

# MISDESCRIPTION IN BILLS OF LADING AND THE USE OF THE LETTER OF INDEMNITY:

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**A comparative study of  
English, Greek and Norwegian Law.**

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Sincerely thank you.

*The bill of lading may be described as 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.*

*BOWEN LJ<sup>1</sup>*

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<sup>1</sup> Sanders Bros v. Maclean & Co (1883) 11 QBD 327, 341.

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# 1 Introduction

## 1.1 Presentation of subject and issues to be addressed

In this thesis, I will be addressing a fundamental issue in Maritime Law that arises to carriers and maritime businessmen on a daily level; the issue of misdescription in bills of lading and the legal consequences of misdescription in three different jurisdictions, which have all implemented the *Hague-Visby Rules*. The letter of indemnity, as a parameter of misdescription, will be, also, examined under the national law of the three jurisdictions, in view of the fact that the governing International Convention is silent.

It seems important, at this point, to define misdescription but, in the absence of an international definition, the approach will be made through *contra legem* interpretation. The law prescribes the necessary elements that the editor of the bill of lading is obliged to include in the bill<sup>2</sup>, which among others are the quantity and the condition of the goods. Equally important to the definition of misdescription is the evidential function of the bill of lading; the bill is evidencing what the carrier received at the port of loading. Therefore, if the carrier, recklessly or intentionally, made an incorrect statement regarding the quantity or the condition of the goods he received, then the bill of lading will contain such inaccuracies during its transfer to endorsees, having as a result that the final holder of the bill of lading will suffer economical loss because he will have paid for the apparent, on the document, value of the goods, while he will receive goods of a different value. Thus, misdescription is prescribed by the legal requirements imposed by the governing Convention in combination with the factual submission made by the carrier.

With regards to the legal framework, the bill of lading, like many other phenomena in shipping and transportation law, is governed by International Conventions. Thereby legislation on the bill of lading is now uniform in many jurisdictions. The main convention in the area introduces the so-called *Hague-Visby Rules*, through the 1924 Brussels Convention on Bills of Lading amended by the Visby Protocol (1968) and the SDR Protocol (1979). As it will be further discussed on, three other international instruments regulate bills of lading; the 1924 Brussels Convention, without the subsequent amendments –known as the *Hague Rules*–, the International Convention on the Carriage of Goods by Sea adopted in Hamburg on 31 March 1978 –known as

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<sup>2</sup> Further discussed under chapter 3.



the *Hamburg Rules*- and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted in Rotterdam on 11 December 2008 -known as the *Rotterdam Rules*<sup>3</sup>.

The analysis will be concentrated on a comparative study of three major maritime legal systems; the English, the Greek and the Norwegian legal system which have all incorporated the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924) -hereafter referred to as the *Hague-Visby Rules* or the *Rules* or the *Convention* or *HVR*. Notably, Norway has, additionally, implemented certain regulations of the *Hamburg Rules*, without being a member to the Convention, but, nevertheless, not contradicting to the commitments undertaken through the *Hague-Visby Rules*.

In general, the bill of lading remains a document of the utmost importance, in connection to carriage of goods by sea, international sale of goods and the financing of such sales by letters of credit. It is a document being in use for hundreds of years as the source of a party's rights and liabilities in carriage of goods by sea. Nevertheless, the bill of lading does not only generate rights and liabilities for the parties that have entered into the contract of carriage, but it is also the mechanism through which third parties, such as buyers and banks, acquire rights and liabilities towards the main parties of the contract, the shipper and the carrier<sup>4</sup>.

An overview of the general framework under which a bill of lading is issued is of essence, in order to understand its significance in the maritime industry and international trade.

A person wishing to transport goods from one place to another approaches a carrier, who may be the owner of the vessel or agent or a third party having the commercial management of the vessel, and, at the moment they reach to an agreement, the parties enter into a contract of carriage of goods by sea. Through this contract, the carrier undertakes a dual obligation; firstly, to perform the transport as promised and, secondly, to issue a bill of lading conforming to the applicable provisions upon the request of the shipper.

Generally, following full shipment of cargo under a contract of carriage, a bill 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

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<sup>3</sup> The entry into force of the Rotterdam Rules is pending until 20 ratifications are made; so far, three countries have completed the ratification.

<sup>4</sup> Kiantou-Pampouki, *Maritime Law*, 2007, p.352.

of loading<sup>5</sup>. 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.

From a legal point of view, the bill of lading evidences the carrier's receipt of the goods, the terms of the contract of carriage and the right to possession of the goods. The pre-mentioned three functions of the bill of lading, construed its definition, as evidenced by international and national legal instruments<sup>6</sup>.

In practice, 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.

Consequently, because the carrier is thereby placed at risk, the information inserted on the face of the bill of lading generally will be deemed to have been supplied and warranted by the shipper, who will be required to indemnify the carrier against inaccuracies in the information provided for inclusion in the bill of lading<sup>7</sup>. The above described scheme constitutes the indemnity contract which is regulated by the national law of each country, thereby leaving a gap of international uniformity. The issue arising is whether the indemnity letter will be under any circumstances valid, entitling the carrier to raise a recourse claim towards the shipper, or whether the subjective behaviour of the carrier will determine the course of the recourse claim based on the indemnity letter.

It is hoped that the following overview, by relating the content and some of the principal legal rules governing bills of lading to the legal functions of bills of lading, will provide a helpful introduction to this area. The aim of the thesis is not only to understand how the system of misdescription operates under every legal system but, also, to evaluate the national regulations on the letter of indemnity.

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<sup>5</sup> Wilson, *Carriage of Goods by Sea*, 2010, p.103.

<sup>6</sup> See further on chapter 2.1.

<sup>7</sup> Article 3(5) HVR.

## 1.2 Legal sources and method

In this thesis I will be relying largely on the text of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924), on national provisions implementing the Convention, as well as on reports of the Law Committees, cases, articles and textbooks.

The thesis will have its focus on a legal comparative analysis of three national legal systems. The paper will, also, be based on a legal dogmatic method, with the meaning that the law applicable to the issue in question shall be described and investigated in order to establish the current legal structure and principles that are applicable.

## 1.3 Structure of thesis

This paper is divided into five parts; the first part introduces the subject of misdescription in bills of lading, followed by the second part where briefly the role of the bill of lading in the contract of carriage, its functions by law as well as the necessity of an International uniform system are presented. The third part of the system analysis concerns the legal framework on misdescription and in particular the gradual development of carriage of goods by sea over time, the International Conventions on bills of lading and certain implemented national provisions; here, the English, Greek and Norwegian legal systems are discussed as all three have implemented the *Hague-Visby Rules* and, being included in the top 10 largest merchant shipping fleets<sup>8</sup>, they have a serious impact on the international maritime business. Part IV explores a question of considerable importance to maritime law and practice; the exchange of letters of indemnity against clean bills of lading, as a relatively common practice in the maritime business. Even though the letter of indemnity is foreseen in the international instruments, in case of intention to mislead the endorsee, the national provisions apply and, as will be concluded, the indemnity will be of no effect. Finally, part V will include the major findings of the paper in a summarized form so as to ascertain the current issues and present possible solutions for a healthy well-being and development of the international maritime business.

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<sup>8</sup> <http://www.mapsofworld.com/world-top-ten/largest-merchant-shipping-fleets.html>.

## 2 The role of the bill of lading in the Contract of Carriage

### 2.1 Range of legal functions of the bill of lading

The bill of lading is one of the main documents in contracts of carriage of goods by sea and misdescription is the main problem encountered in this document. In fact, the B/L (Bill of Lading) is a document which covers transport of goods by sea, the significance of which extends beyond the field of maritime law as it is a central document in International trade and commerce, of the greatest interest to exporters, banks, importers and insurers of the goods. Similar types of documents are found in other modes of transport, as for example transport by air (airway bill) and land transport (railroad cargo waybill, truck company transportation cargo waybill).

The necessity of rules on incorrect description is, additionally, proved by the fact that the B/L is the only transport document with a negotiable effect. In other words, other transport documents have the evidential and receipt effect, but not the document of title function. Accordingly, at the point of delivery the receiver is entitled to receive goods as described on the B/L because the rules on misdescription protect him. Contrariwise, in other areas of transport, the carrier would be able to prove that there is something wrong with the description and correspondingly, prove himself innocent. Under the B/L regime the carrier will not have such an option and will have to compensate the receiver; besides that is why the letter of indemnity is envisaged. With this in mind, it is comprehensible why the *Rules* apply “only to contracts covered by a B/L or any similar document of title”<sup>9</sup>.

In transport by sea, a B/L is defined as a writing signed on behalf of the owner of the ship in which goods are loaded, acknowledging the receipt of the goods and undertaking to deliver them at the port of discharge, subject to any conditions as may be mentioned on the bill or the main contract of carriage<sup>10</sup>. The B/L has three legal functions which define its content and characterize it as a document; accordingly, the bill operates as receipt for the goods shipped, as evidence of the contract of carriage and as a document of title.

In sea transportation, the B/L is mainly connected to the contract of carriage goods by sea, but it has also importance to a chartering agreement, which is evidenced by the charter party. In the present thesis, the B/L in the light of the *Hague-Visby Rules* will be examined in order to

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<sup>9</sup> Article 1(2) HVR.

<sup>10</sup> Lord Justice Blackburn’s definition in the case of *Coventry v Gladstone*.

fully present the importance of the description of the goods in such a document and the legal consequences thereafter.

