AN INTRODUCTION TO BILLS OF LADING

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Bills of lading can appear daunting both to practitioners who are new to shipping law and to practitioners who specialise in other areas but need sometimes to refer to reported cases involving bills of lading. It is hoped that the following overview, by relating the content and some of the principal legal rules governing bills of lading to the commercial functions of bills of lading, will provide a helpful introduction to this area.

Range of Commercial and Legal Functions of Bills of Lading

Evidence of Receipt of Cargo

Bills of lading originated as no more than documents issued to merchants by carriers to evidence receipt by the carriers, in good condition, of cargoes shipped on board their vessels. Bills of lading thus enabled the shippers or the receivers of the cargo to establish that cargo that either was not delivered at all or was delivered in damaged condition at the discharge port had been loaded on a vessel in good condition and, thus, must have been damaged whilst in the care of the carrier. This receipt function remains a primary function of the “face” of most bills of lading (i.e. the side of the bill of lading in which information specific to particular cargoes, such as the description and weight or volume of bulk cargoes or the dimensions, number and seal numbers of containers in the case of containerised cargoes, is entered, generally in numbered boxes). The words “shipped on board in apparent good order and condition” remain, by virtue of Article III, rule 3 of the Hague and Hague-Visby Rules (and, similarly, Article 15(1)(b) of the Hamburg Rules), the most common form of words used to evidence receipt on board a vessel, in good condition, of a shipper’s cargo.

Bills of lading often are prepared by shippers and carriers, if they prepare bills of lading, must rely principally on information supplied by shippers. Carriers often will have little opportunity, in the course of loading, independently to confirm all that is said by shippers as to the nature, condition and quantity of their cargoes, e.g. because cargo is concealed within packaging. Nonetheless, because the bill of lading is a receipt issued by the carrier, it is the carrier and not the shipper that will be liable to the receiver for any discrepancies between the quantity and apparent order and condition of the cargo on shipment, as acknowledged in the bill of lading, and
of the cargo as delivered to the receiver. The bill of lading can be treated as conclusive evidence as between the carrier and a receiver and as at least *prima facie* evidence as between the carrier and the shipper, as to the number, weight or quantity and apparent order and condition of the cargo on loading; see, the Carriage of Goods by Sea Act 1971, section 1(6); Hague and Hague-Visby Rules, Article III, rule 4; the Hamburg Rules, Article 16(3); the Carriage of Goods by Sea Act 1992, section 4. The content of the face of a bill of lading alternatively can give rise to an estoppel at common law or can become actionable as constituting a fraudulent or negligent misrepresentation. Consequently, because the carrier is thereby placed at risk, the information inserted on the face of the bill of lading generally will be stated or deemed to have been supplied and warranted by the shipper, which will be required to indemnify the carrier against inaccuracies in the information provided for inclusion in the bill of lading; see, Hague and Hague-Visby Rules, Article III, rule 5 and Article IV, rule 5(h); Hamburg Rules, Article 17(1); the Carriage of Goods by Sea Act 1992, section 3(3).

The information set out on the face of a bill of lading often is expressed in qualified terms. The common use of words “said to” in relation to the description, contents or weight or other measure of a cargo supplied by the shipper and entered on the face of the bill of lading might not operate, at least alone, to qualify, as between the carrier and a consignee, the accuracy of factual statements to which they relate; see, *The River Gurara* [1998] 1 Lloyd’s Rep. 225 @ 234 per Phillips LJ; *The Boukadoura* [1989] 1 Lloyd’s Rep. 393 @ 399 per Evans J.; cf., e.g., *The Galatia* [1979] 2 Lloyd’s Rep. 450. However, the description of either the condition or the quantity of the cargo contained in the “receipt” portion of the bill of lading often is further qualified, e.g. by stating that the quality or condition of the cargo or the number of packages, the contents thereof or the weight or measure of the cargo is “unknown”. Such qualifications generally are effective so as to negate any representation as to the quality or as to the “internal”, but not as to the “external” (i.e. readily observable), condition of the cargo (e.g. *The Peter der Grosse* (1875) 1 PD 414) and can prevent a bill of lading from operating, even in the hands of a consignee, as even *prima facie* evidence of the quantity of cargo shipped (assuming compliance with Article III, rule 3 of the Hague and Hague-Visby Rules, subject to its proviso, where those Rules apply); see, *The River Gurara* [1998] 1 Lloyd’s Rep. 225; *The Mata K* [1998] 2 Lloyd’s Rep. 614; *The Atlas* [1996] 1 Lloyd’s Rep. 642. However, it appears that a representation as to quantity contained in a bill of lading, even if qualified by words such as “weight unknown”, in
any event will be presumed to be “not wildly at odds” with the quantity in fact loaded; *The Sirina* [1988] 2 Lloyd’s Rep. 613 @ 615 per Phillips J.

It might be thought that the qualifications commonly applied to the statements inserted on the face of bills of lading negate entirely the commercial purpose of bills of lading as receipts for cargo. However, this is not the case in practice, because the carrier cannot without risk ignore matters that either are known to it or are readily observable or ascertainable. If it is evident at the time of loading, e.g., that the cargo or its packaging is not in good condition, or that the shipper’s figure for the quantity of cargo loaded is more than minimally inaccurate, unless there is some genuine doubt or disagreement between the carrier and the shipper as to the apparent condition or quantity of the cargo, all discrepancies noted by the carrier can, and should, be reflected in the bill of lading, which should be appropriately “claused”; e.g. *The Boukadoura* [1989] 1 Lloyd’s Rep. 393; *The Nogar Marin* [1988] 1 Lloyd’s Rep. 412. Should the carrier in such circumstances instead consent to issue a “clean” bill of lading, usually because it is offered by the shipper an indemnity against any liability to any subsequent holder of the bill of lading, not only will the carrier expose itself to liabilities to the receiver by reference to the untrue statements that are entered on the face of the bill of lading but any indemnity that it has accepted against those liabilities will be unenforceable against the shipper because, regardless of whether it intended or desired to defraud any subsequent holder of the bill of lading, the carrier at least will have been reckless in participating with the shipper in issuing a bill of lading containing representations of fact that are known or believed to be untrue; *Brown Jenkinson v Percy Dalton* [1957] 2 QB 621; cf. Hamburg Rules, Article 17(3)-(4) (which require proof of intention to defraud a subsequent holder of the bill of lading but, on such proof, deprive the carrier also of the benefit of limitation of liability).

