under the L/C (albeit rejected) and recognised that intent to deliver and the corresponding intent to accept delivery was required but went on to decide that there was

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[133] The role of Delivery Orders in the shipping and delivery chain *CRATEX INDUSTRIAL PACKING LTD* [Online] Available at: https://www.cratexgroup.com/role-delivery-orders-shipping-delivery-chain/ [Accessed 16 October 2019}.
[134] Ibid at 127.
[135] [2014] EWCA Civ 1382
136 *(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;*
[137] Act 50 of 1992.

no need to consider any contractual relation between SCB as endorsee and Gunvor as consignee. The fact that SCB had rejected the presentation was not regarded as relevant.

The appellant judge established that by virtue of s5 (2) (b) of the Act endorsement by delivery is incomplete without the voluntary and unequivocal transfer by Gunvor as holder to SCB as endorsee and the same unequivocal acceptance of delivery by SCB. As a result of SCB's rejection of the presentation on 4 June 2010, said delivery was rendered incomplete.

By Gunvor accepting payment from SCB on 7 July 2010, the appellant judge held that Gunvor had naturally acknowledged that SCB warranted to '"take up"' the documents. SCB's settlement inferred unconditional acceptance of the transfer and thus meant that SCB were in fact lawful holders of the Bs/L in accordance with s5 (2) (b) of the Act.

Therefore, a consignee is only required to be in possession of the B/L to be able to bring legal action under the B/L whereas in the case of an endorsee, transfer and corresponding acceptance of the B/L is required before an endorsee is deemed a lawful holder and thereby able to bring action under the B/L.[138]

2.3.2 The contractual rights of a bona fide holder under the bill of lading

The sea carriage contract is that between the shipper and the carrier. The B/L holder as described in s4 (1) of the STD 2000[139] shall have recourse in law against the carrier as though he were a party to the original sea carriage contract. The right of recourse in law vested in the holder is not dependent upon the transfer of property in the cargo under the B/L.[140]

[138] Walker, C. "When does an indorsee of a bill of lading have title to sue the carrier" (2015) *INCE* [Online] Available at: https://www.incegd.com/en/knowledge-bank/when-does-an-indorsee-of-a-bill-of-lading-have-title-to-sue-the-carrier [Accessed 17 October 2019].
[139] Act 65 of 2000.
[140] DGS Chong "Rights Under Bills of Lading: Trawling Through Singapore Waters" (2006) 18 *Singapore Academy of Law Journal* 629 [Online] Available at: https://heinonline-org.ukzn.idm.oclc.org/HOL/Page?public=true&handle=hein.journals/saclj18&div=27&start_page=629&collection=journals&set_as_cursor=0&men_tab=srchresults [Accessed 11 September 2019].

2.3.2.1. Possessory rights under the bill of lading

The transfer of a negotiable B/L does not mean that possessory rights to the cargo described therein are automatically transferred. The parties must possess the necessary intention to do so.[141]

It has been said that the B/L is the "key to warehouse" and with this key the lawful B/L holder is able to demand constructive possession of the cargo described therein from the carrier.[142]

Where an endorser aims to establish a pledge over the cargo under the B/L, that pledgee's special interest in the cargo is sufficient to bring an action against the carrier for wrongful detention of cargo as well as for conversion in the case of mis-delivery of the cargo.[143] This was held true in *Chabbra Corporation Pte Ltd v Jag Shakti*[144] where the pledgee was found within his rights to claim possession of the cargo upon presentation of the original B/L at the discharge port.[145] The pledgee's suit against the carrier for the mis-delivery of the cargo was upheld.[146]

The B/L holder must be able to show that he was denied possession of the cargo or that his right thereto was hindered. It is of no consequence that the carrier had no knowledge that the cargo being delivered belonged to someone else. The delivery of cargo in the absence of an original B/L amounts to the tort of conversion. Discharge of the cargo against an LOI where there is no original B/L for presentation to the carrier is a business tool and does not reduce the carrier's liability.[147]

2.3.2.2. Proprietary rights under the bill of lading

To be able to transfer property in the cargo through the B/L, the transferor must possess irrefutable ownership of the cargo described therein and there must not exist any dating rule

[141] Ibid at 138.
[142] Ibid at 127.
[143] Ibid at 137.
[144] [1986] 1 MLJ 197; [1986] AC 337
[145] Ibid at 137.
[146] Ibid.
[147] Ibid.

concerning the transfer.[148] There must be mutual consent between the transferor and the transferee regarding transfer of ownership in the cargo.
The transferee by virtue of endorsement and delivery of the B/L cannot obtain a title greater than that which the transferor has possessed.[149] Therefore the transferor is only capable of transfering title as good as the one he had.[150]

In the *Kota Bakti* case[151] the B/L holder was also the cargo owners and sued the carrier for negligence due to the loss of their cargo.[152] Having abandoned the voyage, the cargo was discharged and stocked in a warehouse.[153] The carrier then arranged to transhipthe cargo on board the Kota Agung without the permission of the cargo owners.[154] A fire subsequently broke out on board the Kota Agung resulting in the cargo being destroyed.[155] The court at first instance found the first carrier, as custodian of the cargo, guilty of the tort of conversion when they arranged to transhipthe cargo without the necessary permission of the cargo owners.[156] The appellant judge found the carrier guilty of negligence for failing to take the appropriate care of the cargo which was flammible in nature and therefore supersensitive.[157]

The holder of a B/L may bring suit in negligence against a carrier where the holder enjoys lawful ownership in the cargo or a possessory title thereto.[158] This right exists despite the holder's right of recourse against the carrier afforded by the Act[159] by virtue of the indorsement and delivery of the B/L.[160] As the carrier is permitted to deliver the cargo against the production of one original B/L by the holder, the carrier is then not at risk of multiple claims from a combination of claimants.[161]

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[148] M R A Ahmadi, M Elsan, I Noshadi. "Study of Bill of Lading Function as Title Document" (2017) Journal of Politics and Law, 10(1), p. 191 [Online] Available at: https://heinonline-org.ukzn.idm.oclc.org/HOL/Page?public=true&handle=hein.journals/jpola10&div=24&start_page=188&collection=journals&set_as_cursor=1&men_tab=srchresults [Accessed 21 October 2019].
149 Ibid at 137 p.663.
150 Ibid.
[151] [1993] 1 SLR 849
[152] Ibid at 137 p.664.
[153] Ibid at p.665.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.
158 Ibid.
159 Act 50 of 1992; s 2.
160 Ibid at 137 p.665.
[161] Ibid

2.4 Conclusion

A carrier must only deliver the cargo in exchange for an original B/L in the hands of a lawful B/L holder. The B/L confers upon the holder the entitlement to demand constructive possession of the cargo described therein and affords the holder a right of recourse against the carrier as though he were an original party to the sea carriage contract. The right to possession of the cargo is not dependent upon the B/L holder being the owner of the cargo.

Due to the number of times the cargo is traded and the B/L being transferred whilst the cargo is in transit to the discharge port, very often the vessel will arrive at the discharge port before the B/L. To overcome the presentation rule, it has become fairly commonplace that a carrier is issued an LOI in exchange for delivering the cargo without the presentation of the original B/L in order to avoid delays, escalating port and berth dues and demurrage bills.

The LOI has become a handy business tool provided to avoid delays to discharge but in no way discharges the carrier's absolute obligation to deliver the cargo against presentation of an original B/L.

Having described the significance of the document of title and corresponding presentation rule, the following chapter will examine the LOI for non-production of an original B/L[162] given in exchange for delivery of the cargo where the B/L is not available and the associated risks of accepting such an indemnity.

[162] Circular 4/01: "Bills of lading – Delivery of cargo: Std forms of LOI" (2001) *UKP&I* [Online] Available at: https://www.ukpandi.com/knowledge-publications/article/circular-4-01-bills-of-lading-delivery-of-cargo-std-forms-of-loi-2195/ [Accessed 21 October 2019].

CHAPTER 3:

THE USE OF LETTERS OF INDEMNITY IN LIEU OF ORIGINAL BILLS OF LADING

3.1 Introduction

It has been established that the document of title and those rights associated with it are linked to the presentation rule. In those cases where the B/L is unavailable and it is not possible to present it to the carrier, the carrier is placed in a difficult position. The options available to the carrier would be to wait for the B/L to arrive, or discharge the cargo in a bonded warehouse, or deliver without the B/L or deliver against an LOI in exchange for non-presentation. The option of using an LOI will be the focus of this chapter.

3.1.1. Consequences of waiting for the bill of lading

To wait for the B/L would not make commercial sense in terms of idle time and increased expenditure in the form of berth dues, port dues, demurrage under a voyage charter and hire under a time charter. Discharging the cargo into a bonded warehouse does not discharge the carrier of his obligation to deliver to the B/L holder and would thus require the carrier to retain control over the cargo through his agent at the discharge port until such time that the B/L is handed over in exchange for the delivery order.[163] The popular option is to accept an LOI in exchange for no B/L at the discharge port.

An indemnity may be described as a form of security or protection offered against loss or other financial burden.[164] Accordingly, the LOI offered to a carrier is an undertaking from the charterer to indemnify the ship owner in the case of any liabilities that may arise as a result of the ship owner agreeing to adhere to his request to deliver cargo without being presented with an original B/L.

The presentation rule provides that by virtue of issuing a B/L to a shipper, the carrier undertakes to transport and deliver the cargo to the lawful holder of a B/L upon presentation at the port of discharge. If the carrier neglects to observe this obligation he would be found in breach of contract of the B/L

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[163] Gerald Lee, L. A. a. K. D. "The discharge of cargo in China without original bills of lading" (2016) *LEXOLOGY*. [Online] Available at: https://www.lexology.com/library/detail.aspx?g=a1aa1690-4040-4f25-8b81-70ae8beecc3d [Accessed 31 January 2020].

[164] Anon., n.d. LEXICO. [Online] Available at: https://www.lexico.com/en/definition/indemnity [Accessed 22 October 2019].

terms, in particular with respect to the holder of the B/L who is entitled to delivery of the cargo.[165] Where the carrier discharges the cargo in the absence of a B/L, he may be found guilty of breach of the carriage contract and liable to the true owner of the cargo or the party entitled to possession thereof by virtue of indorsement and delivery of the B/L as was seen in *The Stettin* case.[166]

A B/L drawn to a named party "or to his or their assigns" was not available for presentation to the carrier upon the ship's arrival at Stettin.[167] In the interim, the shipper had provided instructions that the cargo was to be transhipped to Manasse.[168] The shipper did not receive payment for the cargo and subsequently sued the carrier for mis-delivery of the cargo.[169] The carrier argued that the B/L was a straight B/L that did not necessitate presentation as it was made out to a named party and was not endorsed.[170] The court found that the carrier was not allowed to deliver cargo to a consignee without a B/L.[171]

As discussed in chapters one and two, often the vessel will arrive at the discharge port ready to discharge the cargo before Bs/L have arrived. . This may happen for a number of reasons which may include a short voyage, or the Bs/L may be tied up in the banking system because of L/C's in place, or the cargo has been traded several times as was seen in the *Zagora* case[172], resulting in the ensuing delay of presentation of the bill of lading.

An LOI is a contract of indemnity often used by carriers, sellers, buyers and banks to facilitate the execution of their contractual obligations.[173] The LOI is a pledge to indemnify the carrier because he has carried out his obligation (to deliver the cargo in the case of non-presentation of the bill of lading) rather than because of the carrier's failure to perform.[174]

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[165] Anon. "Delivery of cargo without original bills of lading" (2017) *HELLENIC SHIPPING NEWS WORLDWIDE.* [Online] Available at: https://www.hellenicshippingnews.com/delivery-of-cargo-without-original-bills-of-lading/ [Accessed 17 February 2020].
[166] [1889] 14 PD 142
[167] Anon., "The Stettin: 189" (2019) *Swarb.Co.Uk.* [Online] Available at: https://swarb.co.uk/the-stettin-1889/ [Accessed 01 February 2020].
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] [2016] EWHC 3312
[173] Arizon, F. & Semark, D., 2014. Maritime Letters of Indemnity. s.l.:Informa Law from Routledge.
[174] Ibid.