The B/L is regulated by the *Rules* in Article 3(3), (4), (5), (6), (7), (8)<sup>11</sup>. It is notable that the Convention does not provide for a definition of the B/L. It was not until 1978 that the United Nations Convention on the Carriage of Goods by Sea<sup>12</sup> stated in Article 1: “*The bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document*”. Accordingly, national legislators attempted to provide a definition of the B/L; for instance, the Norwegian Maritime Code defines in Article 292 the bill by its functions and the 1992 Carriage of Goods by Sea Act of England defines the document negatively by stating what it is not<sup>13</sup>. Consequently, the B/L is most effectively and commonly identified by its three main characteristics which are developed over time through mercantile custom, from the tacit consent of the legislature and the maritime business<sup>14</sup>.

Specifically, through its historical development, the B/L acquired certain legal functions which made it a valuable document in commercial transactions. In the 14<sup>th</sup> century, the B/L constituted a non-transferable receipt, issued by the carrier to the shipper who was not going to travel with his goods. This type of receipt included statements of the carrier concerning the goods<sup>15</sup>. However, later, it was considered necessary to include, additionally, the terms of the transport agreement in order to facilitate the adduction of evidence and the dispute resolution. In the 18<sup>th</sup> century, due to the expansion of international commerce and the development of the documentary credit system, the role of the B/L began to evolve<sup>16</sup>.

The B/L acquired the function of a document of title in order to make it possible for the traders to trade their goods before the vessel reached its destination<sup>17</sup>. In other words, a trader could ship his goods towards a destination and proceed to the sales of the goods in transit by transferring the B/L to the hands of a new buyer by endorsement. The three main characteristics given to the B/L as a document of title are:

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<sup>11</sup> See chapter 3 for Conventions governing the bill of lading.

<sup>12</sup> Known as the *Hamburg Rules*.

<sup>13</sup> Article 1(2) COGSA 1992.

<sup>14</sup> Gaskell, *Bills of Lading*, 2000 p.3.

<sup>15</sup> Wilson, p.118.

<sup>16</sup> *Ibis*.

<sup>17</sup> See *Mason v. Lickbarrow (1794) 5 TR 683, 101 ER 380*, which recognized the transferable quality of the bill of lading.

- (i).the holder of the bill is entitled to delivery of the goods at the port of discharge
- (ii).the holder can transfer the ownership of the goods during transit merely by endorsing the bill
- (iii).the bill can be used as a security for debt<sup>18</sup>.

From a legal perspective, the B/L is a document which contains two main certifications; firstly, through the bill the carrier certifies that the goods described in it were loaded and secondly, he promises to carry the goods and deliver them at the agreed destination.

As deduced from the above legal analysis and the provisions of the Convention, the B/L performs three major functions<sup>19</sup>:

a. “Evidence of the contract of carriage”

The fact that the B/L certifies loading or receipt for shipment of the goods, means that even before the issue of the document there is an agreement between the parties for the transport, pursuant to which the document is issued. Thus, the B/L includes the conditions governing the transfer, evidences the agreement of the parties and the drawing of the contract of carriage. Although it is not a separate contract of carriage, it performs the contractual function of being written and *prima facie* evidence of the contract of carriage between the carrier and the shipper. In practice, because Bs/L often are transferred, by endorsement and delivery or mere delivery, not only from shippers to consignees - the persons to whom the cargo is consigned or sent- but also by shippers or consignees to banks or onward to subsequent purchasers, a B/L 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 B/L. Thus, Bs/L 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<sup>20</sup>.

b. “Receipt of the goods”

The document of the B/L incorporates the promise of the carrier to perform the transport. Thus, the document, firstly, proves that the goods were received by the carrier and secondly that they were received and/or loaded, as described in the bill. These indications are of great importance because they form the basis for every claim of the holder of the B/L, in case the goods are not delivered or are delivered deficiently or damaged.

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<sup>18</sup> Wilson, p.133.

<sup>19</sup> Falkanger, *Scandinavian Maritime Law: The Norwegian perspective*, 2010, p.276.

<sup>20</sup> Kiantou-Pampouki, p.265.

Consequently, the B/L incorporates the claim resulting from the promise of the carrier, in a way that the receiver of the goods cannot raise his claim without the possession and the return of the document to the carrier. In that sense, the B/L serves as a legitimation paper for the consignee<sup>21</sup>.

c. “Document of title”

Based on the above element, the B/L constitutes a document of title; only the person in possession of the bill can obtain delivery of the goods. The right of delivery may be transferred, which means that the B/L will be negotiated to a new holder. Thus, the transfer will be completed through endorsement following the relative rules of the applicable national legal system. Hence, the B/L is considered as representing the cargo, for the reason that the goods are sold when the B/L is handed over.

## 2.2 Why do we need rules on misdescription?

In order to evaluate the significance of the *Rules* on misdescription in Bs/L, it is necessary to make a reference to the historical background. As demonstrated above, the document of title function necessitated the adoption of rules on incorrect description.

The adoption of the *Hague-Visby Rules* brought a radical change to the unilateral regulation of the carriage contracts by the shipowners because they had no longer the freedom to minimize their liability. The *Rules* envisaged mandatorily the necessary elements of a B/L as well as the legal consequences for non-compliance. Thus, the *Rules* altered the position in the shipper’s favor through provisions of mandatory application.

Among that cluster of Articles which relate to the receipt function of B/L, the Article of more direct relevance here is Article 3(3), (5) which sets the rules on description of the cargo and on the inter-relation of the shipowner and the shipper. Through contra-interpretation of the same Articles, the rules on misdescription of the goods are prescribed by defining the rights and liabilities of the shipper with regards to the type of receipt he can expect to receive from his carrier.

Another reason that demonstrates the necessity of the *Rules* is the fact that the declarations of the carrier in the document affect the trading validity of the B/L. In other words, under a

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<sup>21</sup> Gard P&I Club, *Gard Handbook on P&I Insurance*, 1979, p.200.

documentary credit transaction, banks accept only clean Bs/L – the description of the goods loaded is made without any reservations- for the reason that a reservation may be an indication that the goods are not in the described and expected condition<sup>22</sup>. Thus, the carrier is obliged to make statements of the goods as to the description, only in so far as he has no reasonable doubts or no reasonable means for checking. As will be presented in chapter 3 of the present thesis, under certain legal systems the carrier is additionally required to mention the basis of his doubt or of his inability to check the cargo; the scope of this additional requirement is to eliminate unjustified invocations of the exception of Article 3(3) which relieves the carrier from his duty to mention the specifics of the goods.

The regulation functions, also, vice versa for the sake of the carrier; the carrier has the right of refusing to issue a B/L if he understands, beyond the boundaries of reasonable doubt, that the shipper provided false information in order to mislead a third party. In such a case, if the carrier still signs the B/L, not only he will be liable for willful misconduct but, also, will lose his limitation rights and will be prosecuted for fraud, according to national penalty law<sup>23</sup>.

The most essential function of a B/L is that it operates as a document of title, meaning that the document itself enables the holder to deal with the goods described in it as if he was the owner; “title” is the right to ownership which can be transferred by a formal transfer of the document, such transfer being an endorsement and/or delivery of the document itself<sup>24</sup>.

This character that is given to the bill as a document of title, necessitates that all entries on it should be correct. The carrier is under the obligation to deliver the goods to the consignee as stated in the B/L because, being the editor of the document, he bears the risk of misdescription. Thus, the Convention protects the third party who acquired the document in good faith, since he is not a party to the original contract of carriage and could not, by any way, control the accuracy of the statements in the B/L.

Moreover, the travaux preparatoires of the *Hague Rules*<sup>25</sup> highlight the importance that was attributed to the accuracy of the B/L statements as there was a general recognition of the commercial importance of the bill of lading by the draftsmen.

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<sup>22</sup> Holmberg, *Bills of Lading Fraud*, 1990, p.15.

<sup>23</sup> Damar, *Wilful Misconduct in International Transport Law*, 2011, p.25.

<sup>24</sup> <http://www.shipinspection.eu/index.php/home/k2-item-view/item/755-the-bill-of-lading-as-document-of-title>.

<sup>25</sup> *The travaux preparatoires of the Hague Rules*, Comite Maritime International, p.188.



Lastly, demands for higher efficiency in the trade and industry, the development of combined transport systems, fierce competition on the shipping market and increased capital costs have raised the need for rules that regulate in an adequate and comprehensive way the spheres of liability of each party. For instance, in liner trade the goods arrive in the port of loading shortly before departure and the master has no time to check the statements of the shipper as to the cargo. In such cases, the *Rules*<sup>26</sup> envisage that the shipper shall be deemed to have guaranteed to the carrier the accuracy of those statements, by providing the carrier with a right of a recourse claim.

Consequently, the need for uniformity and consistency of the legal provisions internationally and at the same time the need for quickness and efficiency in transactions, made the adoption of International rules concerning misdescription on Bs/L a necessary element on the agenda of the International Maritime Organizations. In the growing prosperity of the cause of international trade and shipping and document transactions, the B/L is the main use of the means of international trade fraud, making legislative intervention necessary.

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<sup>26</sup> Article 3(5) of the HVR.

## 3 Legal framework on misdescription

### 3.1 Introduction

A *bill of lading* is a document of title, a negotiable instrument, which includes certain information. This function of the B/L requires that all entries on it are correct, especially the ones regarding the quantity and the condition of the goods. In principle, the concepts of misdescription and B/L are inextricably linked. If the carrier is in breach of his obligation to describe the goods in the bill correctly, then he is in breach of the main contract of carriage.