A bill of lading issued by a carrier to a charterer that is also named as the shipper of the cargo covered by the bill of lading generally will be characterised as no more than a receipt for cargo; *Rodocanachi v Milburn* (1886) 18 QBD 67. There is a strong presumption that the contract for carriage of that cargo, as between the carrier and the charterer shipper, is contained in the charter alone. However, bills of lading otherwise now perform other equally important commercial and legal functions.
Evidence of a Contract of Carriage

Gradually, the terms on which received cargo was to be carried came to be set out (in ever greater detail and ever smaller print) on the “reverse” side of bills of lading. However, the manner in which bills of lading are issued has dictated their characterisation, generally, as documents that contain or evidence, rather than constitute, contracts of carriage. Save for a “received for shipment” bill of lading, a bill of lading will not or, at least, should not, be issued until after all of the cargo covered by that bill of lading has been shipped on board the carrying vessel (see, *The Wilomi Tanana* [1993] 2 Lloyd’s Rep. 41 @ 45 per Hobhouse J.) and, indeed, might not be issued until after the carrying vessel has sailed from the loadport. However, it would be commercial nonsense to assume that shippers would load their cargoes onto vessels, and that carriers would accept those cargoes for carriage on board their vessels, regardless of the terms on which those cargoes were to be carried. Consequently, it is reasonable to assume, and Courts have long inferred, that a contract of carriage must have been concluded before or as cargo is tendered and accepted for shipment on board a vessel, e.g. on completion of a booking note by a shipper or upon the shipper tendering cargo for loading pursuant to the advertised terms of a liner service, and thus prior to issue of a bill of lading; see, e.g., *The Barranduna and Tarrago* [1985] 2 Lloyd’s Rep. 419; *cf.*, *The CPC Gallia* [1994] 1 Lloyd’s Rep. 68. It might be that that antecedent contract is on terms simply that the cargo is to be carried on the terms of a specific bill of lading but that reference has to be had to the antecedent contract because no bill of lading in fact is issued, e.g. because the intended voyage is aborted prior to the issue of the bill of lading or because the cargo is damaged shortly after loading; e.g. *Hanjin Shipping Co. Ltd. v Procter & Gamble (Philippines) Inc. et al.* [1997] 2 Lloyd’s Rep. 341; *Pyrene Co. v Scindia Navigation Co.* [1954] 2 QB 402. Alternatively, reference might need to be had to the terms of that antecedent contract of carriage because those are said either to differ from, or to assist in the construction of, the terms of the bill of lading later issued; see, *The Ines* [1995] 2 Lloyd’s Rep. 144. Often, however, once a bill of lading has been issued it will be both sufficient evidence, and the only available evidence, of the terms of the contract for carriage of the cargo that it covers.

In practice, because bills of lading often are transferred, by indorsement and delivery or mere delivery, not only from shippers to consignees (i.e. the persons to whom the cargo is consigned or sent and, thus, the intended receivers of the cargo) but also by shippers or consignees to banks or onward to subsequent purchasers, a bill of lading will be the only evidence of the terms of the
contract for carriage of the cargo that it covers that is available to a consignee or other transferee of the bill of lading. Thus, bills of lading in the hands of consignees or other, intermediate or subsequent, transferees often have to be assumed to contain all of the terms of the contract of carriage.

The characterisation of a bill of lading issued to a charterer shipper as no more than a receipt for cargo, if followed through in the event of transfer of such a bill of lading, would defeat the use of the bill of lading as even evidence of a contract of carriage. Consequently, it has long been accepted, for the same commercial rationale that dictates that bills of lading in the hands of consignees or other, intermediate or subsequent, transferees generally must be treated as containing the full terms of a contract of carriage, that, as between the carrier and a lawful transferee of a bill of lading issued to a charterer shipper, the bill of lading, from the moment of transfer, “must be considered to contain a contract”; Leduc v Ward (1888) 20 QBD 475. (The Carriage of Goods by Sea Acts of 1971 and 1992, reverted to below, should be construed accordingly.)

Further, it should be noted that where a charterer acquires a bill of lading not as an original shipper but by transfer from some other shipper, i.e. as a charterer transferee, unless the charter provides that bills of lading are to be signed “without prejudice” to the charter (which it often will), the transferred bill of lading can operate, as between the carrier and the charterer, to modify or supplement the terms of carriage contained in the charter; see, e.g. Hansen v Harrold Brothers [1894] 1 QB 612. Alternatively, if the charterer is not the shipper but becomes the ultimate consignee of the cargo, it might in any event be able to rely upon the terms of the bill of lading as terms to be enforced pursuant to a contract to be implied from its taking delivery of the cargo under that bill of lading (i.e. a Brandt v Liverpool contract; see, [1924] 1 KB 575).

The commercial requirement that a bill of lading contain or evidence the contract for the carriage of cargo that it covers dictates that it will contain detailed terms on matters such as the scope of the duties accepted by the carrier in relation to the carriage and discharge of the cargo, the duties of the person entitled to the cargo in relation to the payment of freight and the rights and duties of the person entitled to the cargo in relation to the discharge and delivery of the cargo. It is in this connection that the Hague, Hague-Visby and Hamburg Rules have assumed such importance in the law governing bill of lading contracts. These Rules were developed in response to the adoption by carriers of bill of lading clauses that increasingly purported either to avoid altogether
Charterers historically have had sufficient commercial power to be able to negotiate fair and reasonable commercial terms of carriage with shipowners. However, because a contract of carriage generally is concluded prior to the issue of a bill of lading, bill of lading holders other than original shippers never in fact have a chance to negotiate at all with carriers, let alone to negotiate with carriers on an equal commercial footing. It thus was deemed desirable, in the face of the increasing restrictions that were being introduced into bill of lading contracts by carriers, that international standards should be developed to ensure that bills of lading should contain contracts of carriage on essentially fair and reasonable commercial terms. The Hague Rules were the first attempt at such international standards. Deficiencies over time in the operation of the Hague Rules, e.g. as to the application of the package or unit limitation to containerised cargo, were intended to be rectified, but have not in all instances been overcome, in the Hague-Visby Rules. The Hamburg Rules represent an attempt not only to rectify remaining operational deficiencies in the Hague-Visby Rules but also to alter the commercial balance reflected in the earlier Rules, by increasing the protection offered to bill of lading holders and reducing that afforded to carriers. There is now wide acceptance in practice, by ocean carriers, of the Hague or Hague-Visby Rules, or of statutory variants on those Rules, as part of the terms of their standard bill of lading contracts but there has been only limited adoption to date by ocean carriers of the Hamburg Rules.

**Document of Title to Cargo**

Cargo often is intended to be sold, or sold on, after it has been consigned to a carrier and the consignee thus either might not be identified when a bill of lading is issued or might thereafter alter. The shipper or consignee of a cargo sold, or sold on, after consignment to the carrier but not immediately paid for will require some assurance that the cargo will not be delivered to the purchaser or end purchaser before the price has been paid. Conversely, if the cargo is sold or sold on and paid for immediately after consignment to the carrier, the purchaser or end purchaser will require some assurance that the cargo will be delivered to it, and not to the order of either the shipper or the original consignee. Similarly, a bank might have advanced funds for the purchase of the cargo either to the original shipper, or to the consignee, or to a subsequent purchaser and will require some assurance that the cargo cannot be disposed of before the bank is
reimbursed. It is not feasible for intermediate or subsequent transferees, or transferees for limited purposes, of a cargo that is dealt with afloat each to take physical possession of that cargo for the duration of their interest. However, it is both feasible and desirable for each of those transferees to control disposition of the cargo for a period of time, or to an appropriate degree, through control of a document representing an entitlement to the cargo. Thus, by mercantile custom, both “received for shipment” and “shipped on board” bills of lading have come to be treated as documents of title to cargo.

