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1. Introduction[1]:

Shipping Documents[2] are of utmost importance[3] for the carriage of goods by sea and other legal relationships that surround it, such as sales contracts[4] and contracts of insurance[5]. The importance of these documents is to be appreciated since the moment of the bargain between the parties until post contractual stages in which the document may be used in order to resolve disputes[6] between them, or even between one of the parties and a third party[7] that results affected by a contractual breach and is entitled by law[8] to claim damages from the guilty party[9].

[1] Mauricio Carvajal G. Beneficiario Colfuturo 2010.

[2] Following Section 1 of the Carriage of Goods by Sea Act 1992, by shipping documents one is going to make reference to Bills of lading, Straight Bills of lading, sea waybills and delivery orders. As well, other documents used in shipping are going to briefly be mentioned in this work such as mate's receipts and tally clerk's reports.

[3] It is submitted that these documents are of the important for the carriage by sea trade due to the fact that depending on the shipping document used, the holder of that document may have in its hands evidence of the contract of carriage, a document of receipt and a document of title. Nevertheless, it has to be stated that following the Pyrene v Scindia Navoigation Co [1954] 2 QB 402 it was stated that ´a bill of lading is not the contract but only the evidence of the contract´, therefore, if the goods have been shipped and there is a casualty that damage the goods or make them perish, if the shipping document has not been issued yet, the party that suffered the damage and has title to sue is still entitled to claim under the terms of the contract and using supplementary evidence to support its loss (as well as it happens when the document has been issued).

[4] The following are some examples of disputes that involve shipping documents in the frame of trade where the statements in the document and the qualifications included by the carrier are studied. The relevance of this is that it can be seen how the receipt function of shipping documents is not only relevant in terms of the contract of carriage but as well may affect the position of the parties involved in a sales contract.: "The Galatia" [1979] 2 Lloyd's Rep 450, Brown Jenkinson v Percy Dalton [1957] 2 QB 621, "The David Agmashenebeli" [2003] Lloyd's Rep 92, New Chinese Antimoney Co. Ltd v. Ocean SS. Co. Ltd [1917] 2 K.B. 664, "The Atlas" [1996] 1 Lloyd's Rep 642 and "The Mata K" [1998] 2 Lloyd´s Rep 614

[5] The following are some cases that involve the study of the topic from the insurance perspective: The Galatia [1979] 2 Lloyd's Rep 450 and Brown Jenkinson v Percy Dalton [1957] 2 QB 621.

[6] For the purpose of this work cargo claims disputes are the ones that are going to be analyzed.

[7] Eg. Attornees or assignees of the shipping documents.

[8] Carriage of Goods by Sea Act 1992 establishes who has title to sue in case a dispute arises.

[9] Who for the purpose of this work in which cargo claims are to be analyzed is the carrier under the carriage contract or may be the seller under a breach of the sales contract.

One of the many issues that may arise between the parties of a contract of carriage[10] comes into light whenever a shortage, loss or damage of cargo arises. If this happens, (subject to be proved the state of the cargo when shipped and its further condition when delivered) the parties may be in front of the breach by the carrier of "the shipowner´s prime obligation which is to deliver the goods at the contractual destination in the same good order and condition as when shipped"[11]. Under these circumstances, the parties in defence of their interests will have the burden of proving their loss in the case of cargo interest and in the case of the shipowners they will have to prove that they delivered the goods in the same conditions as when shipped. The question here is into what extend shipping document´s receipt function[12] can serve as evidence for this use?

Whether the claim arises in relation to shortage, loss or damage to the goods, a breach of the contractual or other obligation has to be proven which has caused the particular loss damage to the cargo owner. In documenting the loss the statement in the bill of lading can be of paramount importance[13] for setting the grounds of their claims and defences.

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[10] Specifically the one that is going to be studied in this work.

[11] "The Galatia" [1979] 2 Lloyd's Rep 450 p 510

[12] Shipping documents will be evidences for the parties to prove their case. This can be stated in the way that since its beginnings, specially the bill of lading "started life as a bailment receipts (...) which formed the basis of any cargo claim should the goods be short delivered or damaged on discharge" Wilson John. Carriage of Goods by Sea. 7th edition. Harlow 2010. P 118

[13] ´It may therefore fairly be said that the statement in bills of lading as to the apparent order and condition of the goods will in many cases be of fundamental importance to the operation of international contracts for the sale of goods carried by sea and to the operation of contracts for the carriage of goods by sea´ "The David Agmashenebeli" [2003] Lloyd's Rep 92 p 720

The importance of this topic is such, that common law[14], as well as international instruments such as The Hague Rules[15], The Hague Visby Rules[16], The Hamburg Rules[17] and The Rotterdam Rules[18], contain provisions in order to regulate this subject. Nevertheless, as the aim of this project is to analyse the position from the view of English law, only The Hague Visby Rules[19], case law and the UK Carriage of Goods by Sea Act 1992[20] which refer to the topic will be considered.

The statements that constitutes the receipt function of these documents, which have been represented as representations of fact [21] of the state of the goods at the time the carrier takes control over them, may affect the position of the parties vis a vis their contractual obligations[22] or by giving rise to estoppel. Its importance as a receipt is

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[14] Brown Jenkinson v Percy Dalton [1957] 2 QB 621, Compañia Naviera Vascongada v Churchill [1906] 1 KB 237, New Chinese Antimoney Co. Ltd v. Ocean SS. Co. Ltd [1917] 2 K.B. 664, The Atlas [1996] 1 Lloyd's Rep 642, The David Agmashenebeli [2003] Lloyd's Rep 92, The Mata K [1998] 2 Lloyd´s Rep 614 and The Sea Success [2005] 2 All ER (Comm) 441 among others.

[15] INTERNATIONAL CONVENTION FOR THE UNIFICAION OF CERTAIN RULES O LAW RELATING TO BILLS OF LADING, BRUSSELS, AUGUST 25, 1924. Entered into force June 2, 1931. Contracting states: Algeria, Angola, Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Cape Verde, China, Democratic Republic of the Congo, Cote D´Ivoire, Cuba, Cyprus, Denmark, Dominica, Ecuador, Fiji, Finland, Germany, Greneda, Guyana, Ireland, Israel, Jamaica, Kenya, Kiribati, Kuwait, Madagascar, Malaysia, Mauritius, Monaco, Peru, Portugal, Saint Lucia, Somalia, Slovenia, Sri Lanka, Turkey, United States among others.

[16] INTERNATIONAL CONVENTION FOR THE UNIFICAION OF CERTAIN RULES O LAW RELATING TO BILLS OF LADING, BRUSSELS, AUGUST 25, 1924, as emended by the Protocol signed in Brussels on 23 February 1968 and by the protocol signed at Brussels on 21 December 1979. Enacted by the CARRIAGE OF GOODS BY SEA ACT 1971 [8th April 1971]. Entered into force February 22, 1982. Contracting States: Australia, Belgium, Croatia, Denmark, Finland, France, Greece, Italy, Japan, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Russia, Sweden, Switzerland and United Kingdom.

[17] United Nations Convention on the Carriage of Goods by Sea, 1978. Entered into force November 1, 1992. Contracting States: Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Senegal, Sierra Leone, Syria, Tunisia, Uganda, Tanzania and Zambia.

[18] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009. Up to date, it has not entered into force and he only contracting state is Spain.

[19] CARRIAGE OF GOODS BY SEA ACT 1971 [8th April 1971]

[20] CARRIAGE OF GOODS BY SEA ACT 1992 [16th July 1992]

[21] Brown Jenkinson v Percy Dalton [1957] 2 QB 621. P. 630

[22] The Carriage of Goods by Sea Act 1971 Article III rules 3/5

evidenced with the fact that in the trade in which this documents are involved, the parties are to rely[23] in the information stated in these documents with the effect (among others) that in case of a dispute the parties may use these documents as evidence to defend their case.

Despite the importance shipping documents have as evidence, their role may be undermined by the action of the carrier if the statements within the document are claused. The effect this may have is that the value of the shipping document as evidence will disappear affecting the cargo interests considering that these documents can be the main evidence instrument that for instance a cargo interest such as an indorsee has[24].

This has effects for cargo interests in case a cargo claim arises. The effects of these incorporations are such that the evidential power of the statements within the documents is nullified[25], undermining the position of the cargo interest and making the position of the carrier very comfortable in terms of burden of proof.

Consequently, due to the harsh consequences these 'qualifications' may have, once a cargo claim arises, the cargo interest affected by such a qualification will have to find ways to reverse the clause effects, thing that will be easier or harder to do depending on the shipping document that has been used or to the access the affected party may

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[23] "A shipowner clearly intends that the bill of lading he issues should be relied upon. He intends that it should be relied upon by those into whose hands it properly comes: consignee, bankers and endorsees must be within his contemplation" [1957] 2 QB 621. P. 630

[24] As described in the "River Gurara", if this happens the onus of proof will be reversed being the cargo interest who will have to prove the state of the cargo when shipped and the differences when delivered by the carrier. "The River Gurara" [1998] 1 Lloyd's Rep. 225

[25] "In Jessel v Bath, the marginal note, "Weight unknown", entirely nullified the statement of weight in the body of the bill of adding. Similarly here the words "contents unknown" throw the burden of proof on the plaintiffs". Brown Jenkinson v Percy Dalton [1957] 2 QB 621 p. 416

have to use complementary means of evidence such as the ones allow by the Civil Evidence Act[26].

The above is stated due to the fact that depending on the shipping document used, different rules and regimes may apply allowing the parties to access a wider or narrower set of defences in respect to the statements included in the document acting as a receipt[27]. Therefore, the cargo interest will have to find the way to avoid the effects of carrier's qualifications, consequently being able to use the document as evidence vis - a - vis a cargo claim.

