CA on appeal from Commercial Court (Mr Justice Langley) before Peter Gibson LJ; Rix LJ; Mr Justice Jacob. 16th April 2003.

JUDGMENT : Lord Justice Rix:

1. In 1924 the international maritime community enacted a convention, the International Convention for the unification of certain rules of law relating to Bills of Lading signed at Brussels on 25 August 1924, intended to regulate the minimum terms by which international shipping contracts of carriage of goods by sea should be governed. That convention, although signed at Brussels, derived, with amendments, from a set of standard rules originally designed for incorporation into bills of lading as a matter of contract which were negotiated at The Hague in 1922. Thus the rules came to be known as the Hague Rules. By article I(b) those Rules applied only to contracts of carriage "covered by a bill of lading or any similar document of title". It is a matter of some surprise that nearly eighty years later the meaning of that phrase is still controversial. Indeed new forms of shipping documents appear to have caused in recent years an increasing number of cases to reach the courts raising the question whether a bill of lading consigned to a named consignee, a so-called "straight bill of lading", is a bill of lading within the meaning of the Rules. A straight bill of lading is to be contrasted with an "order" or bearer bill of lading, each of which permits the transferability of the bill to any number of transferees in succession, respectively by endorsement or delivery. This form of transferability has also traditionally, but idiosyncratically, been referred to as "negotiability". *Scrutton on Charterparties and Bills of Lading*, 20th ed, 1996, at 185, explains the point well:

   "Note 1. "Negotiable" as a term of art describes an instrument which can give to a transferee a better title than that possessed by the transferor. A bill of lading is not "negotiable" in this sense: the indorsee does not get a better title than his assignor. Indeed a bill of lading is "negotiable" only in a popular, and not in a technical, sense. For it is "negotiable" to the same extent as a cheque marked "not negotiable", i.e. it is "transferable"."

   The effect of a negotiable bill of lading has been famously described by Bowen LJ in ***Sanders v. Maclean*** (1883) 11 QBD 327 at 341 in this passage: *"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol; and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods…It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."*

   A straight bill of lading, on the other hand, requires delivery of the goods to the named consignee and (subject to the shipper's ability to redirect the goods) to no other.

2. The present appeal concerns such a straight bill of lading, under which the shipper, Coniston International Machinery Ltd, of Liverpool ("Coniston"), consigned four containers of printing machinery to J I MacWilliam Company Inc, of Boston USA ("MacWilliam"). MacWilliam had purchased the machinery from Coniston under a sale contract cif Boston. The machinery was carried on two vessels each of which was owned by or demise chartered to Mediterranean Shipping Co SA, of Geneva ("MSC"). One vessel, *The Rosemary*, carried the machinery from Durban in South Africa to Felixstowe in England, where it was discharged and subsequently reshipped. The other vessel, *The Rafaela S*, carried the machinery from Felixstowe to its final destination at Boston. On the way, it was badly damaged. The parties to the appeal, which arises, via the commercial court, out of a London arbitration, are MacWilliam and MSC. The business issue between the parties is whether the contract of carriage contained in or evidenced by the bill of lading prescribed a package limitation under the Hague Rules, the Hague-Visby Rules, or the US Carriage of Goods by Sea Act 1936 ("USCOGSA"). The Hague-Visby Rules are an amended version of the Hague Rules, introduced by the Protocol signed at Brussels on 23 February 1968. It contains a more liberal package limitation. USCOGSA reflects the earlier limitation regime of the Hague Rules and would limit any recovery to US$500 per package.

3. The straight bill of lading issued by MSC to Coniston at Durban on 18 December 1989 (the date, now more than 13 years ago, may be noted) is the only contract document in evidence relating to the carriage. If it governed the complete voyage to Boston, then its terms relate directly to that second leg on which the machinery was damaged. If, however, the position is that it only governed the first leg to Felixstowe, then no second bill of lading to cover the on-carriage to Boston was ever issued. It is nevertheless common ground that, in such a case, the carriage on that second leg would be governed by a second contract in the same form as the Durban-Felixstowe bill of lading, mutatis mutandis, in other words by a straight bill of lading.

4. At this stage it is still a matter of mere assumption that MacWilliam has title to sue and that MSC is liable at all for the damaged machinery. However, the parties have decided to determine the package limitation regime as a preliminary issue in the arbitration. That issue ultimately turns on whether the compulsory regime of the English Carriage of Goods by Sea Act 1971 (the "1971 Act"), which gives to the Hague-Visby Rules the force of law *"where the port of shipment is a port in the United Kingdom"* (section 1(3)), applies to the second leg of the voyage, that from Felixstowe to Boston. MacWilliam submits that the 1971 Act's regime does apply, MSC submits that it does not. That difference in turn raises three questions of some refinement. The first of these is whether the relevant contract of carriage is a single contract from Durban to Boston, or whether the carriage as a whole was covered by two separate contracts, one governing the voyage from Durban to Boston and the other governing the on-voyage from Felixstowe to Boston. The second question, however, is whether the separate contract of

carriage which would in that case govern the second leg from Felixstowe to Boston was a contract which "expressly or by implication provides for the issue of a bill of lading or any similar document of title" (section 1(4) of the 1971 Act). Seeing that it is common ground that such a contract would have been in the form of a straight bill of lading, the second question is simply whether a straight bill of lading is a "bill of lading or any similar document of title" within the meaning of the 1971 Act. Since that phrase goes back ultimately to the Hague Rules, the parties are agreed that the second question is asking whether a straight bill of lading is a bill of lading or similar document of title within the meaning of the Hague Rules. If it is not, it is again common ground that the more liberal package regime of the Hague-Visby Rules does not apply.

5. The third question only arises if, on the contrary, the second leg was governed by a contract within section 1(4) of the 1971 Act and asks whether, whatever the answer to the first question, and even if therefore there was a single contract for the whole carriage from Durban to Boston, there nevertheless was a "port of shipment…in the United Kingdom" within the meaning of section 1(3) of the Act, namely Felixstowe. MacWilliam submits that there was and that the answer to the first question is therefore ultimately irrelevant. This third question has tended to be obscured below, possibly because it was considered to be bound up with the first question, as I think MSC views it to be, but also perhaps because, in the light of both the arbitrators' and Langley J's decision on the straight bill of lading question, neither the first nor the third questions were decisive.

6. Thus it was that the arbitrators (Messrs Mabbs, Hamsher and Moss) defined only two issues in their award as follows: *"Was the shipment from Durban to Boston governed by one contract of carriage or two?"* and *"Was the [straight] bill of lading a "bill of lading" within [the 1971 Act]?"*

7. The answers given by the arbitrators were **"One"** and **"No"** respectively. Therefore MacWilliam failed, on two separate grounds, to avoid the USCOGSA $500 per package regime. The arbitrators did not separately address MacWilliam's submission (see para 11 of their Reasons) that Felixstowe was in any event a "port of shipment".

8. Permission was given to appeal the award to the commercial court, where Langley J upheld the arbitrators' answer on the bill of lading issue, and therefore dismissed the appeal, but went on to express his views for differing from the arbitrators on the one contract or two issue. In his view there were two separate contracts. He, however, defined this issue in a way which incorporated MacWilliam's further "port of shipment" submission, as follows: *"Whether, as the buyers [Macwilliam] also contended, the "port of shipment" for the carriage of the goods pursuant to that "Bill of Lading" was a port in the United Kingdom (namely Felixstowe) within Section 1(3) of COGSA 1971 ("Issue 2"). Issue 2 itself depended upon whether there was a single contract of shipment from Durban to Boston or two contracts of carriage from Durban to Felixstowe and Felixstowe to Boston."*

9. Permission was again given to MacWilliam to take a second appeal to the court of appeal. By a respondent's notice MSC has sought to uphold Langley J's order dismissing the appeal from the award on the alternative ground that the arbitrators were also right on the one contract or two issue.

10. The three questions argued on the appeal are very different. The one contract or two issue is a question of construction on the wording of the bill of lading. The straight bill of lading issue is a question of general significance with potentially far-reaching implications. The "port of shipment" issue has barely been addressed below, but appears to be a mixed question of statutory interpretation and fact. The arbitrators and Langley J dealt with the bill of lading issue first. However, it will not be reached at all unless there is a "port of shipment" within the United Kingdom. It is therefore logical, but also convenient, to take the two questions which relate to the "port of shipment" first. It is as well to settle the form of the contract (one contract or two) before asking what its effect is in the light of international convention or domestic statute. In any event, however, I need to begin by setting out the terms of the straight bill of lading.

The straight bill of lading

11. The face of the bill of lading contained a series of numbered boxes, in which various details were typed. There was also printed material, as well as several stamped provisions. The document as a whole was headed "Original BILL OF LADING" and it was given a number in a box headed "B/L NO."

12. The numbered boxes had printed titles asking for appropriate details to be supplied. Thus box (1) was headed "Shipper" and had Coniston's name and address inserted in it. Box (2) was headed "Consignee: (B/L not negotiable unless "ORDER OF")": it referred to MacWilliam's name and address but did not contain the additional words "order of". That was what made the document a straight bill of lading. The terms of box (2), both the printed words and the absence of "order of" in the typed in provisions, are the linchpin of MSC's argument on the bill of lading issue. Box (6) was headed "Vessel" and referred to "ROSEMARY". Box (7) gave the "Port of Loading" as "DURBAN"; box (8) the "Port of discharge" as "FELIXSTOWE". Box (9) was headed "Final destination (through transport)" and referred to "BOSTON". Against the number (9) was an asterisk, picked up further down the page by the printed information – "If box 5 and/or 9 filled out, this is a through Bill of Lading (see clause 3)". This provision together with clause 3 (see below under para 17) is central to the one contract or two issue. Box (10) was headed "On-carriage" but was left blank. Box (11) was headed "Number of Original Bs/L" and was filled out "3 (THREE)". Box (13) contained the "particulars furnished by shipper".

13. Further unnumbered boxes, left blank, were headed "Specification of freight and charges", "Declared Value (See Clause 21)" and "Signed for the merchants (Compulsory for Italy, Belgium and France)".

14. In a box above the boxes for "Place and date of issue" (where "DURBAN" and 18 December 1989 were inserted) and "Signed for the Master…as Agents" (where an agent's stamp and signature were inserted) were three printed paragraphs dealing with receipt, agreement and attestation. The last of these, in essentially standard form, read as follows: *"IN WITNESS whereof the number of Original Bills of Lading stated above [viz three] all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order."*

15. Although the freight box was left empty, another box headed "Freight Payable at:" was completed with the typed word "DESTINATION"; but another copy of the bill had that word crossed through in manuscript and the word "Felixstowe" written above it. The words "FREIGHT PAYABLE DESTINATION" were also typed in the centre of the particulars of the goods.

16. There were also two stamped provisions which were relevant to the one contract or two issue, namely "On-Carriage to BOSTON to be arranged by M.S.C. Agents" (the word "Boston" was written in to a blank space in this stamp), and "Cargo to be cleared by U.S. Custom at port of discharge".

17. The reverse of the form contained standard conditions in typically small print. It will be sufficient to set out the following:

"This contract is between the Merchant and the Master, acting on behalf of the Carrier. Wherever the term "Merchant" occurs in this Bill of Lading (hereinafter "B/L") it shall be deemed to include the Shipper, the Consignee, the holder of the B/L, the receiver and the owner of the goods. "Carrier" shall mean the vessel and her owner or demise charterer for whom the Master has entered into this contract…MSC shall act as agent of the owner or demise charterer in arranging the transport covered by this B/L…

"1. PARAMOUNT CLAUSE. It is mutually agreed that this Bill of Lading shall have effect subject to the provisions of the International Convention relating to Bills of Lading dated Brussels 25th August 1924 (hereinafter called "Hague Rules"). The Hague Rules shall not apply where…this bill of lading is subject to any compulsorily applicable enactment, including Hague-Visby Rules, based on said Hague Rules, 1924. If goods are shipped to or from the United States, this bill of lading shall be subject to US Carriage of Goods by Sea Act 1936. The Carrier's published tariff is incorporated herein and made part of this contract.

"2. LAW AND JURISDICTION. Claims and disputes arising under or in connection with this B/L shall be referred to arbitration in London or such other place as the Carrier in his sole discretion shall designate…English law shall be applied, unless some other law is compulsorily applicable, except that claims and disputes relating to cargo carried to or from the United States shall be subject to the sole jurisdiction of the US in the US District Court, Southern District of New York, and US law shall be applied.

"3. SUBSTITUTION OF VESSEL, THROUGH TRANSPORT, TRANSSHIPMENT AND FORWARDING. The Carrier agrees to carry the goods from the Port of Loading to the Port of Discharge, and shall have the right at its sole discretion to substitute other vessels, feederships, lighters or other modes of transport for the vessel named herein (Box 6). If boxes 5 and/or 9 are filled out, the Carrier will, acting as shipper's agent, only arrange for transport of the cargo by other carriers from the place of origin to Port of Loading and/or from Port of Discharge to destination, and during such segments of Through Transport, handling and storage of the goods shall be subject to the freight contracts and tariffs of the other carriers. It is expressly understood that the Carrier's liability as "carrier" applies only from the Port of Loading to Port of Discharge under this B/L, and only while the goods remain in its actual custody and control, whether as Carrier or bailee…

"21. CLAIMS VALUATION, PACKAGE LIMITATION, TIME-BAR. …Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding Pounds Sterling 100 of lawful tender in the U.K. per package or unit, unless the nature and the value of such goods have been declared by the merchant before shipment and inserted in the B/L. But declaration of value for the purpose of calculation of freight shall not be considered a declaration in the above sense. This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes. In case goods are shipped to or from the United States, the carrier's liability shall be limited to $500 per package or customary freight unit, unless excess value is inserted on the face hereof and extra charge paid."

One contract or two?

18. The arbitrators considered that there was only one contract. Their reasoning started with the words on the face of the form that *"this is a through Bill of Lading"*, which they considered confirmed the bill's appearance as a *"classic through transport bill"* covering the entire carriage from port of loading at Durban to final destination at Boston. There was further support in the fact that freight was only payable at destination, presumably in a single sum (the arbitrators actually state that "freight was paid in one lump sum"), and in the background sale contract *"cif Boston"* which emphasised that intermediate arrangements were of limited if any significance to the shipper and consignee. There remained the stipulation that Felixstowe was the port of discharge together with clause 3. The arbitrators interpreted these provisions, however, as merely giving to MSC the option of making alternative provisions on a second leg from Felixstowe to final destination. For that leg MSC was entitled to delegate the obligation to another carrier or to complete the carriage itself. Where MSC opted to complete the carriage itself, it did so under its original contract.

19. Langley J came to the opposite conclusion. This was, I think, essentially based on his reading of clause 3 (together with the relevant box entries) as providing for two separate contracts, rather than a single contract under which MSC exercised an option to complete a single voyage by means of transshipment at an intermediate port.

20. On this appeal, Mr Simon Croall, on behalf of MSC, has submitted that the arbitrators were right essentially for the reasons given by them. Properly construed in its entirety, the bill of lading issued at Durban evidenced a contract of carriage to ship cargo from Durban to Boston with an option to sub-contract parts of the carriage and in particular the leg from Felixstowe to Boston. Although clause 3 said nothing about MSC performing that second leg as a carrier in its own ships, as distinct from arranging for transport as the shipper's agent, it was common ground that MSC was entitled to arrange such on-carriage in its own ships. Where it did so, it was still performing the original contract of carriage under a single through bill of lading for a freight which had been agreed for the whole carriage payable in one sum at final destination in Boston.