Furthermore, on the basis of the transfer of title of the goods by endorsement of a B/L, the endorser transfers simultaneously all rights of suit under the contract of carriage. Therefore, the B/L is not a separate contract of carriage but merely serves a contractual role<sup>27</sup>; it is written and *prima facie* evidence of the contract of carriage between the carrier and the shipper<sup>28</sup>.

Misdescription of the goods can occur for a number of reasons. Either the nature, which includes the quantity and the identifying marks, or the value of the goods, can be misdeclared by the shipper when providing the necessary information to the carrier. Among other reasons the shipper will misdescribe the goods in order to get a lower freight rate or to comply with the terms of the underlying contract of sale or even to avoid restrictions imposed by Customs. As it will be further analyzed, the carrier is protected to a certain extent and it is the shipper who bears the sanctions for misstating the goods to the carrier<sup>29</sup>. The carrier will be entitled to a recourse claim against the shipper for any inaccuracies, except the “good order and condition” prerequisite for which the carrier will bear full liability. Accordingly, all International instruments regulating carriage of goods by sea, agree to the pre-mentioned point that the shipper will be deemed to have guaranteed to the carrier the accuracy of his statements at the time of shipment<sup>30</sup>. The protection of the carrier, though, is not absolute since in the hands of a *bona fide* party the B/L will provide an irrefutable presumption of the information of the goods, unless a clause has been inserted.

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<sup>27</sup> Wilson, p.129.

<sup>28</sup> Article 3(3) HVR.

<sup>29</sup> Article 4(5h) HVR.

<sup>30</sup> Article 3(5) HVR, Article 17(1) Hamburg Rules, Article 31(2) Rotterdam Rules.

Consequently, the uniform application of the Convention is necessary. If the legal rules are applied differently under different legal systems the object of establishing an international regime governing the carriage of goods under a B/L would be defeated.

In the present chapter, firstly, I elaborate on the different international regimes governing Bs/L and subsequently I conduct a research on the implementation of the *Hague-Visby Rules* and more specifically of the *Rules* relating to misdescription, under three different legal systems of three major maritime nations.

## 3.2 Conventions

### 3.2.1 The development of carriage of goods by sea

Historically, it was the chartering contract that first appeared. The agreement between the shipowner and the charterer was subject to free negotiation and was regulated by the charter party, which envisaged the rights and obligations of the parties. Thus, various charter parties were formed, the main of which are used even today. In the middle of the 19th century, though, a new category of ships was evolved, the so-called liners. This development, which coincided with the expansion of international trade, was connected with the use of steam as engine force which allowed ships to provide designated routes<sup>31</sup>. Following, a brief reference to the historical legal development of the B/L is made for the sake of comprehension of misdescription.

An additional difference to the present day is that in an earlier time international trade was a privilege of the big enterprises, who could afford to import raw materials and transport goods by sea by chartering big vessels. The merchants who wanted to transport small amounts of goods left some packages, boxes or bags to bunch in the warehouses of shipowners, until enough quantities, which justified a shipment, were gathered<sup>32</sup>. The shipowners, moreover, included in the charter parties clauses -as general terms and conditions- which shifted the risk onto the charterers. The weak position of the charterers excluded every chance of negotiation between themselves and the shipowners<sup>33</sup>. Thus, the charterers were obliged to accept the clauses inserted by the shipowners and insure their goods in their own expense.

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<sup>31</sup> Karan, p.52

<sup>32</sup> Ibis.

<sup>33</sup> Ibis.

The above described situation caused the reaction of the charterers/shippers and the insurers of the goods, who had to bear the risks of transport by sea without being entitled to make a claim towards the shipowners. This reaction passed on to the governments of import and export countries, which did not have the means and particularly the commercial fleets in order to export their goods or import raw materials from other countries<sup>34</sup>. The first government reaction appeared in the end of the 19<sup>th</sup> century in the USA which was a big import and export country. In 1893, the American Congress voted the *Harter Act* which established mandatory rules on the obligations and the liabilities of the carrier, applicable to all the vessels transporting goods towards and from the USA. This legal act raised a barrier in the absolute freedom of carriers to determine unilaterally the terms of the transport and exempt themselves from liability<sup>35</sup>.

*Harter Act* triggered additional developments. Soon after the Act the carriers realized that it would be impossible to persevere to their absolute freedom. At the beginning of the 20<sup>th</sup> century, it was felt necessary to unify the law on carriage of goods by sea. In 1921, the International Law Association prepared a set of rules on Bs/L which were accepted during the meeting of the Association in Hague (thereby referred to as the *Hague Rules*). The *Hague Rules* were prepared in order to be adopted voluntarily by the parties and to be incorporated in the carriage of goods by sea contracts or in Bs/L. However, after a short period of time, it was realized that the voluntary application of the rules did not bring out the expected results and that the legal commitment of the states and the contractual parties through an International Convention was necessary.

After further processing of those rules, the International Convention for the Unification of certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) was drafted. This Convention, better known as the *Hague Rules*, was based on the principles introduced by the *Harter Act*. It did not constitute a complete Code on the contracts of carriage of goods by sea but it was limited to the purpose of unifying certain rules on bills of lading.

The *Hague Rules* mainly apply in carriage of goods by sea when the transport is covered by a B/L. The Convention sets the general framework in which the duties of the carrier, the

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<sup>34</sup> Wilson, p.116.

<sup>35</sup> *Ibis*.

maximum level of protection a carrier can have through exclusion from liability clauses and a system of limitation of his liability are regulated<sup>36</sup>.

In 1968 the Visby Protocol was signed, which amended the Convention of 1924 and renamed it to “*Hague-Visby Rules*”. The Protocol which was signed in Brussels modified certain provisions of the Convention which seemed problematic during their application. In specific, the Protocol of 1968 raised the limit of limitation of liability for damages in container transports and specified more precisely the scope of application of the Convention. In addition, in 1979 the SDR Protocol modified the Convention with regards to the monetary limit for calculation of the compensation payable by the carrier.

The International Convention of Brussels (1924) has been ratified by a number of states (88 states up to now)<sup>37</sup>. As shown from the above, the need for legal intervention was imperative due to the unilateral regulation of carriage of goods by sea from the shipowners’ side. The *Rules* introduced, among others, a uniform legal system on misdescription in Bs/L, rendering the editor of the document liable for his writings.

### 3.2.2 The *Hague-Visby Rules*

As John F. Wilson remarks in his textbook, the *Hague Visby-Rules* ratified by the major maritime nations are not conceived “*as a comprehensive and self-sufficient code regulating the carriage of goods by sea, but merely were designed to provide a basic and compulsory framework for the contract of carriage, outside which the parties were free to negotiate the remaining terms*”<sup>38</sup>. Thus, the *Rules* can be categorized in those establishing the minimum obligations of the carrier and in those clarifying the maximum exemptions to which the carrier is entitled to limit his liability.

Regarding misdescription in the B/L, Article 3(3) and 3(4) are of interest. These Sections envisage the information that should be included in the B/L and the liabilities of the parties thereof. Correspondingly, the carrier is liable for incomplete or incorrect description of the goods or other incorrect statements.

The *Rules* prescribe the content for a complete B/L. According to the relevant provisions, the carrier is under a duty to insert a description of the goods in the document. The description

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<sup>36</sup> Debbatista, *Bills of Lading in Export Trade*, 2008, p.6.12.

<sup>37</sup> <http://www.informare.it/dbase/convuk.htm>.

<sup>38</sup> Wilson, p.187.

shall contain details regarding the identity of the goods and their quantity, as furnished by the shipper as well as their apparent condition, as noticed by the editor of the B/L<sup>39</sup>. Further analysis on what exactly is required and how the legal text has been interpreted will follow under Part 3.3 of the present thesis where the misdescription system is elaborated.

Further on, the *Rules* prescribe the carrier's liability for the correctness of these statements. In this way, the *Rules* strengthen the practical position of the final possessor of the B/L. The carrier is strictly liable towards a good faith assignee of the B/L, as he has no longer the right to produce any exculpatory evidence in relation to such a person. "Good faith", as a prerequisite of the holder of the B/L, means diligent good faith; if, at the time he received the B/L, the receiver knew or should have known that the information was incorrect, he loses his right of suit. The fact that the receiver must have understood that the correctness had not been checked by the carrier was no longer of any significance under the new Convention<sup>40</sup>. At this point, the *Rules* adopted the English *prima facie* evidence rule supplemented by the English doctrine of estoppel.

The doctrine of estoppel, which inspired the drafting of the *Rules*, operates under certain situations in order to prevent a person from relying upon certain rights, or upon a set of facts which is different from an earlier set of facts<sup>41</sup>. Correspondingly, under the Convention, entries on the face of the B/L -which may embrace not only the weight, quantity and apparent exterior condition of the goods and packaging, but also payment of freight and the date of receipt/shipment- serve as *prima facie* evidence in favor of the shipper, and irrefutable evidence, in the sense of an estoppel, in favor of third parties taking up the B/L.

However, the *Rules* provide a statutory imposition of an indemnity in the carrier's favor, in order to grant him a recourse claim against the shipper for the consequences of inaccurate marks and figures<sup>42</sup>. In practice this indemnity is provided through back letters, the validity of which is regulated by national laws and will be examined in Part 4.

The *HVR* were the first International instrument that succeeded a degree of uniformity in regulating Bs/L, as well as, balancing the interests of carriers and cargo owners. Although their

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<sup>39</sup> Article 3(3) of the HVR.

<sup>40</sup> Kiantou-Pampouki, p.438.

<sup>41</sup> Poole, *Textbook on English Contract Law*, 2012, p.158.

<sup>42</sup> Article 3(5) HVR.

application has long been tested, issues arose relating mainly to the success of protecting the cargo interests.