As the purpose of this dissertation is to study the receipt function of the shipping documents already mentioned and the position of the cargo interest where the document has been qualified by the carrier, the structure of this work will be divided as follows.

First in chapter 2 - 2.1, an analysis of general aspects of the receipt function will be presented, followed by the position applicable to bills of lading, which by holding all the characteristics that the other documents only hold partially, allow describing in detail the features these documents represent as receipts. After it in chapters 2.2, 2.3

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[26] Civil Evidence Act 1995 [8th November 1995]; The Atlas [1996] 1 Lloyd's Rep 642

[27] "The evidentiary value of statements contained on the face varies between the various types of shipping documents. Thus cargo interests are sometimes more and sometimes less protected from the clausing in the description of the goods." Common law, The Hague Visby Rules and The Carriage by Sea Act 1992 establishes different effects as to the receipt function of the shipping documents. The effects of one regime or another will apply according to the document used. This point is to be explained further in this paper. Eg. "The David Agmashenebeli" [2003] Lloyd's Rep 92 p. 721, where reference is made to a case where The Hague Visby Rules applies to a claim involving a Bill of Lading.

and 2.4, reference will be done to the other documents of control and their differences and similarities with the bill of lading.

Subsequently in chapter 2.5, an exposition regarding the qualifications included by the carrier will be done; and at last in chapter 3, an analysis to the possible defences the cargo interest has against such qualifications will be done.

Finally in the conclusions, this investigation will show how the bill of lading, among the other documents, is the safest document for the cargo interest to use in front a cargo claim.

2. <u>The shipping documents´ receipt function:</u>

In the frame of carriage by sea shipping documents act as receipts[28] representing that the goods were shipped for carriage[29] and representing as well the condition in which those goods were shipped. This can be evidenced in the statements incorporated by the parties[30] in the document. This function is generally represented by statements as to the 1. the apparent order and condition of the goods; 2. the quantity, packages and weight of the cargo; and 3. its leading marks. Although the statements within the shipping documents are not considered as contractual clauses but as mere

[28] The purpose of the statements in the BL is "to record the carrier´s evidence as to his receipt of the goods and as to their apparent condition when he did received them for carriage". "The David Agmashenebeli" [2003] Lloyd's Rep 92 p. 741

[29] "The words "shipped in good order and condition" are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods". Compañia Naviera Vascongada v Churchill [1906] 1 KB 237

[30] It usually is the shipper the one who "will prepare drafts of both Mate´s receipts and bills of ladings for signature by, respectively, the ship´s mate (or his agent) and the master, or his agent." Once the document is sign the shipowner make the representations within the shipping document as its own. "The Sea Success" [2005] 2 All ER (Comm) 441 p 177

representations of fact[31], these statements are material whenever litigation arises in terms of the evidence power they have.

Although the receipt function[32] of the different shipping documents is in principle the same[33], the effect of its function as receipts varies according to the legal regime that applies to the contract[34].

In a claim arising due to loss, shortage or damage of cargo, the starting point for the innocent party to prove his case, and in many cases the only proof the innocent party[35] has is based on the descriptions made in the shipping document. For the innocent party, it is important to be able to use the receipt function of the shipping document in all of its extent[36] in order to avoid the burden of proof to be reversed[37] having to assume the burden that in principle is one of the carrier.

The problem comes when the representations in the shipping document, due to a qualification[38] made by the carrier, becomes irrelevant as evidence of the state of the

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[31] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[32] These documents (bills of lading) "started life as mere bailment receipts" that show the condition of the cargo. Wilson John. Carriage of Goods by Sea. 7th edition. Harlow 2010. P 118

[33] The purpose of the statements in the BL is "to record the carrier´s evidence as to his receipt of the goods and as to their apparent condition when he did received them for carriage" "The David Agshamenebeli" [2003] Lloyd's Rep 92 p 798

[34] Eg The Hague Visby Rules, The Carriage of Goods by sea Act 1992 or case law.

[35] Such is the case of buyers, consignees and endorsees that the only evidence they have of the shipped goods is the shipping document.

[36] Either prima facie evidence or conclusive evidence according to the applicable regime. "The Mata K" [1998] 1 Lloyd's Rep. 225. The Hague Visby Rules or The Carriage of Goods by Sea Act 1992.

[37] "The Peter der Grosse" [1875] 1 P.D.414 p 416

[38] "In context ´clausing´ meant notation on the bill of lading by master qualifying existing statements in the bill of lading as to description and apparent condition of the goods" The Sea Success [2005] 2 All ER (Comm) 441

cargo[39], or what is even worse do not represent the real[40] condition of the cargo received by the carrier. Consequently, in any of these cases is to the claimant (cargo interest) to prove via alternative means of evidence that the goods were shipped and that the shortage or damages suffered[41] by the cargo occurred during the time the goods were under the carrier control.

2.1 The Bill of Lading's receipt function:

The bill of lading contains[42] "an acknowledgement by the carrier that he has received the goods in question"[43] as described by the shipper and as such, it will be the basis to defend the parties' position in a cargo dispute.

The importance of the bill of lading as evidence[44] is because this document "is considered to be a binding receipt or acknowledgement as to shipment on board the carrier's ship."[45] Nevertheless, in practice and as a matter of law it can be seen that

[39] "Where the bill of lading is so qualified it does not even constitute prima facie evidence that the goods detailed by the shipper have been shipped". New Chinese Antimoney Co. Ltd v. Ocean SS. Co. Ltd [1917] 2 K.B. 664

[40] "Trust is the foundation of trade; and bills of lading are important document. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any convenience provided by the giving of clean bills of lading against indemnities" [1957] 2 QB 621 p 639

[41] "In such circumstances the onus is on a claimant to prove by extrinsic evidence the shipment of any goods which he claims have been lost or damaged" [1998] 1 Lloyd's Rep. 225 p 626

[42] This can be find in different Bills of Lading forms such as: Conlinebill 1978, Conlinebill 2000, Congenbill and Mearsk Line bill among others.

[43] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p 208

[44] "The purpose of the statements in the BL is "to record the carrier´s evidence as to his receipt of the goods and as to their apparent condition when he did received them for carriage" [2003] 1 Lloyd's Rep 92 p 738

[45] GASKELL N.J.J; DEBATTISTA CHARLES; Swatton R.J. Chorley and Gille's Shipping Law. 8th edition. Pitman Publishing. Essex 1987. p 242

this evidence purpose disappears once the carrier includes a qualification[46] to the statements within the Bill of lading.

The statements into the bill of lading are usually inserted by the shipper[47]. However, that information is understood to be ratified by the carrier once his master on his behalf signs the bill of lading[48]. From that moment on, it can be argued that the bill of lading is evidence of the goods as received by the carrier and the representations incorporated in it can produce effects to the parties involved in the contract of carriage and to third parties who might become part of that contract, such as the consignee or the indorsee of the bill of lading[49].

The information incorporated into the bill of lading[50] as to its receipt function is usually incorporated in the face of the document. Those statements[51] are the ones which will serve as a receipt and the ones which will be represented to third parties willing to gain possession of the bill[52].

As stated in "The David Agmashenebeli", the bill of lading "gives information to inform subsequent holders of the facts represented in it"[53], having as an effect that the

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[46] "If the bills provide ´Weight… number… quantity unknown´ it cannot be said that the bills ´show´ the number or weight. They show nothing at all because the shipowner is not prepared to say what the number or weight is." "The Atlas" [1996] 1 Lloyd's Rep. 642

[47] "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 p738

[48] "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 p 738

[49] "The Galatia" [1979] 2 Lloyd's Rep. 450 p. 508

[50] "The words in the Bill of Lading are not words of contract , but the shipowner is bound by the representations of the master" Compania Naviera Vascongada v Churchill [1906] 1 KB 237

[51] Statements in the Bill of Lading are statements of fact and not of contract. "The Peter der Grosse" (1875) 1 PD 414

[52] "Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit" Compania Naviera Vascongada v Churchill [1906] 1 KB 237 p 247

[53] "The David Agmashenebeli" [2003] Lloyd's Rep 92

holder can use it in an eventual action against the carrier or against the seller of the goods, if the goods are lost or damaged.

The effect of the bill of lading as a receipt, in what concerns English law, can be studied through case law, The Carriage of Goods by Sea Act 1971 (Hague Visby rules) and The Carriage of Goods by Sea Act 1992.

Although the position in principle does not seem to change substantially, there are differences under each one of these regimes which make it worth to have a clearer look.

The effect under common law[54] depends on who holds the bill of lading at the port of discharge. It has been established that the bill of lading is prima facie evidence for the shipper of the statements incorporated in it[55]. Therefore if at the end of the voyage, when the cargo is delivered, the goods are lost or damaged, the shipper, with the help of his bill of lading, will be able to claim from the carrier the damages suffered which will be represented by the difference between the cargo delivered at port of destination and the cargo represented by the receipt.

By prima facie[56] evidence, following the Henry Smith & Co v Bedouin Steam Navigation Co Ltd[57], must be understood as evidence that "if accepted by the carrier,

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[54] Be aware that nowadays after COGSA 71 and COGSA 92 the great majority of cases of carriage under bills of lading are ruled by the provisions of these acts. See: J Aron & Co v Comptoir Weigimomnt [1921] 3 K. B 435 (Carver p. 15)

[55] "The River Gurara" [1998] 1 Lloyd's Rep. 225 and "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 among other cases

[56] See Girvin paragraph 6.04: Prima Facie evidence: "i.e. evidence which raises a rebuttable presumption of fact; it stands until rebutted; it therefore cannot establish more than a probability, but a probability which may be displaced by evidence." The Draupner [1910] AC 450

[57] Henry Smith & Co v Bedouin Steam Navigation Co Ltd [1896] AC 70

the burden will fall on him to prove the contrary."[58] In order to contradict the prima facie evidence presented by the cargo interest, the carrier has to present evidence[59] that proves that the statements represented in the bill were wrong and that the cargo was not lost or damaged during the time it was under the carrier´s custody; "mere inference that the bill figures are wrong"[60] will not be enough to contradict the prima facie evidence effect of an unqualified bill of lading.