21. Mr Alistair Schaff QC, on the other hand, on behalf of MacWilliam, has supported the conclusion of the judge. He has emphasised that the expression "through bill of lading" must itself take its colour from the other contractual provisions and in this case predominantly from clause 3. That clause, when read together with the relevant boxes on the front of the bill, does not provide for a single contract of carriage but for two separate contracts, one from Durban to Felixstowe and the other from Felixstowe to Boston. It may be true that MSC was entitled to arrange that second contract to be with itself, but that should not disguise the fact that such an arrangement must be viewed in exactly the same light as a new contract arranged through MSC's agency with a different carrier. If the latter would be a separate contract with a separate port of shipment, then so must be the former arrangement. Otherwise the regime under the bill of lading would change depending on the manner in which MSC exercised its option. If it arranged on-carriage with itself, then there would be a single contract for a voyage from Durban to Boston, with transshipment at Felixstowe, and US law and jurisdiction would apply under clause 2 and USCOGSA would apply under the penultimate sentence of clause 1. If on the other hand, MSC arranged on-carriage with another carrier, then the contract would only be for shipment from Durban to Felixstowe, not to the US, and London arbitration and English law would apply under clause 2, and there would be a port of shipment within the UK which, subject to the straight bill of lading issue, would also invoke the compulsory regime of the 1971 Act. However, law, jurisdiction and the applicable shipping regime must, it was submitted, be established at the outset of the contract, and could not "float" dependent on subsequent events.

22. Two authorities have been cited as throwing some light on this issue. In ***Stafford Allen & Sons Ltd v. Pacific Steam Navigation Company*** (1956) Ll L Rep 105 it would seem that the first carrier's bill of lading provided for shipment at Corinto in Nicaragua, discharge and transshipment at Cristobal (in the Canal Zone) by a named "on carrier" and a final destination in London. A special clause, clause 11, dealt with the circumstances of transshipment, to the effect that the first carrier made arrangements for the transshipment and on-carriage "solely as the forwarding agent of the shipper and without any other responsibility whatsoever" and that the transshipment and on-carriage would be subject to "all the provisions of the regular form of bill of lading" of the second carrier. No further bill of lading was issued, but the second carrier did have a regular form of bill of lading. The plaintiff's cargo was damaged on the second leg and it sued the second carrier. The issue was whether the regime terms of the first carrier's bill of lading applied throughout the voyage to London, or whether the terms of the second carrier's regular bill of lading applied. Sellers J held that the second carrier's terms applied. Nothing more is known about the terms of the first carrier's bill of lading, for instance as to the freight provisions.

23. In ***The Anders Maersk*** [1986] Lloyd's Rep 483, a decision of the Hong Kong High Court, the bill of lading stated that the port of shipment was Baltimore and the port of discharge was Shanghai. The bill gave the carrier a right of transshipment, which it exercised at Hong Kong. It appears to have been described as a through bill of lading. It made no express reference to Hong Kong at all. The plaintiffs' cargo was damaged between Hong Kong and Shanghai. The issue was whether Hong Kong was the "port of shipment" for the purposes of the Hong Kong equivalent of the 1971 Act. Mayo J held that transshipment was not the same as shipment, and that there had been only one port of shipment and that was Baltimore. Therefore, under the bill of lading terms, USCOGSA's $500 per package limitation applied. Mayo J said (at 486):

"Unless reference is made to the contract between the parties, there would always be a likelihood that there would be an element of uncertainty. The shipper of goods may have no knowledge of the arrangements being made by the carrier, and it would put the shipper in an invidious position if he could only establish his rights by a subsequent re-construction of events which took place without his knowledge.

"I entirely reject Mr Tong's argument that shipment includes transhipment. All the references to shipment in the rules are consistent with shipment being confined to the initial shipment referred to in the bill of lading."

24. In my judgment, the present case is closer to the situation in ***Stafford Allen*** than in ***The Anders Maersk***. MSC's bill of lading specifically identifies Felixstowe as the port of discharge. It is true that Boston is also identified as the ultimate destination (as was London in ***Stafford Allen***) and that the bill states that it is therefore a "through Bill of Lading": but for the meaning of that loose and ambiguous expression (see *Scrutton* at 369/371) one is immediately referred by the bill's own language ("If box 5 and/or 9 filled out, this is a through Bill of Lading (see clause 3)") to clause 3. That clause then sets out the limits of MSC's obligations as a carrier under its bill. *"The Carrier agrees to carry the goods from the Port of Loading to the Port of Discharge"*. Felixstowe, not Boston, is the port of discharge. MSC therefore did not agree to carry the goods to Boston. For the purposes of that voyage to Felixstowe it is entitled to substitute other vessels etc. If Box 9 is filled in with a final destination, then *"the Carrier*

will, acting as shipper's agent, only arrange for transport of the cargo by other carriers…from Port of discharge to destination", just as in ***Stafford Allen*** the first carrier acted only as an agent in arranging the on-carriage by the second carrier. Clause 3 continues: "*and during such segments of Through Transport, handling and storage of the goods shall be subject to the freight contracts and tariffs of the other carriers",* again as in ***Stafford Allen*** the on-carriage from Cristobal was subject to the second carrier's "*regular bill of lading*". The next sentence in clause 3 begins with special emphasis – "*It is expressly understood"* – and continues *"that the Carrier's liability as "carrier" applies only from Port of Loading to Port of Discharge under this B/L…"* That is consistent with the point made in the first sentence of the clause, but underlines it by stressing that MSC's liability as a carrier ends at Felixstowe. The clause continues: *"and only while the goods remain in its actual custody and control, whether as Carrier or bailee":* Mr Croall submits that the machinery remained in MSC's custody and control on the *Rafaela S* on the voyage from Felixstowe to Boston, but that submission ignores the point that the second half of this sentence is an additional limitation on MSC's liability.

25. There is nothing in clause 3 to extend MSC's responsibility as carrier beyond Felixstowe. It may be common ground that there was nothing to prevent MSC making a further arrangement for another MSC vessel to perform the on-carriage from Felixstowe, but that is not to be derived from clause 3 itself. In these circumstances, unless some other part of the bill of lading has a preponderant and overriding effect, superseding clause 3, I cannot see how it can be said that the contract evidenced by the bill is a contract of carriage (as distinct from a contract *for* carriage) beyond Felixstowe.

26. Do then the references to freight being payable at destination or anything else on the face of the bill transform the situation? I do not think so. The actual freight arrangements are not known, but the freight tariffs of MSC and any other carriers were incorporated into the bill by language within clauses 1 and 3. In practice, however, the freight will have been agreed, probably with Coniston, as part of the background to the sale and carriage. It was obviously not intended in practice for MacWilliam, the buyer, to pay for the freight element of its purchase twice. Nevertheless each carrier would have its remedy against the "merchant" for freight in accordance with its incorporated tariff, save to the extent that such rights arising under a general incorporation may have been superseded by any special arrangement. Then there is the stamped legend "On-carriage to Boston to be arranged by M.S.C. agents": that is consistent with clause 3. Finally there is the stamp: "Cargo to be cleared by U.S. Custom at port of discharge": but that, if a reference to a port in the US, cannot displace the parties' choice of Felixstowe as the port of discharge, and must be understood to refer instead to port of final destination.

27. For these reasons, I conclude that although MSC was contracted to arrange on-carriage to Boston, it was not contracted to carry the machinery to Boston until it entered into a new arrangement at some stage, the details of which are not reported, to on-carry the goods from Felixstowe. That was a separate contract of carriage, which entitled the shipper to demand a bill of lading and therefore, subject to the straight bill of lading issue, meant that the contract was *"covered by a bill of lading"* for the purposes of article I of the Hague or Hague-Visby Rules: see ***Parsons Corporation v. C V Scheepvaartonderneming "The Happy Ranger"*** [2002] 2 Lloyd's Rep 357.

"Port of shipment"

28. It is convenient to take this issue at this stage, since it is now apparent that it is in truth closely connected with the one contract or two issue. If there are two contracts, then it is hard to see how Felixstowe is not to be regarded as the *"port of shipment"* for the purpose of the second contract. The bill of lading which the shipper would have been entitled to have issued to it would presumably have stated Felixstowe as the port of shipment. This would not have been a mere case of transshipment at an intermediate stage of a single contract of carriage, as in **The Anders Maersk.**

29. If, on the other hand, the first question had been determined in favour of a single contract, then it may be that the port of shipment issue would not have been so obviously decided in favour of Durban rather than Felixstowe, seeing that the single contract would still have referred to Felixstowe as a port of discharge. If Felixstowe was a port of discharge it could, I suppose, be argued that it was also a port of shipment. However, it would in truth be a port of re-shipment. I suspect, therefore, that the answer would have been to regard Durban as the critical port of shipment, otherwise all the problems of a single contract governed by a changing regime, highlighted in Mr Schaff's submissions, would ensue. It is not perhaps impossible to have different parts of a single contract governed by a different legal regime, including a different proper law, although I think that this is more familiar to civil law jurisprudence than to the common law, and I would be sceptical about inferring any such intention on the part of the parties. However, this discussion merely emphasises that ultimately this question could be a matter of statutory interpretation rather than contractual construction. These are waters that the submissions of counsel have not entered. Since it is not necessary to decide whether Felixstowe would be a "port of shipment" within the meaning of section 1(3) of the 1971 Act on the hypothesis of a single contract of carriage, I would prefer to leave the question undetermined.

30. The critical question is now whether a straight bill of lading is within the regime of the Hague Rules and thus within the regime of the 1971 Act as well.

Is a straight bill of lading a "bill of lading or any similar document of title"?

31. The submissions of the parties on this issue are essentially straightforward, but have little point of contact. On behalf of MSC, Mr Croall submits that negotiability, or more properly speaking transferability, that is to say the ability to transfer the rights and liabilities under the bill of lading contract by endorsement or delivery to a succession of transferees, is essential to the nature and meaning of a "bill of lading" properly so-called. It is only

such a document that can be called a "document of title" or at any rate a "similar document of title", for only such a document is capable of transferring title to the goods concerned. That this is so can be traced back to the time when the law merchant developed the bill of lading and recognised in it a universal custom as to its nature. That this remains the position to this day is confirmed by the Law Commission's Report no 196 *Rights of suit in respect of the carriage of goods by sea"* and the ensuing Carriage of Goods by Sea Act 1992 (the "1992 Act"), which treat a straight bill of lading as if it were a sea waybill and not a bill of lading. The earlier 1971 Act also treated "a bill of lading" and "a non-negotiable document" separately in section 1(6)(a) and (b). As for the Hague Rules themselves, their travaux preparatoires demonstrate that in 1924 those responsible for the formulation of the Rules, consistently with the law both before and since, regarded transferability as the essence of a bill of lading.

32. On behalf of MacWilliam, however, Mr Schaff submits that all this is to ignore matters of greater significance. Although a straight bill of lading cannot be transferred down a series of transferees, it can be transferred at any rate once, namely to the named consignee, and that for the purpose of that limited transfer it performs all the functions of a transferable bill of lading. It is a "document of title" both for that reason and in any event because the consignee cannot obtain possession of the goods without its presentation (see the attestation clause set out at para 14 above). Moreover, the Hague Rules are not concerned with transferability per se, but with securing an international regime of minimum standards as to the substance of the bill of lading contract, so as to protect parties who are not privy to its negotiation themselves but are nevertheless bound by its terms by reason of its transfer to them. That is why as between immediate parties to a charterparty the Hague Rules regime does not apply and they therefore retain complete freedom of contract. However, the Rules' rationale applies equally to the first transferee even if he is also the only possible and last transferee: he, like any subsequent transferee, is not in privity with the shipowner prior to transfer. Moreover, since the Hague Rules are an international convention, they should not be construed too narrowly according to domestic English concepts. In this connection, the MSC bill of lading "looks and smells" like a bill of lading. As for the travaux preparatoires, they demonstrate that straight bills of lading were recognised in 1924, and that the Hague Rules were intended to embrace them. As for the Law Commission report and the 1992 Act, they come too late to affect the issue, and in any event proceed on a view of English law which either reflects too narrow and domestic a view or may even have proceeded upon a mistake. Thus at least since the Bill of Lading Act 1855 (the "1855 Act") a straight bill of lading was treated in exactly the same way, despite its limited transferability, as a fully "negotiable" bill.

33. Mr Croall seeks to answer some of these points as follows. He submits that a first transferee is not to be treated as a "third party" to the original bill of lading contract since he is an immediate party to an underlying sale of goods contract with the shipper and thus can influence the terms of the contract of carriage. As for the attestation clause, he submits that it only applies where the bill of lading is "negotiable" and that "duly endorsed" in it therefore means "duly endorsed as appropriate", which would not be the case where the bill is filled in as a straight bill. As for the 1855 Act, that did not apply to straight bills of lading precisely because they were not fully transferable.

34. The arbitrators agreed with MSC's position. Thus at paras 21/22 of their Reasons they argued as follows:

> *"21. We were not impressed by the argument put forward on behalf of the Claimants that the Hague-Visby Rules apply to straight-consigned bills of lading because a purposive construction of such conventions is necessary to give effect to the basic intention of redressing the imbalance of bargaining power between carriers and cargo interests. As we have already noted, we regard the primary objective of such international conventions as being to protect the interests of third parties to whom bills of lading can be expected to be negotiated but who do not have any say in the initial bargaining process which leads to the issuing of the bill of lading.*
>
> *"22. It did not seem to us to assist the Claimants to argue that the bill in this case must be presumed to be a bill of lading properly so described since it stated that it was a bill of lading and resembled in all superficial respects a bill of lading. The fact was that it was on a printed form which was clearly intended to be used for <u>both</u> negotiable and non-negotiable bills. The distinction between negotiable bills of lading and straight-consigned bills or waybills is fundamental and whilst Counsel for the Respondents was able to refer us to a number of decisions which appeared to support his proposition that the touchstone of the distinction between these two types of bills was that one was a negotiable instrument, the endorsement and delivery of which could affect the property [in] the goods shipped, Counsel for the Claimants did not seem able to find any persuasive support for his position on the authorities. We found ourselves inescapably drawn to the conclusion that the bill of lading in this case was a straight-consigned bill of lading which was not a document of title."*

35. In the commercial court Langley J also agreed with Mr Croall's submissions. The judge put the matter thus (at paras 21/23):

> *"21. In my judgment Mr Croall is right and Mr Schaff wrong in these submissions. A "document of title" in this context is, I think, the antithesis of a document which can evidence the title of only one person. It is general not specific to one person. It is a document by which goods can be transferred by endorsement and delivery of the document itself. A straight consigned Bill of Lading is not such a document. Indeed the parties to this Bill have a choice, exercisable by inclusion in Box (2) of the words "Order of" before naming the consignee, whether or not to constitute the Bill a document of title in the sense to which I have referred.*
>
> *"22. Whilst in terms of strict analysis Mr Schaff is right that no binding authority has determined the question, the consistent and overwhelming burden of judicial and other legal sources is against his submission.*

"23. The established definition of a bill of lading includes the characteristic of "transferability" of title to the goods: Scrutton on Charterparties, 20th Ed. Article 2, pages 1-2; Benjamin's Sale of Goods, 5th Ed. Para 18-007; Carver on Bills of Lading, 1st Ed paras 6-007 and 6-014. The Law Commission Report (Law Com No 196) which led to the Carriage of Goods by Sea Act 1992 noted, at paragraph 2.50, that a straight consigned bill of lading was not a document of title at common law. The terms of the 1992 Act itself reflect that in Section 1(2). I also agree with Mr Croall that the travaux preparatoires for the Hague Rules support the same conclusion. So, too, do the terms of Section 1(6)(b) of COGSA 1971 itself which make express provision for circumstances in which "a non-negotiable document" may result in application of the Rules."