The presentation rule as set out in English law due to the adoption of the Act which provides that:

"[...] a person who becomes a lawful holder of a bill of lading shall [...] have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to the contract."[175]

The B/L holder is vested with the right to demand delivery from the carrier and a corresponding right to institute action against the carrier in the case of mis-delivery as though he were an original party to the carriage contract.[176] The same right is afforded to the B/L holder as contained in s4 (1) of the STD 2000[177].

By agreeing to accept the LOI, the carrier breaks the carriage contract and is not discharged of his duty to deliver the cargo against a B/L[178]. Despite contravening the law, the practice is accepted without objection in the maritime industry.[179] The LOI however does provide the carrier with an instrument for recovery of his losses from the indemnifier and should therefore only be accepted from a reputable charterer.[180]

3.1.2 General Practice

The IG of P&I Clubs do not support the practice of delivering cargo in the absence of the B/L but has attempted to assist their members by providing standard LOI wording that is meant to protect the carrier as far as possible. By assisting their members with standard wording, the IG does not set aside their exclusion of club cover.[181]

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[175] Act of 50 of 1992; s(2) 1
[176] Croce, L., n.d. "Maritime Law – Delivery withouth bill of lading" *CROSE & Associes.* [Online] Available at: https://croce-associes.ch/en/maritime-law-delivery-without-bill-of-lading/ [Accessed 20 January 2020].
[177] Act 65 of 2000.
[178] Ibid at 176.
[179] Ibid.
[180] Anon. "Claims Arising From Mis-Delivery Of Cargo Without Production Of Bills Of Lading" (2001) *Rajah & Tann.* [Online] Available at: https://static1.squarespace.com/static/537e8bcbe4b09ac6c31f0ae6/t/53db004de4b02d4db204d69e/1406861389733/SBL_Claims+arising+from+mis-delivery.pdf [Accessed 20 January 2020].
[181] Steven J. Hazelwood, D. S. *P&I Clubs Law and Practice.* (2010)Fourth ed. p. 161.London: informa. [Online] Available at https://books.google.co.za/books?id=E7hxb2G8Q-QC&pg=PA154&lpg=PA154&dq=tort+of+conversion+and+the+stettin+1889&source=bl&ots=ynL7YVfFi6&sig=ACfU3U3wi-YSt5uK5ns99hzL_1Dm3HSAzA&hl=en&sa=X&ved=2ahUKEwibsbnh8JLnAhXBSBUIHSD0CpwQ6AEwAXoECAgQAQ#v=onepage&q=tort%20of%20conversion%20and%20the%20stettin%201889&f=false [Accessed 20 January 2020].

As per Rule 2 s17 (c) (i) and (ii) of the UK P&I Club's List of Rules & Bye-laws, delivery of cargo without presentation of an original B/L or at a different port or place other than that stated in the B/L is an excluded liability so owners risk their P&I cover when they take the decision to accept an LOI.[182] The carrier that chooses to accept the LOI risks exposing himself to an uninsured loss.[183]

Wanting to maintain the commercial rapport, carriers often accept the indemnity because it is perceived as a form of surety against a liability that they would not ordinarily be exposed to. In addition to the expenditure incurred by the carrier in defending a claim, the ambit of the LOI would extend to include ancillary costs such as demurrage bills that accrue due to the vessel being arrested and any losses suffered from the resultant delay.[184]

This chapter will focus on the LOI for non-production of the B/L only and will explore the risks associated with the acceptance of the indemnity by the carrier. Older as well as recent case law will be visited to establish how the courts interpret the operation and enforceability of the LOI.

3.2 Inherent dangers of mis-delivering the cargo

The B/L serves as the "key to the warehouse" and where this "key" is unavailable to "unlock the warehouse" at port of discharge, the LOI will not exculpate the carrier's liabilty when he delivers the cargo to the wrong party.[185]

3.2.1 Mis-delivery of cargo

Delivery of cargo in the absence of a B/L that negatively impacts on a lawful B/L holder's right to possession of the cargo is established in law as the tort of conversion.[186] Delivery of cargo under these circumstances is done without the support of the carrier's P&I club.

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[182] Contacts & Rules 2014 List of Correspondents and Rules and Bye-laws UK P&I CLUB.
[183] Anon., "LOI, LOU and BLG – Confused?" (2010) *GARD.* [Online] Available at: http://www.gard.no/Content/503153/No%2001-10%20LOI%20LOU%20and%20BLG%20-%20Confused.pdf [Accessed 22 October 2019].
[184] Ibid at 176.
[185] Anon. "Delivery of cargo without original bills of lading" (2017) *HELLENIC SHIPPING NEWS WORLDWIDE.* [Online] Available at: https://www.hellenicshippingnews.com/delivery-of-cargo-without-original-bills-of-lading/ [Accessed 23 October 2019].
[186] Ibid at 176.

A carrier cannot be forced to deliver the cargo without being presented with an original B/L in exchange.[187] The safest, albeit impractical route to take, would be for the carrier to wait for the Bs/L to arrive at the discharge port but this would lead to a different set of problems including port congestion, increased port and berth dues and rising demurrage claims.
To deal with the problem of non-availability of the B/L, the parties often arrange to include a clause in the charter party confirming the carrrier's agreement to discharge the entire cargo against an LOI where the bills of lading are not available for presentation.[188]

A typical example of such a clause in the dry bulk sector would read:

"If original Bill(s) of Lading are not available at discharging port, Owners agree to discharge the entire cargo to the Charterer's order against presentation by Charterers of a single Letter of Indemnity in standard wording as per Owner's P&I Club form signed by Charterers only and without requirement for any bank guarantee(s). Master to be instructed to discharge on receipt by Owners of a correctly drawn up faxed copy of the Letter of Indemnity."

Under these circumstances a carrier would not be able to refuse to deliver the cargo unless of course he suspected that the party requesting delivery was not the party entitled to delivery of the cargo.

3.2.2 Loss of P&I coverage

P&I cover is that category of liability insurance that serves to cover those risks unique to the maritime industry.[189]

The risk of possibly delivering the cargo to the wrong party is the rationale behind the P&I Club's restriction on the practice of delivery without a B/L.[190]

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[187] Ibid at 184.
[188] Ibid.
[189] Moorcraft B. "What is protection and indemnity insurance?" (2019) INSURANCE BUSINESS ASIA Available at: https://www.insurancebusinessmag.com/asia/guides/what-is-protection-and-indemnity-insurance-164294.aspx [Accessed 17 February 2020].
[190] Ibid at 183 p.149.

Rule 2 s17 (c) (ii) of the UK P&I Club's List of Rules & Bye-laws, and indeed all P&I Club Rules precludes cover where the cargo has been mis-delivered[191] unless the Directors of the P&I Club resolve to permit the retention of cover.[192]

The LOI was drafted in an attempt to relieve those risks that are associated with the practice of permitting delivery without the presentation of an original B/L.[193]

Ultimately, the LOI serves to stand in the place of a carrier's P&I cover.[194]

3.3 Enforcing the LOI

In order to avoid opening themselves up to excessive risk, a carrier must pay special attention to the wording of the LOI.[195] Clauses are ocassionally modified to read owners "agree to discharge" instead of "agree to deliver".[196] On the face of it, "agree to discharge" would seem to be beneficial as the LOI would engage from the moment of discharge, however under the B/L, carriers are obligated to "deliver" the cargo.[197] The carrier places himself at risk of misdelivery if he is not able to maintain control over or retain possession of the cargo once it has been discharged.[198]

The carrier must further strictly adhere to the LOI wording as was higlighted in *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The "Bremen Max").*[199]

Owners of the Bremen Max, Pavey Limited chartered the vessel to Cosbulk. Several back to back charters existed at the time as follows: Pavey Limited → Cosbulk → Farenco Shipping → Daebo Shipping → Norden and Deiulemar. Ten Bs/L were issued by Pavey Limited for a cargo of sinter feed that was carried from Brazil to Bulgaria in March 2008. The Bs/L were not available for presentation at Bourgas, Bulgaria and charterers requested owners to permit discharge of the cargo against an LOI. Back to back LOI's were passed up the charter party chain. The LOI issued by Daebo Shipping to Farenco Shipping was the one in contention.[200]

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[191] Hickson, L. "Best Practice And Bills Of Lading" (2017) *DRY CARGO International.* [Online] Available at: https://www.drycargomag.com/best-practice-and-bills-of-lading [Accessed 24 October 2019].
[192] Ibid at 184.
[193] Ibid.
[194] Ibid.
[195] Ibid at 185.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] [2008] EWHC 2755
[200] Chuah, J., 2009. Transport Law. *European Journal of Commercial Contract Law,* 1(2), pp. 107-108. [Online] Available at: https://heinonline-org.ukzn.idm.oclc.org/HOL/Page?handle=hein.journals/ejccl1&id=107&collection=journals&index= [Accessed 24 October 2019].

The LOI in this case was drawn up as follows:

"The above cargo was shipped on the above ship by COMPANHIA VALE DO RIO DOCE and consigned to THE ORDER OF HSH NORDBANK AG, LONDON for delivery at the port of BOURGAS, BULGARIA but the bill of lading has not arrived and we, DAEBO SHIPPING CO., LTD, hereby request you to deliver the said cargo to KREMIKOVTZI AD, SOFIA – BOTUNETZ at PORT OF BOURGAS, BULGARIA without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows:-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5. As soon as all original bills of lading for the above cargo have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.

6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England."[201]

The last sub charterer in the chain alleged that the consignee did not obtain delivery of the cargo. Stemcor UK were holders of the Bs/L and demanded delivery of the cargo. The charterers down the charter party chain were called upon to honour their LOI but they failed to do so, resulting in Stemcor UK ordering the arrest of the vessel upon her arrival in Australia. The owners, Pavey Limited secured the vessel's release by putting up the security. Pavey Limited then procured a USD 11 million Rule B attachment[202] on Cosbulk's banks accounts and advised their charterer that their bank accounts would not be released until they were able to secure a guarantee for the same USD 11 million from a first class bank plus an additional USD 500 000 to cover owners' claims. Realising that the Rule B attachment would jeopardise trade between the charterers, Farenco Shipping put up cash security to Stemcor that was to be held in escrow by a firm acting for Cosbulk. Freight markets fell and Farenco Shipping had to contend with a counterparty defaulting under a Forward Freight Agreement leaving them exposed. Farenco Shipping then proceeded against Daebo Shipping to reimburse the security put up by themselves. Daebo Shipping then proceeded against Norden for the same under the LOI.[203]

Teare J had to consider the following three points:

1. Is the party providing the LOI obligated by virtue of clause 3 to provide security directly to Stemcor?

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[201] *Farenco Shipping v. Daebo Shipping (The "Bremen Max") (2008) EWHC 2755* [Online] Available at: https://archive.onlinedmc.co.uk/farenco_shipping_v__daebo_shipping_(the_bremen_max).htm [Accessed 24 October 2019].

[202] Rule B of the Admiralty Rules allows a maritime claimant to attach a defendant's tangible or intangible personal property as security for a maritime claim. [Online] Available at: https://www.irmi.com/articles/expert-commentary/significant-narrowing-of-rule-b-attachments#1 [Accessed 24 October 2019].