However, the carrier is entitled to present supplementary evidence[61] in order to demonstrate that the goods were not shipped or were not damaged during the carriage. Nevertheless, the evidence presented by the carrier in order to defeat the prima facie evidence value of the bill "must be sufficient to lead to the inference not merely that the goods may possibly not have been shipped or damaged during carriage, but that in point of fact they were not shipped or they were actually damaged during carriage."[62]

In addition, although not being expressly recognised as conclusive evidence under case law[63], where in possession of a third party[64], the bill of lading, may via common

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[58] GIRVIN STEPHEN. Carriage of Goods by Sea. 2nd edition. Oxford University Press. Oxford 2011. paragraph 6.04

[59] Just like in The Atlas where tally reports, mate´s receipts and survey reports were used in order to revert the prima facie evidence power of the bill.

[60] The George S [1989] 1 Lloyd's Rep 369

[61] Mate's receipt, tally reports, prior survey reports etc.

[62] Smith v. Bedouin Steam Navigation co [1896] AC 70 (Wilson p. 120)

[63] Where the bill has been transferred to a third party acting in good faith there is an estoppel as to the accuracy of the statements: the carrier is precluded from proving the contrary. Whereas at common law the rules of estoppels may in certain circumstances preclude the carrier as against the lawful holder of the bill from the opportunity to displace such conclusion (...) there is no decision which suggests that the carrier contractually warrants either the accuracy or the exercise of reasonable care in relation to the accuracy of such statements in the bill of lading." "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92p738 p. 739

[64] I.e. Indorsee or consignee of the bill of lading.

law estoppel by representation[65] be a powerful weapon against the carrier alleging the cargo was not in the condition stated in the bill.

For this to happen the elements of estoppel have to be present[66], especially, the third party has to rely[67] on the information contained in the bill in order to be able to allege estoppel, hence, "the estoppel does not operate in favour of an indorsee who knows that the statements in the bill were false."[68]

Furthermore, it must be said that although the functions of the bill of lading[69] may be interrelated, the absence of any of the other two functions do not alter the receipt function here described[70].

An example of this is the case of "The Forum Craftman"[71] where it was held that "a bill of lading may be a receipt of goods even though it does not contain or evidence a contract of carriage e.g. because a contract of carriage previously made had been rescinded."[72]

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[65] "It has been decided that the statement as to ´apparent god order and condition´ estops (as against the person taking the bill of lading for value or presenting it to get delivery of the goods) the shipowner from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects ..." [1957] 2 QB 621 p 630

[66] See Girvin 6.05: "1. the statements must embody a statement of fact; 2. the maker intended that the representation should be relied upon; and 3. the party arguing the estoppel should in fact have relied upon the representation to his detriment."

[67] Carr v London and North-Western Ry. Co. [1875]L.R. 10 C. P. 307

[68] TREITEL GUNTER REYNOLDS. Carver on Bills of Lading. 2nd edition. Sweet & Maxwell. London 2005. p 16

[69] 1. Evidence of the contract of carriage 2. Receipt of the goods 3 Document of title

[70] "Even when the BL is not contract of carriage it constitute evidence of the delivery of the goods to the carrier." Sewell v Burdick (1884) 13 QBD 159

[71] "The Forum Craftman" [1984] 2 Lloyd's Rep 102 at 106

[72] TREITEL GUNTER REYNOLDS. Carver on Bills of Lading. 2nd edition. Sweet & Maxwell. London 2005. p 16

Where the Hague Visby rules apply[73], the shipper has the right to demand from the carrier to issue a bill of lading including statements as to quantity[74], condition[75] and leading marks[76] in the terms of article III rule 3[77].

If this happens and the carrier regardless of the demand of the shipper issues a qualified bill, it will be for the shipper to prove he demanded from the carrier a bill with the characteristics of article III rule 3[78]. In case there is no such 'demand', the carrier is not obliged to include the mentioned statements into the document[79].

In practice, it has to be said that it is not common for the shipper to insist that the carrier issues a bill of lading with specific information (unless the document does not comply with the sales agreement conditions) due to the fact that under the sales contract, the sooner the shipper gets the bill of lading and is able to tender it fulfilling

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[73] The Hague Visby Rules are to apply in the cases referred by the sections 3, 4, 6 and article X of the Carriage of Goods by Sea Act 1971.

[74] Carriage of Goods by Sea Act 1971 article III Rule 3.b

[75] Carriage of Goods by Sea Act 1971 article III Rule 3.c

[76] Carriage of Goods by Sea Act 1971 article III Rule 3.a

[77] See: Carriage of Goods by Sea Act 1971 Article III rule 3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity, or weight, as the case maybe, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods. Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

[78] "The Peter der Grosse" (1875) 1 PD 414 at 416

[79] "The David Agshamenebeli" [2003] 1 Lloyd's Rep at 739

his documental obligations, the sooner he will receive payment for the goods. Consequently, if the shipper starts to argue with the carrier regarding the information to be incorporated into the bill, the payment may be delayed, which for obvious reasons is unlikely[80].

As the system recognises the importance of the bill of lading as a receipt, the Hague Visby Rules in its article III rule 4 recognises the bill of lading as prima facie evidence when in the hands of the shipper and as conclusive evidence that the cargo has been shipped by the carrier in the quantity and conditions represented in the document, when is in the hands of a third party[81].

Despite the assistance the rules give to the shipper in this aspect, the rules also protect the interest of the carrier[82] by making the shipper liable for all damages the carrier suffers as a consequence of misstatements incorporated into the bill[83].

Under The Hague Visby Rules article III rule 3[84], the carrier is allowed to refuse to include the information required by the shipper "if the master or carrier´s agent has reasonable grounds for suspecting that the statements within the document does not

[80] "As shipper under the contract of carriage, the seller is quite unlikely to use this mechanism, partly because some of the statements originated in a very real sense with himself, and partly because the seller´s right to prompt payment depends on prompt tender of the bill of lading, whose issue will be delayed by the seller´s quibbling with the carrier about the details of statements as to the goods on shipment." Debattista Charles. Bills of Lading in Export Trade. 3rd edition. Haywards Heath. Tottel 2008.

[81] "In cases where the Hague Visby Rules apply, and nowadays there are very few cases where they do not, a clean bill of lading is, by operation of article III rule 4, prima facie evidence of the receipt of the cargo by the carrier in apparent good order and condition and when the bill has been transferred to a third party acting in good faith it is conclusive evidence of the apparent good order and condition." "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 at 721

[82] Hague Visby Rules article III rule 5

[83] "The Boukadoura" [1989] 1 Lloyd's Rep. 393

[84] This issue is analyzed as well by case law in "The Esmeralda" [1988] 1 Lloyd´s Rep 206

accurately represents the goods actually received, or which he had no reasonable means of checking"[85] the state of the goods.

The problem is that with the increase of containerised cargo carriage, it will be the common rule for the carrier to clause a bill alleging impossibility of checking[86] its contents, therefore the receipt function of that document will be useless[87].

Regarding the consignee, it has to be stated that due to privy of contract[88], he is not entitled either under the contract of carriage to ask from the carrier to issue a bill of lading nor to request the specific statements the document must contain. Therefore, he will have to conform himself with the information contained in the document he received as a transferee[89].

Even though the position as per the prima facie evidence effect of the bill of lading remains the same, in case law and under The Hague Visby Rules, things are not the same as to the conclusive evidence effects.

Where The Hague Visby Rules[90] or the Carriage of Goods by Sea Act 1992[91] apply, if the bill is in the hands of a third party which complies with the requirements of these

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[85] Be aware that "for that purpose the law did not cast upon the master the role of an expert surveyor." "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 at 717

[86] "Furthermore, even before the initiation of container carriage, the rules catered for the possibility that the carrier would have no reasonable means of checking the "number of packages or pieces, or the quantity, or the weight, in which case the carrier is under no obligation to record these matters on the bill of lading." [1998] 1 Lloyd's Rep. 225 at 625

[87] "The Peter der Grosse" (1875) 1 PD 414 at 416

[88] Compania Naviera Vascongada v Churchill [1906] 1 KB 237 at 248

[89] This is evidenced in The Carriage of Goods by Sea Act 1992, which recognises the receiver as a party of the contract only when the bill has been transferred to him.

[90] Article III rule 4.

rules[92], the statements represented in the bill will be conclusive evidence and the carrier will be prevented from denying the contained in the document.

It has been stated[93] that the difference between article III rule 4[94] and Section 4[95] (in addition to the fact that the former may not applies to certain bills[96] whereas the later may apply to all bills that fulfil the requirements of the Act) is that The Hague Visby Rules provision, when referring to the statements in the bill, "merely makes them conclusive evidence of the receipt by the carrier of the goods"[97] whereas the 1992 Act "makes the bill conclusive evidence of the receipt for shipment of the goods."[98]

2.1.1 Common representations:

Although there are some representations which are frequently incorporated into bills of ladings, the bill in its function as a receipt can represent any of the features of the goods the parties want to represent in the document. Nevertheless the most common

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[91] Section 4 (b)

[92] The Hague Visby Rules or the Carriage of Goods by Sea Act 1992

[93] See Carver paragraph 2-022

[94] Carriage of Goods by Sea Act 1971

[95] Carriage of Goods by Sea Act 1992

[96] See Debattista p. 127: Even though the wording of article III rule 4 of the Hague Visby rules seems to be enough to give conclusive evidence to the bills of lading there are cases in which this proviso will not rule the bill. This is the case of charterparties where "the contract of carriage between the charterer and the shipowner is contained in the charterparty rather than in the bill of lading therefore Hague Visby rules do not apply to the contract unless they are expressly incorporated into the charterparty." For such a case, when Hague Visby does not apply, the English legal system covers the situation by making the statements in the bill conclusive evidence in terms of Section 4 of COGSA 1992.