36. In the light of these arguments it is necessary to seek to interpret the Hague Rules by reference not only to their background and own terms and purposes, but also to the subsequent viewpoints expressed in authorities, statutes and text-books.

The background to the Hague Rules

37. A good place to start is the Bills of Lading Act 1855. This provided in part as follows:

"WHEREAS, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner; and it is expedient that such rights should pass with the property…

1. Consignees, and endorsees of bills of lading empowered to sue.
Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

38. It will be noted first, that the preamble begins by citing the concept of a transferable bill of lading which by the custom of merchants passes property by its endorsement, but secondly, that section 1 extends the idea of passing contractual rights with the property not only to endorsees but also to consignees "*named in a bill"* where property in the goods passes "*by reason of such consignment"*. Mr Croall, who is concerned to submit that the expression "bill of lading" can *only* properly refer to a fully transferable bill and cannot describe a straight consigned bill, is forced to submit that the expression "Every consignee named in a bill of lading" does not embrace a bill of lading which is neither an "order" bill nor a bearer bill. It might be said that this limitation is not immediately apparent in the width of the language used ("*Every consignee named"* (emphasis added)), nor in the purpose of this limitation. Why would Parliament not wish a named consignee under a straight bill of lading to have contractual rights and liabilities under the bill of lading passed to him as well as the property in the goods?

39. In ***C P Henderson & Co v. The Comptoir D'Escompte de Paris*** (1873-74) LR 5 PC 253 the Privy Council had to consider a "bill of lading…in the usual form, with this difference, that the words "or order or assigns" are omitted" (at 259/260). The Privy Council was prepared to assume that such a bill was not a negotiable instrument. It said (at 260): *"It has been argued that, notwithstanding the omission of these words, this bill of lading was a negotiable instrument, and there is some authority at nisi prius for that proposition; but, undoubtedly, the general view of the mercantile world has been for some time that, in order to make bills of lading negotiable, some such words as "or order or assigns" ought to be in them."*

40. On the basis of this assumption, the question for decision was the effect of the onward endorsement of such a bill by the consignee to the defendant bank in circumstances where the shipper and consignee had privately agreed that the proceeds of sale of the goods should be remitted to London as security for an advance made by the shipper to the consignee. It was held that such endorsement gave the bank only an equitable right to the goods, but that the bank subsequently added to that a legal title when possession of the goods was actually delivered to it. In such a case, whose title was to be preferred, that of Henderson the shipper, or that of the bank the endorsee? That depended on whether the bank had any notice of the trust in favour of Henderson. It was argued that the omission of the usual words "or order or assigns" put the bank on enquiry, but that argument was rejected. It was held first, that there was no evidence as to why the words were omitted, and secondly, that even if the omission had been observed, it would not have amounted to notice of the arrangement. This litigation did not involve a shipowner and thus cannot throw any direct light on the problem under discussion. It seems however that as late as 1873 the significance of the words "or order" for the negotiability of a bill of lading was still regarded as unsettled; that such a document, even though assumed not to be a negotiable instrument, was still referred to throughout the Council's opinion as a "bill of lading"; and that even the use of such a bill did not prevent its endorsement passing an equitable title. There is little support in such treatment for regarding the expression "bill of lading" as reserved in some way exclusively for the admittedly usual form of a bill to order.

41. The researches of Mr Croall, for which I am grateful, have produced an extract from the first edition of *Carver's* treatise on Carriage of Goods by Sea, 1885. He there (at para 487) described the bill of lading as – *"generally a negotiable instrument, carrying with it the right to demand and have possession of the goods described in it…But in order that it may have this character, it must, it seems, purport on the face of it to be negotiable…It usually states that delivery is to be to the "order or assigns" of the consignee, or of the shipper; and words of this kind seem essential to the negotiability."*

42. *Carver* then went on to refer to *Henderson*. What may be observed about this description is the careful language that whereas the words "order or assigns" seem essential to negotiability in the stated sense, it is not suggested

that negotiability is essential to the existence of a bill of lading; and *Carver* was cautious to say that the bill of lading was "generally" a negotiable instrument.

43. In ***The Ship "Marlborough Hill" v. Alex Cowan and Sons Limited*** [1921] AC 444 the question was whether a document, described within itself as a bill of lading but written less usually in the form of a receipt of goods *for* (rather than *of*) shipment, was a bill of lading for the purposes of the Admiralty Court Act, 1861, which set out the jurisdiction of the admiralty court for an action in rem. The claim had been brought by consignees or indorsees of such documents, which provided for delivery to the shipper's order. The Privy Council held that it was a bill of lading within the meaning of the Act. Among the incidents of the document noted in the speech of Lord Phillimore was that it purported to be negotiable. It seems to me that the observations of Lord Phillimore offer some assistance to both sides of the argument. Mr Croall prays in aid the comment (at 452) that "If this document is a bill of lading, it is a negotiable instrument." On the other hand, Mr Schaff points to passages which stress other incidents of the document as being standard for a bill of lading, such as detailed terms and conditions in familiar form; the fact that the document is called a bill of lading many times in the course of such provisions and that it is made subject to the US Harter Act; the fact that it provides that "If required by the shipowner, one signed bill of lading, duly endorsed, must be surrendered on delivery of the goods"; and that it "ends in the time honoured form", viz "In witness whereof the master or agent of said vessel has signed three bills of lading, all of this tenor and date, of which if one is accomplished, the others shall be void" (at 452/3). I do not for my part read Lord Phillimore as saying that negotiability is essential to the existence of a bill of lading nor even that it was its defining aspect. If that was so, he would not have to look further. He was rather emphasising that the document would work as merchants would expect a bill of lading to work. Thus he said (at 452):

"Money can be advanced upon it, and business can be done in the way in which maritime commerce has been carried on for at least half a century, throughout the civilised world. Both parties have agreed to call this a bill of lading; both, by its terms have entered into obligations and acquired rights such as are proper to a bill of lading All the other incidents in its very detailed language are such as are proper to such a document."

44. In my judgment this tells one nothing as to whether a non-negotiable bill of lading could not properly be called such. Indeed, it would be a remarkable thing if a claim by a consignee under a non-negotiable bill of lading would not merit falling under the admiralty jurisdiction.

45. In 1924, on the eve of the Hague Rules, ***Thrige v. United Shipping Company, Ltd*** (1924) 18 Ll L Rep 6 suggests that at any rate in England (for the position in the US, see below) the use of a straight bill of lading was regarded as unusual and its ramifications still unsettled. The plaintiff Thrige was a Danish seller of machinery to a purchaser in England, the Victoria Company. The terms of sale were cash against documents. Thrige used a Danish line to carry the machinery and took a straight bill of lading which named the Victoria Company as the consignee without any reference to "or order or assigns". The goods were discharged at Harwich and proceeded by rail to London, where the Great Eastern Railway delivered them to the Victoria Company without production of the bill of lading, and Thrige, whose documents had not been taken up, thereby lost the value of the shipment. The role of the defendant line in this matter was obscure: at any rate the actual decision in the case was that no cause of action had been shown against it at all, since it acted as a mere agent without possession of the goods. However, the interest of the case for present purposes is that, of all judges, Scrutton LJ himself was intrigued by the issues which might have arisen if the carrier itself, the Danish line, had been sued. He described the bill of lading as being "in a very odd and unusual form" in that it was taken neither to the shipper's nor to the consignee's order (at 8). At any rate he appears to have been quite comfortable in describing the document as a bill of lading. He went on to say this (at 9):

"That renders it unnecessary to decide the question which I personally feel considerable interest in, i.e., as to whether, when a bill of lading is made out to a consignee and the property passes on shipment, the shipowner who delivers to the named consignee without production of the bill of lading is or is not guilty of any breach of contract. It is not necessary to decide it; and I only wish to say that if ***the Stettin*** *case, (1899), 14 P.D. 142, decides there is such a duty, I think the Stettin case may require consideration. I am not expressing a final opinion, but I do not at present agree that with a statement in the simple form that I have stated it, where the property is passed on shipment and the bill of lading is to a named consignee, the agent of the shipowner gets into any difficulties if he delivers to the named consignee without production of such a bill of lading. It is also unnecessary to determine whether such a bill of lading is or is not a negotiable instrument."*

46. There are a number of separate strands for consideration in that dictum. One raises the question whether the proper analysis of a sale cash against documents is that property passes on shipment (subject to a vendor's lien) or whether property does not pass until the exchange of payment and documents. Another is the question, which I will consider separately below, whether a carrier under a straight bill of lading is entitled to deliver the goods to the named consignee without production of the bill of lading. On the submissions in this court there is a dispute both as to this issue in itself and also as to whether, if production of the bill of lading remains necessary, this by itself makes a straight bill a "*similar document of title*". What for the present is of particular interest, however, is that as late as 1924 even so hugely experienced a figure as Scrutton LJ himself should be expressing uncertainty as to the effect of a straight bill of lading.

The US law prior to the Hague Rules

47. In the United States, on the other hand, the straight bill of lading was sufficiently recognised at a relatively early stage as to be given specific treatment in the Pomerene Bills of Lading Act 1916 (USC title 49). It is defined (in

section 2) as a bill in which it is stated that the goods are consigned or destined to a specified person. Such a bill *"shall have placed plainly upon its face by the carrier issuing it 'nonnegotiable' or 'not negotiable'"* (section 6). Section 29 provides:

"29. A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby…

Section 32 provides:

"32. A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before notification…"

48. It appears that under US law a straight bill of lading within the Pomerene Act is subject to the minimum contractual standards of the Harter Act 1893, section 1 of which applied the Act's scope to "any bill of lading or shipping document". The Harter Act was a leading precursor of the Hague Rules.

The Hague Rules

49. *Scrutton* at 404ff contains helpful "Introductory Notes" concerning the history of the Hague Rules both in their original and in their amended form (the Hague-Visby Rules). I would extract the following:

"At common law the shipowner, whether he carried the goods under a charterparty or under a bill of lading, could modify his prima facie liability as carrier as much as he wished, and in the course of years the protective exceptions in these documents increased both in number and complexity to such an extent that a careful scrutiny of the documents became necessary in order to ascertain what rights they contained against the shipowner. So far as charterparties were concerned this was unobjectionable; the decreased liabilities enabled the shipowner to carry at a lower rate of freight and the charterer had ample opportunity of ascertaining the terms of his contract. With bills of lading, however, different considerations arose. Not only were they contracts of carriage but they were also documents of title, which by virtue of mercantile custom and the Bills of Lading Act 1855, passed freely from hand to hand as part of the currency of trade conferring on their holder both rights and liabilities. Thus consignees, bankers, and others who had not been parties to the original contract and had no effective control over its terms, became interested in the bill of lading without having had any real opportunity of examining its terms or assessing the value of the security it afforded.

"In the years before and immediately after the 1914-18 War, as the terms of bills of lading became more diverse, the need for standardisation became more and more insistent and an increasing demand was made on the part of importers and exporters for the imposition by legislation, on the lines of the American Harter Act 1893, of certain minimum liabilities of sea-carriers who issued bills of lading…"

50. The distinction drawn between the freedom of contract which was unobjectionable as between immediate parties to a contract of carriage and the need for protection for subsequent transferees is the explanation for a number of the provisions of the Hague Rules. I need to set out the following extracts:

"Article I.-Definitions…

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or any similar document of title regulates the relations between a carrier and a holder of the same.

Article V.-…

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules…

Article VI.-Special Conditions

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier in respect of such goods…provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement."

51. Thus, articles I(b) and V make it plain both that the Rules do not apply to charterparties at all (because they are only contracts between immediate parties) and that they only apply to bills of lading issued under a charterparty once they have started to regulate the relations between the carrier and a bill of lading holder. This latter rule reflects the doctrine that when a bill of lading is issued to a shipper who is also in charterparty relations with the carrier, then as long as the bill of lading remains in the shipper's hands it operates only as a receipt and does not in the least affect the contractual regime under the charterparty: once, however, the bill of lading is transferred into the hands of a third party, then it springs into life as a separate contract of carriage, which is why it must

comply at the outset with the requirements of the Rules. *Scrutton* at 424 mentions as an example of "the moment" from which a bill of lading issued under a charterparty regulates the relations between a carrier and the bill's holder as being "if the charterer ships goods and takes a bill of lading making the goods deliverable to a named consignee, the time when the bill of lading is delivered to the consignee". Unless this text is written on the assumption that a bill of lading must by definition be negotiable, that reads very much like the case of a straight bill of lading.

52. This court was not addressed by counsel as to the significance of article VI. I would therefore be reluctant to place too much weight on its terms. It seems to me, however, to be saying that a shipper and a carrier may agree any terms for carriage provided that (i) no bill of lading is issued, (ii) the terms agreed are embodied in a document described instead as a "receipt" and marked as "non-negotiable", and (iii) the shipments concerned are of a special nature such as reasonably to justify a special agreement. This article effectively renders such an exceptional, permissive regime one that exists only at the fringes of carriage by sea. It gives no support to the hypothesis that a straight bill of lading dealing with ordinary commercial shipments would lie outside the international minimum standards of the Rules.

53. It may be noted that when the Hague Rules were scheduled to the 1924 Act, section 4 of the latter disapplied the final proviso of article VI in relation to any carriage of goods from one port in Great Britain or Northern Ireland to any other such port (or in the Irish Free State), so that in relation to such shipments article VI, which begins with the paramount words "Notwithstanding the provisions of the preceding articles", entitles the shipper and carrier to operate in a regime of complete freedom of contract in relation to goods of any kind, provided only that no bill of lading is issued and instead the terms of carriage are embodied in a receipt marked as non-negotiable.

The interpretation of the Hague Rules

54. It is by now well recognised that English statutes which give effect to international conventions need to be interpreted with the international origin of the rules well in mind. In ***Stag Line v. Foscolo, Mango & Co*** [1932] AC 328, with reference to the Hague Rules themselves as incorporated into the 1924 Act, Lord Atkin said (at 342/3): *"It will be remembered that the Act only applies to contracts of carriage of goods outwards from ports in the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity, it is, therefore, important that the courts should apply themselves without any predilection or the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them."*

55. And Lord MacMillan famously said (at 350) – *"As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."*

The travaux preparatoires of the Hague Rules

56. Both Mr Schaff and Mr Croall relied on the travaux preparatoires as pointing in their favour, while both recognised that in this area *"only a bull's eye counts"*. The arbitrators tended to think that they supported Mr Croall's position, for they said (at para 18 of their Reasons): *"it did seem to us to be clear that there was nothing in these records of the discussions leading to the Convention to suggest that the expression "bill of lading" in the strict legal sense was intended to extend to documents which were not negotiable. This was perhaps not surprising, since our understanding is that the overwhelming concern of the international body which were responsible for this Convention was to ensure that the progress of international trade was promoted by safe-guarding the rights of third parties to whom bills of lading might be negotiated-."*

57. I would readily agree with the last sentiment, but this passage tends to beg two or even three questions at the heart of this case: one is whether, there was in 1924 a "strict legal sense" limiting the expression "bill of lading" to a negotiable document: Scrutton LJ's dictum in ***Thrige*** would suggest there was not. The second is whether the logic of the legislators of the Hague Rules did not extend to all third parties to whom bills of lading might be transferred, such as a named consignee. The third is whether too narrow a domestic view of things is in any event the correct approach.