[203] Ibid at 200.

2. Is the provider of the LOI relieved of his obligation to put up bail or other security under clause 3 after the vessel has been released from arrest?

3. Were the undertakings in the LOI conditional upon the carrier delivering the cargo to Kremikovtzi?

With regard to the first point, it was agreed that Stemcor was entitled to obtain security directly from the indemnifier under the LOI.

With regard to the second point, Teare J considered that the owner should not have to endure the arrest of the vessel and that charterers are responsible to owners for the security or bail to obtain release of the vessel. This sought to oppose the shrewd logic posed by counsel that as the vessel was no longer under arrest, then it followed that it was impossible for the charterers to put up such bail or security to avoid such arrest. This issue was found in the owner's favour by the court.

With regard to the third point, it was held that the undertakings in the LOI were dependent upon the carrier delivering the cargo the party named in the LOI. Owners were unable to prove that the cargo had been delivered to Kremikovtzi. The court decided that the undertakings in the LOI was therefore not engaged and found in favour of the charterer.[204]

3.3.1 Credit worthiness of the party providing the indemnity

A charterer's ability to make his hire payments are not indicative of their creditworthiness to be able to defend a case for the monetary worth of the cargo in the case of mis-delivery. The creditworthiness of a middle charterer in the charter party chain came to the fore in the *Zagora* case leaving those charterers higher up the chain responsible for the mis-delivery claim.[205]

An owner is unable to exercise any lien over the cargo for a claim under an LOI.[206] In order to exercise a lien over the cargo, the ship owner would be required to be either in possession or in control over the cargo. In the case of mis-delivery, the carrier would have delivered the

[204] Ibid.
[205] [2016] EWHC 3312
[206] Ibid at 176.

cargo to the incorrect party and therefore no longer retaining possession or control over the cargo.

3.4 How does a letter of indemnity serve to protect the carrier?

The LOI is independent of the sea carriage contract and serves to indemnify the carrier for the delivery of cargo without a B/L, as a commitment to deliver, upon receipt thereof, all original Bs/L to the carrier and will contain a choice of an adept jurisdiction in case the LOI needs to be actioned.

In an attempt to assist their member ship owners, the IG have provided recommended LOI wording to afford them greater protection.[207]

Under ideal circumstances, there should exist three parties to the LOI which must serve as legally and commercially enforceable. They are the carrier seeking to obtain the indemnity, the party furnishing the indemnity and first class bank endorsing the party furnishing the indemnity.[208]

Due to the risk involved when a carrier agrees to deliver cargo without the presentation of a B/L the carrier must endevour to obtain the greatest cover under the LOI.[209] The claim for mis-delivery is unlikely to be confined to the value of the cargo only. Instead the receiver is within his rights to claim the value of the cargo plus incidentals which could include promptly sourcing subsititute cargo (possibly at a higher price) and the ensuing suspension of operations at his factory due to lack of cargo availabililty.[210]

Accordingly, clauses 1, 2 and 3 of the IG LOI wording does not provide for any monetary limit to the indemnity that is to be provided to the carrier, his servants and his agents.

The party providing the LOI undertakes to hold the carrier harmless for any claims or liabilities that may arise as a result of following the charterer's instruction to deliver the cargo without a B/L. Where a ship owner is at risk of having one of his ships or an associated ship in his fleet arrested as result,

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[207] Anon., n.d. "International Group Standard Letters of Indemnity" *UK P&I.* [Online]
Available at: https://www.ukpandi.com/knowledge-publications/industry-issues/international-group-of-pi-clubs/international-group-standard-letters-of-indemnity/ [Accessed 23 October 2019].
[208] Kirrane, B. "Letters of indemnity" (2019) *UK P&I.* [Online]
Available at: https://www.ukpandi.com/knowledge-publications/article/letters-of-indemnity-1161/
[Accessed 22 October 2019].
[209] Ibid.
[210] Ibid.

then the party providing the LOI undertakes to put up the necessary security to ensure release of the ship.

The indemnity provided should not be time barred. English law provides that the party bringing suit against the carrier for the tort of conversion must do so within six years from the date on which the damage was suffered.[211]

The liability of the party providing the indemnity only ceases once the full set of original Bs/L are surrendered to the carrier. Clause 5 of the IG LOI wording provides as follows:

> *"As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease."*[212]

Carriers must be vigilant when it comes to accepting LOI's – can they trust that the party furnishing the indemnity will still be operating six years after delivery of the cargo in accordance with their instructions? The carrier must be left in the position he would have been in, save for following the indemnifier's instruction.[213]

The IG LOI wording does not provide leave for the indemnifier with the financial interest in the claim to defend it after having put up the finances.[214] The indemnifier would have to trust the carrier to competently defend the claim.[215]

3.5 Changes to the IG LOI wording

Considering that the judgement laid down in the *Bremen Max* case where a carrier was obliged to identify and deliver specifically to the party named in the LOI, it became prudent to revise and amend

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[211] Anon. "Limitation periods" (2019) *THOMAS REUTERS PRACTICAL LAW.* [Online] Available at: https://uk.practicallaw.thomsonreuters.com/1-518-8770?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 [Accessed 23 October 2019].
[212] Ibid at 187.
[213] Ibid at 176.
[214] Shepherd, S. "UK: Letters Of Indemnity Against Discharge Without Bills Of Lading – Seeking To Minimise The Trader's Risk" (2011) *MONDAQ.* [Online] Available at: http://www.mondaq.com/uk/x/142016/Marine+Shipping/Letters+of+Indemnity+against+discharge+without+Bills+of+Lading+seeking+to+minimise+the+Traders+risk [Accessed 23 October 2019].
[215] Ibid.

the LOI wording in order to protect the carriers' rights, and to circumvent possible obstacles to be overcome by the carrier when he sought to invoke those indemnities incorporated into the LOI.[216] The IG have modified the LOI wording to read as follows:

"*The above cargo was shipped on the above ship by [insert name of shipper] and consigned to [insert name of consignee or party to whose order the bill of lading is made out, as appropriate] for delivery at the port of [insert name of discharge port stated in the bill of lading] but the bill of lading has not arrived and we, [insert name of party requesting delivery], hereby request you to deliver the said cargo to* ***"X [name of the specific party] or to such party as you believe to be or to represent X or to be acting on behalf of X"*** *at [insert place where delivery is to be made] without production of the original bill of lading.*"

The original wording placed too much of a responsibility upon the carrier to ensure that the cargo was delivered to the named party in circumstances where the captain of the ship was unsure of the identity of the person claiming delivery. The new wording was drafted to establish that where a carrier believed that X was the party to whom the cargo was supposed to be delivered, or that the party was acting on behalf of X, then he is able to rely on the LOI.

The new LOI wording was put to the test in *Oldendorff GmbH & Co KG v. Sea Powerful II Special Maritime Enterprises (The Zagora).*[217] The case drew attention to the role of agency where there is a chain of LOI's involved.

> The Zagora carried a cargo of iron ore from Koolan Island to Lanshan. SCIT Trading sold the iron ore to Xiamen, who sold it Cheongfuli, who finally sold it to Shanxi Haixin.
>
> The sales contract specified that Shanxi Haixin was to appoint the agent at the discharge port.
>
> SCIT Trading was the head CFR[218] seller and was responsible for arranging the vessel to lift the iron ore. Under a contract of affreightment in place between SCIT Trading and SCIT

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[216] Anon. "Standard Forms of Letters of Indemnity Delivery of Cargo without Production of Bills of Lading (2010) *the MECO group.* [Online] Available at: https://www.themecogroup.co.uk/charterers-liability-insurance/wp-content/uploads/sites/2/2018/11/2010-010-Standard-Form-of-LoI.pdf [Accessed 28 October 2019].

[217] Oldendorff GmbH & Co KG v. Sea Powerful II Special Maritime Enterprises (2016) EWHC 3212. [Online] Available at: http://www.bailii.org/ew/cases/EWHC/Comm/2016/3212.html [Accessed 28 October 2019].

[218] CFR – Cost and Freight – is a legal term that stipulates that the seller is obliged to organize the carriage of the cargo by sea to the discharge port and then furnish the buyer with the documentation needed to collect the cargo from the carrier. "Cost and Freight – CFR" (2019) *INVESTOPEDIA* [Online] Available at: https://www.investopedia.com/terms/c/cfr.asp#targetText=CFR%20is%20a%20legal%20term,the%20items%20from%20the%20carrier. [Accessed 28 October 2019].

Services, the latter was responsible for shipping those cargoes sold by SCIT Trading and subsequently voyage chartered the Zagora from Oldendorff Carriers. The voyage charter party between SCIT Services and Oldendorff Carriers contained a clause that stipulated that the discharge port agent was to be the "charterer's agent".

Anticipating the non-availability of the B/L at the discharge port, the sales contract made provision for the eventuality by including a clause that stipulated that Owner/Master had agreed to discharge and release the cargo against an LOI in case Bs/L were not available.

Following a longstanding agreement between Oldendorff Carriers and Oldendorff GmbH & Co KG (Oldendorff), the latter would supply the former with the vessel. The agreement provided that any voyage charters that Oldendorff Carriers intended to perform was to be on back to back terms with the vessel's owners. The Zagora was fixed for one trip time charter from Sea Powerful II Special Maritime Enterprises (Head Owners).

The time charter stipulated that charterers must arrange and pay for agency appointments; the Master "*shall be under the orders and directions of the charterers as regards employment and agency*"; and charterers were to issue an LOI where bills of lading were not expected to be available with a copy of the LOI to be faxed to the vessel.

Shanxi Haixin declared Lanshan as the discharge port to Xiamen and Sea-Road as the port agent. This information was conveyed to SCIT Trading, SCIT Services, Oldendorff Carrier and Head Owners.

Foreseeing that there may be need for an LOI, Oldendorff sought Head Owners' LOI wording for non-production of Bs/L. Head owners provided their LOI wording and left the identity of the party entitled to delivery blank. This LOI wording was handed down the charter party chain. When Xiamen handed the LOI to Shanxi Haixin, Xiamen named Sea-Road (or such party believed to be Sea-Road or acting on behalf of Sea-Road) as the party entitled to delivery.

When passing the LOI back up the charter party chain to SCIT Trading, Xiamen named itself (or such party believed to Xiamen or acting on behalf of Xiamen) as the party to whom delivery was to be made. The LOI in this form, naming Xiamen, was then passed to SCIT Services, Oldendorff Carriers, Oldendorff and Head Owners.

The captain was advised by head owners of the LOI and instructed to deliver the cargo of iron ore as per the terms of the LOI. A Sea-Road representative boarded the vessel and advised that his duty was to take care of discharge on behalf of Xiamen. Discharge proceeded without incident against the LOI in the absence of the B/L.

The Zagora returned to Lanshan about eight months later and arrested at the order of the Bank of China. The Bank of China claimed that they were the lawful B/L holder, they had not received payment from Shanxi Haixin and argued that the head owners had unlawfully discharged with the cargo without the B/L.

Head owners directed Oldendorff to secure the release of their vessel following the LOI supplied. The request to secure release of the vessel was passed down the charter party chain. Oldendorff Carriers obtained an interim mandatory injunction against SCIT Services forcing them to take decisive steps to get the vessel released. SCIT Trading secured an identical order against Xiamen but nothing was done to achieve the release of the vessel.

Oldendorff and Oldendorff Carriers broke the deadlock and agreed to put up the security to have the vessel released but reserved its rights to demonstrate the LOI was never engaged. The court initially presented the difference between discharge and delivery as postulated in the *Bremen Max* case. Discharge is simply the action of moving cargo from the vessel "*over the ship's rail*" to the shore. On the other hand, delivery denotes transfer of possession of the cargo with the carrier no longer exercising any control over the cargo.