Bills of lading made out to a consignee whose name is left blank or to “bearer” or to “order” or to “assigns” are transferable (as opposed to truly negotiable) instruments the delivery or indorsement and delivery of which can transfer property in or rights and liabilities concerning the cargo covered. Mere delivery of a blank or bearer bill of lading, or of a bill of lading “indorsed in blank”, can transfer property in or rights and liabilities concerning the cargo covered by that bill of lading whereas both indorsement and delivery are required to transfer property in or rights and liabilities concerning the cargo covered by a bill of lading made out to a named consignee or “indorsed in full”. A bill of lading is “indorsed in blank” simply by insertion of the name of the shipper or consignee on the reverse of the bill. A bill of lading is “indorsed in full” by the shipper or consignee signing on the reverse of the bill an order to “deliver to X or order”. Transfer of a blank or bearer bill of lading can be restricted simply by filling in the blank or adding a full indorsement. Conversely, transfer of a bill made out to a named consignee or to order or assigns can be facilitated by adding an indorsement in blank.

Delivery or indorsement and delivery of a bill of lading has the following effects, provided that the bill of lading is not “spent” (i.e. that it relates to some cargo that has not yet been finally delivered by the carrier, having regard to the quality of any delivery effected by the carrier rather than to the absolute quantity of cargo so delivered; see, The Delfini [1988] 2 Lloyd’s Rep. 599):

- by mercantile custom, it transfers such property in the cargo as the parties to the transaction intended it to transfer, e.g. legal title only, for purposes of a mortgage, or absolute transfer, or absolute transfer subject to a right of stoppage in transit (Sewell v Burdick (1884) 10 App. Cas. 74);
- by the Carriage of Goods By Sea Act 1971 and Hague-Visby Rules, Article I(b) and Article III, rule 4, where the delivery or indorsement and delivery of the bill of lading is from a charterer shipper, it can operate to create a contract of carriage between the carrier and the
transferee that is subject to the Rules and thus, potentially, on terms differing from those of the charter, even though the bill of lading incorporates the terms of the charter;

- by the Carriage of Goods by Sea Act 1992, it transfers to a lawful (i.e. good faith) holder of the bill of lading all rights under, and also subjects the lawful holder to liabilities under, the contract evidenced in (or, construing the Act consistent with *Leduc v Ward*, created by transfer of) the bill of lading. (The Carriage of Goods by Sea Act 1992 thus connects transfer of title to sue with transfer of possession of the bill of lading rather than, as was formerly the case under the Bills of Lading Act 1855, section 3, with the passing of property or risk in the cargo covered by the bill of lading.)

Meanwhile, the carrier, which generally will have had no involvement at all in sales or onward sales of cargo whilst afloat, nor in any delivery or indorsement and delivery of the bills of lading covering such cargo, will be concerned on arrival at the discharge port to deliver the cargo to the proper person without being put to undue enquiry or delay. If there were only one original bill of lading issued, those commercial concerns could readily be met by a rule that simply required delivery to be made only against production of that single original bill of lading. However, bills of lading traditionally have been issued in sets of 3 originals; one to be retained on the vessel, one to be retained by the shipper and one to be sent to the consignee. There still are good commercial reasons for splitting a set of 3 original bills of lading, e.g. to ensure that at least one original bill of lading arrives at the discharge port ahead of the vessel, and this practice would create no difficulty if bills of lading still were treated as no more than receipts for cargo. (The former practice of retaining an original bill of lading on board the vessel, otherwise generally discontinued, has been revived on oil tankers, but for the purpose of delivery of one original to the receiver at the discharge port, because the original bills of lading, which often have to be “negotiated” through banks under numerous back-to-back sales afloat, otherwise often would reach the discharge port long after the vessel.) However, because bills of lading have come to be treated also as documents of title to the cargo covered, the use of sets of original bills of lading now provides substantial scope for fraudulent dealings; e.g. *The Lycaon* [1983] 2 Lloyd’s Rep. 548. The rules that have been developed to govern the exhaustion of bills of lading as documents of title thus have had to reflect both a balance between the commercial interests of merchants in retaining freedom to deal with their goods after shipment on board ocean vessels and those of carriers in being able to identify, both with certainty and without incurring undue
delay, the persons entitled to delivery of cargo at a discharge port and the oddity that ocean bills of lading continue to be issued in sets of up to 3 originals.

Absent notice of any conflicting claim to the cargo, or knowledge of circumstances that ought to raise a reasonable suspicion that the holder is not entitled to the cargo, the carrier is entitled and, indeed, obliged to deliver the cargo to the first holder who presents one of a set of original bills of lading that makes that cargo deliverable to him and is thereby discharged from any further delivery obligation under the bill of lading; Glyn, Mills & Co. v East and West India Dock Co. (1882) 7 App. Cas. 591. Thus, even though the original bills of lading as issued named X as consignee, if Y presents to the carrier one of the set of original bills of lading that appears to have been duly indorsed in blank by X, the carrier can and should deliver the cargo to Y and not to X. (If the carrier either has notice of a conflicting claim or has some reasonable doubt as to the entitlement of the holder of the first bill of lading that is presented at the discharge port, it should interplead; e.g. Hanjin Shipping Co. Ltd. v Procter & Gamble (Philippines) Inc. et al. [1997] 2 Lloyd’s Rep. 341. However, the carrier will not be allowed the costs of interpleader proceedings where it has itself caused or contributed to such a conflicting claim or doubt, e.g. by issuing a second set of original bills of lading without first procuring the surrender to it of the initial set of original bills of lading; e.g. The Lycaon [1983] 2 Lloyd’s Rep. 548.) Conversely, regardless of whether it might in good faith do so, the carrier is neither obliged nor entitled to deliver the cargo to a person who appears to be entitled to it, unless that person can produce to the carrier an original bill of lading; The Houda [1994] 2 Lloyd’s Rep. 541; The Ines [1995] 2 Lloyd’s Rep. 144; The Rio Sun [1985] 1 Lloyd’s Rep. 350. Thus, even though the original bills of lading as issued named X as consignee, if X cannot present to the carrier one of the original set of bills of lading, the carrier is neither obliged nor entitled to deliver the cargo to X.

In practice, because inability to produce an original bill of lading at the discharge port most often is the result of unavoidable delays in the processing or transmission of bills of lading and not of dishonest dealings, carriers usually will be prepared to deliver cargo against either adequate security or an indemnity against potential adverse claims offered by a named consignee or other person who appears to have a good claim to cargo for which he cannot produce an original bill of lading. However, the decision of Sheen J. in The Siam Venture and Darfur, [1987] 1 Lloyd’s Rep. 147, cannot now stand in so far as it suggests that a carrier might be considered to have acted unreasonably, and thus might be denied demurrage, if it refused to deliver cargo to a particular claimant on production of a guarantee from a reputable bank in place of an original bill
of lading. (In any event, as appears from the submissions made to Sheen J. as to, e.g. loss of P&I Club cover, it could rarely be unreasonable in fact for a carrier to refuse to deliver cargo without production of an original bill of lading, even if security or an indemnity were offered; see also, e.g., *The Ines* [1995] 2 Lloyd’s Rep. 144.)