[97] TREITEL GUNTER REYNOLDS. Carver on Bills of Lading. 2nd edition. Sweet & Maxwell. London 2005. p. 36

[98] Ibid paragraph 2-022. Therefore, as the first works only for shipped bills of lading, the second works as well for "received for shipment bills of lading"

representations studied by case law[99] and The Hague Visby Rules[100] are representations as to 1. quantity; 2. condition; and 3. leading marks.

2.1.1.1Representations as to Quantity:

One of the most frequently used[101] statements in a bill of lading are those making reference to the quantity of the goods received by the carrier. These statements can come in many different presentations. They might be making reference to the number of units received, the weight of the cargo[102], etc.

These representations, if not qualified[103] are recognized by case law and by The Hague Visby Rules as constituting prima facie evidence for the holder of the document "that the goods were shipped"[104] in the quantity expressed in the document.

Being prima facie evidence gives the opportunity to the claimant to rely on the statements in the document to prove their case in the event that a shortage resulted at discharge[105].

Although there can be other documents that record the amount of goods received by the carrier, such as tally reports or even registers from the port showing the weight of

[99] Compania Naviera Vascongada v Churchill [1906] 1 KB 237; The Sea Success [2005] 2 All ER (Comm) 441; The Galatia [1979] 2 Lloyd's Rep. 450 among others.

[100] Article III rule 3 a, b and c

[101] See Conelinebill 1978; Conlinebill 2000; Congenbill; Mearsk Line bill among others.

[102] "The Atlas" [1996] 1 Lloyd's Rep. 642 at 1153

[103] A qualified bill of lading does not constitute evidence of any particular quantity of goods shipped. New Chinese Antimoney Co. Ltd v. Ocean SS. Co. Ltd [1917] 2 K.B. 664

[104] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p. 211

[105] "The Atlas" [1996] 1 Lloyd's Rep. 642

the cargo[106], once the information as to quantity is incorporated into the bill of lading, this document becomes the principal evidence instrument regarding the amount of cargo that has to be delivered at port of discharge and if wanted to be contradicted will be the carrier the one who has the onus of proving in contrary.

Many problems may arise from quantity statements in the bill of lading but one of the most dramatic is presented in case the carrier issues a bill of lading stating that certain amount of cargo has been shipped when it has not. In this case if the document is governed by The Hague Visby Rules it will be prima facie and conclusive evidence. Nevertheless, as the aim of this document as a receipt is to be relied on, if this situation happens, not only with quantity statements but with any other representation within the bill, the carrier may be liable for tort of deceit for the false statement represented in the bill[107].

Before the introduction of section 4 of The Carriage of Goods by Sea Act 1992, by referring to this problem, one would have to make reference to cases with characteristics of fact as the ones presented by Grant v. Norway[108] case. In this case, the master signed a bill of lading stating that the cargo was shipped when it was not. Because of it, the Court held that "a master had no authority to sign for goods that were not in fact shipped."[109] What the court tried to do in this case was to exclude the liability of the carrier for what was considered an independent act of the master,

[106] "The Atlas" [1996] 1 Lloyd's Rep. 642

[107] "By making in the bill of lading a representation of fact that they knew to be false with intent that it should be acted upon were committing the tort of deceit." Brown Jenkinson v Percy Dalton [1957] 2 QB 621at 622

[108] Grant v Norway [1851] 10 C.B. 665

[109] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p. 211

precisely an act which he was not authorized to perform on behalf the carrier therefore not binding him.

The problem is that it is submitted that this was decided without regards to the characteristics of this trade where reliance on the statements within these documents is of the essence.

Consequently, although the case was trying to protect the carrier from an independent action of his master[110], when applicable this decision may have side effects in trade where there is a big deal of trust[111] between the parties, therefore, if there is the chance that the bill of lading issued by the Master does not bind the carrier, then trust[112] is going to be lost affecting commercial relationships.

Fortunately, against this ruling, which was openly criticised, there are provisions which neutralize its effects. Section 4 of The Carriage of Goods by Sea Act 1992[113] was designed to reverse the effects of Grant v Norway. This can be stated because this section makes the bill of lading conclusive evidence in favour of the lawful holder of the bill no matter that the document has been signed where the goods have not been shipped.

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[110] "It is not contended that the captain had any real authority to sign bills of ladings unless the goods had been shipped; nor we can discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had the authority to sign such bills, whether the goods were on board or not" Grant v Norway (1851) 10 CB 655 at 688

[111] "The River Gurara" [1998] 1 Lloyd's Rep. 225 and Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[112] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[113] COGSA 1992 Section 4 A bill of lading which: a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipments.

Although this section is fundamental for the purpose of preserving the evidence power as to receipt, one has to mention that it is only applicable to lawful holders[114] of bills of lading as defined by Section 1 (2) of the same Act.[115]

Consequently, neither straight bills nor seaway bills, nor delivery orders are governed by this provision and cannot rely on the estoppel of section 4; therefore in one´s opinion, these shipping documents are to be ruled in by the common law ruling in Grant v Norway.

In addition to the mentioned provision of The Carriage of Goods by Sea Act 1992, The Carriage of Goods by Sea Act 1971 provides as well a provision that equally undermines the ruling of Grant v Norway. By stating that the bill of lading will be prima facie evidence when in hands of the shipper and conclusive evidence when it has been transferred to a third party acting in good faith, Article III rule 4 establishes an estoppel that defeats the ruling of Grant v Norway.

Regarding this provision it is important to highlight that although it destroys the ruling of Grant v Norway by making the bill conclusive evidence, article III links the conclusive evidence effect of the bill with the requirement of transferring the bill of lading to a third party. Therefore, if the bill is not transferable[116] or even more if it has not been transferred to a third party when the casualty occurs, the document may be governed by the ruling of Grant v. Norway.

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[114] COGSA 1992 Section 5 "a person shall be regarded as the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

[115] COGSA 1992 Section 1 (2) Reference in this act to bill of lading a) do not include reference to a document which is incapable to transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but b) subject to that, do include reference to a received for shipment bill of lading.

[116] Ie, Straight Bill of Lading.

Even though until this part of this paper it seems that the bill of lading favours the position of the cargo interest, it must be said that the system allows the carrier to walk away[117] from the representations contained in the bill by merely qualifying its statements.

Although these qualifications[118], which are going to be studied further in this work, will undermine the statements as to quantity, they will not undermine the faculty the bill has as a receipt that the cargo has been shipped, therefore, it will continue to be conclusive evidence in that respect and the carrier will not be able to present evidence to the contrary.

3.1.1.2 Representations as to condition:

Other statements which normally are included into the documents of control refers to the condition[119] of the goods received by the carrier. Furthermore, one of the statements mentioned in The Hague Visby rules which have to be represented by the carrier on the shipper's demand is the "apparent order and condition of the goods."

As stated in "The Peter der Grosse"[120] and ratified by "The Compañia Naviera Vascongada v Churchill"[121], the statements in the bill of lading[122] as to condition

[117] Qualifications entirely nullify the statements in the body of the bill of lading. "The Peter der Grosse" (1875) 1 PD 414 at 416

[118] Qualifications as: "said to contain" or "weight unknown"

[119] "The shipowners duty is to issue a BL which recorded the apparent order and condition of the goods according to the reasonable assessment of the master" "That was not a contractual guarantee of absolute accuracy as to the order and condition of the cargo or its apparent order and condition". "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92

[120] "The Peter der Grosse" [1875] 1 P.D.414

[121] Compañia Naviera Vascongada v Churchill [1906] 1 KB 237

[122] 'apparent good order and condition'

relates to the external and apparent condition of the goods as opposed to its internal condition.

These statements refer to what is apparent to the master when the cargo is received; "the master needs no more than his own [honest] judgment on the appearance of the cargo being loaded."[123]

It follows that a bill of lading containing a representation as to the condition[124] is prima facie and conclusive evidence only of the external condition of the cargo. Hence, if a claim arises for the cargo being delivered damaged at port of discharge, although common law[125] had established "that the delivery of the goods in a damaged state provided prima facie evidence of a breach of the contract of carriage"[126], in cases like this the cargo owner will have to provide further evidence to prove that the cargo was in sound condition when delivered to the carrier and that when the goods where received at port of discharge, the cargo was damaged.

A good example of the above is represented by the carriage of containers[127]. In this type of carriage, it is virtually impossible for the carrier (unless the carrier packs the container[128]) to make representations as to the condition of the goods when he has

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[123] See Girvin paragraph 6.15: The David Agmashenebeli [2003] 1 Lloyd's Rep 92

[124] Condition refers to external and apparent condition, and "quality" to something which is usually not apparent, at all events to an unskilled person. Compania Naviera Vascongada v Churchill [1906] 1 KB 237

[125] Albacora v. Westcott & Laurence Line Ltd [1965] 2 Lloyd's Rep. 37; Robin Hood Flour Mills Ltd v. N.M Patterson & Sons Ltd (The Ferrandoc) [1967] 2 Lloyd's Rep 276

[126] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p. 217

[127] [1998] 1 Lloyd's Rep. 225

[128] Where the bill of lading makes reference to a container being packed "Free Container Load" FCL it means that it was the shipper or his agent the one in charge of packing the container and therefore the carrier has no knowledge neither of its contents nor of the internal condition of it. In contrast, if the bill states that the container was packed "Less Container Load" which means that the carrier has been the one in charged to pack cargo form different shipper in the same TEUS therefore the carrier or his agent has the opportunity of getting to see what is

access only to see the external condition of the container. Therefore the representation made by the bill of lading will be considered to represent the external condition of the container instead of the condition of the goods packed inside.