### 3.2.3 The *Hamburg Rules*

The *HVR* were strongly criticized for two main reasons<sup>43</sup>: the first reason was developed around the belief that serious time had passed and economic developments had taken place since its adoption, while secondly that it was over favorable to the interests of the carriers and the developed maritime nations, in the detriment of the shippers and the developing countries who had no resources of commercial fleet.

This criticism led to the creation of the United Nations Convention on the Carriage of Goods by Sea adopted in Hamburg on 31 March 1978. The *Hamburg Rules* constitute a complete code that covers the contract of carriage. *Inter alia*, increased liability limits of the carrier's liability are envisaged and many advantageous regulations for the carrier have been removed. The application of the *Hamburg Rules* followed a slow pace as they were put in force in 1992. Today, 30 countries have ratified the Convention of 1978, some of which are African states with no commercial fleets. Nevertheless, it is believed that, in the near future, the influence of the *Hamburg Rules* will rise for the reason that the member states of the rules apply them mandatorily on shipments from and towards those member states<sup>44</sup>.

One main difference between the two sets of *Rules* is that the *Hamburg Rules* apply to all carriage by sea except charter parties. This approach differs from the *HVR* which apply only to contracts of carriage covered by a B/L or any other similar document of title.

Regarding the context of a B/L, the *Hamburg Rules* regulate the matter in Articles 14, 15, 16 and 17. According to Art.14 the carrier is obliged to issue a B/L when demanded by the shipper. Furthermore, Art.15 prescribes the contents of the B/L by providing a long list of 15 aspects, which is more detailed than the corresponding list of Art.3(3) of the *HVR*. Moreover, in the same Article, it is envisaged that in the absence of one or more particulars, the legal character of the document as a B/L is not affected, provided that it nevertheless meets the minimum requirements set out in Art.1(7). Additionally Art.16(2) differs from the regulation of the *HVR* because according to the *Hamburg Rules*, the carrier is deemed to have recorded the apparent

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<sup>43</sup> Wilson, p.116.

<sup>44</sup> Poulantzas, *Maritime Law*, 2005, p.99.

good order and condition of the goods in the B/L, even if he omits such a statement. Lastly, the *Hamburg Rules* impose the duty to the carrier to qualify the description in the document, by mentioning the grounds of his inability to insert the particulars of the goods, when he has reasonable grounds to suspect that they are incorrect (Article 16(1)).

### 3.2.4 The *Rotterdam Rules*

The most modern and comprehensive Convention is the International Convention on Contracts for the International Carriage of Goods wholly or partly by Sea (The *Rotterdam Rules*), adopted by the United Nations on 11 December 2008 and assembled by the United Nations Commission on International Trade Law (UNCITRAL). This new Convention aims to replace the *Hague Rules*, the *Hague-Visby Rules* and the *Hamburg Rules* and to achieve uniformity of law in the field of maritime carriage<sup>45</sup>. Although formed for door-to-door operations, the core of the *Rotterdam Rules* is still carriage by sea. It can be said that the liability regime set by the rules is a mixture of the *Hague-Visby* and the *Hamburg Rules*, although in some points it differs substantially.

The *Rotterdam Rules* have been signed by 24 countries, ratified by Spain, Togo and Congo and therefore not, yet, set into force. However, it is notable that the member states of the Convention represent the 25% of the world's trade, giving an element of success in the future to the Convention.

The *Rotterdam Rules* intend to modernize the liability regime by making it more favorable for the cargo interests and they, also, intend to connect to the existing structure of the *HVR* in order to leave as much as possible case law intact.<sup>46</sup>

Regarding contracts, the *Rotterdam Rules* in Chapter 8 (Art.35-42) refer to transport documents and electronic transport records. The *Rotterdam Rules* apply even if a transport document is not issued. Another innovative provision is that the carrier is obliged to qualify the information included in the B/L if he has reasonable grounds to believe that it is false and in this aspect a distinction is made between closed containers and not closed ones. Article 36 regarding the contract particulars provides an extensive list, like the *Hamburg Rules*, dividing the contents into which particulars must be provided by each party.

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<sup>45</sup> <http://www.rotterdamrules.com/>

<sup>46</sup> Rhidian, *The Carriage of Goods by Sea under the Rotterdam Rules*, 2010, p.210.



All things considered, the provisions of the *Rotterdam Rules* appear to be significantly different from the earlier existing sets of *Rules* by not only providing a clearer and concrete international legal framework but also by introducing the electronic B/L which brings a radical change to the ongoing traditional maritime business.

### 3.2.5 Conclusion

Previously, as a result of various and conflicting maritime laws, regulation on carriage of goods by sea varied from one country to another, and legal disputes regarding misdescription in Bs/L were solved differently according to the law and the forum chosen.

The International Conventions drafted, sought to find a fair balance between the rights of the carriers and those of cargo interests. In the present thesis, discussion will be focused on the *Hague-Visby Rules* mainly because they have become identified with the traditional maritime nations and many legal disputes have arisen concerning their application and interpretation. Moreover, when it comes to the matter of misdescription of the goods in the B/L the corresponding regulations of the three Conventions do not differ in essence. All three sets of rules have as a primary purpose to safeguard the holders and beneficiaries of Bs/L and to serve the need for security in international trade, by creating convention based mandatory uniform rules.

Article 3(3), (4) and (5) of the *HVR* regulate the issuance of a B/L and the legal consequences of misdescription of the goods. These provisions will be analyzed through their implementation in three different legal systems. Specifically, the English, the Greek and the Norwegian legal systems will be examined. The contrasts of civil law and common law countries, as well as the importance of those three nations in the maritime business today are the main reasons of this choice of laws.

## 3.3 Implemented provisions of the *Hague-Visby Rules*

### 3.3.1 English Law

#### 3.3.1.1 Introduction

In the United Kingdom treaties and conventions have no direct effect and require to be enacted by the legislator. The enacting legislation for the *Hague-Visby Rules* is the Carriage of Goods by Sea Act (COGSA 1971).

The *HVR* were attached as a schedule to COGSA 1971, with the meaning that they apply *verbatim*, and did not become effective until 1977 when the required ratifications were made. The issue in common law was the same as in other legal systems; before the *Hague* and the *Hague-Visby Rules* were adopted, the parties to a contract of affreightment were free to negotiate and form their own terms and as a result carriers took advantage of their powerful position by inserting clauses in burden of the shippers<sup>47</sup>. The main purpose of the *Rules*, which was to protect cargo interests and unify certain rules relating to Bs/L, was accomplished by allocating the risks among the parties, regulating the minimum level of liability of the carrier as well as his limitation rights.

It should be clarified that the Carriage of Goods by Sea Act 1992 is a UK statute which replaced the Bills of Lading Act 1855 and does not amend the *Hague-Visby Rules* which are an International Convention. The 1992 Act regulates when rights and liabilities under a B/L are transferred, a matter which is not, yet, dealt by a uniform international law. The COGSA 1992 mainly focuses on two points: the title to sue which is no longer connected to property in the goods and also the transfer of rights under a contract of carriage which acts independently of any transfer of liabilities<sup>48</sup>. A main difference from COGSA 1971 is that COGSA 1992 applies not only to Bs/L but also to sea waybills and ships' delivery orders<sup>49</sup>. It should be noted that according to Article 4(5) of COGSA 1992 "*the provisions shall have effect without prejudice to the application, in relation to any case, of the Hague-Visby Rules which for the time being have the force of law by virtue of Section 1 of the Carriage of Goods by Sea Act 1971*". For the purpose of the current thesis, discussion is conducted based on the COGSA 1971 and particularly Article 3(3), (4) of the *Rules* as interpreted by International and English Law.

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<sup>47</sup> Karan, p.52.

<sup>48</sup> Wilson, p.137.

<sup>49</sup> Article 1(1) COGSA 1992.

### 3.3.1.2 Article 3(3) of the Hague Visby Rules

Following, Article 3(3)<sup>50</sup> of the *HVR* will be analyzed, with the aim of understanding what constitutes a misdescription in the B/L and the type of legal consequences.

Goods must be ascertained in the B/L so as to be distinguished from other goods loaded in the same vessel; otherwise it cannot be determined which goods are subject to the contract and which goods have been received by the carrier and are to be delivered to the lawful holder of the document, so as to ascertain cases of misdescription. This conclusion is achieved by Article 3(3) of the *HVR* which enumerates the particulars which must be contained in the transport document.

Paragraph 3 of Article 3 concerns the issue of a B/L and imposes on the carrier a twofold duty<sup>51</sup>. Firstly, the carrier, master or agent on behalf of the carrier shall issue the B/L when requested by the shipper. Secondly, the carrier shall state certain vital information in the document which will serve the receipt function. The right to demand the issue of a B/L is restricted to the shipper and is not conferred to the consignee or endorsee. Also, the carrier may avoid the duty to issue B/L, if this is incorporated in the contract of carriage, expressly or impliedly<sup>52</sup>. In that way the shipper will not be able to demand at a later time a B/L but another document will be issued and the *HVR* may be applicable in that document (e.g. sea waybill) if agreed by the parties.

The carrier will issue the B/L after he has received the goods into his charge. Thus, there are two types of B/L, the “received for shipment B/L” and the “shipped B/L”. The first type is a B/L for goods that have been received but not yet shipped. However, through par.7 of the same Article, authority is given to the shipper to demand later a shipped B/L in exchange for the previous document.