The central question that needed to be resolved by Teare J was whether Sea-Road took delivery of the cargo as the agent on behalf of Xiamen or whether they took charge of the cargo on behalf of the head owner or Oldendorff. A number of legitimate inferences supported Teare's J decision that Sea-Road had acted as an agent on behalf of Xiamen:

i. The sales contract had provided that the buyer (Shanxi Haixin) was to choose the agent at the port of discharge;

ii. When passing the LOI wording to Shanxi Haixin, Xiamen named Sea-Road as the party entitled to delivery in the event that the B/L was unavailable, notwithstanding that Xiamen named itself as the party to whom delivery should be made when passing its LOI to SCIT Trading.

iii. Sea-Road may have acted for head owners when carrying out minor owners' matters but head owners would not have been interested to have Sea-Road take possession of the cargo on their behalf as this would mean that they still retained control of the cargo which would invalidate the effect of the LOI.

Therefore the risk associated with accepting the LOI in this instance was removed when Teare J held that the head owners were eligible for an indemnity from Oldendorff following the LOI supplied, and that all the LOI's down the charter party chain to Xiamen were engaged and valid.[219] The decision is welcomed but the idle time of the ship which is measured in lost earnings cannot be overlooked.

3.6 LOI Best Practice

The preferred route is to seek the advice of your P&I club before accepting an LOI.

That being said, it is imperative that parties get the LOIs correct at the time of issuing and act swiftly to enforce its terms in the case of a mis-delivery claim.[220]

Best practice would entail the ship owner enquiring as to where the Bs/L are and then the solvency of the party providing the LOI.[221] It is imperative that use is made of the latest IG approved LOI wording and that the party entitled to delivery of the cargo is the same as that party named in the B/L.[222] Further, the LOI should be broadly addressed and must not be time barred.[223]

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[219] Toby Miller, C. P. B. C. "Oldendorff GmbH & Co KG -v- Sea Powerful II Special Maritime Enterprises and Others [2016] EWHC 3212 (Comm)" (2017) *HILL DICKINSON.* [Online]
Available at: https://www.hilldickinson.com/insights/articles/oldendorff-gmbh-co-kg-v-sea-powerful-ii-special-maritime-enterprises-and-others [Accessed 29 October 2019].
[220] Rory Butler, W. G. "DISCHARGE OF CARGO WITHOUT ORIGINAL BILLS OF LADING AND LETTERS OF INDEMNITY (LOI): ONE OF THE BIGGEST RISKS A SHIPOWNER OR CHARTERER CAN TAKE, MARCH 2018" (2018) *HFW.* [Online]
Available at: http://www.hfw.com/Discharge-of-cargo-without-original-bills-of-lading-and-letters-of-indemnity-LOI-one-of-the-biggest-risks-a-shipowner-or-charterer-can-take-March-2018
[Accessed 29 October 2019].
[221] Ibid.
[222] Ibid.
[223] Ibid.

3.7 Conclusion

The B/L's document of title function is prejudiced when cargo is delivered without a B/L.

The current practice of delivering cargo in the absence of B/L's in exchange for an LOI is to disregard the presentation rule and a breach of the sea carriage contract. It is however, a convenient and essential mechanism for international trade.
The IG's attempt to assist its members with standard LOI wording is welcomed but does not eradicate the risk of mis-delivering the cargo to the incorrect party as was seen in the *Bremen Max* case which precipitated a redrafting of the LOI wording. The *Zagora* case provided ship owners with some relief to know that the LOI would be engaged where cargo was delivered to an agent for the party named in the LOI.

The LOI is further dependent upon the issuer's solvency. In addition to the risk of a claim for mis-delivery and the charterer's insolvency, there are also the additional expenses faced by the ship owner during litigation. A ship may be arrested and be idle for months not earning any hire whilst a ship owner would still be responsible for the daily running costs of the ship which would equate to thousands of dollars per day.
The reality is that the B/L will still often be late and not available upon the ship's arrival at the port of discharge. The LOI is a tool available but is not without inherent risks as has been displayed with case law as specific examples.

The E-bill is a welcome entrant to the world of shipping as it is able to be transmitted within minutes and therefore unlikely to be unavailable before the ship arrives. Parties that have adopted the E-bills have observed a notable reduction in the number of LOI's being issued which would certainly result in a corresponding reduction of mis-delivery claims.[224]

The following chapter will explore whether the E-bill is a suitable alternative able to replicate the paper B/L's functions, especially as a document of title. The chapter will look at the IG's attitude to the new entrant and case law will be presented where applicable.

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[224] Ibid at 187.

CHAPTER 4:

THE ELECTRONIC BILL OF LADING

4.1 Introduction

The problem with the late B/L and the risks associated with accepting an LOI for non-presentation may be overcome by making use of a speedier electronic version of the B/L, namely, the E-bill. However, whether all parties involved in the carriage of goods by sea will embrace the newest entrant is yet to be seen.

It has been established that the B/L is conceivably the most remarkable document involved in the international transportation of goods by sea. For hundreds of years, the B/L has been a tangible document, produced on paper, capable of being 'held' physically and subsequently transferred. The threefold function of the B/L, (i) as proof of receipt of the cargo; (ii) as evidence of the contract concluded prior to its issue; and (iii) the unparalleled document of title has seen the B/L survive as a consistent element of international trade. The timeworn B/L is not without its own set of problems. The principle drawbacks are delays, increased administrative expenditure and security risks.

The electronic bill of lading (E-bill) is meant to mirror the established paper B/L's three-fold function by the operation of extremely protected technology and a lawful framework which would hold the contracting parties bound by means of a user agreement.[225]

The benefits associated with E-bills include speedier transmission of the E-bill, a reduction in administrative expenses, uncomplicated correction of any E-bill errors and diminished exposure to fraud.[226]

The benefits associated with E-bills are exciting but their growth has been impeded by three obstacles that need to be overcome: (i) suitable technology that will facilitate the safe and secure transmission of electronic records; (ii) the different parties involved in the transportation of cargo by sea must

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[225] Nielsen, H. "Electronic Bills of Lading" (2016) *BIMCO.* [Online]
Available at: https://www.bimco.org/contracts-and-clauses/chartering-help-and-advice/bills-of-lading-advice/electronic_bills_of_lading [Accessed 31 October 2019].
[226] Anon. "E-bills of lading" (2018) *NORTON ROSE FULBRIGHT.* [Online]
Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/b20094b6/e-bills-of-lading [Accessed 31 October 2019].

agree to endorse the technology; and (iii) industry doubt surrounding the lawful status of electronic transferable records.[227]

As of 2010, members are able to retain their P&I cover when using E-bills provided that they make use of one of the five IG approved electronic trading systems (Bolero, essDOCS and e-title™, Globalshare S.A. edoxOnline and WAVE). Those exclusions that are applicable to the paper bills of lading will apply in the same way to the E-bill.

BIMCO are in support of the shift to E-bills and have responded to the increased demand by formulating a specialist E-bill clause that can be incorporated into charter parties.[228]

Chapter 3 had highlighted the inherent perils associated with delivering cargo without the simultaneous exchange of an original B/L. This chapter will explore the introduction of an electronic alternative that may or may not be able to take its place in maritime history as the technology that was able to replicate the historical paper B/L and possess the unique "document of title" function.

A brief and simple discussion on how the five electronic trading systems operate will be discussed. The technical aspects of the five electronic trading systems (Bolero, essDOCS, e-title™, GlobalShare S.A (edoxOnline) and WAVE) are beyond the scope of this dissertation. The BIMCO E-bill clause will be expanded upon.

The chapter will conclude with author's opinion on whether the E-bill can successfully replicate the paper B/L and thereby eliminate the need for accepting LOI's where the arrival of said Bs/L are delayed.

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[227] Stephen Tricks, R. P. "The Legal Status of Electronic Bills of Lading A report for the ICC Banking Commission" (2018) *ICC INTERNATIONAL CHAMBER OF COMMERCE.* [Online]
Available at: https://iccwbo.org/content/uploads/sites/3/2018/10/the-legal-status-of-e-bills-of-lading-oct2018.pdf [Accessed 31 October 2019].

[228] Anon. "Electronic Bills of Lading Clause 2014" (20140 *BIMCO.* [Online]
Available at: https://www.bimco.org/contracts-and-clauses/bimco-clauses/electronic-bills-of-lading-clause-2014 [Accessed 31 October 2019].

4.2 Paper bill of lading drawbacks

4.2.1 Delays

On arrival at the port of discharge, and in the absence of suspicion of fraud, the carrier is obliged to deliver the cargo to the lawful B/L holder in exchange for one original B/L. The paper B/L is a negotiable instrument in that it can be transferred to a new holder each time the cargo is traded and sold whilst the voyage is still in progress. The paper B/L is more often than not sent to the buyer/new holder by means of a courier each time the cargo is traded. Couriering the B/L from one party to the next takes a fair amount of time which means that the vessel often arrives at the port of discharge before the B/L does. The absence of the B/L at the discharge port means that the cargo cannot be discharged because to do so in the absence of an original B/L means that the carrier will inevitably lose his P&I cover.[229] Loss of perishable cargoes, demurrage claims, storage costs and increased berth dues are unavoidable where the decision is taken to wait for the original B/L to arrive. The decision to wait for the original B/L to arrive at the discharge port is not a commercially viable decision resulting in carriers agreeing to discharge the cargo without the production of the original B/L in exchange for an LOI. The LOI increases trading costs and administrative expenses. More importantly, accepting the LOI does not relieve the carrier of his liability under the B/L in the case of mis-delivery of the cargo.[230]

4.2.2 Paper Administrative Expenses

In addition to the B/L, additional documents involved when cargo is transported by sea include, amongst others, bills of sale, letters of credit and customs clearance

[229] Anon. "Electronic Bills of Lading" (2017) *UK P&I CLUB.* [Online] Available at: https://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/2017/Legal_Briefing_e_bill_of_Lading_WEB.pdf [Accessed 01 November 2019].
[230] Ibid.

documentation.[231] This archaic paper based system accounts for 5 – 10% of the value of cargoes traded per annum.[232]

4.2.3 Security Risks

Paper Bs/L are frequently issued in sets of three originals, however a lawful holder is only required to present one original to the carrier at the discharge port to claim delivery. When the cargo is sold, constructive possession in the cargo is passed when the transferor endorses and delivers one B/L to the transferee. The remaining two Bs/L are likely unendorsed, or in the case of fraud, endorsed to a different transferee. A party who has obtained a B/L by fraudulent means is still able to take delivery of the cargo thereunder where the carrier agrees to deliver the cargo against an LOI.[233]

It is not difficult to falsify, steal or mislay a paper B/L. A true holder of a valid B/L can still sue the carrier for mis-delivery of cargo where the carrier had delivered cargo against a forged or stolen B/L.[234]

4.3 Can the E-bill fix the problem of the late B/L?

The E-bill is intended to correct the historical drawbacks of its paper-based counterpart. It is certainly transmitted faster resulting in shorter payment cycles, a reduced need for LOIs, and is also less prone to human error, falsification and fraud.[235]

The United Nations Commission on International Trade Law (UNCITRAL) Model Law provides a model that could be used to create a regulatory framework for the E-bill.