58. Langley J also considered that the travaux preparatoires supported Mr Croall (see para 23 of his judgment, cited at para 35 above). It appears, however, that both the arbitrators and the judge had less of the material than was available in this court.

59. As often occurs, the travaux preparatoires are rich in ambiguity. I am not sure that either party has scored a bull's eye. What, however, does I think emerge, and does so with some clarity, is that the assembled representatives were anxious to preserve freedom of contract for immediate parties and protection for third parties (that is not in dispute); that the case of straight bills of lading was discussed in conference, without it must be said an unequivocal result; but also that it is impossible to find any clear statement of an intention to exclude straight bills of lading from the protection of the Rules. I shall try to indicate the basis of these conclusions.

60. At the London Conference held in October 1922 (see *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague* Rules, edited by Prof Sturley and translated by Caroline Boyle, 1990) a question was asked as to bills of lading issued under charterparties where shipper and receiver are the same the same person (ie, as I suppose, where the shipment is between two branches of the same organisation): what if the bill of lading was not negotiated? Sir Leslie Scott (recently solicitor-general) said that in such a case the bill of

lading remained a mere receipt and the contract was to be found in the charterparty, *"and it is only when it is negotiated…and gets into the hands of a third party that it will represent the conditions of carriage…I have always understood up to now that the intention, at The Hague and subsequently, always has been in those cases [ordinary charterparty shipments] to leave freedom of contract unaffected"* (at 391).

The Chairman (Sir Henry Duke, President of the Probate, Divorce and Admiralty Division) said (at 395): *"At The Hague the view was that there was business which was between two individuals, and with which the Bankers and Insurers and the world at large had nothing to do, where the shipper was the receiver of the goods and was intended to be, and that you need not legislate about them…"*

61. That was on 10 October. On 24 October, a discussion was initiated which focused on the "bill of lading as a negotiable document, bearing the clause "to order"" and the role of a subsequent holder "who took no part in its drafting" (at 349). At one point, however, there was this exchange (at 352/3):

"Mr. De Rousiers. – That is what we understand by "connaissement négociable" (negotiable bill of lading) or "connaissement à personne dénommée" (bill of lading for a designated person). In fact, negotiable bills are the vast majority.

Mr Beecher. – In so far as I understand Sir Leslie Scott, he seems to believe that these rules, as they are defined, only apply to bills of lading that are negotiated or negotiable. But the opinion of the London Conference was (and in my opinion, that is essential) that these rules apply to all bills of lading whether negotiable or not. I am told that a bill of lading that is not deemed negotiable in England is so on the Continent.

The Chairman [Mr Louis Franck]. – Not negotiable, but simply transferable under the rules concerning the transfer of civil obligations according to law.

Mr Beecher. – But Sir Leslie Scott seems to be mistaken about what we understand as the subject of these rules. That is why I want to know whether the rules apply to all bills of lading indiscriminately, whether negotiable or not.

The Chairman. –What does the Harter Act say on the matter?

Mr Beecher. – It applies to all bills of lading indiscriminately.

Sir Leslie Scott. – It is the same here. The rules apply to all bills of lading, but there is nothing in the convention that says that when a charterer by means of his charter party receives a bill of lading from the shipowner, it constitutes a new contract between him and the shipowner."

62. That exchange, between, as it appears, representatives of the UK, France and the US, would seem to be directly in point and favours Mr Schaff. On the other hand, just a few pages on (at 385), Mr Franck raises the same question again, with specific reference to article I(b): *"Let us now return to article 1(b), which we had left to one side. With all possible respect to the authors of this proposal, I do not find it very clear. Do you intend to exclude those bills of lading called, "connaissements à personne dénommée" (bills of lading for a denominated person)."*

63. To which Sir Leslie Scott replies: *"I believe the French delegation considers the drafting adequate."* It is not clear whether Sir Leslie Scott is saying, consistently with his answer a few short pages before, *"Yes, as the French delegation itself accepts",* or whether he is simply failing to answer the question. It would make more sense to suppose the former.

64. So far, these materials were not before the arbitrators or judge. They assist Mr Schaff. Indeed, the exchange quoted at para 61, taken by itself, could be described as a "bull's eye". The balance of the materials discussed below, however, were before the arbitrators and/or judge.

65. The conference resumed in October 1923 in Brussels. At 432/3 there was a discussion as to the meaning of "any similar document of title" in article I(b):

"Mr. Berlingieri indicated that this idea was expressed in the comments of the German delegation, where it said "document giving to the legitimate holder the right to the goods carried."

Sir Leslie Scott added that it was a document that could be negotiated with a banker.

Mr. Ripert asked if one might apply these rules to a nominal [ie a straight] bill of lading?

The Chairman replied that one could except when it was a matter of a non-negotiable bill of lading. In such a case article 6 [see under para 50 above] would apply.

Mr Ripert verified that the rules did not apply to a bill of lading that was non-negotiable and felt that this should be pointed out in article 1.

Sir Leslie Scott observed that that happened in article 6."

66. A few lines later the question was asked what a "*similar document of title"* might be. Sir Leslie Scott gave a mate's receipt as an example and added: *"The desire was to avoid the possible side-stepping of the convention by the parties through the adoption of a similar document that was not called a bill of lading."*

67. As far as it goes, this passage might seem to assist Mr Croall rather than Mr Schaff, but it is difficult to interpret, possibly because of terminological uncertainties. A distinction is made between a negotiable and a non-negotiable straight bill. Since a straight or nominal bill is by definition one made out to a named consignee only, what is the difference? It could perhaps depend on the use to which the straight bill is put. Where it is not used

with a contract of sale, as where the shipper and receiver are the same person, or perhaps two different companies within the same group, then there might be no question of any transfer of title. Where, however, the bill of lading is used as part of international trade, for instance under a cif sale under which title is not intended to pass save against payment for the documents, then although the bill, not being an "order" or bearer bill, is not negotiable in the full sense, ie repeatedly transferable, it is transferable once. It may be that "negotiable" is being used in these passages both in the sense of meaning fully transferable and in the sense of limited transferability. That would at any rate explain why Scrutton LJ in ***Thrige*** was uncertain whether a straight bill of lading was to be regarded as a negotiable instrument or not (see at para 45 above). Moreover, the reference to the future article VI is interesting, for that is not concerned with bills of lading at all, and is limited to shipments outside the ordinary course of commerce. It is very difficult indeed to think that straight bills were thought of as falling within that description.

68. It is also interesting to note that in Sir Leslie Scott's view the expression "or any similar document of title" was intended as an anti-avoidance device. As such it is a useful one, for where the document can affect title, it has the capacity to affect third parties, who, of course are the object of the conference's concern.

69. I think that my understanding of these texts is supported by a further discussion a few pages on (at 435/6) about the language in article I(b) "from the moment" etc. Article I(b) says "from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same". Various expressions were canvassed, such as "from the moment the bill of lading is negotiated" and "from the moment it is remitted to a third party". The trouble with the latter was the possibility that a third party "might be an agent of the shipper"; moreover, where goods were simply sent abroad by a shipper to its own factory, "there is no third-party interest". It may not be a coincidence that the enigmatic word "negotiated" was passed by. At any rate the chairman, Mr Franck, remarked – *"that it would be up to the courts to decide in each case if there was a bill of lading, that is to say, a document representing the goods on board a specific ship giving title to delivery."*

My understanding is also supported by this passage (at 441): *"The Chairman stated that as soon as a bill of lading could be negotiated and placed in the possession of a holder, it should conform to the Hague Rules…No one carried goods without a bill of lading, except in cases that were altogether out of the ordinary, which there is no point discussing here, because the question posed is purely theoretical. In general, the shipper had a bill of lading, and he needed this document of title to receive the goods at their destination, to prove his rights toward the captain, to insure the goods, to get credit.* ***What one more often sees, perhaps, are straight bills of lading, but in every case there was a bill of lading or similar document of title"*** (emphasis added).

70. On the other hand, as a matter of counterpoint there is the following passage (from a subsequent day's session) in Mr Croall's favour (at 477/8):

"The Chairman [Mr Loder] noted that in the convention everything concerning the bill of lading had been regulated and that article 6 had been inserted later to show that in this case there was freedom of contract. From the time when the bill of lading was negotiable [sc negotiated?], the convention applied. But if there was no bill of lading, it did not apply and freedom of contract still existed.

Sir Leslie Scott attested that the scope of the convention was just that indicated by Mr Loder. The possibility existed of issuing a non-negotiable document. Here the term "bill of lading" meant an ordinary bill of lading, that is to say, negotiable.

Mr Berlingieri wanted there to be understanding on the meaning of the word negotiable. He would prefer the word "non-transferable" instead of "non-negotiable" because a straight bill of lading could be a negotiable bill of lading provided the transfer formalities were fulfilled. One might therefore evade the convention by always creating a straight bill of lading and by later fulfilling the formalities required for transfer.

Mr Franck believed that the concept of the first conference had been for the bill of lading to be "to bearer" or "to order". If it were a straight bill of lading, one might allow transfer by the normal method. It should not be feared that, by means of transfer under general law, one could evade this provision."

However, almost immediately another representative, Mr Sohr, noted that – *"the express goal of article 3 [sc article III, rule 8] had been to prevent frauds and agreements like those indicated by Mr. Berlingieri. It was evident that one could not evade the convention by creating a straight bill of lading and by having recourse to civil transfer. It was still necessary that it should not apply to ordinary commercial cargoes since the last paragraph [sc of article VI) expressly prevented it."*

71. That is a statement in Mr Schaff's favour, for it makes a plain distinction between the subject matter of article VI and the ordinary case of a straight bill of lading.

72. This led to a further discussion of the purpose of article VI. Mr Franck returned (at 478/9) to the charge – *"…But what was established was that there was no way of evading, by means of this text, the chief object of the convention, which was to protect negotiable bills of lading "to order".*

The Chairman re-affirmed this point of view. The convention only regulated the question of bills of lading. If one was not issued, the absolute freedom of the parties remained. But if one created a bill of lading, it was necessary to do so according to the rules decreed by the convention.

Mr. Ripert wanted a clear statement on two points. In France there was an important trade with the United States, which imported typewriters, industrial machines, etc. This trade was carried out by firms that shipped these machines to themselves or their branch offices with no intention of transferring the bills of lading to third parties. It should be understood that it was permissible to issue a nominal bill of lading for these machines that did not include the clause "to order" and to which the rules did not apply.

Sir Leslie Scott pointed out that the *rules always applied to ordinary commercial cargoes* [emphasis added].

Mr. Ripert asked what should be understood by exceptional cargoes.

Sir Leslie Scott cited some examples. Aboard was a cargo of cotton damages by seawater and there was a desire to reship what remained of this damaged cargo. Another example might be the shipment of a product containing some new material when it was not known whether this cargo would suit the ship, for which it might be dangerous. That was an experimental shipment. It was the beginning of what would perhaps later become an ordinary trade, but for the time being it was still an exceptional cargo."

73. It seems to me that this passage confirms, what appears to me the natural construction of article VI, that straight bills of lading were not intended to fall within it. This passage also demonstrates that although a bill of lading under which a shipper ships to himself (the French example of the typerwriter trade) would, for reasons quite outside article VI, lie beyond the rules since such a bill of lading would remain a mere receipt, nevertheless, where ordinary commercial cargoes were concerned, the rules were intended to bite, even if, as I would hazard, the bill of lading was a straight (nominal) one.

74. This is I think confirmed by a further passage, the last that I will cite, a page later (at 480) as follows:

"Mr. Ripert felt that that was not enough because the nominal bill of lading in France could be transferred. Would it be necessary to make the bill of lading completely non-transferable [sc to fall within article VI]?

Sir Leslie Scott stated that a nominal bill of lading fell just as much under the convention as any other bill of lading, even if it had not been transferred."

75. In sum, I would regard this material as showing that at the heart of the conferences' concern was the archetypal fully negotiable, ie repeatedly transferable, bill of lading, which of course was the paradigm case of a document of title and an instrument which therefore would come into the hands of third parties. Such a document was the prime focus of the rules. On the other hand there were a number of other cases where it is clear that the representatives intended the rules to be disapplied: such as the charterparty, such as the bill of lading issued under a charterparty to a shipper in whose hands it remained a mere receipt, such as a mere receipt marked non negotiable in the context of out of the ordinary shipments, and such as a bill of lading which could never come into the hands of a third party as a document of title because it was consigned by a shipper only to himself. That left the question: what of a straight bill of lading, which was not a mere receipt in the hands of the original shipper, which was not a consignment by a shipper to himself, and which was not an extraordinary shipment, but an ordinary contract of carriage in international trade pursuant to a sale contract under whose terms title was to remain with the seller/shipper until transfer of the shipping documents, such a document as was in every sense like an "order" bill of lading save that the shipment was consigned to a named consignee and thus could only be transferred once? At the end of the day, I do not think that there is anything in the travaux preparatoires which I have seen which unequivocally states that such a case is outside the scope of the rules, and there is much in that material which points in the opposite direction.

Authorities from the Hague Rules to the 1971 Act

76. It took the best part of twenty years for a British court to consider the question of a non-negotiable document by reference to the Hague Rules and then it fell to the Northern Ireland court of appeal to do so, in *Hugh Mack & Co, Ltd v. Burns & Laird Lines, Ltd* (1944) LI L Rep 377. The shipment was of men's clothing from Belfast to Glasgow, carried pursuant to a consignment note and receipt stamped "Non-negotiable". The consignment note named consignees in Scotland and stated: *"Please receive for forwarding per Burns and Laird Lines' steamers the undernoted goods…"* These documents were retained by the shipper. The goods were damaged and the shipper claimed against the carrier, which relied on terms incorporated into its receipt. The shipper said that the Hague Rules applied by virtue of the 1924 Act. The claim failed on two grounds. The first was that the consignment note and receipt was not a bill of lading or any similar document of title; the second was that in any event the parties had freedom of contract under article VI as amended in the case of coastal trade within the British Isles and Ireland by section 4 of the 1924 Act. As to the first point Andrews LCJ said this (at 383):

"Such a receipt, even if it can be properly described as a "document of title," is not "similar to" a bill of lading. It has none of its characteristics. It is different in form; it is given at a different time; it bears no stamp; it does not acknowledge the goods to be on board any particular ship, nor, indeed, does it acknowledge a shipment on board at all; it is retained by the consignor, not sent to the consignee; above all, it is not a negotiable instrument, the indorsement and delivery of which may affect the property in the goods shipped."

77. Mr Croall relies on that "above all"; but of course a document which was retained and was never intended to be sent to the consignee as a symbol of the goods could never have affected the property in the goods. It is plain, moreover, that the receipt was never treated as a "bill of lading" of any kind, nor *similar* to one.