However, when there is insufficient packaging[129], if it is detectable or apparent on reasonable inspection, the carrier will be estopped from arguing insufficiency of packing to avoid liability. On the other hand, if the case makes reference to the internal condition of the goods[130] which cannot be verified by the carrier, the statements in the bill will not be regarded as representing the internal condition of the goods, therefore, the carrier will not be estopped from denying the statements as condition incorporated into the bill.

As a matter of comparing the quantity and the condition statements, it has to be highlighted, that as to quantity and even as to leading marks (which we will study below), the carrier merely acknowledges the information given by the shipper. On the other hand, regarding representations as to condition, the statements are incorporated by the carrier "after a reasonable inspection of the goods",[131] therefore the bar for him is higher and the protection he normally has by article III rule 5 will not apply.

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into the container, then one most conclude that the representation as to condition will regard the external condition of the cargo's package and not the external condition of the container. The Esmeralda 1 [1988] 1 Lloyd's Rep 206

[129] Silver v Ocean Steamship Co [1930] 1 KB 416

[130] As explained in the Compania Naviera Vascongada v Churchill [1906] 1 KB 237

[131] WILSON JOHN. Carriage of Goods by Sea. 7th edition. Harlow 2010. p. 125

Finally, as well as with statements as to quantity, the receipt function as to condition can easily be destroyed by the carrier including qualifications[132] to the bill. With it, the carrier will walk away from the representations stated on the document[133].

2.1.1.3 Representations as to leading marks:

Leading marks[134] refers to "any identification or quality mark appearing on the goods shipped."[135] These marks are incorporated into the bill of lading the same way as statements of quantity and condition are. Nevertheless, statements regarding leading marks, at least at case law, do not accumulate an estoppel against the carrier unless "such marks are essential to their identity or description."[136]

Representations as to leading marks makes reference to the statements incorporated into the bill of lading in order to allow identifying the goods which are going to be carried.

As well as with statements as to quantity and condition, statements as to leading marks are part of the list of representations the carrier is obliged to incorporate in the bill on the shipper's demand.[137]

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[132] Nevertheless, the carrier will be liable for unjustified qualifications. [2005] 2 All ER (Comm) 441

[133] "The Sea Success" [2005] 2 All ER (Comm) 441

[134] Carriage of Goods by Sea Act 1971Article III rule 3 (a)

[135] Ibid p. 126

[136] Ibid p. 126

[137] Hague Visby Rules article III rule 3 "After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things: a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage."

It has to be said that these representations correspond only to the marks that identify the carried goods which "will normally list container numbers, or the marks on the packages."[138]

These representations, following article III rule 4 of the Hague Visby rules will be prima facie evidence when in the shipper's hands and conclusive evidence when in a good faith third party's hands to whom the goods have been transferred.

2.2 The Sea waybill´s receipt function:

As a shipping document sea waybills[139] may have two functions: 1. evidence of the contract of carriage and 2. receipt function. The difference with the bill of lading is that the sea waybills do not perform the third function that bills of lading may have, which is being a document of title. As in the rest of this work, regarding the purpose of the study one is going to make reference only to the receipt function of this shipping document.

Regarding their receipt function, in principle, sea waybills are only prima facie evidence of the receipt of the goods by the carrier[140]. Nevertheless, if the case law requirements[141] for the estoppel by representation are fulfilled, the carrier may be estopped from denying the information represented within the document in its function as a receipt.

[138] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p. 218

[139] Sea waybills are ruled by statute law: Carriage of Goods by Sea Act 1992 Section 1 (3) (a) and Carriage of Goods by Sea Act 1971 section 6 (b)

[140] Carriage of Goods by Sea Act 1971 Article III rule 4 "first sentence".

[141] "The Peter der Grosse" (1875) 1 PD 414

As to The Hague Visby Rules, it has to be stated that although these rules are to apply with force of law to bills of lading, and to "any receipt which is non-negotiable document marked as such if the contract contained in, or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading".

Consequently, if a sea waybill fulfils this characterisation, the rules will apply including article III rules 3, 5, and partially rule 4. It is said that partially, due to the fact that Carriage of Goods by Sea Act 1971 section 1(6), establishes that the second sentence of rule 4 is not applicable to documents with the characteristics of a sea waybill, consequently, this type of documents will not be considered conclusive evidence on the terms of the act.

Nevertheless, when using sea waybills, the shipper will still be entitled to demand[142] the carrier to issue the document with the required information as to marks, quantity and condition. As well the carrier will be able to recover damages caused by the shipper's misrepresentations in terms of article III rule 5.

Regarding sea waybills under the application of the Carriage of Goods by Sea Act 1992, it must be said that although this statute includes sea waybills for various of its purposes; for the purpose of section 4, which is the section[143] that is of the interest to this investigation, sea waybills are not regarded, due to the fact that it clearly states to be applicable only to bills of lading.

[142] Carriage of Goods by Sea Act 1971 article III rule 3.

[143]Section 4 which establishes as conclusive evidence the representations on bills of lading that fulfils the requirements of this section. Sea waybills are not ruled by this section, therefore the estoppels established on it does not apply to this shipping document.

As neither the corresponding ruling of the Carriage of Goods by Sea Act 1971 nor the one of the Carriage of Goods by Sea Act 1992 applies to sea waybills. Consequently, the sea waybill will never be considered as conclusive evidence of the statements represented in it in terms of the mentioned statutes, thus the only protection the third party has in case he wants to use this document as evidence is the common law estoppel.

As a consequence, where no goods have been shipped, the rule of Grant v Norway will apply to sea waybills leaving the cargo interest unprotected and unable to sue the carrier; the only option will be to sue the master or the seller under the sales contract if there was any breach of the sales agreement.

2.3 The Straight bills of lading´s receipt function:

Straight bill of lading as shipping documents are more similar to a sea waybill than to a bill of lading, in the way that it is a "non negotiable bill of lading made out to a name consignee which omits the words ' negotiable', or ' to order', or 'order or assigns' on its face.[144]

This has as an effect that section 4 of Carriage of Goods by Sea Act 1992 does not apply to it due to the fact that this section applies only to bills of lading as described in Section 1 (2) (a)[145] and the straight bill, as a non negotiable bill, although it is called a bill of lading, does not fit that description.

[144] STEPHEN GIRVIN, ' Straight bills of lading in international trade: principles and practice' [2006] JBL 86.

[145] COGSA 1992 Section 1 (6): Reference in this act to a bill of lading (a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement:; but (B) subject to that, do include references to a received for shipments bill of lading.

Although these documents have been assimilated as sea waybills for the purpose of the Carriage of Goods by Sea Act 1992, after the ruling of the Rafaela S[146] it can be stated that straight bills may be considered as bills of lading or similar documents of title for the purpose of the application of The Hague Visby Rules.

By this ruling, it can be stated that the Rules apply to these documents; nevertheless, due to the different opinions presented in the case, it is still open for discussion to decide whether the straight bill is in fact considered as a bill of lading for the mere fact of calling itself a bill of lading (case in which the rules will apply including the second sentence of article III rule 4 which makes the document conclusive evidence) or if it is considered as a similar document of title, which will frame the straight bill into the classification of section 1 (6)(b) resulting in the applicability of the rules except in what respects to the second sentence of article III rule 4.

If such is the case, the straight bill of lading, although calling itself a bill of lading for purposes of evidence, will be only prima facie evidence and the carrier would be able to present complementary evidence in order to demonstrate that the statements in it are not true.

On the other hand, if considered as a bill of lading, it will be regarded as having prima facie or conclusive evidence power depending on who has possession of it; Prima facie in the hands of the shipper and conclusive in the hands of the consignee.

[146] "The Rafaela S" [2005] 1 Lloyd's Rep 347

2.4 The Ship's Delivery Orders´ receipt function:

Although a shipping document, ship's delivery orders[147] as stated in the Carriage of Goods by Sea Act 1992 section 1 (4) are neither bills of lading nor sea waybills. As properly stated by Carver, the difference between the mentioned documents and a ship's delivery order is that the former "are receipts for the goods and contain or evidence contracts of carriage, while a ship's delivery order has neither of these characteristics."

A ship's delivery order, although a shipping document; does not have receipt function as the other documents mentioned in this work. This document which is frequently used in the carriage of bulk cargo where the cargo is to be fractioned and delivered to different attornees, is considered just as a document which represents the order given by the shipper regarding to whom the carrier has to deliver the cargo and an undertaking by the carrier to do so[148].

Following the above, in terms of the evidence value of the ship's delivery order, the cargo interest in a cargo claim would have to make reference to the original bill of lading or to complementary evidence in order to establish that the cargo was delivered to the carrier in certain amount and condition and that after the carriage ended, the carrier delivered it in a different amount or condition to the attornee.

[147] "Where a shipper ships goods in bulk and, having taken one bill of lading, sells different parcels of the cargo to different buyers, he will need to tender to each of those buyers a document entitling them to delivery of a parcel of goods from the carrier." Debattista Charles. Bills of Lading in Export Trade. 3rd edition. Haywards Heath. Tottel 2008. P. 48

[148] Carriage of Goods by Sea Act 1992 Section 1 (4)

Regarding the application of The Hague Visby Rules and The Carriage of Goods by Sea Act 1992 it must be stated that these do not apply to ship's delivery orders. Although the last applies to these documents in terms of title to sue and title to ask for delivery, they do not apply for the purpose of Section 4.