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[231] Ioannidi, H. "*Electronic Bill(s) of Lading: A Practical "Tool" or Not?*" (2015) [Online] Available at: https://www.academia.edu/20325958/ELECTRONIC_BILL_S_OF_LADING_A_PRACTICAL_TOOL_OR_NOT [Accessed 01 November 2019].
[232] Anon., n.d. "The United Nations electronic Trade Documents (UNeDocs) Project A Synopsis *UNECE* [Online] Available at: https://www.unece.org/fileadmin/DAM/trade/workshop/wks_capbld/unedocs_summary.pdf [Accessed 01 November 2019].
[233] Ibid at 236.
[234] Ibid at 233.
[235] Nicol, D. "Electronic bills of lading: How secure are they really?" (2019) *GTR Global Trade Review.* [Online] Available at: https://www.gtreview.com/magazine/volume-17-issue-3/electronic-bills-lading-secure-really/ [Accessed 03 November 2019].

There are generic and specific requirements that the E-bill must address. Generic requirements refer to the writing and signature prerequisites. In addition, the E-bill must specifically function as a receipt of cargo, evidence of the sea carriage contract and as a document of title.[236]

4.3.1 UNCITRAL Model Laws on Electronic Commerce and Electronic Transferable Records

The Model Law on Electronic Commerce (MLEC), whilst not a rule of law, was drafted UNCITRAL and adopted in 1996 as a guide to advancing e-commerce.[237] The MLEC serves to clear the way for trading electronically by providing lawmakers with a set of rules that would be accepted internationally. The objective is the removal of any legal impediments and to reinforce uniformity for electronic trading. It is open to jurisdictions to enact the MLEC into their national laws.

Article 17 (3) provides for the negotiation and transfer of an E-bill:

> *"If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique."*[238]

The UNCITRAL Model Law on Electronic Transferable Records (MLETR) was adopted in 2017 and seeks to permit the lawful use of electronic transferable records, notably the E-bill, globally. The MLETR does not have the force of law but serves as a model that is capable of being enacted into a jurisdiction's code of law. The functional equivalence of an electronic transferable record is found in Article 10 of the MLETR:

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[236] Kuester, F. "Electronic Bills of Lading – How is paperless trade possible?" (2017) *Combined Transport Magazine.* [Online] Available at: https://combined-transport.eu/electronic-bill-of-lading [Accessed 3 February 2020].
[237] UNCITRAL "UNCITRAL Model Law on Electronic Commerce" (1996) *UNCITRAL.* [Online] Available at: http://tfig.unece.org/contents/uncitral-model-law-ecommerce.htm [Accessed 25 January 2020].
[238] Ibid.

"Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and

(b) A reliable method is used;

(i) To identify that electronic record as the electronic transferable record;

(ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) To retain the integrity of that electronic record."[239]

4.3.2 The Writing Requirement

In order to meet the requirement of a document of title, it is globally accepted that the B/L must be in written form.[240] Therefore most jurisdictions have found it difficult to adapt to the accelerated advances of modern technology in the form of E-bills. They still assert that the B/L must take the form of a written tangible document which then prejudices switching over to the E-bills.

Article 6 (1) of the MLEC makes provision for the writing requirement of an E-bill as follows:

"Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."[241]

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[239] UNCITRAL "UNCITRAL Model Law on Electronic Transferable Records" (2017) *UNCITRAL.* [Online] Available at: https://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf [Accessed 25 January 2020].

[240] Alawamleh, K. "Traditional Bills of Lading v. Electronic Bills of Ladings: Pros and Cons and the Way Forward" (2017) *WORLD RESEARCH LIBRARY.* [Online] Available at: http://www.worldresearchlibrary.org/up_proc/pdf/711-149128316801-03.pdf [Accessed 07 November 2019].

[241] Ibid at 241.

Article 8 of the MLETR provides that a writing requirement is fulfilled where the details recorded in the electronic transferable record is able to be accessed and subsequently used:

> *"Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."*[242]

4.3.3 The Signature Requirement

A handwritten signature authenticates a document and indicates that parties intend to be bound to a contract.[243] A digital signature is able to change a signed document enabling the receiver to identify the sender.[244] The digital signature uses private and public keys, the former used to sign and the latter used to verify.[245]

Article 7 (1) of the MLEC makes provision for the signature requirement on an E-bill as follows:

> *"Where the law requires a signature of a person, that requirement is met in relation to a data message if:*
>
> > *(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and*
> > *(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement."*[246]

Article 9 of the MLETR provides that where a party's identity and intention as regards the electronic transferable record can be established, the signature requirement is said to be fulfilled:

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[242] Ibid at 243.
[243] Anon., n.d. "What are digital signatures" *DocuSign.* [Online]
Available at: https://www.docusign.com/how-it-works/electronic-signature/digital-signature/digital-signature-faq [Accessed 17 January 2020].
[244] Anon. "Implementing A Electronic Bill Of Lading Information Essay" (2016) *UKEssays.* [Online]
Available at: https://www.ukessays.com/essays/information-technology/implementing-a-electronic-bill-of-lading-information-technology-essay.php [Accessed 17 January 2020].
[245] Ibid.
[246] Ibid at 241.

"Where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record."[247]

A legal framework exists for the acceptance of electronic signatures under English law contained in The Electronic Communications Act 2000.[248]

4.3.4 Receipt Function

The paper B/L confirms receipt of the cargo and includes information pertaining to the quantity, observable quality of the cargo as well as the date that it was loaded on board. The IG approved electronic trading systems, Bolero, essDOCS, e-title™, edoxOnline and WAVE maintain the identical form so that the information is added in the same way as it appears on the B/L.[249] The E-bill is accordingly able to satisfy the receipt function.

4.3.5 Evidence of the contract of carriage

Those details incorporated on the face and reverse of the paper B/L serve to illustrate an existent contract of carriage. The Act[250] elucidates the term "*contract of carriage" as "in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill*". Unfortunately, any text or electronic message accompanying an E-bill does not form part of that E-bill. An E-bill is required to embody those details that are included on the face and reverse of the paper B/L.[251] The IG approved electronic trading systems, Bolero, essDOCS, e-title™, edoxOnline and WAVE are able to provide an E-bill identical to the traditional paper B/L with the second page displaying those terms that prove the existence of a contract of carriage.[252]

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[247] Ibid at 243.
[248] Stephen Tricks, R. P. "The Legal Status of Electronic Bills of Lading" (2018) *Clyde&Co.* [Online] Available at: https://www.clydeco.com/uploads/Files/The_Legal_Status_of_E-bills_of_Lading_-_ICC_and_Clyde_Co.pdf [Accessed 17 January 2020].
[249] Ibid at 236.
[250] Act 50 of 1992; s5 (1).
[251] Ibid at 236.
[252] Ibid.

4.3.6 Document of Title

It is possible to subdivide this function into three: The holder of a bill of lading is able to control the cargo described therein by reason of constructive possession, the holder is able to transfer title to the cargo and the capacity to furnish security in the cargo.[253] The E-bill will be regarded as functionally equivalent to its paper counterpart when the "holder" is in the same position as the holder of the paper B/L.[254]

The E-bill is therefore able to effortlessly simulate the receipt and evidence of contract functions because that entails the sole transfer of information[255], however, it becomes tricky in regard to its function as a document of title. The purpose of a document of title is to enable seamless trading of goods and the ability to obtain finance from banking institutions where the B/L is held as security for payment or collateral.[256] It is this decisive point that could be universally accepted if the groundwork existed to be able to implement an adequate set of rules that would allow banks and merchants to recognise the document of title function through the establishment and fulfilment of a security interest in an E-bill.[257]

The Act[258] governs the rights and liabilities under the sea carriage contract but does not apply to the E-bill[259], however, s1 (5) of the Act makes the following provision:

> *"The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to –*
>
> *(a) the issue of a document to which this Act applies;*

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[253] Ibid at 254.
[254] Ibid at 231.
[255] Dubovec, M., 2006. The Problems and Possbilities For Using Electronic Bills of Lading as Collateral. *Arizona Journal of International and Comparative Law,* 23(2), pp. 437 – 466 at p.448. [Online] Available at: https://9jalegal.com.ng/downloads/International%20Trade/ELECTRONIC%20BILLS%20OF%20LADING%20-%20DUBOVEC.pdf [Accessed 1 December 2019].
[256] Maanen, M. v. & Regtien, I. "E-bills of lading" (2018) *LEXOLOGY.* [Online] Available at: https://www.lexology.com/library/detail.aspx?g=453d225f-ca8b-404f-9b39-f39f4f0a7b90 [Accessed 30 November 2019].
[257] Chukwuna, R. F. S. C., 2013. Can The Functions Of A Paper Bill Of Lading Be Replicated By Electronic Bill Of Lading?. *Public Policy and Administration Research,* 3(8), pp. 101 - 108. [Online] Available at: https://pdfs.semanticscholar.org/e139/62b0904ecd043358660d7a490cb4e88068dd.pdf [Accessed 1 December 2019].
[258] Act 50 of 1992.
[259] Goldby, M. "Legislating to facilitate the use of electronic transferabe records: A case study" (2011) *UNCITRAL.* [Online] Available at: https://www.uncitral.org/pdf/english/colloquia/EC/Legislating_to_facilitate_the_use_of_electronic_transferable_records_-_a_case_study_.pdf [Accessed 25 January 2020].

(b) the indorsement, delivery or other transfer of such a document; or

(c) the doing of anything else in relation to such a document."

On this basis, the provision it would seem that provided the necessary regulations was indeed passed, the Act would then apply to E-bills.[260] The E-bill document of title function will remain a problem until such time that a legal framework exists to regulate their use and the courts acknowledge and endorse their use.[261]

"Possession and "holdership" involved in the transfer of the B/L is required to be translated in such a way as to be plausible in the electronic arena.[262]

The document of title functions permits the B/L holder to exercise "control" over the cargo whilst the cargo is still in transit to the port of destination. The MLETR defines the transfer of an electronic transferable record as the transfer of control, in much the same way as a paper B/L would be exchanged between parties.[263]

Article 10 of the MLETR provides that:

"1. Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and
(b) To identify that person as the person in control.

2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record."[264]

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[260] Ibid.
[261] Ibid.
[262] Ibid at 231.
[263] Lampic, J. "UNCITRAL Model Law on Electronic Transferable Records: A Brief Introduction" (2020) *Schonherr*. [Online] Available at: https://www.schoenherr.eu/publications/publication-detail/uncitral-model-law-on-electronic-transferable-records-a-brief-introduction/ [Accessed 3 February 2020].
[264] Ibid at 248.

The MLETR's provision for the negotiability and transferability of an electronic transferable record makes it possible for an E-bill to possess the document of title function. This would facilitate a reduction in the number of LOI's for non- presentation being issued and accepted because it would mean that E-bill would be available at the port of discharge before the ship arrives.

The Model Law has no force of law and only serves as a model that lawmakers could elect to enact into their national law as a means to overcome those hurdles associated with electronic trading.

At the time of writing, this functional equivalence can only be achieved when the parties to the sea carriage contract mutually agree to regard the E-bill as having the same force as the traditional paper B/L.[265]

4.4 The need for legislation and reform

The MLEC and MLETR provide the model law that if enacted into national law would regulate the use of E-bills which might entice the traditional shipping community to move away from paper to the much faster and more secure electronic version of the B/L.

The use of the E-bill is still far from being considered the norm because without the existence of an explicit statutory framework, legal uncertainty concerning their use would abound.[266]

In order to recognise the functional equivalence of an E-bill under English law, it would be necessary to revise the law pertaining to the carriage of goods by sea.[267] A course of action could include the lawmaker providing directives under s 1(5) of the Act that extend to the
E-bill in addition to making the Hague-Visby rules[268] applicable thereto.[269] The principal prerequisite would be that the holder must be guaranteed exclusive control of the E-bill.[270]

The functional equivalence of the E-bill is not about to recognised in law, therefore parties to a sea carriage contract will need to register with one of the five IG approved paperless trading platforms by

[265] Ibid at 231.
[266]Ibid at 231.
[267] Ibid.
[268] A set of international regulations governing the sea carriage of cargo.
[269] Ibid at 231.
[270] Ibid.

signing a multilateral contract whereby they agree to treat the E-bill as the functional equivalent of the paper B/L.