78. ***Gardano & Giampieri v. Greek Petroleum George Mamidakis & Co*** [1961] 2 Lloyd's Rep 259 is another of the small number of cases in English law which are concerned with straight bills of lading. The shipment in that case was

made by Greek Petroleum under a c&f sale contract with the Greek Ministry of Commerce and pursuant to a charterparty between Greek Petroleum and the claimant shipowner, Gardano. The bill of lading simply named the Greek Ministry as consignee. The shipowner argued, in reliance on section 1 of the Bills of Lading Act 1855 (see para 37 above) that the shipper had lost its title to sue as a result of the transfer of the bill of lading to the consignee. That argument failed on a number of grounds, one of which was that section 1 of the 1855 Act did not operate where property had passed under the express terms of the sale contract *not* on or by reason of the consignment but ex the loading installation. If, however, Mr Croall were correct in his submissions, section 1 could never have applied in any event. But for the special terms of the sale contract, however, McNair J would have treated it as a typical cif or c&f contract, which he described in these terms (at 265):

"It is quite true, and of course, commonplace law, that, in an ordinary contract of sale in the traditional c.i.f or c. & f. form, the seller discharges his obligations as regards delivery by tendering a bill of lading covering the goods. It is not necessary for me here to state all the qualifications involved, but the contract is essentially one which, though not a sale document, has been correctly described as a sale of goods performed by delivery of documents, and in the normal way, of course, the property passes when the documents are taken up."

79. This question was further discussed in the Privy Council in ***Kum v. Wah Tat Bank Ltd*** [1971] AC 439 at 446. The documents in that case were mate's receipts stated to be consigned to a named consignee and marked "non-negotiable". The case was decided on a different point, but at 446 Lord Devlin said:

"It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title. But it has never been settled whether delivery of a non-negotiable bill of lading transfers title or possession at all. The bill of lading obtains its symbolic quality from the custom found in Lickbarrow v. Mason and that is a custom which makes bills of lading "negotiable and transferable" by endorsement and delivery or transmission. To the same effect the Bills of Lading Act, 1855, recites that a bill of lading is by the custom of merchants "transferable by endorsement". There appears to be no authority on the effect of a non-negotiable bill of lading. This is not surprising. When consignor and consignee are also seller and buyer, as they most frequently are, the shipment ordinarily serves as delivery (Sale of Goods Act, 1893, sect. 32(1) and also as an unconditional appropriation of the goods (sect. 18, rule 5(2)) which passes the property. So as between seller and buyer it does not usually matter whether the bill of lading is a document of title or not."

80. So the point remained undecided. However, I understand Lord Devlin here to be speaking purely generally about the sale of goods issue. I can see no reason why as between a seller and a buyer under a cif sale the usual principle discussed by McNair J in *Gardano & Giampieri* does not apply, even in the case of a straight bill. The seller does not wish to part with property unless the buyer pays for the documents, and the seller/shipper who is left with both goods and documents wishes to be protected against losing his goods to a consignee who is allowed to take delivery of them from the ship without production of a bill of lading.

81. ***The Maurice Desgagnes*** [1977] 1 Lloyd's Rep 290 is a decision of the Canada Federal Court. The issue was whether a document, which was not described as a bill of lading, was not issued by or with the authority of the carrier, and which recorded shipment by Canadian General Electric Co at Barrie, Ontario, of goods consigned *to itself* at St John's, Newfoundland, was a bill of lading within the meaning of the Hague Rules as scheduled to the Canadian Carriage of Goods by Water Act 1970. Reference was made to *Hugh Mack*. Dube J concluded as follows (at 296):

"The document before the Court is not titled "bill of lading" and there is nothing to indicate that the carrier intended it to be a bill of lading. In fact the defendant carrier in his defence alleges that it did not issue a bill of lading. The document has to be considered as a mere receipt given by the forwarder to the shipper, and not a negotiable bill of lading issued by the shipowner and signed by the master or other agent in authority."

Although relied on by Mr Croall, I do not think that this case takes the matter any further forward at all.

The Carriage of Goods by Sea Act 1971

82. The 1971 Act was the medium by which the Hague-Visby Rules were introduced to English law. As in the case of the 1924 Act, the 1971 Act required a "*bill of lading or any similar document of title*". However, the concept of a "receipt which is a non-negotiable document marked as such" and which "*expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading*" makes its entrance. The relevant provisions are sections 1(4) and (6), as follows:

"(4) Subject to subsection (6) below, nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.

"(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to –
(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and
(b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading,

but subject, where paragraph (b) applies, to any necessary modifications and in particular with the omission of Article III of the Rules of the second sentence of paragraph 4 and of paragraph 7."

83. As for the Hague-Visby Rules scheduled to the 1971 Act, article I(b), article V, and article VI remained as they had done under the Hague Rules.

84. The concept of a receipt which is a non-negotiable document marked as such derives from article VI of the Hague Rules: but there, as in the same article of the Hague-Visby Rules, it was a means for contracting out of the Hague Rules; whereas under section 1(6) it is an alternative means for incorporating the Hague Rules. However, section 4 of the 1924 Act, which disapplied the final proviso of article VI in the case of coastal voyages, now disappears.

85. Mr Croall relies on the concept of a non-negotiable receipt in section 1(6) as being an indication that a bill of lading within the meaning of the 1971 Act, and therefore, it is suggested, within the meaning of the Hague Rules themselves, is something different from a bill of lading. The arbitrators and the judge endorsed that submission. However, I am not convinced by this reasoning. A non-negotiable receipt is not prima facie the same thing as a straight bill of lading. A premise to the contrary would mean that all talk of a straight bill of lading is incoherent, a contradiction in terms, and that would make nonsense of much of the discussion of the issue which I have cited above. There was no investigation in counsel's submissions into the origins of the distinction drawn in section 1(6), but I would hazard that it derives from the previous concepts of article VI and section 4 of the 1924 Act. Article VI says that you are only very exceptionably permitted to avoid issuing a bill of lading where otherwise you would be required to do so, and thus to take yourself outside the Hague Rules, but that when entitled to do so you have to do so in a very clear manner, avoiding the language of bill of lading and making it clear that the document concerned, described as a receipt, is non negotiable. It is clear from the terms of article VI above and from the travaux preparatoires that article VI is not covering the ground of a straight bill of lading. Section 4 of the 1924 Act said that you could use that device in less restricted circumstances, namely in all coasting voyages between ports in the British Isles including all of Ireland. Section 1(6) of the 1971 Act now provided that the same technique could be used not only to take you outside the Hague Rules but, where the document also makes it clear that the Hague- Visby Rules are to govern as if the document were a bill of lading, to bring you back inside the Rules. It appears that such documents are in use on short journeys, such as cross-channel trips, where it is not necessary or practicable to employ a bill of lading surrender of which by the receiver is required to obtain delivery of the goods. Nevertheless, there is no inevitable desire in such a trade to stand outside the terms of the rules; and so special provision was made to allow such documents to come back within the regime of the rules. See *The Vechscroon* [1982] 1 Lloyd's Rep 301, where the document covered the carriage of sides of pork from Poole to Cherbourg and was described as a "commercial vehicle movement order"; and *The European Enterprise* [1989] 2 Lloyd's Rep 185, where the carriage was of a refrigerated tractor and trailer from Dover to Calais under a document described as a consignment note/way-bill in respect of a contract which expressly provided that no bill of lading would be issued. It would be quite understandable that the United Kingdom, with its enormous trade between its own islands and the Continent, might wish to make special provision for such circumstances.

Up to the Carriage of Goods by Sea Act 1992

86. In ***The Captain Gregos*** [1990] 1 Lloyd's Rep 310 there was a claim in tort by purchasers of a cargo of oil which had been carried under bills of lading which incorporated the Hague-Visby Rules. There was an alleged theft of part of the cargo, and the question was whether article III rule 6 of the rules barred the claim on the ground that it had not been brought within one year. The court of appeal held that it could not finally determine the issue on the present facts, because it was not yet clear whether the claimants were parties to the bills. It was in this context that Bingham LJ said (at 317/8):

"(1) As s. 1(4) of the Act and arts. I(b) and X of the rules in particular make clear, the bill of lading is the bedrock on which this mandatory code is founded. A bill of lading is a contractual document with certain commercially well-known consequences when endorsed and transferred. It is not clear to me why the code should treat the existence of a bill of lading as a matter of such central and overriding importance if the code is to apply with equal force as between those who are not parties to the contract which the bill contains or evidences."

87. I mention this citation only because it has been relied on in a subsequent case (see para 109 below) concerning straight bills of lading as a definitive statement of the meaning of a bill of lading, viz that only a fully negotiable bill which can be transferred by endorsement down a line of transferees is capable of being a bill of lading within the meaning of the Hague Rules. However, it seems to me that all that Bingham LJ was doing, in the context of a case involving receivers of cargo when it was still uncertain whether they had become parties to the bills in question, was to emphasise that a bill of lading, when endorsed and transferred, remained a contractual document to the terms of which subsequent parties were capable of becoming contractually bound as parties to it by "c*ommercially well-known consequences".* There is of course no doubt that such a negotiable bill is a paradigm example of a bill of lading. The question remains whether a straight bill of lading, albeit it is capable of being transferred only once to a named consignee, and then by delivery rather than endorsement, also comes within the designation of being a bill of lading.

88. The 1992 Act was preceded by the Law Commission's Report No 196, *Rights of suit in respect of carriage of goods by sea*. Unlike the 1924 and 1971 Acts, the 1992 Act was not concerned with the *content* of a contract for the carriage of goods by sea, but, like the 1855 Act, with the *transfer* of rights and liabilities under it. The 1855 Act, which had tied such transfer to the concept of property passing at the identical time and by reason of a consignment or endorsement, had been shown by the pressure of factual situations to be causing difficult problems

relating to title to sue the carrier. For these purposes, in the course of its report the Law Commission not surprisingly discussed the concept of a bill of lading. At para 2.50, under the heading "Definition of bill of lading", the Commission wrote:

"We have also opted against a definition of "bill of lading", just as there is no definition under the 1855 Act or the Factors Acts. Under the present law, a bill of lading is usually identified by reference to its three functions, i.e. that it is a receipt for the goods, that it usually evidences the contract of carriage and that it may be a document of title (at least until complete delivery of the goods has been made to the person entitled thereto). However, to attempt a definition, which would necessarily be elaborate would, we feel, be counterproductive, particularly as there are many documents which are called bills of lading but which are not bills of lading properly so-called: for instance, a standard ocean "shipped" bill of lading is radically different from a so-called "house" bill of lading, which is really no more than a merchant's delivery order. However, clause 1(2) of the Bill stipulates that a bill of lading must be transferable, thus following the preamble to the 1855 Act. A "straight" consigned bill of lading, such as one made out to "X" without any such words as "to order", *is not a document of title at common law*. It will therefore merely be a receipt for the goods and, in the absence of a charterparty, will usually evidence (in the hands of a third party) the terms of the contract of carriage. *Hence, it will resemble a sea waybill, apart from the fact that a sea waybill will not normally be presented to the ship to obtain delivery*. The main practical consequence of "straight" bills of lading not satisfying clause 1(2) of the Bill is that they will not fall within the ambit of clause 4 of the Bill, relating to the conclusive nature of a bill of lading in the hands of a lawful holder. Were a "straight" bill of lading to be a bill of lading for the purposes of the Bill, it would mean that the holder thereof would have the benefit of clause 4 whereas the consignee named in the sea waybill would not. *Apart from being inconsistent with the Hague-Visby Rules, this would be an anomalous result given that "straight" bills of lading and sea waybills are much the same type of document save that the sea waybill is not required to obtain delivery*. The contrary argument is that sea waybills should come within the ambit of clause 4, an argument which we have rejected for the reasons given below. In conclusion, we require that a bill of lading must be transferable to fall within the Bill. Where a bill of lading is not transferable, it will undoubtedly fall within the definition of sea waybill to be found in clause 1(3) of the Bill." (emphasis added).

89. We have italicised certain passages on which particular emphasis has been placed by counsel, and which are the subject of dispute. The footnote accompanying the statement that a straight bill of lading "is not a document of title at common law" cites *Benjamin* at para 1446, ie *Benjamin's Sale of Goods*, 4th ed, 1987. The footnote accompanying the statement that for a straight bill of lading to be a bill of lading would be inconsistent with the Hague-Visby Rules refers to section 1(6) of the 1971 Act and says that that provision –

"distinguishes bills of lading and non-negotiable (meaning non-transferable) receipts, into which latter category sea waybills or straight bills of lading are capable of falling: see ***The European Enterprise****…"*

90. Mr Schaff relies on the distinction made between a straight bill of lading and a sea waybill to the effect that the former is, although the latter is not, "required to obtain delivery". Mr Schaff submits, moreover, that on that basis a straight bill of lading is in any event a document of title similar to a bill of lading within the meaning of the Hague Rules.

91. In accordance with the recommendations of the Law Commission, the 1992 Act makes a distinction between bills of lading and sea waybills in the following terms of section 1(2) and 1(3):

"(2) References 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 shipment bill of lading.

"(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but –
(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract."

92. It follows that, for the purposes of the 1992 Act, a straight bill of lading cannot be a bill of lading within section 1(2) above, but will be a sea waybill within section 1(3). That, however, will not affect the essence of the subject matter of the Act, for in either case rights under the respective document can be transferred to the named person to whom delivery is to be made, in the case of the bill of lading if he is its "lawful holder", and liabilities can then be transferred to that person if he takes or demands delivery of the goods: see section 2 (dealing with rights), section 3 (dealing with liabilities) and section 5(2) (dealing with the meaning of the holder of a bill of lading). When those sections are read, it is perfectly obvious why the more complicated case of the classic bill of lading has been dealt with separately, and the more simple case of the straight bill of lading and/or sea waybill has been addressed in different terms: but both are dealt with essentially to the same ends.

93. Section 5(5), moreover, states that the 1992 Act takes effect "without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules)" which have the force of law under the 1971 Act. Section 6(2) repeals the 1855 Act.

94. Thus the 1992 Act is drafted on the basis that a straight bill of lading is not a bill of lading for the purposes of the 1992 Act, but leaves open the question for the purposes of the Hague and Hague-Visby Rules and the 1971 Act.

From the 1992 Act to date

95. In the last decade or so a number of cases have been coming to court concerning straight bills of lading. It is not clear why there is this recent proliferation of such cases, as compared with the paucity of them over the previous 150 years or so. It may have something to do with changes in the documentary forms used in connection with carriage by sea. This may in turn have been influenced by the terms of the 1992 Act. The question has arisen in connection with such forms as to whether the Hague-Visby Rules apply. That question has been looked at from the point of view of whether the straight bill of lading is a bill of lading, and also from the point of view of whether the document is a "similar document of title". The latter question has been seen possibly to depend on whether the consignee is obliged to present the document in order to obtain delivery of the goods.