It is interesting to examine what the consequences may be if the carrier does not issue a B/L. Both the *Rules* and the Act do not provide for any remedy in case of non-compliance of the carrier and this is why the Rule of Article 3(3) is characterized as a paper tiger<sup>53</sup>. Nevertheless, English Law entitles the shipper to claim for the loss caused by the non-issue of the B/L, on the

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<sup>50</sup> Cited in Annexes.

<sup>51</sup> Carver, *Carver on Bills of Lading*, 2012, p.9-152.

<sup>52</sup> *Ibis*.

<sup>53</sup> Chardson, *A Guide to the Hague and Hague-Visby Rules*, 1998, p.23.

grounds that the further sale of the cargo is affected economically and may be impossible thereafter<sup>54</sup>.

The Article continues with a detailed list of the specifics that must be included in the B/L. According to sub-section (a) the leading marks necessary for identification of the goods as furnished in writing by the shipper must be mentioned. The purpose of the provision is that the holder of the B/L will be able to identify the goods that he is entitled to demand<sup>55</sup>. Specifically, the carrier has a duty to state the marks only as furnished by the shipper and if they are clearly shown on the goods in such a manner as to remain legible until the end of the voyage. The requirement regarding legibility will vary according to the individual circumstances. If the above conditions are not met, then the carrier may refuse to mention the marks. Notably, only leading marks are necessary and further detail should be avoided as it is not required for documentary credit purposes.

The next rule prescribes the requirement for an acknowledgment of the number, quantity or weight of the goods shipped. The shipper can demand that the carrier issues a B/L “*showing either the number of packages, or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper*”. Based on the wording of the provision, the option of the carrier is disjunctive; the carrier must certify either the number or the quantity or the weight, but under most circumstances the carrier will follow the pattern provided by the shipper.

The carrier is required to acknowledge at least one specific of Article 3(3b). It is possible for him to acknowledge one and at the same time disclaim knowledge for the other<sup>56</sup> specifics. This was the case in *Oricon v Intergraan*<sup>57</sup> where the Bs/L acknowledged “the receipt of 2000 packages of copra cake said to weigh 105,000 kg...for the purpose of calculating freight only”. The court held that the number of packages was *prima facie* evidence of what was shipped, the weight did not constitute evidence and thus the consignee had to prove the quantity shipped. It is worth clarifying that if the shipper does not express a demand to provide such information then the carrier is under no obligation to do so and, consequently, the consignees will find themselves in a difficult position since the right to request the information about number, quantity or weight

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<sup>54</sup> *Ibis*.

<sup>55</sup> *Parsons v New Zealand Shipping Company*, [1901] 1 KB 566.

<sup>56</sup> *Wilson*, p.121.

<sup>57</sup> *Oricon Waren-Handelsgesellschaft MbH v. Intergraan NV* [1967] 2 Lloyd's Rep 82.

is not extended to them<sup>58</sup>. The same situation applies both to Norwegian and Greek legal systems for the reason that the demand of issue of a B/L is legally considered a personal right, given exclusively to the shipper of the cargo; the basis for that is that only the shipper is present during loading and he is also, by virtue of law, deemed to have guaranteed the information he provided.

The above mentioned requirements concerning the identity marks and the number, quantity or weight of the goods are subject to a reservation envisaged in the same Article. Accordingly, the carrier is not obliged to show any of the details required “*which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has no reasonable means of checking*”. The second part of the sentence regarding the means of checking applies where it is physically impossible for the carrier to check or it is commercially unreasonable. Examples of this are if the master receives the goods for shipment just before the beginning of the voyage or if the leading marks are not stamped<sup>59</sup>. The above mentioned reservation applies particularly in containerized carriage, where the master of the ship can only acknowledge the existence of one container and not its contents. In such situations, it is usual that the carriers clause their statements by inserting phrases such as “details declared by shipper but not acknowledged by the carrier”<sup>60</sup>.

The third and last requirement of Art.3(3) requires that the carrier mentions the apparent order and condition of the goods. This representation is made exclusively by the carrier and occupies an important role at the progress of a cargo claim. Hence, the carrier must only state the apparent condition after a reasonable examination of the goods and refer to any damage which is observed during such inspection. The carrier is not expected to open the packages and check for internal condition, but merely a duty of honesty is required<sup>61</sup>. If the carrier finds a deficiency then he is obliged to refer to it in the B/L and deliver the goods at the port of discharge as described in the document or else he will bear liability for misdescription. In case of containerized cargo, statements concerning the condition of the goods are superficial because the inspection is limited in the external appearance of the containers. Examples frequently appearing at legal disputes are a leaking package, rusty iron or moldy fruit.

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<sup>58</sup> Ibis.

<sup>59</sup> Karan, p.237.

<sup>60</sup> Chardson, p.24.

<sup>61</sup> Carver, p.9-163.

A breach of the carrier's duty to state the apparent order and condition of the goods, entitles the shipper to claim for damages, based on the fact that it will be difficult to dispose of the B/L. In other words, if the carrier does not state the condition of the goods according to reality, the shipper can demand the issue of a second B/L or claim for damages based on national law<sup>62</sup>.

One problem arising is that in case the cargo is found damaged and the carrier clauses the B/L, the shipper eagers to delete such clause for documentary purposes. The banks, which finance the shipment through a documentary credit system, accept only Bs/L containing the statement of the good order and condition of the goods unqualified. Thus, the shipper, usually, makes a promise of an indemnity in return for issuing a clean B/L which will contain a misdescription of the goods. Subsequently the lawful holder of the B/L will make a successful claim against the carrier for such misdescription. The carrier, in his turn, will be entitled to make a claim against the shipper based on the indemnity letter as long as the statement is not deliberately false. This complicated issue, regarding the indemnity letter, will be further discussed under section 4 of the present thesis.

### **3.3.1.3 Article 3(4) of the *Hague-Visby Rules***

For the purpose of understanding the consequences of misdescription in the B/L, Article 3(4) is of significant value. The wording of the provision is the following:

*“such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith”.*

The provision demonstrates the evidentiary effect of a B/L. The second sentence of the Article was added by the Visby Protocol in order to protect third parties who have acquired the document in *bona fide*. As mentioned in Part 2.1, the B/L is a document of title which means that it confers title to the goods to the consignee noted on the bill. Thus, the lawful holder of the B/L needs to be protected by possible legal defenses of the carrier, in view of the fact that he is not a party to the original contract of carriage.

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<sup>62</sup> Carver, p.9-167.

In United Kingdom, courts had already dealt with the matter by applying the doctrine of promissory estoppel which precluded the carrier from denying anything to the contrary of that which had been included in the document<sup>63</sup>. According to the doctrine, a party who stated certain facts with knowledge that the statement may be relied on, is estopped from asserting otherwise if the statement is, in fact, relied on and it would be inequitable to allow him to subside from that statement<sup>64</sup>.

The *HVR* incorporated the doctrine by inserting the last sentence of Article 3(4) making sure that the carrier checks carefully the information provided by the shipper and providing the basis for the carrier's responsibility for the goods covered by the B/L.

At a legal dispute the carrier will have the burden of proving that the goods were received in a condition other than as described in the B/L. However, if the document passed to the hands of a third party in good faith, the law justifiably chooses to protect the third party and thus the carrier will not be entitled to prove anything to the contrary of what is written in the document.

It is notable that the transfer of the B/L needs not to be for value. In addition, the holder of the bill does not need to prove his reliance on the statements so as to benefit from the conclusive evidence rule, because the *Rules* differ from the common law approach at this point<sup>65</sup>. Consequently, if the B/L is not transferred to a third *bona fide* party, it is clear that the presumption of *prima facie* evidence is *de juris tantum*; the parties may adduce proof to the contrary showing that the goods were taken over in a state otherwise than as described in the document. It is possible for the carrier and not contrary to the *Rules*, that a clause is inserted ("conclusive evidence clause") which turns the specifics from *prima facie* into conclusive evidence. Such clause will be enforceable since it increases the liability of the shipowner and, thus, does not conflict with paragraph 8 of the same Article which prohibits exemption clauses.

Even though Article 3(4) of the *HVR* evaluates the information included in the B/L as conclusive evidence for a third party acting in good faith, article 3(5) envisages a statutory liability of the shipper; the shipper will be liable against the carrier for any misstatements that the shipper has provided regarding the marks, number, quantity and weight of the goods.

Such liability is presented as indemnity in favor of the carrier and based on the wording of the Article it does not cover the statement of the order and condition of the goods. The

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<sup>63</sup> Ibis, p.9-172.

<sup>64</sup> Poole, p. 159.

<sup>65</sup> Karan, p.235.

insertion in the document of the condition of the goods is assigned exclusively to the carrier through the provision of Article 3(3c) so that the carrier is burdened with the external control and inspection of the goods loaded. “Order”, under the sense examined, means the general type of the cargo, while, “condition” describes the adequacy of the packing for the intended carriage and the general appearance of the cargo<sup>66</sup>. Thus, the shipper bears liability towards the carrier for the information he has provided himself.

### 3.3.2 Greek Law

#### 3.3.2.1 Introduction

Carriage of goods by sea in the Greek legal system is governed by the International Convention of Brussels (1924), referred to as the *Hague-Visby Rules*, as amended by the Protocols of 1968 and 1979. Those three international legal instruments were ratified by Greece through law 2107/1992 which came into force in 1993. The incorporating Act gave to the Convention direct effect in the national legal system, without adding any modifications to the original legal text, following the pattern of the English legal system.