Nonetheless, in advising disponent owners or owners, care should be taken to avoid an unreasonable refusal to discharge ashore, as opposed to a refusal to deliver to a particular claimant, cargo for which no original bill of lading has been produced. Absent a clear provision to the contrary in the charter (a clause providing that the charterer shall indemnify the disponent owner or owner against all consequences of delivery of cargo without production of a bill of lading is not such a provision), neither a time nor a voyage charterer of the carrying vessel can require the disponent owner or owner to release cargo without production of an original bill of lading; *The Houda* [1994] 2 Lloyd’s Rep. 541. However, if cargo can be discharged, as opposed to delivered to a particular claimant, without prejudice to the carrier’s position, e.g. to be held ashore subject to a lien, a refusal to discharge that cargo could result in the vessel being treated as off hire or the carrier being denied demurrage; *Carlberg v Wemyss* 1915 S.C. 616.

(It is suggested that the proposition that a carrier would be required, or at least entitled, to release cargo without production of an original bill of lading if the absence of the bill of lading had been “satisfactorily accounted for” (*Barclays Bank Ltd. v Commissioners of Customs and Excise* [1963] 1 Lloyd’s Rep. 81 @ 89 per Diplock LJ; see also, *The Smorovskiy 3068* [1994] 2 Lloyd’s Rep. 266 @ 272 per Clarke J.) cannot survive *The Houda*. However, it appears that the Court has an “equitable jurisdiction to grant relief in the case of lost bills” (*The Houda* [1994] 2 Lloyd’s Rep. 541 @ 558 per Millett LJ) and thus that, where an original bill of lading has been lost, failing agreement, the cargo claimant can apply to the Court for an Order that, upon the claimant tendering a sufficient indemnity, the loss of the bill of lading is not to be set up by the carrier as a defence to its claim to have the cargo delivered; *The Houda* [1994] 2 Lloyd’s Rep. 541 @ 553 per Leggatt LJ; see also, *Carlberg v Wemyss* 1915 S.C. 616 @ 624 per Lord Johnson.)

**Common “Labels” for Bills of Lading and Analogous Documents**
Confusion often is created by descriptive “labels” that commonly are used to indicate the most characteristic features or functions of particular bills of lading. That confusion is added to when the title “bill of lading” is used to describe documents that lack certain of the commercial functions or certain of the legal characteristics of a bill of lading and thus are not properly so described at all. The following list is intended to include, and define, most of the more widely used “labels” that might cause confusion.

*Charterer’s bill;* a bill of lading by virtue of which the charterer of a vessel is the contractual carrier.

*Charterparty bill;* a bill of lading that indicates that it is subject to a charter. Charterparty bills of lading, e.g. Congenbill, characteristically contain far fewer detailed terms on their reverse than do other bills of lading, for the very reason that most of their detailed terms are set out in the material charter.

*Claused bill;* a bill of lading that contains a positive notation of a defective condition or shortage either of the cargo covered or, where material, of its packaging. (The usual qualifications such as “said to contain” and “condition, weight, etc. unknown” contain no positive notation of any defect or shortage and thus do not render a bill of lading “claused”.)

*Clean bill;* a bill of lading that contains no positive notation of a defective condition or shortage either of the cargo covered or, where material, of its packaging. (A bill of lading can be “clean” although it contains no positive statement that the cargo covered was shipped “clean”. However, such positive notation is commonly placed on the face of bills of lading.)

*Combined Transport/Multimodal Transport/House to House bill;* a bill of lading that covers not only carriage of cargo on an ocean going vessel but all or other stages and/or forms of carriage, e.g. carriage of the cargo by rail, road or barge from the shipper’s premises to an ocean port of shipment, from that port to an ocean port of discharge and from that port of discharge by rail, road or barge to the consignee’s premises. The issuer of such a bill of lading generally accepts primary responsibility as carrier for all stages and forms of carriage.

*Cover bill;* a bill of lading issued by one carrier to another carrier that has arranged for cargo shut out from its own vessel to be shipped on the issuing carrier’s vessel.

*Feeder/Service/Cover bill;* a bill of lading issued by a sub-carrier to the main carrier under a combined transport or through bill of lading, which covers only the stage and form of carriage performed by the sub-carrier, e.g. carriage by barge of parcels of cargo either from inland ports
or from smaller or more remote coastal ports to a principal coastal port served by a combined transport liner service operator. (Feeder bills of lading generally are of concern only to main carriers and sub-carriers and do not affect the relations between main carriers and shippers or consignees that are evidenced or created by the related combined transport or through bills of lading.)

*Freight Forwarder’s/House bill*; generally, a document with the effect of a cargo delivery order issued to a shipper of cargo by a freight forwarder, which thereafter arranges, usually as agent for the shipper, for shipment of the cargo under a combined transport or ocean bill of lading. (However, regard must be had to the substance and not merely to the title or form of a document and a freight forwarder’s bill of lading might on its true construction be a fully transferable bill of lading and not merely a cargo delivery order; see, *Sonicare International Ltd. v East Anglia Freight Terminal Ltd. et al.* [1997] 2 Lloyd’s Rep. 48.)

*Liner bill*; a bill of lading issued by a particular shipping line that offers a regular, scheduled service between specified load and discharge ports.

*Ocean/Port to Port bill*; the “classic” marine bill of lading, which covers ocean port to ocean port carriage of cargo on a single ocean going vessel and no other stage or form of carriage.

*Owner’s bill*; a bill of lading by virtue of which the owner of a vessel is the contractual carrier.

*Received for Shipment bill*; a bill of lading containing an acknowledgement by the carrier that the cargo covered has been received by it, e.g. at a container yard, for shipment on board a vessel. (A “received for shipment” bill of lading can be, and often is, converted to a “shipped” bill of lading by subsequent notation acknowledging that the cargo covered has been shipped on board a vessel.)

*Shipped/Shipped on Board/On Board bill*; a bill of lading containing an acknowledgement by the carrier that the cargo covered has been loaded on board a vessel.

*Ship’s Delivery Order*; an undertaking given by a carrier, pursuant to a contract for the carriage by sea of the cargo to which the undertaking relates, to the person so identified, to deliver that cargo to a person identified therein (i.e. not a bill of lading; see, the Carriage of Goods by Sea Act 1992, section 1(4)). SDOs generally are issued when the shipper of a bulk cargo covered by a single bill of lading wishes to split the bulk cargo and to deliver distinct parcels to a number of consignees. SDOs will be issued to avoid problems potentially faced in procuring the surrender of the initial original bill of lading and issuing a number of different original bills of lading in substitution; see, *SIAT v Tradax* [1978] 2 Lloyd’s Rep. 470 @ 493.
Short Form bill; a bill of lading with fairly standard face format, but which includes a clause that incorporates the carrier’s standard conditions, and with a blank reverse, e.g. BIMCO’s Blank Back Bill.