Where no goods have been shipped and in transit a delivery order is issued. It is arguable that the ruling of Grant v Norway should apply as explained before considering that the master or the agent have no authority to sign the document stating that some goods had been shipped when the reality is other. If that happens, the document signed will not bind the carrier

2.5 Qualifications:

Even though at first view as a consequence of the receipt function shipping documents have it seems like the balance is in favour of the cargo interests, it has to be stated that the carrier can easily nullify the effects of the document of control as a receipt by qualifying the statements incorporated in it[149]. The carrier[150] has the capacity virtually[151] by simply including a qualification[152] to destroy the receipt function of the bill of lading.

[149] "The Peter der Grosse" (1875) 1 PD 414

[150] If considered appropriate by using his judgment, the master may qualify the statements in the shipping document. "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 at 741

[151] "the master who honestly takes an eccentric view of the apparent condition of the cargo which would not be shared by any other reasonably observant master would not be justified in issuing bills of lading which were qualified to reflect his view" "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 at 741

[152] "In context ´clausing´ meant notation on bill of lading by master qualifying existing statements in bill of lading as to description and apparent condition of goods" "The Sea Success" [2005] 2 All ER (Comm) 441

Although the representations that conforms the receipt function are nullified by the qualification incorporated to the document by the carrier, these are nullified only in respect of the specific statements attacked by the qualification[153] and "it remains evidence that some goods have been shipped."[154] This is, if the qualifications refer to the quantity (I.e. "Quantity unknown"), statements as to condition or others will not be affected by the qualifications. On the other hand, if the qualification includes all the statements referred in the document, (I.e. "Condition, Quantity ... unknown") the evidence value of all of these statements will be nullified.

There are many examples of qualifications[155]. There can be as many as the carrier's needs and imagination provide. Nevertheless there are some qualifications that are more frequently found.

This is how, it is usual to find descriptions such as "weight, measure, quantity, quality, condition, contents and value"[156] which by the inclusion of the word 'unknown' destroys all the evidence power of the documents of control.

Moreover, standard[157] bills of lading before being filled by the shipper or the carrier already contain qualification clauses aimed to destroy the evidence power of these statements within shipping documents.

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[153] "The Galatia" [1979] 2 Lloyd's Rep. 450 at 512

[154] GASKELL N.J.J; DEBATTISTA CHARLES; SWATTON R.J. Chorley and Gile's Shipping Law. 8th edition. Pitman Publishing. Essex 1987. p 245

[155] This can be find in different Bills of Lading standard forms such as: Conlinebill 1978, Conlinebill 2000, Congenbill and Mearsk Line bill among others, as well as can be included by handwriting..

[156] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p 218

[157] See Gaskell 218-227: "Congenbill 1994; Conlinebil; Combiconbill; Combiconbill (as revised 1995); P&O Nedlloyd Bill;Multidoc 95; Mitsui OSK Lines Combned Transport Bill 1992; Mitsui OSK Lines Combned Transport Bill 1993; K line Bill of lading; ANL Tranztas Bill of Lading; ANL Ausralia / South east Asia Service BillOniosn from Egypt Clause; Shell Nill of Lading; HIBL Bill and Austwheat Bill."

Case law[158] gives several examples evidencing the effect of these qualifications. In addition, these cases illustrate how the Courts have tried to make a balance between the rights and duties of each of the parties making this issue into a matter of construction in which according to the statements represented on the bill and the qualifications made by the carrier, the Court will decide to what extent the bill is good evidence or not.

The first example to be mentioned refers to statements as to quantity. The New Chinese Antimoney Co. Ltd v. Ocean SS. Co. Ltd[159] case shows how a qualification made by the carrier destroys the evidence power of the bill of lading.

In this case, the bill contained a clause stating that "the shipment was of 'a quantity said to be 937 tons'"[160], but as well it had a clause stating "weight, measurement, contents and value (except for the purpose of estimating freight) unknown".

Because of these annotations, the Court decided that the bill of lading lost its evidence power being held that the bill, for purposes of quantity, by stating 'weight unknown', was not even prima facie evidence of the statements in it, because of the mere fact of the qualification; allowing to conclude, that for this case the representation made by the carrier as to the weight had no evidence value at all.

Regarding the common qualification "condition unknown", the Courts[161] have been clear in stating that this qualification refers only to the internal condition of the cargo,

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[158] "The Galatia" [1979] 2 Lloyd's Rep. 450; "The Peter der Grosse" (1875) 1 PD 414; Brown Jenkinson v Percy Dalton [1957] 2 QB 621; "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92 among others

[159] New Chinese Antimoney Co. Ltd v. Ocean SS. Co. Ltd [1917] 2 K.B. 664

[160] TREITEL GUNTER REYNOLDS. Carver on Bills of Lading. 2nd edition. Sweet & Maxwell. London 2005. p 16

[161] See "The Skarp" [1935] P 134 and "The Galatia" [1979] 2 Lloyd's Rep 450

which the carrier does not have awareness of, and not to its external condition. Example of this is The Galatia, where it was stated that a qualification as to 'condition unknown' "did not qualify an acknowledgement of apparent condition" stated in the bill of lading.

A further case that can finely illustrate how qualifications made by the carrier nullify the receipt function of the bill of lading is the Canadian & Dominion Sugar Co. Ltd v Canadian National (West Indies) Steamship Ltd[162]case. Here, although the bill stated that the cargo was "received in good order and conditions", a further qualification made by the carrier which conditioned the statement of the bill to the annotations in the mate's receipt, resulted in the destruction of the evidence power of the bill.

This occurred because in that specific case, the mate's receipt contained a note stating that some of the cargo was handed over to the carrier damaged. Because of the reference the bill of lading made to the mate's receipt and the annotations contained in it about the bad shape in which the cargo was handed to the carrier, the Court held that the bill was not even prima facie evidence that the goods where delivered to the carrier in "good order and condition".

Moreover, in the Attorney General of Ceylon v Scindia Steam Navigation Co. Ltd[163], the bill of lading stated that certain number of bags were shipped followed by a qualification stating 'weight, content and value when shipped unknown', the court held that the bill of lading continued being good evidence of the number of bags loaded; despite the fact that due to the qualification, the cargo interest should have to prove with complementary evidence what the contents of the bags were.

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[162] Canadian & Dominion Sugar Co. Ltd v Canadian National (West Indies) Steamship Ltd [1947] A.C 46

[163] Attorney General of Ceylon v Scindia Steam Navigation Co. Ltd [1962] AC 60

An additional example of how the courts construe the statements and qualifications incorporated into the bill of lading is the example in “The Peter Der Grosse”[164] where it was claimed that a qualification stating "weight, contents and value unknown" did not undermine a statement in the bill that the goods were in "good order and condition."

Another type of qualification is presented where the carrier incorporates in the face of the bill the annotation 'Free Container Load' (FCL). The effect of this annotation is to manifest the fact that the cargo was stuffed into a container by the shipper or his agent and the carrier has no knowledge of the contents, including quantity and condition.

This eliminates the evidence power of the bill as to the condition of the goods packed into the container and ratifies the position that states that 'condition' representations relate only to the external condition of the goods. On the other hand, it is clear that the representations referring to the external condition of the container, although the FCL[165] qualification will remain effective and the cargo interest will be able to use the bill as evidence in order to prove his case where damages in the container can be used to prove the damage of the cargo.

Furthermore, where pre-printed qualifications are present, as stated by “The Skarp”[166] "a clear statement by the shipowner that the goods were shipped in good order and

[164] “The Peter der Grosse” (1875) 1 PD 414. In this case it was stated as well that the term "'contents' referred to the internal contents and did not qualify the external appearance" see Gaskell p. 219

[165] See: Ace Imports Pty Ltd. V Companhia de Navegacao Lloyd Brasileiro [1987] 10 NSWLR 32

[166] “The Skarp” [1935] P 134

condition will override any standard printed clauses in the body of the document indicating that the state of goods on shipment was unknown."[167]

The question regarding the above case is what would happen if the qualification was made in reference to the condition of the cargo? This is stated because in that case there is no mention to the condition of the cargo in the qualification incorporated by the carrier, therefore one considers that as a contractual matter, this becomes a construction issue; consequently, if instead of the mentioned qualification the bill stated "condition unknown", one considers that the court would have to allow the qualification to apply and eliminate the power that the law gives to the bill of lading as a receipt.

Following the above as a claused shipping document can result in a breach of the sales contract, the market has reacted with alternatives in order to avoid these situations. If agreed, the carrier will issue a clean bill of lading[168] in exchange for receiving from the shipper a Letter of Indemnity (LOI)[169] as a guarantee to the carrier that in case he has to indemnify a third party for the inaccuracy of the information given by the shipper, the former can make effective the guarantee and recover from the shipper his loss without having to resort to legal action.

Although there are many other scenarios in international trade in which a LOI will be allowed, an example is where the master is requested by the shipper to issue a clean bill when the former is not able to inspect the goods or has doubts as to the condition of the cargo. Despite the fact that the carrier is allowed by The Hague Visby rules to

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[167] WILSON JOHN. Carriage of Goods by Sea. 7th edition. Harlow 2010. p 125

[168] "The Galatia" [1979] 2 Lloyd's Rep 450

[169] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

reject issuing a bill of lading under these circumstances, by receiving an LOI from the shipper he will feel safe to issue the document without worrying about a prospective claim, unless "the carrier is actually aware of the falsity of the declaration, case in which the LOI will be ineffective."[170]

A good example of this is the case of Brown Jenkinson v Percy Dalton[171] where it was held that the carrier can issue a clean bill of lading in consideration for an LOI where he does not know the condition of the cargo, but he cannot do so when he is aware that the cargo is damaged or missing. As mentioned before, if he does so, "the indemnity may be unenforceable against the shipper who requested the clean bill and expressly promised to indemnify, because it may constitute a fraudulent misrepresentation and therefore be illegal"[172]; consequently it has to be said that "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[173]

On the other hand, it can be said that without the need of an LOI from the shipper, wherever The Hague Visby Rules apply, the carrier can feel safe to issue a clean bill (after a reasonable inspection and when ignoring any damage) due to the protection of article III rule 5.[174] Nevertheless, this rule applies only for statements as to 'marks, numbers, quantity and weight' and not to the description of the condition of the goods.