96. In that connection, it is established law that at any rate in the case of a classic (negotiable) bill of lading the obligation of the ship is to deliver only against its surrender: see ***The Sormovskiy*** *3068* [1994] 2 Lloyd's Rep 266 and ***The Motis*** [1999] 1 Lloyd's Rep 837 and [2000] 1 Lloyd's Rep 211 (CA). The relevant authorities are collected in those judgments. It is sufficient to quote from them as follows. In ***The Sormovskiy*** *3068* Clarke J said (at 274): *"It makes commercial sense to have a simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder of the bill of lading who presents it to him. In that way both the shipowners and the persons in truth entitled to possession of the cargo are protected by the terms of the contract."*

97. In ***The Motis,*** where the issue was whether the carrier was excused if he without negligence delivered against a forged bill of lading, Stuart-Smith LJ said (at 216):

> *"19. But it has been established for well over a century that under a bill of lading contract a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided he has no notice of any other claim or better title to the goods (see* ***Glyn Mills Currie & Co v. East and West India Dock Co.,*** *(1882) 7 App. Cas 591,* ***The Stettin*** *(1889) 14 P.D. 142,* ***Carlsberg v. Wemyss****, 1915 S.C. 616 at p.624,* ***Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd*** *[1959] 2 Lloyd's Rep. 114; [1959] A.C. 576 and particularly the passage I have cited at p.120, col. 1; p. 586,* ***Barclays Bank Ltd. v. Commissioners of Customs and Excise,*** *[1963] 1 Lloyd's Rep. 81 and* ***The Houda,*** *[1994] 2 Lloyd's Rep. 541, particularly at pp. 550, 552-553 and 556). It seems probable that the importance of this obligation stems from the negotiable nature of the bill of lading."*

98. Mr Croall emphasises that last sentence. Mance LJ said (at 217):

> *"8. Looking at the matter more broadly, the issue is one of risk. A shipowner issues bills of lading to serve as the key to the goods, and ought usually to be well-placed to recognize its own bills of lading…the bill of lading serves, as it seems to me, an important general role in representing and securing both title and physical possession of goods; although skilled fraud may not be uncommon, the shipowners' construction…would appear to…undervalue the importance which both parties must be taken to have attached to the ship's obligation to deliver against presentation of original bills of lading."*

99. Mr Schaff emphasises the general principle or philosophy apparent in the citations from the judgments of Clarke J and Mance LJ. He also submits that, against the background of that principle and philosophy, the last sentence in the citation from the judgment of Stuart-Smith LJ should not be understood too narrowly. The traditional importance of the presentation of a bill of lading may *stem* from its negotiable nature, since the ability to transfer a bearer bill of lading merely by delivery or an "order" bill of lading merely by endorsement means that the carrier cannot know, save by presentation of the bill, who is ultimately entitled to delivery. However, once the principle is established, then the requirement of presentation ought to apply in any case where the carrier cannot be certain who is entitled to delivery: and that must apply at least to any bill in which the obligation to present the bill in order to obtain delivery is written into the contract – as Mr Schaff submits is the case here, as shown by the attestation clause. After all, in a case where the shipper requires to be paid cash against documents before he is willing to release the bill of lading, the fact that he has named the consignee cannot make any difference.

100. In this connection *The Stettin* (1889) 14 PD 142 is of some interest, especially as it is a leading case, cited for instance in both *The Sormovskiy 3068* and *The Motis*. The bill of lading there was issued by the owners of a German flag vessel and covered carriage from London to Stettin. It was made out to a named consignee, S Mendelsohn, "*or to his or their assigns*". Mendelsohn was the agent for Julius Manasse in Breslau, and was instructed by the shipper that on arrival in Stettin he was to arrange for the goods to be sent on by lighter to Manasse in Breslau. No bill of lading was produced by Mendelsohn for delivery, however, and it seems that the shipper was not paid by Manasse. The shipper sued the carrier for misdelivery of the goods. It appears to have been common ground that the bill of lading was governed by German law, of which there was evidence. The defendant shipowner's evidence was to the effect that where there was a named consignee "or order" but the consignee did not endorse the bill (as in that case), the effect was the same as a straight bill of lading ("namens connossement"), viz the shipowner could deliver to the consignee *without* production of a bill of lading unless told by the shipper not to do so, taking the risk, presumably as against an endorsee, of whether there had been an endorsement or not (at 145). The shipper's German law evidence, however, was that whether the bill was to be regarded as an "order" bill or a straight bill, the law was the same, viz delivery without production of the bill of lading was *not* permitted (at 144). Butt J gave a short judgment (at 147) and said:

> *"German advocates have been called on both sides, but, as they differ, I must, in this divergence of opinion, decide what, in the result, the German law appears to me to be.*

Having considered the reasons given by these advocates for their opinions, I have come to the conclusion that, on this point, German law does not essentially differ from English law.

According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without production of the bill of lading. I hold that the shipowner must take the consequences…"

101. It seems to me that against the background of the evidence of German law which Butt J was there considering, he was speaking generally of the situation whether the naming of the consignee rendered the applicable rule that of an order bill or a straight bill. I accept that on the facts both German advocates were agreed that the bill of lading in question was an order bill. If, however, the judge had decided the case simply on that basis, then I assume he would have said so. It will be recalled, however, that in *Thrige* Scrutton LJ had said that in the case of a straight bill it was an open question whether delivery could be made without production of the bill of lading, but that he was doubtful whether at any rate in a case where property passed on shipment *The Stettin* was good authority (see at para 45 above).

102. This then is the background to a series of modern cases. The first of them comes from Singapore – ***Olivine Electronics Pte Ltd v. Seabridge Transport Pte Ltd*** [1995] 3 SLR 143. The straight bill of lading in question covered the carriage of a shipment of television sets from Singapore to Russia. The bill of lading contained a clause materially identical to the attestation clause in the present case ("must be surrendered duly endorsed in exchange for the goods"). The judge did not consider the shipper's claim for summary judgment for damages for delivery without production of the bill of lading as unanswerable, since the point was still "somewhat open" (at 149E).

103. The researches of counsel have brought to light a Dutch case decided in 1997, ***The Duke of Yare*** (ARR-RechtB Rotterdam, 10 April 1997). Three trailers were shipped from Scheveningen to Great Yarmouth consigned to a named consignee (GE Plastics). The goods were damaged and one issue, although not necessarily decisive of the case, was whether the Hague-Visby Rules were compulsorily applicable by Dutch law. That in turn seems to have depended on whether the document which either had been issued or ought to have been issued was a "bill of lading or any similar document of title". The exemplar document was a straight bill or "rektacognossement". The court said that such a document –

"exists alongside the bearer or order bill of lading. The fact that a straight bill of lading cannot be treated in the same way as a bearer or order bill of lading does not detract from the fact that the present straight bill of lading meets the legal requirements to be considered as such.

"As opposed to a non-negotiable sea waybill – said document not normally considered a "similar document" in English and Dutch literature – the holder of a straight bill of lading has the exclusive right to delivery of the goods, therefore delivery of the bill of lading is a requirement for obtainment of the load."

104. It would seem from this that the Dutch court would regard a straight bill of lading as a bill of lading within the meaning of the Rules and also considers that its surrender is necessary to obtain delivery of the goods.

105. In ***The Chitral*** [2000] 1 Lloyd's Rep 529 the PNSC bill of lading named Al Ghaith as consignee of goods carried on the defendant's vessel from Bremen to Dubai. Goods were damaged during the voyage. The bill of lading was otherwise in conventional form, but the box in which the consignee was to be named said "If order state notify party" and no notify party was stated. Al Ghaith had nevertheless endorsed the bill to another party. It was submitted by the defendant carrier that Al Ghaith, having endorsed the bill, had no title to sue. Al Ghaith said that its endorsement was ineffective because, since no notify party had been stated, the bill was not to order but a straight bill of lading. The carrier said that the bill remained an order bill because the general printed language of the bill said that delivery was to be *"unto the above-mentioned consignee or to his or their assigns"*. David Steel J rejected that argument. He considered that the form was drafted to permit its use either as a straight or order bill, and that therefore the more general language "consignee or…assigns" should be understood as subject to the implicit words *"as applicable"* (at 532/3). Mr Croall relies on this approach for submitting that the attestation clause with its reference to "duly endorsed" should be similarly understood as subject to the implicit words "as appropriate", and that where the form is used as a straight bill this clause is simply inapplicable.

106. That submission was accepted by the arbitrators and by the judge, in reliance on ***The Chitral***. However, ***The Chitral*** was distinguished in ***The Happy Ranger*** [2002] 2 Lloyd's Rep 357 at paras 28/29 on the basis that in that case there was nothing in any consignee or notify box, other than the mere absence of the words "or to order", to suggest that the bill was not negotiable. It seems to me that the present case is again different. It is not in dispute that the bill of lading, as filled out, was not an "order" bill. It follows that it could not be "duly endorsed". But even if the bill had been a classic negotiable bill made out to a named consignee "or order", there is nothing to require it to have been endorsed where it is simply transferred to the consignee (see *Benjamin*, 6th ed, 2002, at para 18-012). Therefore, on any view the words "duly endorsed" are subject to the understanding "if applicable". The position remains that the bill of lading stated that one of its three originals, all of which were in fact issued, "must be surrendered…in exchange for the goods". And why not? In that way the carrier will be assured that he is not delivering to a person without title if the shipper has withheld the bill for the usual reason that he has not been paid; and the shipper will be assured that the goods will not be delivered unless he has been content to transfer the bill. It is not as though a shipper under a straight bill of lading, as well as under an order bill, cannot withhold the goods, or even redirect them, at any rate if notice is given to the carrier: see *Benjamin*, 6th ed, at paras 18-013 and 18-018/9. This is because, although the shipper's contract with the carrier

under a straight bill is to deliver to the named consignee, it is construed as a contract to deliver as provided in the bill or as the shipper may direct (*ibid*). Although notice may be required to redirect delivery of the goods, there may well be a dispute about the giving of such a notice and in the meantime a condition of surrender of the bill of lading is the traditional and safe way of policing such matters; and litigation is avoided.

107. ***The Brij*** [2001] 1 Lloyd's Rep 431 was decided in the Hong Kong High Court. The facts of this case were complicated, because two different sets of bills of lading had been issued for shipments from China to Venezuela. As between the claimant shipper and a freight forwarder called WTW, *order* bills were issued to the claimant naming the receiver/buyer's agent, Amaya, as the "notify" party, but leaving the consignee simply "to order" (the "Talent bills"). As between WTW and the ship's operator, however, a further set of bills was issued, but only to WTW and not to the claimant, under which the goods were consigned to Amaya (the "CAVN bills"). WTW retained the CAVN bills (they were "not meant to be negotiable or to be negotiated" but were "kept in a drawer and not meant to be used", at 434), because they regarded the operative carriage contract as evidenced by the Talent bills, and it was the Talent bills which were forwarded by the claimant under its sale contract to obtain payment from its buyer. In Venezuela, the goods were delivered to Amaya without production of any bill of lading. The claimant sued on the CAVN bills, not on the Talent bills. Waung J held that the claim in contract under the CAVN bills failed on the ground that the claimant was not a party to them. The claimant also sued in tort and the judge seems to have regarded that issue as dependent on the question whether the CAVN bills were "Straight bills or not" (at 434). He found that these bills were straight bills, even though the consignee box said "or order", apparently on the basis that the surrounding circumstances showed that they were never intended to be used. With respect, that seems to me to be a different question from the proper construction of the bills.

108. Mr Croall, however, relied on *The Brij* for acceptance there found (also at 434) of the proposition, for which the judge cited *Benjamin*, 5th ed, 1997, at 900 (para 18-014), that under a straight bill the carrier is bound to deliver to the named consignee without production of the bill. It may be noted, however, that this statement of *Benjamin* is at odds with the Law Commission's view (cited at para 88 above) that a straight bill differs from a sea waybill in that the former does require its production in order to obtain delivery of the goods. I shall have to refer below to the debate on the subject of straight bills to be found in various text-books. For the present I would merely comment first, that *The Brij* does not provide any reasoning, other than its reliance on *Benjamin*, to support the proposition in issue; and secondly, that because of its special facts I do not think that ***The Brij*** is really of any assistance to the current debate.

109. In ***The Happy Ranger*** [2001] 2 Lloyd's Rep 530 at first instance Tomlinson J, to whom neither ***The Chitral*** nor ***The Brij*** seem to have been cited for they are not mentioned in his judgment, appears (see at paras 23 and 27) to have founded his decision that a straight bill of lading is not a bill of lading within the meaning of the Rules on the passage from the judgment of Bingham LJ in ***The Captain Gregos*** which I have cited above (at para 86). However, for the reasons which I have sought to explain (at para 87) I do not think that Bingham LJ there had the problem of a straight bill of lading in mind.

110. ***Peer Voss v. APL Co Pte Ltd*** is a decision of the Singapore Court of Appeal, [2002] 2 Lloyd's Rep 707. Mr Voss shipped a Mercedes from Hamburg to Busan, South Korea, using APL as his carrier. APL issued a bill of lading which named the buyer in the consignee box without the words "to order". The bill of lading also provided: *"A set of three originals of this bill of lading is hereby issued by the carrier. Upon surrender to the carrier of any one negotiable bill of lading, properly endorsed, all others shall stand void."*

111. Despite that language, it was not disputed that the bill of lading was a straight, non-negotiable, bill (para 10). Nor does any specific reliance appear to have been placed on the second sentence just cited, as distinct from the issue of the bill in a set of three originals (see at para 49). The full set of bills at all times remained with Mr Voss, for the buyer did not pay. The Mercedes was released to the buyer without production of the bill of lading. The submissions before the court covered much of the same ground as this present appeal. In a careful judgment, Chao Hick Tin JA, reviewed much of the material considered here either above or (in the case of text-books) below, including the *Rafaela S* itself at first instance and other citations not here mentioned. The question posed was "whether, in relation to a straight bill of lading…the shipowner may deliver [to the named consignee] without production of the BL" (para 1). The submission of the carrier was that a straight bill of lading was in this respect like a sea waybill, where delivery is made to the named consignee on proof of his identity (para 15, citing *Scrutton* at 39). The submission of the claimant, however, was that production of a straight bill of lading is necessary. That submission appears to have been made and considered as a matter of principle, and not in reliance on the bill's language quoted above (*"Upon surrender to the carrier"* etc). Chao Hick JA commented, accurately as I would understand the position, (at para 16): *"The advantage of resorting to a sea waybill is that it avoids the problems arising from the late arrival of the documentation; its contents can be telexed to the destination. Sea waybills are often used in trades involving short sea voyages, where the carrying ship may arrive at its destination before the shipping documents do."*

112. It is as well to bear in mind that the Singapore Court of Appeal was not concerned with the question whether a straight bill is a bill of lading for the purpose of the Hague or Hague-Visby Rules, but only with the more limited question whether production of a straight bill is necessary for delivery of the goods. On that question the Court's judgment concluded as follows:

> *"48. At the end of the day, it seems to us that the issue must be resolved on the basis of contract law and the intention of the parties. The entire argument of the appellants is that a straight BL is the same as a sea waybill. While it is*

true that a BL, devoid of the characteristic of negotiability, is substantially similar in effect to that of a sea waybill, that is not to say that they are the same. If the parties had intended to create a sea waybill they would have done so. Ordinarily, the main characteristics of a BL are twofold. First, it is negotiable (i.e. transferable). Second, it is a document of title, requiring its presentation to obtain delivery of the cargo. In the case of a straight bill, while the characteristic of transferability is absent, there is no reason why one should thereby infer that the parties had intended to do away with the other main characteristic, i.e. delivery upon presentation. As the Judge below noted, while one cannot indorse a straight bill to transfer constructive possession of the cargo, it does not necessarily follow that the straight bill does not impose a contractual term obligating the carrier to require its production to obtain delivery.