Spent bill; a bill of lading that has been discharged by virtue of a qualitatively complete delivery by the carrier, to the person entitled to it, of the cargo that it covers and thus has ceased to be transferable; see, The Delfini [1990] 1 Lloyd’s Rep. 252 @ 269 per Mustill J. and [1988] 2 Lloyd’s Rep. 599. (However, a bill of lading that is spent prior to its transfer can still operate to transfer rights against a carrier, under the Carriage of Goods by Sea Act 1992, section 2(2), provided that the transfer occurs by virtue of a transaction effected pursuant to arrangements made before the bill of lading became spent or as a result of its rejection to the transferee, also pursuant to arrangements made before the bill of lading became spent, by another person.)

Straight bill; a bill of lading that is not transferable by either delivery or indorsement and delivery, e.g. because it is marked “not negotiable” or is not made out to “bearer”, to “order” or to “assigns”. Straight bills of lading are used, for example, for “in house” shipments between divisions of large multinationals or when it is known for certain, prior to shipment of the cargo, that the intended consignee will not sell the cargo on. (A straight bill of lading is properly characterised as a bill of lading but, because it lacks the characteristic of transferability, does not operate as a document of title and is not treated as a bill of lading for purposes of the Carriage of Goods by Sea Act 1992; see, section 1(2). Since a straight bill of lading is not a document of title, it does not attract the mandatory application of the Hague-Visby Rules as a matter of English law; see, Carriage of Goods by Sea Act 1971, section 1(2). A straight bill of lading can, however, fall within the definition of “sea waybill” adopted for purposes of the Carriage of Goods by Sea Act 1992; see, section 1(3). The principal difference between transferable and straight bills of lading, for purposes of the 1992 Act, thus is that the conclusive evidence provision of section 4 of the 1992 Act does not apply to straight bills of lading.)

Switch bill; a replacement bill of lading issued at the request of a consignee seller to replace the original bill of lading issued to that seller’s supplier as shipper, so as to show the consignee seller as shipper and its own sub-purchaser as consignee. Such bills of lading are intended to keep the identity of the supplier from the sub-purchaser and thus to prevent future direct dealings between the supplier and the sub-purchaser. (Such bills of lading are, however, problematic, particularly if issued by charterers rather than owners; see The Atlas [1996] 1 Lloyd’s Rep. 642. For example, a charterer does not have apparent or ostensible authority to issue a second set of bills
of lading on behalf of the disponent owner or owner of the vessel, which therefore will not to be treated as the contractual carrier under a switch bill of lading. Further, a switch bill of lading almost invariably will contain a statement of fact, as to the identity of the shipper of the cargo, that is known to the issuer to be inaccurate and the switch bill of lading thus can constitute a fraud on the consignee and/or contain a fraudulent misrepresentation. Any indemnity offered to the issuer by a seller requesting a switch bill of lading thus could be unenforceable for illegality; see, Brown Jenkinson v Percy Dalton [1957] 2 QB 621.)

Through bill; a bill of lading covering more than one stage (or, sometimes, more than one form) of carriage. Through bills of lading differ from combined transport bills of lading in that the separate stages and/or forms of carriage, including distinct stages of ocean carriage, generally are intended to be undertaken by two or more successive carriers as primary carrier. Obvious characteristics are wide liberties to tranship and purported restrictions on the liabilities of each carrier to the stage of carriage that it performs.

Waybill/Sea waybill; a receipt for cargo that contains or evidences a contract for the carriage of goods by sea and which identifies the person to whom the carrier is to deliver that cargo (see, the Carriage of Goods By Sea Act 1992, section 1(3)). A waybill or sea waybill differs from a bill of lading in that it lacks transferability and in that the designated consignee thus is not required to produce the waybill in order to obtain delivery of the cargo. (Since a waybill is not a document of title, it will not attract the mandatory application of the Hague-Visby Rules as a matter of English law; see, Carriage of Goods by Sea Act 1971, section 1(2). However, sea waybills are within the ambit of the Carriage of Goods by Sea Act 1992.)
Procedures for Issue and Correction of Bills of Lading

Issue of Bills of Lading

Generally, following full shipment of cargo under a contract of carriage, a bill of lading (or a set of 3 original bills of lading) covering that cargo is signed by the carrier or its agent and delivered to the shipper. In practice, bills of lading sometimes are drawn up and presented or readied for signature prior to completion of loading. However, a bill of lading should never bear a date that is earlier than the date on which the **whole** or **last** of the cargo that it covers was loaded; *The Wilomi Tanana* [1993] 2 Lloyd’s Rep. 41 @ 45 per Hobhouse J. The bill of lading might be prepared by the shipper and presented to the carrier for signature, in which case it must be presented to the carrier within a reasonable time after completion of loading of the material cargo and signed by the carrier within a reasonable time of its presentation. Otherwise, and increasingly often in practice, the bill of lading will be prepared by the carrier, principally from information supplied by the shipper, in which event it should be prepared, signed and delivered to the shipper within a reasonable time after completion of loading of its cargo. (However, it appears that, if less than a full set of original bills of lading initially is issued, a Master, at least on orders of a charterer, remains entitled to sign a second and/or third original bill of lading, in identical form to the first original signed on completion of loading, even at the discharge port; see, *The Mobil Courage* [1987] 2 Lloyd’s Rep. 655 @ 660 per Deputy Judge A. Hamilton Q.C.)

Typical Problems Created by Errors in Bills of Lading

If a bill of lading as issued contains inaccuracies, which most often will occur through mere error or oversight (but appears increasingly to be occurring as a result of fraud by shippers that also are cif sellers), that can result in serious problems and potential losses. For example, the carrier might be at risk of a loss for which it will be unable to claim an indemnity from the shipper because, by error or neglect of the carrier alone, the quantity of cargo acknowledged as shipped in the bill of lading is greater than the quantity declared by the shipper as shipped and, thus, is greater than the quantity available for delivery to the consignee, as against which the bill of lading might constitute conclusive evidence of the quantity shipped; see, *The Nogar Marin* [1988] 1 Lloyd’s Rep. 412. To give another, and increasingly common, example, if the date on which the last of the cargo is shown to have been shipped is inaccurate, the bill of lading might be accepted on behalf of a cif purchaser of the cargo who otherwise would have been entitled to
reject it (as having been issued outside the contractual shipment period), resulting in claims by the consignee against the carrier either for fraudulent or negligent misrepresentation (if the carrier is implicated in the false dating of the bill of lading, e.g. because that was carried out by its loadport agent; e.g. *The Saudi Crown* [1986] 1 Lloyd’s Rep. 261) or under the cif contract, against the shipper, for substantial damages either for fraudulent or negligent misrepresentation or for breach of condition as to presentation of true shipping documents (which, in turn, depending on the facts, could result in a claim for indemnity or contribution by the shipper against the carrier); e.g. *Procter & Gamble Philippine Manufacturing Corporation v Kurt A. Becher GmbH & Co. KG* [1988] 2 Lloyd’s Rep. 21. In all such cases, because the wrongful act complained of, as against the carrier, will be the deliberate or negligent making of a false statement in a bill of lading, which is neither a claim in connection with the cargo itself nor a claim related to the carriage of the cargo, it is thought that the carrier would lose all benefit of the Hague and Hague-Visby Rules, including, e.g., the benefits of the one year time bar under Article III, rule 6 and of the package or unit limitation of Article IV, rule 5; see also, Hamburg Rules, Article 17(3)-(4).