4.5 Modern electronic paperless trading systems in operation

As at February 20th 2010 the IG have provided cover for those liabilities that arise under contracts for the carriage of goods by sea on the condition that members utilise one of the five approved paperless trading systems.[271] They are Bolero, essDOCS and e-title™, Globalshare S.A. edoxOnline and WAVE.[272]

The fourth paperless trading system, Global Share S.A. edoxOnline, that the IG has approved, has become the first to use the novel Blockchain technology.[273] WAVE is the fifth electronic trading system and the second to use Blockchain technology, to be counted amongst those electronic platforms approved by IG.[274]

4.5.1 The Bill of Lading Electronic Registry Organisation (Bolero)

September 27th in 1999 saw the launch of Bolero, a combined project between the Society for Worldwide Interbank Financial Transactions (SWIFT) and the Through Transport Mutual Insurance Association Ltd (TT Club).[275] Bolero is a closed system that provides a multilateral contractual resolution, known as the "Rulebook", whereby its members that are involved in the carriage of goods by sea are obliged to abide by the rules and become affiliated with the

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[271] Anon., n.d. "Circular 16/19 Electronic (Paperless) Trading Systems (2019) *UK P&I.* [Online]
Available at: https://www.ukpandi.com/knowledge-publications/article/circular-16-19-electronic-paperless-trading-151105/ [Accessed 28 December 2019].
[272] Ibid.
[273] Anon., n.d. "International Group approves Global Share SA edoxOnline platform in Blockchain first" (2019) *Insurance Marine News.* [Online]
Available at: https://insurancemarinenews.com/insurance-marine-news/international-group-approves-global-share-sa-edoxonline-platform-in-blockchain-first/ [Accessed 17 December 2019].
[274] Ibid at 260.
[275] e-Scripta, C. S. &. L. "The 21st Birthday of the Electronic Bill of Lading: With Age Comes Maturity" (2003) *INTER-LAWYER.* [Online]
Available at: http://www.inter-lawyer.com/lex-e-scripta/articles/electronic-bills-of-lading-4.htm#_ftn20 [Accessed 28 December 2019].

"Bolero User Association".[276] The Bolero service is governed by English Law as the forum of choice for international trade contracts.[277]

The title registry is a vital part of the Bolero system used to document and assign rights and obligation under the Bolero bill of lading (BBL).[278] All transactions between members are recorded and saved.[279] The title registry provides the tool for trading information and authorises the transfer of rights over the cargo whilst the voyage is still in progress.[280] The threat of fraud is reduced because all the transactions are recorded.[281]

The digital signature, created by means of cryptography, is a fundamental element of Bolero which enables a member to authenticate the BBL electronically.[282] Intricate algorithms and secure keys form the base of cryptography that is able to ensure data integrity and authentication.[283] A certified Bolero member is able to transmit a message by digitally signing the document by means of his private key.[284] Upon verification of the sender by Bolero, the message is then transmitted to the recipient.[285] The Rulebook obliges each member to keep his private key safe.[286]

The carrier or his agent creates the BBL in the same way as the traditional paper B/L by including the usual details such as the shipper, consignee, ship's name, load and discharge ports, cargo quantity and description together with the date that the cargo was loaded or shipped on board. The BBL is created either directly in the application or by scanning the paper bill of lading.[287] Once ready, the final BBL and the Title Registry Instruction (TRI) are uploaded into Bolero.[288] The TRI is evidence of the BBL that serves to safeguard the captured data making it impossible to be amended or duplicated. The BBL and TRI are signed

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[276] Ibid.
[277] McGowan, K. T., 2007. The Dematerialisation of the Bill of Lading. *Hibernian Law Journal,* Volume 7, pp. 68-104. [Online] Available at: https://heinonline-org.ukzn.idm.oclc.org/HOL/Page?public=true&handle=hein.journals/hiblj7&div=9&start_page=68&collection=journals&set_as_cursor=3&men_tab=srchresults [Accessed 28 December 2019].
[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Simpson, S. "Cryptography Defined/Brief History" (1997) *LAITS.* [Online] Available at: https://www.laits.utexas.edu/~anorman/BUS.FOR/course.mat/SSim/history.html [Accessed 14 January 2020].
[284] Ibid at 263.
[285] Ibid.
[286] Ibid.
[287] Anon. "Electronic Bill of Lading: How to Go Paperless with Bolero, essDOCS, e-title, and edoxOnline" (2019) *altexsoft.* [Online] Available at: https://www.altexsoft.com/blog/electronic-bill-of-lading-software/ [Accessed 15 January 2020].
[288] Ibid.

electronically before being sent to the shipper for his examination thereof.[289] Bolero's Core Messaging Platform acknowledges receipt of a sender's message before forwarding that message to the receiver.[290] The sender is then automatically notified that the message has been received after the receiver downloads the message.[291] Bolero will email the carrier once a BBL has been surrendered permitting the carrier to allow discharge of the cargo at the discharge port.[292]

Bolero's members are able to convert the BBL into the trusted paper bill of lading at any stage.

4.5.2 Electronic Shipping Solutions (ESS)

essDOCS was established in 2005 providing solutions to modern paperless trade.[293] ESS' CargoDocs is able to digitise the creation and subsequent approval of the B/L (E-bill) as well as their exchange and transfer between the users via a protected cloud-based platform.[294] The life cyle of the E-bill is regulated by use of the CargoDocs platform. DocHub facilitates the electronic drafting of the E-bill, joint examination by the shipper and the carrier until it is ready to be signed and issued. DocEx regulates the exchange and transfer of the E-bill.

In order to maintain the system's integrity, the ESS user is required to insert a unique code before access to the system is granted.[295] The process begins once the shipper submits a draft E-bill to the carrier for his authorisation.[296] The carrier will provide feedback with regard to any necessary changes and this will continue until both parties are satisfied that the E-bill is in good order and may be released and issued to the shipper. Once released the shipper is now in a position to trade the cargo covered by the E-bill to a third party. The ESS user must insert his unique code each time a change to the E-bill is required, or the E-bill is authorised for release, or the E-bill is endorsed and transferred to a third party where the cargo has been sold

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[289] Ibid.
[290] Ibid at 263.
[291] Ibid
[292] Ibid at 291.
[293] Goulandris, A., n.d. "Vision" *essDOCS.* [Online]
Available at: https://www.essdocs.com/about/vision [Accessed 14 January 2020].
[294] Anon., n.d. "CargoDocs" *essDOCS.* [Online] Available at: https://www.essdocs.com/solutions/cargodocs
[Accessed 14 January 2020].
[295] Comminos, M. "E-trading systems Focus" (2013) *The London P&I Club.* [Online]
Available at: https://www.londonpandi.com/media/2085/4803clubnews69sp.pdf
[Accessed 15 January 2020].
[296] Ibid.

on. By inserting his unique code, each user authenticates his action.[297] CargoDocs permits users to view the E-bill at all times but any amendments to the E-bill can only be actioned by the "Title Holder" much like the holder of a paper B/L.[298]

The Databridge Service and User Agreement (DSUA) is a multilateral agreement between the user and ESS, including all users of the Exchange, which governs the use of and all transactions on the CargoDocs platform.[299]

The E-bill is not accepted as a bill of lading in law.[300] Signing the DSUA is therefore essential to ensure that all parties agree to treat the E-bill as a functional and legal equivalent of its paper counterpart.[301]

After the E-bill has been released, the Title Holder is able to request amendments to the E-bill, for example, splitting the E-bills or changing the port of destination. The required changes are made electronically in a short space of time when compared to its paper counterpart. A paper bill of lading is usually issued in sets of three. Any changes required after the paper bill of lading has been released involves collecting all three original bills of lading and returning them to the carrier before a new bill of lading can be issued with the changes, thereby ensuring that there are not two sets of bills of lading for the same cargo in circulation. All three originals are seldom in the same place at any one time, with one of three posisbly held up at the bank where the bill of lading forms part of the documents required under an L/C.

ESS users are able to convert the E-bill into the trusted paper bill of lading at any stage.

4.5.3 The e-title™ Solution

The three creators of e-title™ were once Bolero members who were able to recognise a business opportunity that entailed providing the means by which carriers and shippers were able to electronically issue and release bills of lading without alteration to the bill of lading or

[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Nicol, D. "Electronic bills of lading: How secure are they really?" (2019) *Global Trade Review.* [Online] Available at: https://www.gtreview.com/magazine/volume-17-issue-3/electronic-bills-lading-secure-really/ [Accessed 15 January 2020].
[301] Ibid at 275.

its functionality.[302] The focus was to safely transfer title in, and the negotiablity of the bill of lading.[303] e-title™ uses peer-to-peer technology to transfer title eliminating the need to rely on expensive central registries.

e-title™ users must become members of the Electronic Title User Group (ETUG) to be able to the sign the mulitalteral agreement[304] that incorporates the Act,[305] making the Act applicable to all e-title™ E-bills.[306]

e-title™ is a program that is linked to the user's back office or whatever trade documentation system the user has in place.[307] The carrier will create the B/L, either in paper form or via a program for trade document creation, and then sends it to the e-title™.[308] The E-bill is created and signed, then registered in e-title's Hardware Security Module that logs every transaction.[309] Once created, the E-bill is then returned to the carrier's back office from where it is sent to the shipper.[310] At the shipper's receiving end, e-title™ confirms the signature and that there have been no amendments to the E-bill.[311] Each time the E-bill is transferred from one holder to the next, the party endorsing the E-bill is required to sign the endorsement record, thereby guaranteeing the E-bill's authenticity, non-repudiation and the integrity of the data contained therein.[312] The E-bill is only ever held by one party at a time and is also capable of being converted into a paper bill of lading at any time in the process.[313]

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[302] Jacqueline Tan, L. S. D. C. W. "Electronic Bills of Lading" (2017) *UK P&I Club.* [Online] Available at: https://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/2017/Legal_Briefing_e_bill_of_Lading_WEB.pdf [Accessed 16 January 2020].
[303] Ibid.
[304] Anon., n.d. "What Is Unique About e-title™?" *e-title.* [Online] Available at: https://www.e-title.net/etug_what.php [Accessed 16 January 2020].
[305] Act 50 of 1992.
[306] Ibid at 299.
[307] Ibid at 291.
[308] Ibid.
[309] Ibid.
[310] Ibid.
[311] Ibid.
[312] Ibid at 291.
[313] Ibid.

4.6 Blockchain Technology

Blockchain was introduced in 2008 as a peer-to-peer network that sits on top of the internet.[314] It can be described as an append-only online ledger meaning that the database is unable to be changed.[315] It is comprised of a chain of blocks that are securely bound to each other.[316] Each block records a set of transactions by means of cryptography that has been confirmed on a block by block basis.[317] The digital signature ensures that each transaction is tamper-proof.[318] Unlike Bolero and essDOCS, blockchain operates on a decentralised system.[319]

4.6.1 GlobalShare S.A. (edoxOnline)

In June 2019 the IG announced that it has approved the first system to use blockchain techonology.[320] edoxOnline is an internet-based instrument that is used in the generation of international trade documents including the E-bill.[321] Information is captured once, producing trade documents as accurately as the data originally captured.[322] edoxOnline enjoys the benefit of the internet to communicate with all the parties associated with the transaction.[323]

The E-bill documentary instructions originate from the point of destination, entered there, then sent to the shipper. The shipper arranges with the carrier to log on using a two-factor authentication, who will then insert the required information.