"49. It seems to us that clear words must be present to imply that the parties intended the instrument to be treated, in all respects, as if it were a sea waybill and that its presentation by the named consignee is not necessary. Indeed, if the parties had wanted to have a sea waybill they could have quite easily adopted that format. They would not have issued a BL with three originals. By issuing the instrument as a BL, it must mean that they wished to retain all the other features of a BL, other than the characteristic of transferability…

"51. Secondly, even looking at the matter from the perspective of the market place, there is much to commend the rule that even in respect of a straight bill presentation of it is a pre-requisite to obtaining delivery. If nothing else, the advantage of this rule is that it is simple to apply. It is certain. It would prevent confusion and avoid the shipowners and/or their agents having to decide whether a bill is a straight bill or an order bill [e.g. The Happy Ranger (supra)], and run the risk attendant thereto if the determination they make on that point should turn out to be erroneous. The rule would obviate such wholly unnecessary litigation …

"52. Thirdly, to accept the arguments put forward by APL is to envisage two broad categories of documents which could be used by shippers. The first option is the negotiable BL; in such a situation, delivery of the goods can only be made upon presentation of the BL. The second option for shippers is to use a non-negotiable straight BL or sea waybill; here, the straight BL or waybill need not be produced for delivery of the goods. In essence, APL's scheme envisages that as long as the shipping document is non-negotiable on its face, presentation of the original BL or sea waybill is unnecessary for delivery. We think that this approach is overly restrictive for an unpaid seller who wishes to use a non-negotiable BL while retaining his security for payment.

"53. Indeed, to hold that a straight BL is not the same as a sea waybill has the advantage of providing such a seller, or in the case of documentary credit, the bank, with some security against default by the buyer, and the buyer of some assurance that the seller has shipped the cargo before he is required to make payment. In short, it gives both the buyer and the seller where they, for their own reasons, want only a straight BL to be issued, a fair measure of protection. That was what Mr Voss wanted: payment before delivery by carrier. In contrast, the sea waybill is only a contract of carriage whereby the carrier undertakes to deliver the cargo to the person identified by the shipper as entitled to take delivery of the cargo. The sea waybill is retained by the shipper and all the consignee need show to take delivery is proof of his identity. It is a receipt, not a document of title. It, unlike a BL, cannot be used as a security to obtain financing."

113. Thus the Singapore Court of Appeal here put forward three reasons for its decision. The first, is that one of the two critical features of a classic bill of lading is that it is a document of title in the sense that its presentation is necessary to obtain possession of the goods: in the absence of clear words or good reason, that feature should be regarded as surviving in the case of a straight bill of lading. The second, is that such a rule is a good, simple and certain rule: reference was here made to Clarke J in *The Sormovskiy 3068* at 274. The third, is that such a rule better protects the interests of a seller (and his bank) and buyer.

114. Mr Schaff relies on this decision for its demonstration that a straight bill of lading is still, in any event, a document of title. Mr Croall submits that the reasoning is flawed in its reliance on the assumption that a straight bill of lading can survive as a document of title in the absence of negotiability, and that in any event a non-negotiable bill is not a "similar" document of title for the very reason that it is not negotiable.

115. The final authority relied on before us is a French one, ***The MSC Magallanes***, a decision of the Court of Appeal of Rennes of 16 May 2002. The carriage in this case was from Anvers to Durban. Straight bills of lading were issued by the carrier, MSC, and sent by the shipper to the consignee, who was an agent for the buyer. The shipper then decided to divert delivery and notified the carrier to this effect. Nevertheless, the goods were delivered to the consignee, and by the consignee to the buyer. The shipper claimed against the carrier for misdelivery, but failed. The shipper appears to have argued that the bills, not being negotiable, were not documents of title but similar to sea waybills, and that therefore it was open to it to divert the goods even after the bills' transfer, on the basis that the carrier's contract was with it and the carrier was therefore obliged to follow its instructions. The court, however, considered that the bills, albeit "nominative and non negotiable", were bills of lading and documents of title for all that, and obliged delivery against and only against their production. The ratio of the decision appears therefore to be in the following paragraphs:

"In effect, [the shipper] having given the original bills of lading and documents of title of the merchandise to [the consignee], MSC could only follow the instructions given by the legitimate bearer of the bills of lading, these documents giving rights.

"Having lost possession of the bills of lading, [the shipper] no longer had the power to change the instructions given to the carrier regarding the destination of the merchandise being transported…"

116. Thus the French Court of Appeal, like the Singapore Court of Appeal, and the Dutch court, appears to have considered that a straight bill of lading remains a document of title, and that its production is necessary for delivery of the goods.

The text-books

117. The text-books which cover this subject provide a rich field for inquiry, and I will try to put the dispute between Mr Schaff and Mr Croall as to the deployment of the opinions of their learned and scholarly authors as straightforwardly as I can.

118. It is common ground that the text-books cite negotiability of the order or bearer bill of lading as being the essence of what, for clarity of exposition, may be called a classic bill of lading. Such a bill is also a document of title, because it is the key to the goods in what has been described as a floating warehouse, and under a classic bill of lading that key can be passed on, at any rate until the contract of carriage is fulfilled, again and again. The essential issue for present purposes is whether a straight bill of lading is sufficiently like a classic "negotiable" bill of lading to be regarded as a bill of lading under the Rules. Another way, perhaps, of putting the issue is whether the essence of a bill of lading as a document of title is that the key has to be capable of being passed again and again, or whether it is sufficient that it can be passed at least once. In that connection it seems to be common ground that a document which does not have to be produced to the carrier to obtain delivery of the goods cannot be called a document of title. Mr Croall submits, however, that only a document of title which is fully transferable and therefore "negotiable" can be called a "similar" document of title. That, however, it seems to me, is to beg the question. If "negotiability" is existentially critical to a bill of lading, then it is unnecessary to ask separately whether a straight bill of lading is a document of title, because even if it is, it will not be "similar".

119. It seems to me that it is unhelpful to cite passages in the text-books which describe the features of a classic bill of lading. By definition, such passages will refer to its negotiability. The important passages will be those which describe the features of a straight bill of lading.

120. *Scrutton* does not consider the position of a straight bill of lading, save to point out that (i) under the 1992 Act, by definition, a straight bill of lading can only be a sea waybill (at 37), and (ii) that because a sea waybill within the meaning of the 1992 Act has not at present been established as a document of title by mercantile custom, therefore it must be doubtful whether it is within the Rules.

121. *Benjamin* has a more extensive treatment of the subject. Significantly, the treatment has changed between the 5th edition of 1997 and the 6th edition of 2002. In the 5th edition at para 18-014 this is said, under a heading which mentions both straight bills and sea waybills:

> *"…It is not easy to find a suitable term in English law to refer to such bills…The essential point is that documents of the present kind differ from order and bearer bills in that they are not transferable by indorsement (where necessary) and delivery. Sea waybills fall into the category of documents of the present kind and the expression "sea waybills" will be used to refer to them in the following discussion, while the expression "bills of lading" will be used to refer to order or bearer bills.*
>
> *"Two things follow from the fact that a document of this kind is not transferable by indorsement and delivery. First, the consignee (if in possession of the document) cannot, by purporting to transfer it in this way, impose on the carrier a legal obligation to deliver the goods to another person. Secondly, the shipper cannot oblige the carrier to deliver the goods to a different consignee from the one named merely by indorsing and delivering the bill to that other person; for under a straight bill a carrier is bound and entitled to deliver the goods to the originally named consignee without production of the bill, so that, when he delivers the goods, he may have no means of knowing of the purported transfer of the goods. This difficulty cannot arise in the case of an order bill, under which the goods are deliverable only on production of the bill."*
>
> At para 18-044 it is similarly stated that a straight bill or sea waybill *"is not a symbol of the goods because the carrier is entitled and bound to deliver the goods to the named consignee without production of the bill. It follows that a carriage document will not be a document of title in the common law sense if it is expressed on its face to be "non-negotiable"."*

122. I have four comments on these passages. First, understandably in the light of the 1992 Act straight bills are included with sea waybills: but this categorisation obscures what may be an important difference between them for the purpose of the Rules. Secondly, the statement that a shipper under a non-negotiable bill cannot oblige the carrier to deliver to someone other than the named consignee merely by indorsing and delivering the bill to another person is true: but that tells you only that the bill is not negotiable and not that the carrier is bound to deliver to the named consignee without production of the bill. Thirdly, that no authority is mentioned for that last proposition. And fourthly, that it would seem to be accepted that if, contrary to that last proposition, the consignee of a straight bill did have to produce the bill to obtain possession of the goods, then such a bill could be described as a document of title.

123. In the 6th edition, however, these passages have been developed and altered. The equivalent paragraphs to 18-014 and 18-044 of the 5th edition are now numbered 18-017 and 18-059. They have become too lengthy to quote in full here, but it may be noted that they discuss some of the recent jurisprudence on straight bills including both this case and *Peer Voss*, each at first instance (see eg footnotes 4 and 98). Points to note, however, are (i) that the proposition that a straight bill need not be produced by the consignee in order to take delivery of the goods is founded in the contrast with an order bill on the basis that where a bill may be transferred by order a

carrier can never know to whom to deliver unless the bill is produced; but (ii) that production of a straight bill may nevertheless be required by contractual provision under it; and (iii) that it is now allowed that the definitional contrasts of the 1992 Act (and the 1971 Act) do not necessarily mean that "sea waybills, or similar non-transferable documents, cannot be bills of lading for any legal purposes whatsoever". So it is expressly contemplated that a straight bill may yet be a document of title for the "wholly distinct" purpose of the Rules (at para 18-059):

"Indeed, to apply the same tests for these two purposes comes dangerously close to the similar link between contractual and proprietary issues made in the Bills of Lading Act 1855, a link which was found to be unsatisfactory and which was therefore severed by the Carriage of Goods by Sea Act 1992. There may be no policy reasons against subjecting parties to a contract contained in or evidenced by a "straight" bill to the contractual regime of the Rules; indeed, the 1971 Act specifically provides that, by the use of appropriate words, the Rules can be made applicable to a "non-negotiable" receipt containing or evidencing a contract for the carriage of goods by sea. But the policy reasons for (or against) applying the Rules to "straight" bills or "non-negotiable" receipts have nothing to do with the question whether such documents are documents of title in the common law sense."

124. *Carver on Bills of Lading*, 1st ed, 2001, deals with straight bills at paras 1-007/9 and 6-007. The distinguished editors of *Carver*, Professor Sir Guenter Treitel QC and Professor Francis Reynolds QC, are common to the authorship of *Benjamin*, and the treatment in *Carver* and in the latest edition of *Benjamin* is broadly similar. Thus it may be noted that at para 6-007 it is stated that no production of a bill of lading is necessary for delivery under a straight bill, but that at para 1-008 it is acknowledged that the definitions and distinctions of the 1971 and 1992 Acts "apply only for the purposes of the Acts in which they occur and not for the purposes of other legislation or of rules of common law". There is a full and interesting discussion of the English statutory and common law meanings of "document at title" at paras 6-001/3. It is submitted there that the common law meaning is derived from proof of mercantile custom and thus limited narrowly to negotiable bills of lading, whereas the statutory use of the expression is broader and extends for instance to all those documents listed in section 1(4) of the Factors Act 1889, which include "any bill of lading…or any other document used in the ordinary course of business as proof of the possession or control of goods…" This is an area of debate which counsel have acknowledged by citation of these passages, but into which they have not led us. I would be reluctant to go there without adversarial argument, but I would again hazard the view that the question of "document of title" within the meaning of the Hague Rules is bound up with the question whether "bill of lading" is there limited to a negotiable bill. If it is, then there is perhaps good reason to think that "any similar document of title" is also being used in a limited sense. If, however, it is not, then there may be less reason to think that the latter expression is also so limited. In this connection it is well to remind oneself that the Hague Rules are an international convention and that English common or statutory law is not determinative. On the contrary, it is salutary to bear in mind that the courts of France, Holland and Singapore have determined that a straight bill of lading does require to be produced for delivery of the goods and on that basis have been prepared to describe such documents as documents of title.

125. *Voyage Charters*, 2nd ed, 2001, by *Cooke, Young, Taylor, Kimball, Martowski and Lambert* describes the issue of surrender of a straight bill of lading as "an open question" (at para 18.143):

"The one way in which a straight bill of lading differs from an ordinary sea waybill is that, being on a bill of lading form, it usually contains words, such as "one of which being accomplished the others to be void", which indicate that it is to be surrendered on delivery. It is an open question whether the carrier under a straight bill is entitled or obliged to deliver to the named consignee without production of the bill or whether, as in the case of a transferable bill, he should only deliver on its presentation."

The same work, at para 18.158/9, states: *"Bills of lading often provide expressly that the goods are to be discharged or delivered upon, and only upon, the surrender of the bill of lading and the standard formula "one of which being accomplished the others to be void" is to the same effect. Furthermore, the status of the bill of lading as a document of title imposes the same requirements…The present trend of authority greatly favours a clear, simple and strict rule obliging a carrier to require the surrender of a bill of lading before effecting delivery…"*

126. *Bills of Lading: Law and Contracts*, [2001], by *Gaskell* helpfully sets out at paras 22.34ff numerous sea waybill forms. The BIMCO Blank Back Form begins (para 22.35) "This Liner Waybill which is not a document of title…" It continues (para 22.47) "The goods will be delivered to the Party named as Consignee or its authorised agent, on production of proof of identity without any documentary formalities…" The Genwaybill states (para 22.36) "This Waybill is a non-negotiable document. It is not a bill of lading…" It contains the same passage about delivery as just cited above (para 22.48). The text at paras 14.23/4 points out that

"In practice, most sea waybills contain express terms allowing delivery merely on proof of identity, without any production of documents such as the waybill itself…It is unclear whether a carrier is obliged to deliver to the consignee named in the document which is expressly described as a "straight bill", even without production of that bill. Rights of Suit [ie the Law Commission report] seems to assume that a straight bill does have to be presented, while it is accepted that a waybill does not. It is submitted that the view of Benjamin is to be preferred, on the basis that there is no real distinction between a waybill and a straight bill, and that neither are needed to obtain delivery of the goods (unless the contract so requires)."

127. One possible answer to the current case, of course, is that the *Rafaela S* form of bill of lading, when used as a straight bill, *did so require*. In that context *Gaskell* comments (at para 14.25) as follows:

"In practice, most of the standard form bills [ie bills of lading, not waybills] (which are mainly designed to be negotiable) do contain express terms which singly or together provide that a bill of lading is to be surrendered before goods will be delivered. There is no apparent distinction, as a matter of construction, between cases where the bill is made out to order and when it is consigned "straight" to a named consignee. Thus, the express terms on the surrender of bills such as Conlinebill or the P & O Nedlloyd Bill states that "an original bill of lading, duly endorsed, must be surrendered…". This clause is to be found on the face of most bills. It might be said that the reference to "duly endorsed" indicates that the term only applies to negotiable and not straight bills. The better view is probably that the carrier is only requiring that any bill presented should apparently entitle the holder to claim delivery (as with a bearer bill), so there is no reason to restrict the application of the clause to negotiable bills when it is well known that the forms could easily be used as non-negotiable documents, e.g. straight consigned bills."

There *Gaskell* is in effect discussing this very case, and rejecting Mr Croall's submission that the attestation clause should be regarded as inapplicable.