**Correction or Substitution of Bills of Lading**

There might be a need to correct or amend a bill of lading after it has been issued not only because it contains an inadvertent but commercially significant error, e.g. as to the condition, quantity or date of shipment of the cargo covered, but because there is some change in circumstance subsequent to the issue of the bill of lading that renders an amendment desirable, e.g. the shipper or consignee requests a change in the named discharge port. However, the range of commercial and legal functions of bills of lading renders such alterations problematic. Once a carrier has complied with a direction or request, whether from a time or voyage charterer or from a shipper, to issue a transferable bill of lading of specified content, because the bill of lading can immediately expose the carrier to contractual liabilities to third parties, that direction or request cannot subsequently be countermanded or varied; *The Houda* [1994] 2 Lloyd’s Rep. 541 @ 558-559 per Millett LJ.; *The Wilomi Tanana* [1993] 2 Lloyd’s Rep. 41 @ 45 per Hobhouse J. It thus is clear that a carrier cannot be required by a time or voyage charterer, shipper or consignee to correct or amend a transferable bill of lading after issue. Conversely, a carrier that becomes aware of an error in an issued transferable bill of lading cannot unilaterally require a time or voyage charterer, shipper or other holder of that bill of lading to surrender the
bill of lading to the carrier for correction or cancellation and substitution; *The Wilomi Tanana* [1993] 2 Lloyd’s Rep. 41 @ 44 and 45 *per* Hobhouse J. The carrier can, however, correct an error in an issued transferable bill of lading with the concurrence of the current holder of that bill of lading, at least so long as the bill of lading remains in the hands of the shipper, whether or not it also has the concurrence of any time or voyage charterer; *The Wilomi Tanana* [1993] 2 Lloyd’s Rep. 41 @ 45-46 *per* Hobhouse J. The carrier must not, under the guise of “correction”, issue a substitute bill of lading in a form that is inconsistent either with the direction or instruction pursuant to which the original bill of lading was issued or with any further direction or instruction as to the content of such substitute bill of lading that has been given in the interim by a time or voyage charterer. (In any event, the carrier should **never** issue a further original bill of lading without first procuring the surrender and cancellation of the initial original bill of lading. *Ishag v Allied Bank International et al.,* [1981] 1 Lloyd’s Rep. 92, and *Elder Dempster Lines v Ishag*, [1983] 2 Lloyd’s Rep. 548, illustrate graphically the confusion and evils that can ensue if this procedure is ignored!) But neither can the carrier be required by a time or voyage charterer to effect such a correction by cancelling the original bill of lading and issuing a different substitute bill of lading; *The Wilomi Tanana* [1993] 2 Lloyd’s Rep. 41 @ 46 *per* Hobhouse J. The best course generally as regards errors, assuming that the carrier can obtain the concurrence of the then holder(s) of all original bills of lading, will be for the carrier to make the necessary correction on the face of each of the original bills of lading and to initial or sign that correction, If that were not possible, the carrier might obtain some measure of protection by creating a separate document containing the proposed correction and issuing that separate document to the shipper or to any other interested party of which the carrier was aware. However, it is suggested that this latter option is far less satisfactory, particularly given the ease with which the bill of lading still could be transferred independently of the separate, corrective document. (It is also thought that the adoption of the former of these options would, but that the adoption of the latter of these options probably would not, ensure that the corrected bill of lading was an acceptable shipping document for purposes of cif sales (assuming, of course, that the bill of lading in its corrected form was otherwise acceptable, e.g. as to the date of shipment); see, *Soules CAF v PT Transap of Indonesia*, 30.07.98, Judgment of Timothy Walker J.)

If substantial alteration, rather than limited correction, of an issued bill of lading is contemplated, the surrender and cancellation of all original bills of lading in a set and the issue of a different, substitute set of original bills of lading would need to be considered. Some of the problems
associated with “switch” bills of lading already have been referred to. However, even assuming that the concurrence of the disponent owner or owner has been obtained and that the substantial alteration proposed does not raise an issue of potential fraud or misrepresentation, great care is needed regarding the procedure adopted for cancellation and reissue. For example, if the initial original bill of lading was issued by a loadport agent in Russia but a substitute original bill of lading would have to be issued from the charterer’s Hong Kong office, that could result in an inadvertent substitution of the Hague-Visby Rules for the Hague Rules as part of the bill of lading contract; see, *The Atlas* [1996] 1 Lloyd’s Rep. 642.

**Practical Concerns Regarding Enforcement of Bill of Lading Contracts**

*Identifying the Contractual Carrier Under the Bill of Lading*

A problem that often faces a holder that wishes to enforce a bill of lading contract is the identification of the other contracting party. This is because vessels often are let by their owners, on time or voyage charter, for the use of third parties, who often will sub-let the vessel, again either on time or voyage charter. A vessel thus might have been let by its owner on a 12 month time charter to X, who in turn has let the vessel on voyage charter to Y.

The identity of the contractual bill of lading carrier will fall to be determined primarily as a matter of construction of material clauses on both the face of the bill of lading (e.g. any logo appearing on the face of the bill, the from of the printed signature clause and the precise terms and capacity in which that clause in fact is signed) and the reverse of the bill of lading (e.g. the presence or absence and terms of any identity of carrier clause or demise clause (e.g. “the contract evidenced by this bill of lading is between the shipper and the owner of the vessel named herein” or “if the vessel is not owned by or demise chartered to the line by which this bill of lading is issued, this bill of lading shall take effect only as a contract with the owner or demise charterer”)), possibly tested, where any doubt remains, at least as between a putative carrier and the shipper, by reference to the circumstances in which the bill of lading came to be issued; *The Hector* [1998] 2 Lloyd’s Rep. 287 @ 291-292 & 293-297 per Rix J.; *The Ines* [1995] 2 Lloyd’s Rep. 144 @ 148-150 per Clarke J.

However, the circumstances of issue of the bill of lading might offer little assistance. For example, the Court has refused to find that the contracting carrier under a bill of lading, which contained a demise clause indicating that the contract was with the shipowner, must be the same
carrier as had been named in an antecedent booking note, which had named a charterer liner service operator as carrier but which also had provided for “other terms as for carrier’s bill of lading”; The Jalamohan [1988] 1 Lloyd’s Rep. 443. In any event, where an issue as to the identity of the bill of lading carrier arises as between a putative carrier and a consignee or other subsequent holder of the bill of lading, the bill of lading carrier in principle should be identified solely on construction of the bill of lading, because it is the bill of lading alone, as a document of title, that is capable of and intended for transfer to such parties, and not the antecedent contract of carriage pursuant to which the bill of lading was issued; see, The Rewia [1991] 2 Lloyd’s Rep. 325 @ 333 per Leggatt LJ. This makes commercial as well as legal sense, given that holders of the bill of lading other than the shipper generally will not in fact have, and will have no need to have, knowledge of the circumstances in which the bill of lading came to be issued. It must therefore be doubted whether it is correct to look at the circumstances surrounding the issue of the bill of lading in order to identify the bill of lading carrier even as between a putative carrier and the shipper, assuming that the purpose of such enquiry is to ascertain whether it alters the conclusion arrived at as a matter of pure construction. It would be odd if the identity of the bill of lading carrier were to differ depending on whether, at the time of determination, the bill of lading was in the hands of the shipper or in the hands of a consignee.