According to the wording of the national regulation, the *Rules* will apply not only to international transport but also to national carriage of goods by sea<sup>67</sup>. Therefore, the application of the International regime is extended, according to the prevailing view<sup>68</sup>, to all national carriage even if it is not covered by a B/L. The opposite interpreting view, that the *Rules* shall apply only to carriage covered by a B/L, is also supported by the minority of academics<sup>69</sup>, but it is the courts’ interpretation that will be of value when the matter will arise at a legal dispute. Furthermore, the Greek private maritime code is still applicable to the extent that it does not conflict with the ratified International Convention<sup>70</sup>.

#### 3.3.2.2 Content of a bill of lading

As mentioned, the *HVR* were implemented to Greek Law in 1992. In the present chapter, discussion will be concentrated to the Interpretation of the relevant Articles of the *HVR* by

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<sup>66</sup> Gard Guidance on Bills of Lading, 2011, p.9.

<sup>67</sup> Article 2 of 2107/1992.

<sup>68</sup> Kiantou-Pampouki, p.389.

<sup>69</sup> Ibis.

<sup>70</sup> Ibis.



National Greek Law and their application in the Greek legal system. Except for the points emphasized in the present chapter, the implementation and application of the *HVR* is identical to the English approach<sup>71</sup>.

An outline of the required content of the B/L will be mentioned here in order to evaluate the differences in implementation under the Greek legal system, regarding the system of misdescription. According to the Convention the B/L must include the identity marks, which allow the identification of the goods from other cargo in the same ship, the quantity of the goods carried and the apparent order and condition of the goods when delivered for carriage.

As discussed above, it is very important to ensure, when signing the B/L, that all elements required are included in the document and that the description is accurate. In most cases, the B/L is presented to the master or his authorized agent for signature, containing the shipper's description, and due to time constraints the replacement of the document is impossible. Under such circumstances, the Master must still examine the cargo and write any remarks on the bill representing his factual findings. Overall, the final formation of the B/L must be in adherence with the *Rules* of Article 3(3) as interpreted on an international and national level.

Article 3(3) of the *Rules* envisages the specifics that a B/L shall contain. The list of Article 3(3) is indicative and not conclusive. This means that firstly, in the B/L other specifics, except for the ones mentioned in the provision, can be added and secondly that the absence of one or more specifics does not affect the validity of the document<sup>72</sup>. Actually, in the last sentence of Article 3(3) the right of the carrier not to include some of the information when he has reasonable grounds for suspecting that the information is not accurate, is envisaged. And *vice versa* whatever serves the functions of the B/L as a receipt, a document of title or a negotiable document, can be included while editing the B/L<sup>73</sup>.

Nevertheless, it shall be noted that some elements cannot be absent from the B/L because, under Greek Law, their absence will have an impact to the validity of the document. These are the signature of the editor and the name of the shipper or the recipient. The Convention does not require the inclusion of these elements but in order for the document to be valid as a document of

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<sup>71</sup> See chapter 3.3.2.

<sup>72</sup> Kiantou-Pampouki, p.393.

<sup>73</sup> *Ibis*.

title under Greek Law, it must contain the handwritten signature of the carrier or the master or the agent of the carrier<sup>74</sup>.

The B/L signed by the carrier legally commits, under Greek Law, the shipper too, without him having to sign it. The absence of the shipper's signature is covered, against good faith, by his acceptance of the B/L or its endorsement.

Finally, the reference to the name of the shipper or the recipient is a necessary element because the bearer B/L is not recognized in the Greek legal system and thus will be invalid<sup>75</sup>. Notably, the same applies in any other legal system that does not recognize the issue of a bearer B/L.

### **3.3.2.3 Requirement of justification for the validity of clauses**

The refusal of the carrier, according to Article 3(3) of the *Rules*, to include in the B/L certain specifics, is demonstrated in the document through clauses; reservations through which the carrier expresses his doubt about the accuracy of the shipper's information or expresses the lack of suitable means to check their accuracy. There is a variety of clauses, as for example: "shipper's load, stow and count", "all particulars as furnished by the shipper but unknown to the carrier", "weight, measure, quality, quantity, condition, contents and value unknown", "said to contain".

The reservations of the carrier are written in the margin of the B/L and thus they are called "marginal clauses"<sup>76</sup>. Under Greek Law the reason that causes the doubt of the carrier or the lack of means about the accuracy of the information, must be inserted in the document. The *HVR* are silent at this point but it is noteworthy that in the next International instrument, the *Hamburg Rules*, this additional obligation is clearly envisaged<sup>77</sup>. Nevertheless, this additional requirement was provided by the Greek legislator in order to serve the general principle of good faith and security in trade, as there is no legal indication of impact of the *Hamburg Rules*. However, English and Norwegian Law have not adopted this additional requirement.

Regarding the validity of these clauses, Article 3(8) shall be examined in relation to the general principles of good faith and commercial practice. Specifically, Article 3(8) precludes

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<sup>74</sup> *Ibis*, p.394.

<sup>75</sup> *Ibis*.

<sup>76</sup> *Ibis*, p.395.

<sup>77</sup> Article 16(1) of the *Hamburg Rules*.

reductions of the carrier's liability. Some such clauses are valid, in so far as the specifics could not be checked by reasonable practices or the carrier has actually reasonable grounds for suspecting the accuracy of such statement. The stricter view that clauses such as "weight and quantity unknown" are disclaimers and infringe Article 3(8), has, also, been supported but this is not a commercially useful solution. According to the prevailing view<sup>78</sup>, reservations by the carrier in the B/L result in the shifting of the burden of proof from the carrier to the holder of the document. In other words, marginal clauses prevent the *prima facie* evidence provision to come into effect. Nevertheless, the validity of such clauses is assessed *ad hoc* taking into consideration the circumstances of the case.

Case 4/1996 issued by the Appeal Court of Piraeus illustrates the above mentioned effect of marginal clauses<sup>79</sup> and it is worthy to be mentioned as a case illustrating the impossibility of reducing the liability for misdescription.

According to the facts, in the 25<sup>th</sup> of September 1992, "Shell Company Hellas Ltd", based in Athens, purchased from "Shell International Chemical Company Ltd", based in London, 677.697 kg of liquid chemical product LAWS (WHITE SPIRIT), worth 0,275 USD per kg. In the 24<sup>th</sup> of December of 1992 and 5<sup>th</sup> of February 1993 the same company purchased from "Shell Nederland Shepie BV" two other types of chemical. For the transport of the above products to the port of Perama, Athens the ship "MULTITANK ASCANIA" was chartered and a voyage charter party was signed. Before loading, the quantities of the pre-mentioned products were counted at onshore installations on account of the shipper. Based on the measurements, the relevant invoices were edited, followed by the loading onboard of the vessel of the chemical products. After the completion of loading, the master issued three Bs/L in which he included the measurements made on the on shore installations. In the first B/L no reservation was made but there was a reference that the goods were loaded in good order and condition. In the second and third B/L it was mentioned "quantity and grade as furnished by the shipper" and with small letters it was, also, mentioned that "the weight, quantity and temperatures are unknown to the master". At the port of discharge it was found that there was a loss of weight of the chemicals which came up to 1,19% for the first chemical, 2,6% for the second one and 1,68% for the third chemical. Thus, a decrease of only 0.5% of the weight was justified for reasons of evaporation

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<sup>78</sup> Ibis, p.410.

<sup>79</sup> Case Law of the Maritime Department of the Appeal Court of Piraeus, edition 1996-1997.

losses during loading and discharge. The carrier as the defendant argued that the clauses inserted by the master excluded his liability for the weight.

According to the court's decision, the B/L provides conclusive evidence among all the interested parties and mainly against the issuer of the document. The probative effect of a B/L concerning quantity may be limited through insertion of the clause "weight unknown", which is permitted not in any case but only where there is reasonable doubt about the accuracy of the statements made by the shipper. The carrier shall invoke and prove the grounds of his reasonable doubt when sued by the shipper. However, when the carrier is sued by a third party-holder of a B/L, he must either mention the elements, which justify his doubt or his inability to inspect cargo, in the document, or invoke and prove that the holder of the B/L, when acquiring the document, acted knowingly to his detriment. It shall be noted, that the same applies when the claimant is the insurer of the holder of the B/L who satisfied the claim of his client.

Further on the court stated that in the present case the clauses in the second and third Bs/L do not meet the requirements of Greek Law so as to limit the liability of the carrier for the quantity mentioned in the document; the necessary element concerning the grounds of the doubt of the master for the statements made by the shipper is missing. Moreover, as it was proved, the receiver of the cargo did not have knowledge of the previous proceedings and acted in good faith. Thus, the Bs/L provided conclusive evidence that the quantities loaded were the ones mentioned in the document and the clauses were of no effect under the particular circumstances.

### 3.3.3 Norwegian Law

#### 3.3.3.1 Introduction

The amended form of the 1924 Convention, known as the *Hague-Visby Rules* was incorporated into the Norwegian Maritime Code –hereafter referred to as "NMC"- existing in the present version of 1994 in Chapter 13.

Norway and the other Nordic countries (Sweden, Denmark and Finland) have not ratified the *Hamburg Rules*. Nevertheless, Norway, as well as all Nordic countries, have adopted a two track system<sup>80</sup> according to which the Conventions ratified apply only to international carriage and the domestic transport is freely regulated by the national legislator. Hence, concerning the

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<sup>80</sup> Falkanger, p.281.

nature of the rules applicable to international carriage, even though Norway has not ratified the *Hamburg Rules*, a hybrid regime is adopted. In other words, some elements of the *Hamburg Rules* are adopted in the NMC in order to reform areas that are commonly thought to be addressed inadequately by the *Hague-Visby Rules*<sup>81</sup>. However, the influence of the *Hamburg Rules* is limited to the extent that it does not collide with the obligations undertaken through the *HVR*. The reason lies to the legal commitment of Norway as a signatory member of the *Hague-Visby Rules* which set, *inter alia*, mandatory rules for the minimum liability of the carrier. During the following analysis, I will make any necessary relevant references to the influence of the *Hamburg Rules* on the current version of the NMC.