128. In any event, I cannot forbear remarking, by reference to the forms of sea waybill set out in *Gaskell*, that in practice those forms are quite distinct from the (hybrid, order or straight) bill of lading form used in the present case (or in ***The Chitral*** and ***The Happy Ranger***). Whatever the intricacies of the law as discussed in this judgment, I do not regard it as a happy matter that the omission of adding the words "or order" in the consignee box in this case (or the omission to add a notify party in the form used in ***The Chitral***), either of which could well have happened without any deliberation at all, should have the effect of transforming a contractual document which in every respect looks and reads like a bill of lading into a sea waybill, when a sea waybill commonly takes a totally different form.

129. *Schmitthoff's Export Trade*, 10th ed, 2000, states a view with which Mr Croall submits *Benjamin, Carver* and *Gaskell* are at variance, to the effect (at para 15-038) that: *"Logically, the function of the bill of lading as a document of title is distinct from its negotiable quality. Even a bill of lading which is not made negotiable operates as a document of title, because the consignee named therein can only claim delivery of the goods from the shipowner if able to produce the bill of lading. However, the great practical value of the bill of lading as a means of making goods in transit rapidly transferable is due to the customary combination of the two features of the bill, namely its quasi-negotiability and its function as a document of title."*

130. I am uncertain to what extent this passage is at variance with the other authors. All the text-books would seem to accept that *if* the goods under a straight bill can only be properly delivered against production of the bill, then it *is* a document of title. There is disagreement, however, as to whether that hypothesis is correct. Again, I am not sure to what extent that disagreement depends on the assumption that a straight bill has nothing to say expressly about use of the document to obtain delivery. Everyone seems to be agreed that if a straight bill expressly provides, as it commonly does, that its surrender is required for delivery to take place, then it is a document of title.

131. Finally, *Marine Cargo Claims*, 3rd ed, 1998, by Professor Tetley QC, casts a comparative eye over the jurisprudence of many countries. He states (at 183) that – *"The named or nominate bill of lading provides for delivery of the goods to a named person, without also specifying "to order or assigns". The nominate bill of lading is a document of title but is not negotiable. The named consignee may obtain delivery of the goods from the carrier upon surrender of the original nominate bill of lading to the carrier."*

He also says (at 184): *"In the case of a nominate bill, the bill and the title to the goods thereunder can only be transferred once, i.e. from the shipper to the consignee. Thereafter the title to the goods covered by the nominate bill cannot be transferred by the mere delivery of the bill itself…"*

132. At 995 he points out that the US straight bill under the Pomerene Act is a hybrid, having certain of the qualities of a document of title, and yet it need not be presented to take delivery.

133. Mr Croall submitted that the text-books were almost uniformly in favour of the carrier's case. However, in my judgment the position is more complex and mixed, and it can also be said that, on the basis that the bill of lading expressly requires its surrender to obtain delivery, there is something like uniformity in the opposite direction.

Conclusions

134. The first question is whether a straight bill of lading, but otherwise in the form of any classic bill of lading, is a bill of lading within the meaning of the Rules. If it is, then, it has not been suggested that it should have a different meaning under the 1971 Act, for all that the treatment of the distinction between a bill of lading and a non-negotiable receipt in its section 1(6) may be seen, in retrospect, as a harbinger of the distinction between a bill of lading and a sea waybill to be found in section 1 of the 1992 Act. It is common ground that the point is open. It is open today. It was open and uncertain immediately before the agreement of the Hague Rules.

135. In my judgment, a straight bill of lading, for all that it is non-negotiable, should be viewed as a bill of lading within the meaning of the Rules. I say that for the following reasons.

136. First, the Hague Rules are predominately concerned with the content of a contract of carriage in circumstances where such a contract as found in a bill of lading may come to affect a third party into whose hands such a bill is transferred. It seems to me to be plain as a matter of common-sense but also on a review of the material cited in

this judgment, that in this connection a named consignee under a straight bill of lading, unless he is the same person as the shipper, is as much a third party as a named consignee under a classic bill. Therefore I would view such a named consignee under a straight bill as prima facie within the concern of the Rules.

137. Secondly, while it is I suppose true that a straight bill of lading can be used in circumstances where there is no intention of transferring it to the consignee, the authorities considered demonstrate that in practice it is used, just like a classic bill, as a document against which payment is required and the transfer of which thus marks the intended transfer of property. Therefore, as Professor Tetley says, its nature is that, although it cannot be transferred more than once, for it is not negotiable, it can be transferred by delivery (just like a classic bill) to the named consignee. In these circumstances, the shipper and his bankers and insurers need the same protection as the shipper under a classic bill; and the consignee himself and his insurers in turn need to have rights against the carrier under the contract of carriage. I can see no reason why straight bills of lading have not always been within the 1855 Act. Those needs are in any event recognised under the 1992 Act.

138. Thirdly, whatever may be the position as a matter of principle and in the absence of express agreement, the practice appears to be that a straight bill of lading, unlike a mere sea waybill, is written on the form of an otherwise classic bill and requires production of the bill on delivery, and therefore transfer to a consignee to enable him to obtain delivery. (In this respect the position of a straight bill under the Pomerene Act appears to be different, but even so the US Harter Act, one of the forerunners of the Hague Rules, would seem to cover straight as well as negotiable bills.)

139. Fourthly, suppose the question is asked, in the context of the Hague Rules, in these terms: What of the straight bill? Is this a "bill of lading" or, being non-negotiable, something else, more akin to a non-negotiable receipt? Then, as it seems to me, the straight bill of lading is in principle, function, and form much *closer to* a classic negotiable bill, than to a non-negotiable receipt, which, to judge from article VI of the Rules, was viewed as something far more exotic.

140. Fifthly, the travaux preparatoires of the Hague Rules, despite lacking unequivocal cogency, to my mind are not only consistent with the view I would prefer, but go far to support it.

141. Sixthly, I am unimpressed by the argument derived from the terms of the 1971 and 1992 Acts. They may reflect a developing English view about how to categorise bills of lading and non-negotiable receipts and sea waybills, but, as the learned authors of *Benjamin* and *Carver* point out, they are ultimately dealing with different purposes. In any event, I do not see how they can control the meaning of the Hague Rules, which are not only much earlier, but also of international and not merely domestic scope.

142. The next question is as to the effect of the attestation clause in the bill of lading in the present case. Is it applicable only to the use of the bill in its negotiable form, or does it survive to control its use as a straight bill? In my judgment, for the reasons stated in para 106 above and in *Gaskell* at para 127 above, the attestation clause is to be construed as applicable in either event. If it had been intended that it should not apply when the bill was used in non-negotiable form, then it could very easily have said so. Against the background of the common forms of sea waybills, it is truly remarkable that it does not say so.

143. The third question is, then, whether such a straight bill of lading, which has to be produced to obtain delivery, is a document of title? In my judgment it is. I consider that the authorities and text-books discussed above support that view. Whatever, the history of the phrase in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore.

144. Is it a "similar" document of title? If I am right to consider that negotiability is not a necessary requirement of a "bill of lading" within the meaning of the Rules, then plainly it is. But I also think that the good sense of regarding a straight bill whose production is required for delivery of the goods as a document of title in turn supports the answer to the prior question of whether a straight bill is a "bill of lading".

145. The final question is whether a straight bill of lading is in principle a document of title, even in the absence of an express provision requiring its production to obtain delivery? It would seem that *Peer Voss* concluded that it was (at any rate if it is issued in traditional form in three originals). That was also the view of the Law Commission. It is unnecessary to decide the point, but in my judgment it is. It seems to me to be undesirable to have a different rule for different kinds of bills of lading – which I think was the view of Butt J in *The Stettin* as well. It is true, as *Benjamin* states, that in the case of a negotiable bill the carrier needs to have the bill produced in order to be able to police the question of who is entitled to delivery. Yet an analogous problem arises with a straight bill. A shipper needs the carrier to assist him in policing his security in the retention of the bill. He is entitled to redirect the consignment on notice to the carrier, and, although notice is required, a rule of production of the bill is the only safe way, for the carrier as well as the shipper, to police such new instructions. In any event, if proof of identity is necessary, as in practice it is, what is wrong with the bill itself as a leading form of proof? That is of course an inconvenient rule where the carriage is very short, as in cross-Channel shipments, and that is why sea waybills are used in such trades. But it is clear that straight bills are used in intercontinental carriage and therefore the inconvenience argument fades.

146. I am not unhappy to come to these conclusions. It seems to me that the use of these hybrid forms of bill of lading is an unfortunate development and has spawned litigation in recent years in an area which for the previous century or so has not caused any real difficulty. Carriers should not use bill of lading forms if what they want to invite

shippers to do is to enter into sea waybill type contracts. It may be true that ultimately it is up to shippers to ensure that the boxes in these hybrid forms are filled up in the way that best suits themselves; but in practice I suspect that serendipity often prevails. In any event, these forms invite error and litigation, which is best avoided by a simple rule.

Result

147. For these reasons, I conclude that this was a bill of lading or similar document of title to which the Hague-Visby Rules applied. In the circumstances I would allow this appeal.

Mr Justice Jacob:

148. This appeal depends first upon the meaning and effect of the document entitled "Bill of Lading." It ends with these words: *"IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order."*

149. Unless the last sentence is taken as struck out or meaningless, the consignee will not be given the goods by the carrier unless he produces an Original Bill of Lading. No one disputes that would be so if the two little words "Order of" had been added after the name and address of the consignee in the relevant box. I can see no reason why their omission from that box should have such a striking out effect on the sentence in question. The judge said: *"But I would add that in any event I do not think the printed words in the Bill of Lading requiring surrender of the Bill against delivery of the goods can bear even the weight which Mr Schaff seeks to put on them. MSC were obliged to deliver the cargo to and only to the consignees. That obligation and concomitant entitlement of the consignees is not affected by whether or not the consignee has or surrenders the Bill of Lading. It is a consequence of the agreement between MSC and the shipper to be found in the fact that the Bill of Lading names the consignee without the words "Order of". Nor does MSC need the protection of delivering only in exchange for the Bill of Lading as it would with a transferable Bill. I also agree with the Arbitrators that delivery against the Bill of lading was not necessary"*

150. I do not follow this. It is true that without these words the carrier could fulfil his obligation by delivery to the named consignee. But these words add more to the arrangement – that the consignee is not to be given the goods unless he produces an original Bill. In practice he will not be able to do that unless he has paid for the goods and been given an Original in exchange. The consignor had a real interest in ensuring that the right to possession (which is really what is meant by "title" here) did not pass until he puts an original Bill into the hands of the consignee. That is of course also true in the case of an order bill which in fact has not been indorsed over to a third party: the original consignee cannot obtain delivery without the original Bill. Putting it another way, it is not only the carrier who gets protection from the Bill. So also does the shipper. I can see no reason why the carrier under this Bill would be permitted to make delivery to the named consignee without surrender of an original Bill. So the Bill is not a mere receipt.

151. It follows, I think, that the Bill is a document of title in the sense that its transfer to the consignee entitles the latter to delivery and is essential to that entitlement. Moreover a consignee who had been given the Bill could demonstrate his title to third parties by its production. What he could not do is to transfer title simply by indorsing the Bill. He could in principle transfer entitlement *as between him and a third* party by a separate arrangement between him and the third party, for instance by executing a fresh document (whether bill or deed or whatever). That would not affect the position of the carrier – he remains bound to deliver to the named consignee and none other.

152. That being the effect of the Bill, I turn to consider whether it is a *bill of lading or any similar document of title* within the meaning of s.1(4) of COGSA 1971. That phrase itself derives from Art.1(b) of the Hague-Visby Rules, scheduled to the Act. Self-evidently it has the same meaning as in those Rules. The goods were damaged en route. The consignee/buyers sue the carriers for negligence. If the bill is within the meaning then the Hague-Visby rules apply with the consequence that liability cannot be capped by anything in the contract of carriage (Art.III para.8). (I note in passing that is somewhat bizarre that the buyers' very title to sue stems from the Bill yet it is said that the Bill is not a document of title for the purposes of the Act and Rules.)

153. What then is the purpose of those Rules? It is to provide protection from onerous terms in the contract of carriage. The carriers submit that such protection is only to be provided if there is a document of title in the sense of a document which can be used to convey title generally – a conventional order bill of lading being the paradigm example. But I do not see why. Ask the question "who is to be given protection?" An order bill protects not only the indorsee(s) of the bill but also the original consignee. I can see no rational reason for giving such a consignee protection but not a consignee who is not able to transfer title by indorsement.

154. There is another way of looking at it. Suppose the consignee had a say in the terms of the bill of lading. If he wanted the goods purely for himself (for instance special purpose machinery, as may well be the case here) rather than for dealing in (as might be the case with a commodity cargo) there is no reason why he would want the goods delivered to his order. Yet, on the respondent's argument, unless he asked for those magic words he loses protection. That would be far from self-evident to an ordinary businessman and would be a quite illogical consequence.

155. A number of academic authors have, particularly in the last 20 years or so, written opinions to the contrary, as indeed did the Law Commission. But, with respect, I do not find in them a sufficient explanation of why the

consignee's protection against onerous terms in the contract of carriage, or the consignor's protection in respect of receiving his money before delivery, should depend on whether it is a straight or order bill.

156. Accordingly I would allow the appeal on the first point. As to the points raised on the cross-appeal I agree with Rix LJ and have nothing to add.

Lord Justice Peter Gibson:

157. In **The Happy Ranger** [2002] 2 Lloyd's Rep 357 at para. 31 Tuckey L.J. said that the question whether a straight bill of lading was a bill of lading or similar document of title within the meaning of s. 1(4) of COGSA 1971 and the Hague/Hague-Visby Rules was not an easy point. He commented that it would be unwise to assume that the statements in the textbooks (which suggested a negative answer to that question) were correct, and that comment was underlined at para. 49 by Rix L.J. Tuckey L.J. was unwilling to decide the point in a case in which it did not call for decision. The point does call for decision on this appeal, in which we have had the benefit of admirable argument from Mr. Schaff Q.C. for MacWilliam and Mr. Croall for MSC. I would pay tribute to their industrious researches which have resulted in all the relevant material being put before us.

158. Although we are differing from the judge and from the arbitrators, Rix L.J.'s judgment, with which I am in respectful agreement, is so comprehensive that, subject only to one matter, there is nothing which I would wish to add. That matter relates to the fact that I was a signatory in 1991 to the joint report of the Law Commission and the Scottish Law Commission on Rights of Suit in respect of Carriage of Goods by Sea (Law Com No 196, Scot Law Com No 130), on which Langley J. relied in reaching his conclusion that the straight bill of lading used in this case was not a bill of lading within the meaning of s. 1(4). As will be apparent from my agreement with Rix L.J.'s judgment, I am afraid that I now take a different view of some of the statements in para. 2.50 of the joint report. Although Dr. Eric Clive of the Scottish Law Commission observed in footnote 1 to para. 1 of his Note of Partial Dissent that it was at least arguable that a straight bill of lading was a bill of lading for the purposes of the Hague-Visby Rules, I have to say that I do not recall much, if any, discussion on this topic within the Commissions or with the distinguished consultants who assisted the Commissions in the preparation of the joint report. The textbook authorities at that time appeared to be consistent and clear.

159. However, in the light of the material now put before us as analysed by Rix L.J. and for the reasons given by him I too would allow this appeal.

Order: Appeal allowed; all other questions, by agreement with counsel who are not able to be here today, put off to a date to be arranged next term and time for making any applications is extended until that date.

(Order does not form part of the approved judgment)

Mr A Schaff QC (instructed by Messrs Clyde & Co) for the Appellant
Mr S Croall (instructed by Messrs Duval Vassiliades) for the Respondent