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[170] WILSON JOHN. Carriage of Goods by Sea. 7th edition. Harlow 2010. p127

[171] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[172] GASKELL NICHOLAS. Bills of Lading and Contracts. LLP. London 2000. p 247

[173] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[174] See: COGSA 1971, article III rule 5

Finally, it might be said that the carrier might destroy the evidence power of the bill of lading by incorporating qualifications to it, but he does not liberate himself from liability in case the cargo owner proves that the goods were, when delivered to the carrier, as described in the bill of lading. This means that if the claimant can via tally reports, surveys, mate's receipts etc demonstrate its case, the carrier will have to indemnify the damages caused.

2.5.1 Unjustified Qualifications:

It has been established after the ruling of The David Agmashenebeli[175] that the carrier is not entitled per se to qualify the statements on the bill of lading. The carrier is able to do so only when he is aware of some damage[176] or shortage in the cargo or where he has no means of reasonable inspect the condition or quantity of the cargo, case in which the 'unknown' qualification will be included.

In case the carrier qualify the statement without any justification, he will be liable for the damages caused to the innocent party.[177] After "The David Agmashenebeli" it can be stated that "the carrier's duty is limited to making and expressing an honest and reasonable assessment of the goods"[178] therefore it must be concluded that unless the master has reasonable reasons to include a clause into the shipping document stating

[175] "The David Agmashennebeli" [2003] 1 Lloyd's Rep 92

[176] Ibid: "to qualify the description of apparent good order and condition simply by describing the urea as discoloured without qualification as to the extremely small extent of the apparent discolouration was to insert an untrue statement as to apparent order and condition which no reasonable master would have inserted"

[177] Probably it will be considered as a "negligent misstatement" as the one studied by Compania Naviera Vascongada v Churchill [1906] 1 KB 237

[178] DOCKRAY MARTIN. Cases & Material on the Carriage of Goods by Sea. 3rd edition. Cavandish. London 2004. p 104

that there is a shortage of cargo or that the cargo is damaged, it would not be reasonable for him to incorporate any clause of this nature.

3. Cargo interest´s defences against qualifications (ways to avoid the effect of qualifications):

As mentioned before, although qualifications have severe consequences for the shipping documents eliminating its evidence power[179], this does not lead to the conclusion that due to this the carrier is exonerated from liability for the damages he caused.

Between the options cargo interests may use, there is the alternative to present supplementary evidence in order to avoid qualifications and being able to prove that the real state in which cargo was delivered at port of loading was the one presented by the shipping document´s representations (before qualified). For this purpose, as presented in The Atlas,[180] The Civil Evidence Act1995 is of assistance to know the evidence instruments allowed by law to be used in order to prove the case. Among others, it has to be stated that cargo interests may use survey reports,[181] witness testimonies where the crew members are called to present their statements and be cross examined[182], expert´s statements[183] and other documents such as mate´s receipts[184] and tally reports[185] that may assist to prove the real state in which cargo was delivered for shipping[186].

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[179] "The Galatia" [1979] 2 Lloyd's Rep. 450
[180] [1996] 1 Lloyd's Rep. 642

[181] "The Peter der Grosse" (1875) 1 PD 414

[182] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[183] "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92

[184] "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92

Due to the relevance of these two final documents we are going to make a brief explanation of its value in order for the parties to support its case in terms of evidence.

The mate's receipt is a document issued by the carrier by which it is acknowledged that the goods have been received by him. This document, although containing statements such as to the quantity and quality of the received goods, is a 'temporary receipt' which will be superseded by the bill of lading once it has been issued. The bill of lading and the statements incorporated in it will constitute the receipt document.

The mate's receipt is regarded as a 'simple receipt', consequently, it is not ordinarily anything more than evidence that the goods have been received on board'[187]. Nevertheless, once the bill of lading has been issued, if in hands of the shipper, the mate's receipt may be used by the carrier to undermine the prima facie evidence statements incorporated into the bill[188]. This operates in the same way against sea waybills and straight bills.

On the other hand, where the bill is in possession of a third party that obtains the document in good faith, the mate's receipt will be of no use to the carrier due to the fact that the bill, as stated before, will be considered as conclusive evidence.

Conversely, the mate's receipt can be used by the cargo interest to prove his claim whenever the carrier has qualified the carriage document. With this, one is making

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[185] "The Atlas" [1996] 1 Lloyd's Rep. 642

[186] These are normally difficult to obtain due to the fact that the parties, especially the ones who become in a later stage holders of the document, does not have access to some of the documents or information herein mentioned.

[187] See Carver 8-018

[188] "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92

reference to the possibility that exists that a bill of lading or other of the studied documents is qualified by the carrier, but the mate's receipt establishes that the condition and quantity of the goods received by the carrier are sound. In that situation, the cargo interest can present the mate's receipt as complementary evidence to support his claim[189].

In what concerns to tally clerk´s reports, these documents are records made by the carrier or by an agent at the moment the cargo is received in port of origin or at port of destination, regarding the state and quantity of the loaded or discharged goods which can as well as the mate´s receipts serve as complementary evidence.

Although this information (which is recorded in a "tally report") can be used as evidence[190] in a cargo claim either by the carrier to contradict a shipping document which is prima facie evidence or by the cargo interest to prove his loss against a qualified document of control, it must be said that these documents are not a receipt issued by the carrier[191].

As well, in addition to presenting complementary evidence to support his case, it has been stated that cargo interests may use other alternatives to make the carrier respond for his liability in concerns to the damages suffered by the carried cargo. Between the alternatives cargo interests may common law estoppel by representation, suing in bailment and suing under tor of deceit[192] may be tried, this last alternative can be

[189] Although difficult, cargo interest can get it from the carrier. If not possible, in court, cargo interest may ask the judge to oblige the carrier to present it.

[190] "The Atlas" [1996] 1 Lloyd's Rep. 642

[191] See Girvin 2.15 where the author makes reference to the case: "San Carlos Milling Inc v Mainsail Navigation Corp (The MAS Venture), unreported, 8 Nov 2000"

[192] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

taken if the carrier being aware of the sound condition of the goods decides to qualify the document or even worse if being aware that the goods where damaged decides to issue a clean document.

Furthermore, the cargo interest affected by the qualification, when it is unjustified, can start an action against the carrier for "fraudulent or negligent misstatement."[193] Here, the receiver will have to prove that the carrier, by including qualifications into the bill of lading, acted negligently or dishonestly[194]. Although it is a very harsh burden for the receiver, it can be proved that the carrier knew of the sound conditions of the cargo and its quantity and nevertheless he decided to misrepresent those facts with the only intention of walking away from his liability as to the receipt function of the bill of lading.

In addition, where COGSA 71 and COGSA 92 are not applicable, in a Grant v Norway scenario, the cargo interest has an action against the signatory of the document which might be based in fraud, negligence or for breach of 'implied warranty of authority'[195].

An additional alternative, which for academic purposes should be studied, bearing in mind that at least for what concerns to English law it has been disregarded by

[193] See Debattista p. 130: Misrepresentation Act 1967 S 2(1); Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[194] PARKER BENJAMIN. Liability for incorrectly clausing bills of lading, 2003 LMCLQ 201 p 229; Compania Naviera Vascongada v Churchill [1906] 1 KB 237

[195] See Carver 2-046: "the signer of the bill can be held liable for the breach of implied warranty of authority: i.e. the rule of agency law by which an agent purporting to make a contract between his principal and a third party impliedly warrants that he has the principal's authority to enter into the contract on the principal's behalf. If the agent has no such authority, he is liable in damages for any loss suffered by the third party."

courts[196], is the possibility of destroying the effects of the qualifications by applying article III rule 8 of The Hague Visby Rules[197].

It has been argued[198], that when The Hague Visby Rules apply, the qualifications made by the carrier may be attacked by article III rule 8[199] for being considered as releasing the carrier's liability.

Following the above it must be mentioned that the extent of the representations made in the bill of lading, in what respects to the application of article III rule 8, have been part of the legal debate which have centred its attention in discussing whether the mentioned statements in the document are contractual clauses or mere statements of fact[200].

This discussion has several effects. Although nowadays one may state that the point has to be considered pretty straightforward after "The Mata K" judgement which confirms that the statements made in the face of the bill of lading are mere statements of fact, one must make reference to the academic discussion that has been brought[201] into the picture to try to avoid the qualifications made by the carrier against the

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[196] "The Mata K" [1998] 2 Lloyd´s Rep 614

[197] This off course for the cases where The Hague Visby Rules apply to the carriage.

[198] "The Atlas" [1996] 1 Lloyd's Rep. 642 and Tetley

[199] Hague Visby Rules, Article III rule 8 "any clause, covenant, or agreement in a contract of carriage relieving the carrier of the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessing such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

[200] As stated before it has been established that these representations are mere representations of fact and not contractual clauses.

[201] See Tetley, Gaskell, Carver, Debattista and Scrutton among others.

shipper's descriptions, moreover when the discussion may apply to jurisdictions where English case law is not binding.