### **3.3.3.2 Description requirements and legal consequences of misdescription**

For the purpose of the present thesis discussion will be focused on the description of the goods in a B/L and the legal consequences of misdescription. Description of the goods is a fundamental aspect of a B/L and is connected with its receipt function; as a receipt, the B/L is signed by the carrier who approves whether the goods corresponding to the contract description have been received, as well as their condition. In case the carrier misdescribes the goods loaded or the date of loading, the holder of the B/L will be entitled to raise a claim against the carrier, since it will be presumed that damage occurred during transport. Accordingly, the carrier will be entitled, in his turn, to raise a recourse claim against the shipper.

The Norwegian legislator, following the pattern of the *Rules*, distinguishes two types of the B/L which are (Section 294 NMC) a received for shipment and a shipped B/L. In either type, certain elements must be included in the B/L listed thoroughly in Section 296 NMC. Among others, the master must mention the specifications of the goods- as shown by the receiver- which they include the general nature of the goods, the leading marks necessary for identification, the number of packages and pieces and the weight of the goods or the quantity as otherwise expressed. The apparent condition of the goods is, also, to be included by the editor.

The Norwegian Maritime Code adopts a detailed listing of the particulars, as the *Hamburg Rules*. This deviation from the *HVR* pattern is within limits<sup>82</sup> since it does not

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<sup>81</sup> *Ibis*.

<sup>82</sup> Honka, *New Carriage of Goods by Sea*, 1997, p.118.

constitute an alteration of the Convention implemented but a mere expansion of the scope in order to better achieve the aim of protection of cargo interests.

The question to be answered is the type of consequences that will occur in case some of the information regarding the goods or the date of issue of the B/L is incorrect. The information mentioned in the transport document is of great importance for many reasons. If there is a discrepancy between the described condition of the goods and the condition they are received in the port of discharge, then it is presumed that something has happened during the voyage. Also, the date of a B/L is significant in international trade as the expected date of delivery is of essence regarding the market price fluctuation, the difference in taxation and the expenses of the further utilization of the goods by the receiver.

The Norwegian approach deals with the issue by separating between the “implied transport liability” and the “liability for misleading information”<sup>83</sup>, which burden the carrier according to Sections 299 and 300 correspondingly.

The heading of Section 299 NMC is the following: “The evidentiary effect of a bill of lading”. According to the Section if the apparent condition of the goods is not mentioned in the document, then it is presumed that the goods were delivered in good apparent condition. If the amount of freight is not indicated it is, also, assumed that the receiver is not to pay freight. Lastly, the third paragraph of Section 299 is of the most interest as it provides for the first liability regime for misdescription in a B/L. According to the regulation, the goods shall be considered to be received as stated in the B/L and, unless the carrier has reserved himself against statements whose correctness he has had reason to doubt or did not have a reasonable opportunity to check<sup>84</sup>, it is presumed that the damage arose during the carrier’s liability period. In such a case, the carrier is permitted to adduce evidence to the contrary only in so far as the B/L has not been acquired by a third party in good faith who acted in reliance to it. Thus, the carrier will be under the obligation to pay damages which, firstly, will be assessed according to the rules otherwise applicable to cargo damage<sup>85</sup>- by ascertaining the difference in value between

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<sup>83</sup> Falkanger, p.337.

<sup>84</sup> Section 298 NMC, “*Carriers duty of inspection*”.

<sup>85</sup> Section 275 NMC.

the defective goods and sound goods at the place of discharge<sup>86</sup> - and, secondly, will be subject to the carrier's right of limitation of liability.<sup>87</sup>

The above regime is called "implied transport liability" since the carrier's misrepresentations concerning the goods are actually treated as if the goods had been lost or damaged during the carrier's liability period.

In order to avoid liability, the carrier may introduce a reservation into the B/L stating that the information is incorrect. Such a reservation may be put if the carrier "*has reasonable grounds for doubting the accuracy of the information or has not had a reasonable opportunity to check its correctness*". For the reservation to be valid it must not be general but provisions like "weight, measures, marks and numbers unknown" are sufficient to free the carrier from liability if it can be shown that he has used normal care in checking the goods.

In such cases, the courts take into consideration the difficulties that may have affected the carrier's means of inspecting the cargo. A relevant case is ND 1948 p.101 according to which, a cargo of potassium fertilizer weighed 15% less, than stated in the B/L, when it arrived at the port of discharge. The B/L weight was evaluated by measuring the ship's marks and the shortage was later detected by an authorized controller when the goods arrived. The court held that the shortage was not insignificant and that the carrier should have realized that the B/L weight was incorrect. Additionally, according to the court's decision, the carrier should have made a notation in the document regarding the correct amount of fertilizer, than the significantly reduced stated.

The second liability regime, called "liability for misleading information in Bs/L", is regulated in Section 300 NMC. According to the provision, the carrier will be liable if he understood or ought to have understood that the B/L would be misleading for a third party. The provision applies if a third party incurs a loss and has acquired the document relying on the accuracy of the information provided. Correspondingly, Section 300 provides for the recovery of tortious losses and has derived from general principles relating to the tort of negligence.

Thereupon, it is necessary for the provision to apply that the B/L contains a misdescription of the goods, or another wrongful statement (for example, wrong date of issue) or even that the carrier has failed to fulfill his duty to check the cargo<sup>88</sup>.

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<sup>86</sup> HVR Art.IV r. 5b), cf. Section 279 NMC.

<sup>87</sup> HVR Art.IV r. 5a), cf. Section 280 NMC.

<sup>88</sup> Ibis p.339.

Notably, if the carrier is held liable under the above mentioned regime, the right of limitation of liability (unit or kilo limitation) will not apply and thus the carrier shall pay full compensation, contrary to the liability envisaged in Article 299. The *ratio* is that the tort remedies of Section 300 are considered to be outside the scope of the *Hague-Visby liability Rules*<sup>89</sup> and thus are remedies regulated by national tort law.

However, the carrier is not strictly liable because if reasonable care has been exercised and the information is nonetheless incorrect, the carrier will not be held liable under Section 300 MC. The criterion is whether the carrier had actual or constructive knowledge of the fact that the statement was incorrect and of the fact that it would probably mislead a third party.

In some exceptional cases the two liability regimes may be both applicable<sup>90</sup>. In such a situation, the claimant has the right of election and probably will claim under Section 300 NMC as the measure of damages is under no limitation rule and therefore the compensation to the holder will be higher<sup>91</sup>. A relevant example is in case a B/L is ante-dated; the carrier will be liable both under Section 299 and 300 NMC, since the cargo owner may incur a loss relying on the fact that the cargo will arrive on a certain date.

### **3.3.3.3 The requirement of third party's reliance**

Based on the analyzed regimes, in order for the information of the B/L to be conclusive evidence under Section 299 NMC and for the carrier to be liable under Section 300 MC, the third party acquirer of the B/L must have acted in good faith and in reliance on the accuracy of the information provided.

The *HVR*, however, in Article 3(4) refer to a good faith third party without requiring that the party has shown “reliance” on the document. This different approach found in Norwegian law is affected by the *Hamburg Rules* which explicitly set the reliance requirement forward<sup>92</sup>.

A third party who acted in reliance on the accuracy of the statements, has the meaning of a party who paid the purchase price and acquired the B/L or a bank who accepted the bill under banker's documentary letter of credit<sup>93</sup>.

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<sup>89</sup> Falkanger, p.312.

<sup>90</sup> Honka, p.130.

<sup>91</sup> *Ibis*.

<sup>92</sup> Article 16(2b) Hamburg Rules.

<sup>93</sup> Honka, p.119.



This additional requirement inserted by the Norwegian legislator is justified<sup>94</sup> under the fact that Article 3(4) of the *HVR* is to be interpreted based on the English *doctrine of estoppel*<sup>95</sup> which requires the reliance of the party. Furthermore, under the meaning of the *Rules* the requirement of reliance is met when the third party has acted upon the statement, typically by having paid against the bills under the relevant sales contract. However, this approach is questionable since the purpose of the *HVR* was to reinforce the cargo interests and relieve them from such burden of further requirements.

Norwegian legislators have successfully implemented the *HVR* and the general principles in order to adopt a complete and comprehensive legal system around the carriage of goods by sea. It is evident that the small inclinations from the Convention merely intend to the better regulation of this type of contracts. It is left to see the way the Nordic Maritime Codes will adjust to the *Rotterdam Rules* who have been signed by all Nordic countries, but not ratified yet.

### 3.3.4 Conclusion

All things considered, the implementation of the *HVR* seems successful, considering that the purpose of a uniform international regime is achieved, under the legal systems examined. The carrier bears full liability for the statements he has included in the B/L so that the receiver will be protected against inaccuracies. After all, this protection was necessary after the B/L acquired the negotiability function. Nonetheless, the present system is in contrast with the needs of business because the shipper is always in need of a clean B/L. For this reason the letter of indemnity derived; the aim was to relieve the carrier from liability for inclusions that he has not inserted and did not have knowledge of their correctness.

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<sup>94</sup> Norwegian Report 1993:36, p.48-49.

<sup>95</sup> Regarding the doctrine of estoppel see p.24.