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[314] Marco Iansiti, K. R. L., 2017. *The Truth About Blockchain,* s.l.: Harvard Business Review. [Online] Available at: https://enterprisersproject.com/sites/default/files/the_truth_about_blockchain.pdf [Accessed 16 January 2020].
[315] Takahashi, K., 2016. Blockchain technology and electronic bills of lading. *The Journal of International Maritime Law,* Volume 22. [Online] Available at: https://www1.doshisha.ac.jp/~tradelaw/PublishedWorks/BlockchainTechnologyElectronicBL.pdf [Accessed 16 January 2020].
[316] Rosic, A. "What is Blockchain Technology? A Step-by-Step Guide For Beginners" (2017) *Blockgeeks.* [Online] Available at: https://blockgeeks.com/guides/what-is-blockchain-technology/ [Accessed 16 January 2020].
[317] Ibid.
[318] Ibid.
[319] Ibid at 291.
[320] Anon, n.d. "International Group approves Global Share SA edoxOnline platform in Blockchain first" (2019) *Insurance Marine News.* [Online] Available at: https://insurancemarinenews.com/insurance-marine-news/international-group-approves-global-share-sa-edoxonline-platform-in-blockchain-first/ [Accessed 16 January 2020].
[321] Anon. "edoxOnline launches the first electronic Bill of lading under Blockchain technology." (2018) *GlobalShare.* [Online] Available at: https://www.globalshare.com.ar/edoxonline/ [Accessed 16 January 2020].
[322] Ibid.
[323] Ibid.

4.6.2 The WAVE Network

December 23rd 2019 saw the IG announce that they had approved the fifth electronic trading system known as WAVE.[324]

Similar to edoxOnline, WAVE works outside of a central registry and is able to transmit original E-bills capable of being verified on a peer-to-peer basis.[325]

The five paperless trading platforms make it possible for parties to register and bind themselves to a multi-user agreement that declares that the E-bill will be treated as a the functional equivalent of the paper B/L. The faster and safer transmission of the electronic version would result in a reduced need for ship owners to accept LOIs for non-presentation and the risks associated with their use.

4.7 BIMCO's Charter Party Clause for Electronic Bills of Lading

BIMCO supports the concept of the E-bill and has responded to the increased user demand for a specialist provision from ship owners and charterers.[326] The use of E-bills does not completely remove the drawbacks surrounding cargoes arriving at the port of destination before the bill of lading, but ought to reduce the number of, and associated risks, when ship owners voluntarily accept LOIs in exchange for the non presentation of an original B/L.[327]

The Electronic Bills of Lading Clause 2014 is set out as follows[328]:

> *"(a) At the Charterers' option, bills of lading, waybills and delivery orders referred to in this Charter Party shall be issued, signed and transmitted in electronic form with the same effect as their paper equivalent.*

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[324] Clubs, I. G. o. P. "Circular 16/19: Electronic (Paperless) Trading" (2019) *UK P&I.* [Online]
Available at: https://www.ukpandi.com/knowledge-publications/article/circular-16-19-electronic-paperless-trading-151105/?dm_i=33T,6OO4K,L77AS1,QNXRH,1 [Accessed 16 January 2020].
[325] Anon. "International Group of P&I Clubs Authorize Wave As Approved Paperless Trading Solution" (2020) *Hellenic Shipping News Worldwide.* [Online]
Available at: https://www.hellenicshippingnews.com/international-group-of-pi-clubs-authorizes-wave-as-approved-paperless-trading-solution/ [Accessed 16 January 2020].
[326] Ibid at 232.
[327] Ibid.
[328] Ibid.

Sub-clause (a) gives the charterer the option to use E-bills and provides that under the charter party their use will be dealt with in the same way as their paper counterpart.[329] The words *"issued, signed and transmitted"* represents paperless trading procedures and *"the same effect as their paper equivalent"* denotes that electronic and paper documents are treated as equal.[330]

> *(b) For the purpose of Sub-clause (a) the Owners shall subscribe to and use Electronic (Paperless) Trading Systems as directed by the Charterers, provided such systems are approved by the International Group of P&I Clubs. Any fees incurred in subscribing to or for using such systems shall be for the Charterers' account.*

It would be unreasonable to attempt to use E-bills without a binding contract between the parties.[331] Further, in order to retain P&I cover, the parties must make use of one of the five paperless trading systems that have been approved by IG.[332]

> *(c) The Charterers agree to hold the Owners harmless in respect of any additional liability arising from the use of the systems referred to in Sub-clause (b), to the extent that such liability does not arise from Owners' negligence."*

Sub-clause (c) is an attempt to persuade ship owners to adopt E-bills by compelling the charterer to hold the ship owner harmless for liabilities that would not normally arise when using paper Bs/L.[333]

4.8 The *Glencore case*

The judgement laid down in *MSC Mediterranean Shipping S.A. v Glencore International AG*[334] serves as a warning concerning the risks associated with cyber security.[335] The dispute centred round Antwerp's Electronic Release System (ERS) which is not mandatorily accepted by all carriers.[336]

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[329] Ibid.
[330] Ibid.
[331] Anon. "BIMCO's new charterparty clause for electronic bills of lading" (2014) *INCE.* [Online] Available at: https://www.incegd.com/en/knowledge-bank/bimcos-new-charterparty-clause-for-electronic-bills-of-lading [Accessed 16 January 2020].
[332] Ibid
[333] Ibid.
[334] [2017] EWCA Civ 365
[335] Whitehouse, B. "A Lesson To All Exporters On The Use Of Electronic Release Systems By Carriers" (2017) *Southern African Shipping News.* [Online] Available at: http://www.sashippingnews.com/2017/07/10/lesson-exporters-use-electronic-release-systems-carriers/ [Accessed 17 January 2020].
[336] Sally-Ann Underhill, J. F. "Collecting your goods – Electronic Release System" (2017) *ReedSmith.* [Online] Available at: https://www.shiplawlog.com/2017/05/26/collecting-your-goods-electronic-release-

With ERS, the carrier provides an electronically generated pin code to the cargo receiver, his agent and the port terminal[337] using electronic data interchange (EDI)[338]. The pin code effectively substitutes the traditional paper delivery order issued against a B/L and grants the holder access to the terminal to be able to collect the cargo.[339] Unbeknown to Glencore, MSC would send an email of the release note with pin numbers after receiving the original B/L and outstanding freight.[340]

Between January 2011 and June 2012, the MSC had carried 70 shipment of briquettes from Western Australia to Antwerp for Glencore.[341] The 70th shipment concerning three containers valued at more than USD 1.5 million[342] saw two of the three containers go missing from the terminal.

The negotiable B/L in question was marked *"to order"* and provided further "*If this is a negotiable (To Order/of) Bill of Lading, one original Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier (together with outstanding freight) in exchange for the Goods or a Delivery Order*".

The judge in the court of first instance was required to decide on the following:

> (a) Did the pin code supplied by MSC to Glencore's agent amount to a delivery as provided for in the B/L?
>
> (b) Did the previous 69 successful shipments imply that MSC were authorised to provide a pin code for release instead of a paper delivery order?
>
> (c) Could Glencore be prohibited from arguing that MSC acted in breach of contract by supplying a pin code instead of a delivery order?

In response to (a), finding in favour of Glencore, the judge turned to s1 (4) of the Act 50 of 1992[343] for the definition of a delivery order. A carrier takes on the responsibility to deliver the cargo to the

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system/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original [Accessed 17 January 2020].

[337] Ibid at 338.

[338] The exchange of electronic documents from computer-to-computer.

[339] Ibid at 338.

[340] Ibid.

[341] Ibid.

[342] Anon., 2017. *i-law.com.* [Online] Available at: https://www.i-law.com/ilaw/doc/view.htm?id=384425 [Accessed 17 January 2020].

person identified in the delivery order.[344] MSC, in its release note containing the pin code provided no such undertaking and subsequently breached the B/L terms.[345]

In response to (b), finding in Glencore's favour, the judge reiterated that the B/L provided that either the cargo or a delivery order would be exchanged for an original B/L having been surrended to the carrier.[346] As the ERS was not mandatorily applied to all ships called Antwerp to discharge cargo, MSC was not obligated to issue a pin code in place of a delivery order.[347]

In response to (c), the judge held that no grounds existed for proposing that Glencore tacitly approved of the issuance of pin numbers instead of delivery orders considering that they possessed little knowledge of the system.[348]

MSC appealed the courts decision which was summarily rejected by the English Court of Appeal.

The English Court of Appeal was unwilling to accept the paperless trading system and held:

> (a) The issuance of a release note did not satisfy the production of a delivery order in terms of Section 1(4) of the Act;[349]
>
> (b) The release note containing the pin codes did not expressly state or imply that MSC was to deliver the cargo to Glencore or its agent;[350]
>
> (c) Glencore had made no representation that delivery of the cargo to the first presenter of the pin code was acceptable.

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[343] *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.
[344] Ibid at 338.
[345] Ibid.
[346] Ibid.
[347] Ibid.
[348] Ibid.
[349] Act 50 of 1992.
[350] Ibid at 338.

4.9 Conclusion

The paper B/L is not perfect and has proven to have a number of drawbacks. The negotiable paper B/L is often traded many times whilst the cargo it represents is still en route to the port of discharge. The result is that the cargo often arrives ahead of the B/L leaving ship owners with the option of waiting either for its arrival and simultaneously incurring expensive berth dues and demurrage costs, or accepting an LOI to allow discharge to proceed without the presentation of the bill of lading. Paper documents are also easily lost or forged resulting in major security risks.

The introduction of the E-bill is a welcomed alternative but must be able to mirror the functionality of its paper counterpart. The E-bill must fulfill writing and signature requirements as well as the function of a receipt for the cargo, as evidence of the contract of carriage and the document of title function.

It is difficult to argue to argue against the benefits of E-bills which include faster transmission times resulting in shorter payment cycles, less susceptibabilty to fraud and human error and a reduced need for owners to accept LOIs.

UNCITRAL's Model Law provides a guide to paperless trading and modern techonological advances are bringing us closer to a global paperless system. An exciting development in this area is the IG's approval of five paperless trading systems – Bolero, essDOCS, e-title™, GlobalShare S.A. (edoxOnline) and the most recent entrant, WAVE. Each of the platforms still requires the parties to sign a multilateral agreement thereby confirming their agreement to treat the E-bill as the legal and functional equivalent of the paper B/L.

Further progress in this area sees BIMCO publishing an express specialist clause in response to the interest from ship owners and charters. The clause is to be incorporated into the charter party and gives charterers the option to use E-bills from an IG approved paperless trading system and at the same time charterers must hold owners blameless in the case of liabilities arising out of their use.

The Glencore case concerning electronic mis-delivery comes as an unexpected surprise to owners of a court's reluctance to accept the modern paperless trade and serves as a reminder that the parties to a contract must be sure that their intentions are clearly reflected in the contract of carriage until such time that statutory provisions are in place to govern the use of paperless trading systems globally.

The shipping industry is nothing if not traditional and the break from paperless Bs/L is understandably taking longer than one would expect as a result of concerns regarding security and authenticity.

E-bills are the future and their benefits cannot be ignored, but for now, their use for reducing the need to accept LOIs and their inherent risks is not possible in the absence of a signed mulitlateral contract on an IG approved paperless trading system. For now, the decision to use E-bills will remain an entirely business decision.

CHAPTER 5:

CONCLUSION

The bill of lading has played a pivotal role in the carriage of cargo across the world's oceans. History has seen the B/L evolve from a simple entry in the ship's register to a document that in addition to acting as a receipt for the cargo, serves as evidence of the carriage contract and goes on to entitle a valid holder thereof to claim possession of the cargo from the carrier. The B/L has expanded into three distinct types now known at the negotiable B/L which facilitates the onward sale of cargo, the straight B/L indicating a named consignee and the bearer B/L which entitles the holder to delivery of the cargo without being named therein.