Reference must be made to Professor Tetley´s theory, which although after "The Mata K" is just inapplicable to English law, is important as an illustrative theory. With this, one is making reference to the theory that states that the qualifications made by the carrier are aimed to lighten the carrier's liability therefore article III rule 8 of the Hague Visby Rules will apply to make such a qualification null[202].

Although qualifications gather most of the requirements of article III rule 8, the fact that it has been established in "The Mata K" that these statements are mere statements of fact as opposed to contractual terms, goes against to one of the fundamental requirements for the mentioned article to apply which is that the "clause, covenant or agreement" which pretend to relieve the carrier from his liability has to be part of the contract of carriage, which for the reasons given before is not the case neither with the representations within the shipping document, nor with the qualifications made by the carrier.

As case law does not go in depth in this specific point, the question here should be why these statements are considered as mere statements of fact rather than contractual clauses. To answer that question, some[203] had stated that just because those statements are in the face of the bill and not in the back where contractual terms are suppose to be find, these statements are mere representations of fact and article III rule 8 is not applicable.

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[202] Although not ratified, this theory has been slightly supported by some judges eg: "The Atlas" [1996] 1 Lloyd's Rep. 642

[203] Gaskell Nicholas. Bills of Lading and Contracts. LLP. London 2000. P 210

This makes one think on what would happen if those statements were included in the back of the document as opposition to the front where they are use to be found. If incorporated in the back of the bill will be considered as contractual terms covered by the ruling of the article? Nevertheless one believes this is not the case because there is not an agreement between the parties on the terms of these representations, this is not the only reason for this provision not to apply.

In addition to the argument of being statements of fact, one considers article III rule 8 should not apply to the studied scenario because although the qualifications make the position of the cargo interest more difficult in terms of burden of proof, it do not release the carrier from its liability, consequently article III rule 8 should not apply for avoiding qualifications even in cases where in foreign jurisdictions English case law is not binding.

Furthermore, considering that at the end the ones who suffer the consequences of the qualifications are parties that because of not being part of the contract at the time in which it was agreed[204], had no part in the decisions as to the statements to include in the bill and were not able to try to avoid qualifications; the main defence the participants have against qualifications is to assume a preventive attitude instead of relying on reactive actions.

With this, one is making reference to the view that it is more effective as a defences that the parties of the sales contract for instance foreseeing the effects of eventual qualifications include terms in their sales contract that oblige the seller to demand

[204] Eg. atornees

from the carrier a bill of lading with the information required by the buyer (without qualifications).

Therefore, in case the carrier decides not to issue a bill with the requested characteristics, or if the seller omits to fulfil his contractual obligation; although the consignee will have no action against the carrier in that respect, he will still have an action against the seller for breaching the sales contract and the seller will be the one who will have to pay the damages suffered by the buyer.

In the same way, insurers that may result affected as stated in the introduction of this work, which are usually affected by qualifications due to the fact that when trying to recover via subrogation, these clauses will affect their claim, can avoid this situation by including into their policy warranties or condition precedent clauses that oblige the assured to obtain from the carrier a shipping document with certain characteristics that allow the document to perform its function as a receipt e.g a bill without qualifications.

4 Conclusions:

To conclude, it must be stated that shipping documents when not claused by the carrier are the most important evidence instrument the cargo interest can use in order to bring his claim whenever there is a shortage, damage or loss of cargo[205].

Nevertheless, it can be argued that the evidential scenario between the shipper and the carrier in what respects to shipping documents as evidence is in some way leveled[206].

[205] It is, however, the difference between that photograph , taken at discharge, and the photograph taken on loading in the bill of lading which provides real substance to the cargo claim because it is that difference, that discrepancy, which constitutes the claimant´s evidence of the loss. Debattista Charles. Cargo Claims and Bills of Lading. Southampton on Shipping Law. Institute of Maritime Law. Informa. London. 2008 Pg. 109

[206] Debattista Charles. Cargo Claims and Bills of Lading. Southampton on Shipping Law. Institute of Maritime Law. Informa. London. 2008 Pg. 110

This is not the case where a third party holds the shipping document considering that the statements within that document may be the only evidence of the state of the goods before shipment this third party has, different to what happens with the shipper who by the mere fact of being the shipper has all the information regarding the state of the goods when delivered to the carrier and the carrier who has the chance either to check the state of the cargo before shipment or to clause the shipping document in case he is not able to check it. The lack of access to the evidence the third party may have "can unfairly skew the balance in carrier's favour."[207]

Moreover, it has to be said that independently to the shipping document used, it is to the parties to establish the evidence value the document will have, whether the balance goes in favour of one or another depends on the parties bargain power which will result either in a clean shipping document or a claused one[208].

Despite the qualifications incorporated by the carrier[209], it will be a matter of construction to get to know to what extent the mentioned qualification will undermine the statements incorporated before into the document. Although qualified, some of the statements on the document may remain useful as receipt. This is in the case where the clause included by the carrier makes reference to a particular statement (which will be nullified) but not to the others which will remain intact[210].

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[207] Debattista Charles. Cargo Claims and Bills of Lading. Southampton on Shipping Law. Institute of Maritime Law. Informa. London. 2008 Pg. 110

[208] It is to be considered that "if the shipper admits the deficiencies of the goods in the description tendered in the bill of lading then the carrier does not need to clause the bill"

[209] "The Peter der Grosse" (1875) 1 PD 414

[210] "The Galatia" [1979] 2 Lloyd's Rep. 450

In addition, absent fraud[211] or negligence[212], the cargo interest has no much remedy against the carrier where he has qualified the document bearing in mind that the carrier is lawfully allowed to doing so.

Nevertheless, where the Hague Visby rules apply, if it can be proved by the shipper that he demanded from the carrier a bill of lading in terms of article III rule 3 and the latter refuses to issue a document with those specifications (under these circumstances) there will be a remedy against the carrier for breach of contract[213].

Furthermore, although the qualifications made by the carrier puts the cargo interest in difficulties in terms of burden of proof[214], due to the fact that without the shipping documents as a receipt it will be much more difficult to prove that the cargo was delivered in port of discharge in different conditions as received by the carrier in port of origin, the cargo interest will not lose his right of action against the carrier in order to be indemnified for the damages suffered.

This is stated due to the fact that by qualifying the document, the carrier might be undermining the statements that constitute the receipt function of the shipping document, but by this he is not walking away from his liability which remains the same in case he damages or loses the cargo. This can be stated due to the fact that if proved by the cargo interest that there were damages or missing parts and that those where due to the carrier's fault, the latter will be held liable to indemnify the cargo interest for his loss.

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[211] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[212] Brown Jenkinson v Percy Dalton [1957] 2 QB 621

[213] Damages can be caused for instance in the frame of the sales contract if for the negative of the carrier the innocent party gets in breach of his sales contract.

[214] "The River Gurara" [1998] 1 Lloyd's Rep. 225

In respect of the evidence power of bills of lading, the estoppel established by the acts mentioned in this work, apply automatically. This is for the mere fact of the document being a bill of lading and the conditions required of the provisions being fulfilled.

Where the receipt is contained in other documents such as a sea waybill, the common law estoppel may apply[215]. Nevertheless, this does not apply automatically. The cargo interest can make use of it only by proving that all of its elements are present[216]. This puts the bill of lading in a better position as a receipt in comparison to the other shipping documents.

On the other hand, it might be stated that the position of cargo interests (in terms of knowing the real state of the goods) may be better in front of non-negotiable document due to the fact that the receiver of the goods have the means or as a matter of fact should know and be able to prove the condition of the goods when delivered to the carrier.

In addition to the mentioned effects the receipt function has, it has to be claimed that its scope of inherence is wider, considering that the negotiability of the document (if any) will be affected by the statements incorporated in it as a receipt, bearing in mind that a qualified document is less attractive than one which is not[217].

Moreover, due to the difficult position in which the cargo interest is left after a qualification, it has to be considered that the most effective defence against these acts of the carrier is to adopt a contractual preventive attitude instead of a reactive one, therefore, via incorporating special provisions in the contracts (such as the contract of

[215] Compania Naviera Vascongada v Churchill [1906] 1 KB 237

[216] Carr v London and North-Western Ry. Co. [1875]L.R. 10 C. P. 307

[217] Brown Jenkinson v Percy Dalton [1957] 2 QB 621; "The David Agshamenebeli" [2003] 1 Lloyd's Rep 92

sales), the cargo interest may guarantee a remedy that allows recovering the loss from someone (seller) in case the document has been qualified and it is not possible to recover from the carrier.

Ultimately, as to which document of control is the safest vis a vis a cargo claim, as shown through this work it can be argued that although the other documents may have some other features that make them better in other aspects than a bill of lading, the bill of lading in what regards to the receipt function is the safest document to use, considering that in addition to the fact that all the defences against qualifications applicable to the other shipping documents applies to it, the provisions of the Carriage of Goods by Sea Act 1971 and Carriage of Goods by Sea Act 1992 including the estoppel and the possibility for the shipper to demand from the carrier a bill in terms of article III rule 3 applies as well.

Finally, it must be said that although in an scenario where the shipping documents´ receipt function serves in all of its extends to the cargo interest claiming damages, either because the document is unqualified or because the cargo interest get to avoid the qualification by one of the ways explained through this paper, its use as receipts is not enough for the claimant to succeed in his claim.

Presenting shipping documents and the evidence contained in them constitute only part of the work cargo interests will have to do to support and succeed in their claim. Consequently, in addition of using the evidence contained in shipping documents to support their case, "for the claimant to succeed, it needs to prove that its loss was the direct result of a breach by the carrier of his obligations."[218]

[218] Debattista Charles. Cargo Claims and Bills of Lading. Southampton on Shipping Law. Institute of Maritime Law. Informa. London. 2008 Pg. 114

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- Civil Evidence Act 1995

Others:

- UPC 600