Although each case must be decided by reference to all of the terms and, with caution, to the circumstances resulting in the issue of the particular bill of lading, some general guidance is available. For vessels under charter (other than by demise), charterers and, if there is an option to sub-let on terms similar to those of a head time charter, sub-charterers, whether on time or voyage charter, generally will have authority to sign bills of lading so as to bind the owner; e.g. The Berkshire [1974] 1 Lloyd’s Rep. 185; The Vikfrost [1980] 1 Lloyd’s Rep. 560. Consequently, a bill of lading signed by charterers “for the Master” generally will be treated as an owner’s bill of lading, even though it also prominently bears the name of some other party, e.g. a liner service operator, on its face; The Rewia [1991] 2 Lloyd’s Rep. 325. However, this result can be displaced by clear indications elsewhere in the bill of lading, e.g. by the inclusion of an identity of carrier clause that identifies the carrier as one of two named joint operators of a regular liner service, neither of which is the owner or disponent owner of the vessel (see, The Venezuela [1980] 1 Lloyd’s Rep. 393) or by an unequivocal statement on the face of the bill of lading that a named party other than the owner or disponent owner is “the carrier”; The Hector [1998] 2 Lloyd’s Rep. 287. (In practice, although a different approach was adopted by the
chartering liner operator in *The Ines*, a liner service operator chartering in tonnage to supplement a regular service provided by its own tonnage often will make clear that bills of lading issued by it are to constitute contracts with itself and not with the owner of the chartered vessel, not only by issuing bills of lading that prominently bear its own logo but also by signing those bills of lading in its own name and not “for the Master”; e.g. *The Okehampton* [1913] P 173.) It must also be doubtful that a bill of lading in fact issued by charterers but to which those charterers have neither actual nor apparent nor ostensible authority to bind an owner or disponent owner, i.e. a bill of lading that bears any representation of fact that is or ought to be known to the charterer to be false, would ever be treated as an owner’s bill of lading, regardless of whether it purports to be signed “for the Master”; *The Hector* [1998] 2 Lloyd’s Rep. 287 @ 296 per Rix J. (The judgment of Rix J. in *The Hector* leaves open a number of interesting issues, e.g. as to whether, when a charterer has issued to a purchaser from the original shipper of the cargo a false bill of lading that does not bind the owner or disponent owner, the innocent shipper of the cargo might be entitled, in fulfilment of the antecedent contract of carriage to be inferred from the tendering of its cargo for shipment on the vessel, to have a true bill or lading issued to it by the owner or disponent owner.)

Where a vessel is chartered by demise (i.e. let to a charterer as owner for the time being of the vessel, such that the Master and crew become the servants of the charterer and not of the owner), a bill of lading that is signed by or for either the Master or the charterer constitutes a contract with the charterer and not with the owner; e.g., *Samuel v West Hartlepool Co.* (1906) 11 Com. Cas. 115 @ 125 per Walton J. (This generally will be obvious from the manner in which any signature by or on behalf of the Master is qualified.)

In practice, if in doubt, particularly when subject to a rapidly expiring one year time limit, it is wise to sue both the owner or disponent owner (pleading also alternative cases in tort and bailment) and all other parties identified as potential bill of lading contracting carriers.

*Identifying the Party Entitled to Sue under the Bill of Lading Contract*

Further problems often have arisen also as to the identity of the person entitled to sue under the bill of lading contract. It is improbable that practitioners now will encounter many, if any, bills of lading issued prior to 16 September 1992 (the date of entry into force of the Carriage of Goods by Sea Act 1992) that give rise to cargo claims that are not already time barred under the Statute of Limitations, let alone under the one year Hague or Hague-Visby Rules time limit. Unless
faced with such a bill of lading, reference now need be had only to the 1992 Act, which renders
far simpler the identification of the person entitled to sue under the bill of lading contract. (Law
should be referred to if an understanding either of the practical problems arising under, or of
reported cases concerning, the Bills of Lading Act 1855 is needed). There still are points of
detail on which there is doubt and debate as to the probable judicial construction of and, thus, the
application in practice of the 1992 Act. However, it is hoped that the following brief outline of
the scheme of the 1992 Act will provide a helpful starting point.

As already indicated, the principal change to bear in mind in considering who is entitled to sue
under the 1992 Act is that the Act is intended to ensure that rights of suit under a bill of lading
contract pass with the bill of lading itself, regardless of the passing of property or risk in the
cargo covered by the bill of lading. Rights of suit pass to the lawful (i.e. good faith) holder of a
bill of lading upon the transfer to him of the bill of lading; section 2(1). Lawful holders include
consignees in possession, indorsees obtaining possession by delivery and the holders in fact of
bearer bills of lading, including within each of those categories persons who have become
holders of bills of lading then spent by virtue of transactions completed pursuant to arrangements
antecedent to the date on which the bill of lading became spent. Section 2(4) of the Act further
enables (but does not oblige) a lawful holder of a bill of lading that has not itself suffered any
substantial loss or damage, e.g. a pledgee bank, to sue on behalf on another party that has
suffered such loss and damage, e.g. the true cargo owner. By section 2(5) the rights of suit of the
shipper (if different from the charterer, in whose hands the bill of lading neither constitutes nor
evidences a contract of carriage) and of intermediate holders of the bill of lading are
extinguished upon transfer. Section 3(1) of the Act imposes the liabilities of an “original
contracting party” on any lawful holder who takes or demands delivery of any of the cargo from
the carrier or makes a claim under the bill of lading against the carrier in respect of any of the
cargo, either at the time of such delivery or demand for delivery or claim or, if delivery is taken
or demanded before the transferee becomes a lawful holder of the bill of lading, upon the
transferee becoming a lawful holder. (It is not clear whether those would include liabilities
which, in the past, have been considered to be personal to the shipper, e.g. liabilities for
inaccuracies in information supplied to the carrier for inclusion in the bill of lading.) However,
section 3(3) provides that the liabilities of the shipper, as an original party to the bill of lading
contract, shall subsist despite the vesting of (perhaps fully concurrent) liabilities in a subsequent lawful holder of the bill of lading.

Identifying the Terms of the Bill of Lading Not Fully Set Out in the Bill of Lading

The two areas that in practice give rise to most difficulty are the identification of the charterparty terms incorporated into a charterparty bill of lading and the identification of which, if any, of the Hague, Hague-Visby or Hamburg Rules applies to the bill of lading contract.