The presentation rule dictates that the carrier is duty bound to deliver the cargo to the B/L holder only, without exception. The B/L's *sui generous* function as a document of title plays a critical role in the carriage of the cargo by sea facilitating the means by which the cargo is able to be traded an infinite amount of times whilst the cargo is still on board the ship in transit to the port of destination. The holder presents the B/L to the master upon the ship's arrival at its destination and by virtue of his title in the document is able to claim delivery of the cargo described therein as was confirmed in the case of *Lickbarrow v Mason*. By virtue of holding the B/L, the holder is assured of the carrier's commitment to deliver the cargo to himself only, thereby allowing him to deal with the cargo as though he had it in his possession. The holder understands that the party transferring the B/L has relinquished any intention to deal with the cargo further and that he, as the new holder, will now exercise control over the cargo, excluding all others. The B/L holder does not necessarily own the cargo as this is determined by the sales contract and the parties' intentions.

The B/L holder must fall within the definitions of a holder as is contained in s3 (2) of STD 2000[351] and s5 (2) of the Act[352]. By virtue of s4 (1) of STD 2000 and s2 (1) of the Act, the holder is able to demand delivery of the cargo from the carrier as well as be able to sue the carrier, independent of property in the cargo, as though he were a party to the original carriage contract. The right to possession and property in the cargo is able to be transferred simultaneously provided that it is the intention of the transferee and transferor to do so.
Chapter three had expanded on the B/L's document of title function by turning to case law to show that the holder of the B/L is entitled to possession of the cargo and has the right to proceed against the

[351] Act 65 of 2000.
[352] Act 50 of 1992

carrier in cases of mis-delivery, short delivery or negligence as though he, the holder, were a party of the original carriage contract.

Chapter four focused on the reasons for, and danger, in accepting an LOI. In the event of a ship arriving before the B/L, carriers are faced with a decision of waiting for the B/L to arrive or to disregard the presentation rule, thereby breaching the carriage contract, against the advice and recommendation of their P&I club, and delivering the cargo in exchange for an LOI. Recognising that the practice has become a handy commercial tool that facilitates smooth delivery of cargo without delay, the IG has compiled standard LOI wording to assist and protect their members as far as possible. Despite the practice of issuing and accepting LOIs becoming par for the course, it carries with it the inherent danger of possibly delivering the cargo to the wrong party and the forfeiture of the carrier's P&I cover. Strict adherence to the LOI as was seen in the *Bremen Max* case is vital. Even the way in which an LOI is addressed can determine whether a carrier is able to proceed directly against a sub-charterer further down the charter party chain. There is always the risk that a charterer in the charter party chain may not be sufficiently solvent to be able to provide the security required once the carrier seeks to enforce the indemnity in the case of mis-delivery.

Mis-delivery claims can undeniably run into hundreds of thousands, possibly millions of dollars which is enough to cripple any ship owner. It is these risks associated with accepting an LOI that necessitates finding a remedy to the late B/L conundrum.

Times are changing, bringing with it unprecedented technological advances so that the advent of the E-bill was to be expected. The only drawback is that judicial legislation has not been able to keep up resulting in a lack of legal framework to regulate their use.

Chapter five looked at the E-bill and whether it was able to successfully replicate the paper B/L and assume its position in the maritime industry. Five paperless trading systems were introduced and it comes with a sigh of relief to know that the IG have endorsed their use and will support members in the same way as they would if a paper B/L was being used, meaning the same exclusions would apply as in the case of the paper B/L. Carriers and shippers have shown an interest in transitioning to paperless and have the support of BIMCO who have compiled the "Electronic Bills of Lading Clause 2014" that is now able to be included in charter parties at the negotiation phase. However, this enthusiasm is marked by the conservative nature of the courts as was seen in the unfortunate judgement in the *Glencore* case involving the use of Antwerp's ERS.

For now, the parties involved in the transportation of cargo by sea are able to bind themselves to a multilateral user agreement whereby they agree to treat the E-bill as the functional equivalent of the

historical paper B/L and agreeing not to challenge its validity. Central registries however exclude the small enterprise involved in transporting goods by sea due to the costs involved in signing up and employing the necessary software. So, until such time that a sufficient legal framework exists to regulate the use of E-bills in the various jurisdictions, it is unlikely that the E-bill will ever acquire the status enjoyed by the paper B/L over hundreds of years. The author maintains that the E-bill is a viable option available to carriers to avoid having to accept an LOI and thereby expose themselves to expensive mis-delivery claims.

APPENDICES

Appendix 1 Standard form letter of indemnity to be given in return for delivering cargo without production of the original bill of lading

Appendix 2 Standard form letter of indemnity to be given in return for delivering cargo without production of the original bill of lading incorporating a bank's agreement to join in the letter of indemnity

APPENDIX 1

INT GROUP A

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING

To : [insert name of Owners] [insert date]

The Owners of the [insert name of ship]

[insert address]

Dear Sirs

Ship:	[insert name of ship]
Voyage:	[insert load and discharge ports as stated in the bill of lading]
Cargo:	[insert description of cargo]
Bill of lading:	[insert identification numbers, date and place of issue]

The above cargo was shipped on the above ship by [insert name of shipper] and consigned to [insert name of consignee or party to whose order the bill of lading is made out, as appropriate] for delivery at the port of [insert name of discharge port stated in the bill of lading] but the bill of lading has not arrived and we, [insert name of party requesting delivery], hereby request you to deliver the said cargo to "X [name of the specific party] or to such party as you believe to be or to represent X or to be acting on behalf of X" at [insert place where delivery is to be made] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.

6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[insert name of Requestor]
The Requestor

.....
Signature

APPENDIX 2

INT GROUP AA

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To : [*insert name of Owners*] [*insert date*]

The Owners of the [*insert name of ship*]

[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification numbers, date and place of issue*]

The above cargo was shipped on the above ship by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bill of lading is made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bill of lading*] but the bill of lading has not arrived and we, [*insert name of party requesting delivery],* hereby request you to deliver the said cargo to *"X [name of the specific party] or to such party as you believe to be or to represent X or to be acting on behalf of X"* at [*insert place where delivery is to be made*] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.

5. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

6. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

.....
Signature

We, [*insert name of the Bank*], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. Shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)

2. Shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfil its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:-

(a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the same or associated ownership, management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and

(b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.

3. Shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]

4. Subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*) (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.

5. Shall be extended at your request from time to time for a period of two calendar years at a time provided that:-

a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and

b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. Shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.
The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref ..... in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully
For and on behalf of
[*insert name of bank*]
[*insert full details of the office to which any demand or notice is to be addressed*]

.....
Signature

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

05 September 2017

Mrs Tanya Lara Henry (215082287)
School of Accounting, Economics & Finance
Westville Campus

Dear Mrs Henry,

Protocol reference number: HSS/1558/017M
Project title: Do electronic bills of lading alleviate risks associated with the use of maritime letters of indemnity?

Approval Notification – No Risk / Exempt Application

In response to your application received on 25 August 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Mr Langa Dlamini and Mr Khulekani Zondi
Cc Acting Academic Leader Research: Dr Harold Ngalawa
Cc School Administrator: Ms Seshni Naidoo

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

5 February 2020

Mrs Tanya Lara Henry (215082287)
School of Accounting, Economics & Finance
Westville Campus

Dear Mrs Henry,
Protocol reference number: HSS/1558/017M
Project title: Bills of lading and the use of maritime letters of indemnity.

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 29 January 2020 has now been approved as follows:

- Change in title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

Best wishes for the successful completion of your research protocol.

Yours faithfully

.....
Dr Shamila Naidoo (Chair)

/ss

cc Supervisor: Mr Langa Dlamini and Mr Khulekani Zondi
cc Academic Leader Research: Dr Harold Ngalawa
cc School Administrator: Ms Seshni Naidoo

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Digital Receipt

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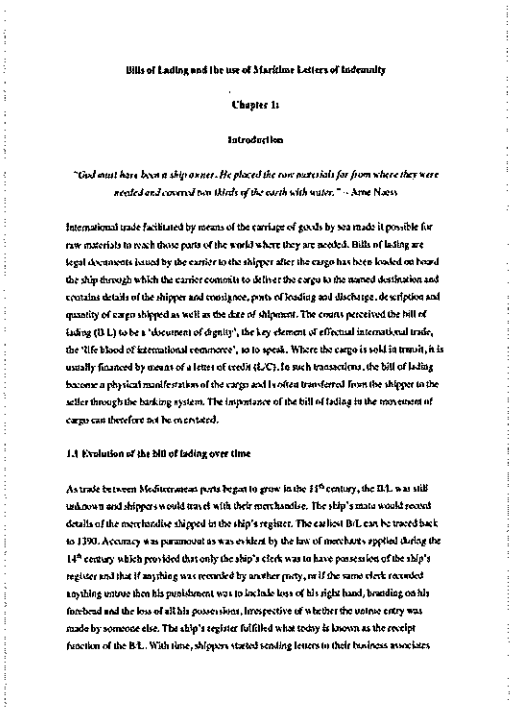


Bills of Lading and the use of Maritime Letters of Indemnity

Chapter 1:

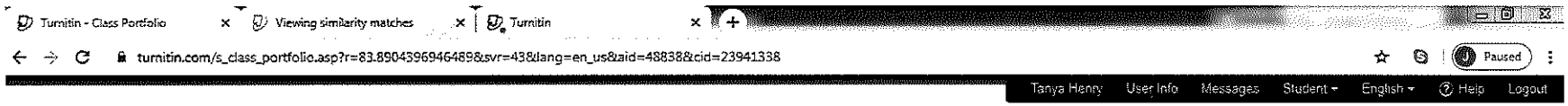
Introduction

"God must have been a ship owner. He placed the raw materials far from where they were needed and covered two thirds of the earth with water." - Arne Naess

International trade facilitated by means of the carriage of goods by sea made it possible for raw materials to reach those parts of the world where they are needed. Bills of lading are legal documents issued by the carrier to the shipper after the cargo has been loaded on board the ship through which the carrier commits to deliver the cargo to the named destination and contains details of the shipper and consignee, ports of loading and discharge, description and quantity of cargo shipped as well as the date of shipment. The courts perceived the bill of lading (B/L) to be a 'document of dignity', the key element of effectual international trade, the 'life blood of international commerce', so to speak. Where the cargo is sold in transit, it is usually financed by means of a letter of credit (L/C). In such transactions, the bill of lading become a physical manifestation of the cargo and is often transferred from the shipper to the seller through the banking system. The importance of the bill of lading in the movement of cargo can therefore not be overstated.

1.1 Evolution of the bill of lading over time

As trade between Mediterranean ports began to grow in the 11th century, the B/L was still unknown and shippers would travel with their merchandise. The ship's mate would record details of the merchandise shipped in the ship's register. The earliest B/L can be traced back to 1390. Accuracy was paramount as was evident by the law of merchants applied during the 14th century which provided that only the ship's clerk was to have possession of the ship's register and that if anything was recorded by another party, or if the same clerk recorded anything untrue then his punishment was to include loss of his right hand, branding on his forehead and the loss of all his possessions, irrespective of whether the untrue entry was made by someone else. The ship's register fulfilled what today is known as the receipt function of the B/L. With time, shippers started sending letters to their business associates



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A&T	ⓘ	Start 15-Feb-2020 4:23PM Due 05-Mar-2020 11:59PM Post 06-Mar-2020 12:00AM	9%	Resubmit View

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