Identifying the incorporated charterparty terms, in outline, involves a 4 step process, as follows -

1. Consider whether the charterparty the terms of which are potentially to be incorporated is sufficiently identified and ascertained to result *prima facie* in the incorporation of its terms into the bill of lading contract. A charter generally need not be identified by words any more certain than “the charterparty” and the effect of such words is not negated by a failure to fill in a blank space intended to contain the date of the charter referred to; see, *The San Nicholas* [1976] 1 Lloyd’s Rep. 8. In theory, e.g. in a case where a vessel is time chartered, then sub-time chartered, then voyage chartered, then sub-voyage chartered, a reference in a bill of lading to “the charterparty” might be considered so ambiguous as to prevent incorporation of any charter terms into the bill of lading contract; *Smidt v Tiden* (1874) LR 9 QB 446. However, the Court generally will seek to give effect to such an incorporating provision and, in cases of doubt, will tend to construe a general reference to “the charterparty” as a reference to any voyage charter to which the shipowner is party; see, *The Sevonia Team* [1983] 2 Lloyd’s Rep. 640. (The Court might, but would be less inclined to, construe a broad reference in a bill of lading to “the charterparty” as a reference to a time charter to which the shipowner is party, simply because it is more difficult to translate into a bill of lading the terms of a time charter, e.g. as to the payment of hire rather than of freight; see, *The Nanfri* [1978] 1 Lloyd’s Rep. 581 @ 591 *per* Kerr J.; see also, *The Hector* [1998] 2 Lloyd’s Rep. 287 @ 297-298 *per* Rix J.) However, a charter, even if otherwise clearly identified, can be incorporated into a bill of lading only if and in so far as it in fact already has been reduced to writing when the bill of lading is issued; see, *The Heidberg* [1994] 2 Lloyd’s Rep. 287.

2. Construe the incorporating clause to determine whether its wording is wide enough to effect an incorporation of each potentially material term of the charter. If the words of incorporation are sufficiently general, e.g. “all terms, conditions, clauses and exceptions of the
charter”, they will operate to incorporate into the bill of lading all provisions of the charter that are compatible with a bill of lading contract, i.e. those which relate to the shipment, carriage and discharge of cargo or to the payment of freight.

(3) Consider whether each potentially material term of the charter that *prima facie* is incorporated in the bill of lading makes sense within the bill of lading. All such clauses are to be considered in a purposive rather than a technical fashion and some manipulation is permissible where a potentially material term relates to shipment, carriage or discharge of cargo. However, any term that does not survive this “commercial good sense” test will not be treated as incorporated.

(4) Consider whether each potentially material term of the charter that *prima facie* is incorporated into, and makes good commercial sense as part of, the bill of lading is consistent with the express terms of the bill of lading. No charter term that is inconsistent with the express terms of the bill of lading will be treated as incorporated.

*Identifying which, if any, of the Hague, Hague-Visby and Hamburg Rules is incorporated* generally is more a matter of the application of jurisdictional and choice of law rules than a matter of contractual interpretation (careful consideration thus also should be given to any choice of law and/or choice of forum clause(s) in the bill of lading). However, the following should provide reasonable guidance for English practitioners, at least as a starting point;

(1) Unless a bill of lading expressly refers to the Hamburg Rules, it is safe to assume that those Rules will have no application in an action before an English Court.

(2) However, regardless of the express terms (other than any positive incorporating provision) and/or of the proper law of the bill of lading (see, *The Hollandia/Morviken* [1983] AC 565), in an action before an English Court consideration must always be given to whether the Hague-Visby Rules have mandatory application by virtue of the Carriage of Goods By Sea Act 1971. The 1971 Act provides that the Hague-Visby Rules shall have mandatory application to -

(i) Any bill of lading issued in a contracting state (to the Hague-Visby Rules) that relates to the carriage of goods between the ports of two different states (section 1(2) and Schedule, Article X(a)). The state of issue of the bill of lading need not be one of the two states between which goods are to be carried. Thus, e.g., a bill of lading issued in London that relates to the carriage of cargo between Russia and Guatemala (neither of which is a Hague-Visby Rules contracting states) as a matter of English law would be subject to the
Hague-Visby Rules. (This is not merely a hypothetical example but is derived from the facts of *The Hector*, [1998] 2 Lloyd’s Rep. 287.)

(ii) Any bill of lading (wherever issued) that relates to the carriage of goods from a port in a contracting state to a port in another state (section 1(2) and Schedule, Article X(b)). The state of destination need not be a contracting state. Thus, e.g., a bill of lading issued in Russia that relates to the carriage of cargo between France (a Hague-Visby Rules contracting state) and Guatemala would be subject to the Hague-Visby Rules.

(iii) Any bill of lading that relates to the carriage of goods between ports in two different states (neither of which need be a Hague-Visby Rules contracting state) and that provides that the Hague-Visby Rules, or any legislation giving effect to them, are to govern the contract (section 1(2) and Schedule, Article 10(c)). (A choice of English law (or, presumably, of any other law that would result in the mandatory application of the Hague-Visby Rules) as the proper law of a bill of lading contract will not be sufficient, of itself, to render that bill of lading contract subject to the Hague-Visby Rules; *The Komninos S* [1990] 1 Lloyd’s Rep. 541.) The Hague-Visby Rules thus apply to a bill of lading issued in Russia that relates to the carriage of cargo between Russia and Guatemala and states “this bill of lading shall be governed by the Hague-Visby Rules”.

(iv) Any bill of lading relating to a voyage commencing from a UK port (section 1(3)). Once applicable, it appears that the Hague-Visby Rules would continue to apply throughout the contracted carriage, despite a transhipment occurring outside the UK; see, *Mayhew Foods Ltd. v Overseas Containers Ltd.* [1984] 1 Lloyd’s Rep. 317. The Hague-Visby Rules thus would govern both a bill of lading relating to carriage of cargo between London and Liverpool, regardless of whether that bill of lading makes any reference to the Rules, and a bill of lading relating to carriage of cargo from London to Calcutta during which cargo is transhipped at Rotterdam, again regardless of whether the bill of lading makes any reference to the Rules.

(v) Any bill of lading that expressly provides that the Hague-Visby Rules shall govern that contract (section 1(6)(a)). The bill of lading need not be issued in a contracting state, nor need there be a voyage from or to a contracting state nor, indeed, need there be a voyage between a port in one state and a port in another state. The Hague-Visby Rules in this instance will take effect not merely as incorporated contract terms but with statutory force and thus will override any inconsistent terms of the bill of lading contract. Thus, as
a matter of English law, a bill of lading issued in New York relating to the carriage of
cargo between New York and Caracas which states that “this contract shall be governed
by the Hague-Visby Rules” would be governed by the Hague-Visby Rules, although
under its proper law it might instead be subject either to the Hague Rules as enacted in
the US Carriage of Goods by Sea Act 1936 (assuming that the law of the state of New
York was the proper law) or to none of the Rules (if the law of Venezuela was the proper
law).

(3) If the Hague-Visby Rules do not have mandatory application as a matter of English law,
consideration should be given to whether the bill of lading either, according to its proper law
(assuming that English law is not the proper law), is subject to the Hague-Visby or the Hague
Rules, or to legislation giving effect to either the Hague-Visby or the Hague Rules, or whether
the bill of lading otherwise provides, e.g. through a “clause paramount”, for the application of the
Hague Rules or an enactment of those Rules.

9 February 1999