## 4 Law in Context – Letter of indemnity

### 4.1 Introduction

In the present chapter I shall discuss a controversial regulation of the *HVR* and specifically Article 3(5) of the *Rules* which holds the shipper liable towards the carrier for the accuracy of certain statements relating to the goods, which have been inserted in the B/L at his request. According to the relevant literature, it is praxis that in these situations a letter of indemnity is issued; the question discussed hereafter is whether the letter is valid or not.

As it was explained under chapter 2.2, it is of great importance for the shipper that the B/L is “clean” which means that it does not contain any marginal clauses. Without the so-called clean B/L it will not be possible for the shipper to receive the purchase money because the bank will not accept the clausured B/L under a documentary credit transaction. From the side of the carrier, he will be liable for any misdescription of cargo included in the B/L signed by him, as analyzed in Part 3. Therefore, the carrier investigates the cargo when loaded and notes any discrepancies he has noticed on the bill.

Nevertheless, the *Rules* provide a right to the carrier and correspondingly a duty to the shipper to indemnify the carrier “*against all loss, damages and expenses arising or resulting from inaccuracies in such particulars*”. This provision is clear and justified for the reason that all the particulars regarding identity marks, number, quantity and weight of the goods are exclusively provided by the shipper to the carrier and in many occasions it will not be possible for the carrier to investigate thoroughly the goods or he may even make an unintentional omission. Thus, the law provides for mandatory restitution of the carrier’s losses. It shall be noted that the regulation does not affect the liability of the carrier towards the holder of the B/L who bases his claim on Article 3(3) of the *Rules*. In other words, the carrier will, in any case, fully compensate the third party, holder of the document, and will then be entitled to sue the shipper to cover his damages<sup>96</sup>. This guarantee agreement implicitly relieves the carrier from liability and constitutes an exemption contract forbidden by Article 3(8); however, since it is directly envisaged by the Convention, the indemnity agreement is valid and enforceable. In this provision the *Rules* aim at relieving the carrier from any liability which connects to the

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<sup>96</sup> Honka, p.131.

reassurances of the shipper on the specifics of the goods and which, in most cases, will be outside of the scope of control of the carrier.

Until this point the *HVR* are clear but not complete. Actually, it is common practice for the shipper to offer the carrier a letter of indemnity in consideration of his issuing a clean B/L. The question arising is that in case the carrier was reckless or was aware of the discrepancies included in the B/L, he would still be liable towards the holder of the B/L; but would the carrier be entitled to enforce the indemnity letter<sup>97</sup>? From the side of the carrier, his position could be explained from the fact that he found an opportunity both to satisfy his client-shipper and to preserve his business relationship with him.

The *HVR* are silent at this point and it is left to the national legislators to regulate the legal nature and the results of the indemnity letter. In the following sub-chapters, I will refer to the national legislation of UK, Greece and Norway which, although they are three different legal systems, reach to a similar regulation of the matter. Case *Brown Jenkinson v Percy Dalton* of the English Appeal Court is of particular importance and will be mentioned, as it is the only case with relevant facts that has provided precedent, ruling that the indemnity letter is invalid.

At this point, it would be important to refer to the next International Instrument, the *Hamburg Rules*<sup>98</sup>, which envisage that such letter of indemnity will be void and of no effect “*if the carrier omitted a reservation with intention to defraud a third party who acted in reliance on the description of the goods in the bill of lading*”. Thus, the provision of the *Hamburg Rules* regarding the letter of indemnity leaves no legal gaps and is regarded as more complete than the corresponding of the *HVR*.

## 4.2 Implemented Provisions

### 4.2.1 English Law

English Law has incorporated, as already seen in 3.3.2, the *HVR* through COGSA 1971. Regarding the right of indemnity which is given to the carrier when he is held liable to a B/L holder, it is interpreted through general principles of English law and thus will be discussed hereafter.

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<sup>97</sup> Todd, *Maritime Fraud and Piracy*, 2010, p.3.043.

<sup>98</sup> Article 17(3) of the United Nations Convention on the Carriage of Goods by Sea (1978).

The English legislator has maintained the same form of the relevant Article 3(5) of the HVR. Accordingly, based on the interpretation of the wording of the Act, the right of the carrier to be indemnified applies only to marks, number, quantity or weight of the goods and not to other statements made by the shipper. Moreover, it has been held that the provision includes claims not only leading to direct damage but also the ones arising from inaccuracies which have led to misdelivery of the B/L<sup>99</sup>. Lastly, it is clear from the wording of the provision that the duty to indemnify burdens exclusively the shipper and not the subsequent endorsees of the bill as it is not regarded as part of the contract of carriage and thus is not transferred.

A representation in a B/L may, also, give rise to an action in tort if the bill contains a statement as to the condition of the goods or a similar matter and the master signs the bill knowing the statement to be untrue. The individual, usually the master or agent, signing the document will be held liable in fraud to anyone who suffers loss by relying on the misrepresentation, which means by taking up and paying for a clean B/L which he would have rejected if the true condition of the goods had been stated<sup>100</sup>. The same result will occur if the master was reckless not caring whether the statement was true or false<sup>101</sup>. The tortious remedies are considered alternatives to the usual contractual remedies but in some respects they differ; for instance the measure of damages is not calculated in the same manner and the short time bar of the *HVR* does not apply to tortious claims. Thus, the holder of the bill which has been defrauded has the option of electing the legal basis which he wishes to follow.

The situation which often arises is that the carrier is caught in the middle and under heavy pressure by the shipper to turn a blind eye to the discrepancies noticed and accept a back letter for a clean B/L, in order for the bill to be in compliance with the Uniform Customs and Practice for Documentary Credits<sup>102</sup>. The indemnity envisaged by the *Rules* may provide illusory protection for the carrier as not only it does not limit the liability of the carrier towards the third party but it also may be unenforceable towards the shipper, on the ground that its object is to defraud a consignee<sup>103</sup>.

Should the carrier consent to issue a “clean” B/L, because he has been offered by the shipper an indemnity against liability to any subsequent holder of the B/L, not only will the

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<sup>99</sup> Carver, p.9-176.

<sup>100</sup> Scrutton, *Scrutton on Charter parties*, 2008, p.108.

<sup>101</sup> *Ibis*.

<sup>102</sup> Rules used in trade finance, issued by the International Chamber of Commerce (ICM).

<sup>103</sup> Wilson, p.126.

carrier expose himself to liabilities to the receiver by reference to the untrue statements that are entered on the face of the B/L but any indemnity that he has accepted against those liabilities will be unenforceable against the shipper because, regardless of whether he intended or desired to defraud any subsequent holder of the B/L, the carrier at least will have been reckless in participating with the shipper in issuing a B/L containing representations of fact that are known or believed to be untrue<sup>104</sup>.

Precisely, English case law holds that the practice of employing an indemnity as a means of settling an argument between the shipper and the master renders the back letter void. Legal authority is given through case *Brown Jenkinson v Percy Dalton*<sup>105</sup>. According to the facts of the case, the shipper had a quantity of orange juice which he wished to ship to Hamburg. The agent of the owner of the vessel, on which the orange juice was to be shipped, informed the shipper that the barrels containing the orange juice were old and frail and that some were leaking and that a claused B/L should be granted. The shipper required a clean B/L and the shipowner, at the shipper's request and on a promise that the shipper would give to him an indemnity, signed Bs/L stating that the barrels were shipped in apparent good order and condition. The shipper, pursuant to his promise, entered into an indemnity whereby he undertook unconditionally to indemnify the master and the owner of the vessel against all losses which might arise from the issue of clean bills in respect of the goods. The barrels, when delivered at Hamburg, were leaking and the shipowner had to make good the loss. The shipowner sued the shipper under the indemnity, the benefit of which had been assigned to them. The shipper refused to pay, alleging that the contract of indemnity was illegal, because it had as its object the making by the shipowners of a fraudulent misrepresentation. It was found that the shipowners did not desire or intend that anyone should be defrauded.

Finally, the Court of Appeal held the indemnity to be void and illegal on the grounds of fraud. Even though there was no intention by the carrier that anyone should be out of pocket as a result of the transaction, nevertheless at the request of the defendants, the claimants made a representation which they knew to be false and which they intended to be relied on by persons who received the B/L, including any banker who might be concerned. In these circumstances all the elements of tort of deceit were present. A remarkable extract of the decision is the following:

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<sup>104</sup> Todd, p.85.

<sup>105</sup> *Brown Jenkinson v Percy Dalton* [1957] 2 Lloyd's Rep 1.

“The promise upon which the shipper relies is in effect this: if you will make a false representation, which will deceive endorsees or bankers, I will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain”.

Nonetheless, such an indemnity letter may be valid if there is a genuine doubt about the condition of the goods, without the master’s conduct being described as reckless. In other words, the back letter will be enforceable if there is a *bona fide* dispute as to the condition of the goods and difficulty may be caused due to short time or other factors<sup>106</sup>.

#### 4.2.2 Greek Law

The carriage of goods by sea is regulated in the Greek legal system by law 2107/1992. The interpretation of Article 3(5) of the *Rules* through Greek legal principles will be discussed here in order to evaluate the differences with the other legal systems and the need for an internationally uniform regulation regarding the validity of the letter of indemnity.

According to Greek Contract Law, the letter of indemnity provided by the shipper contains, firstly, recognition by the shipper of the inaccuracy of the indications of the bill and secondly undertaking of the obligation to compensate the carrier for damages which may arise due to the inaccuracy of those indications<sup>107</sup>.

According to the prevailing view<sup>108</sup>, a distinction is made between two positions; sometimes the issue of a clean B/L against a letter of indemnity is justified and permitted. This takes place when the issue of a bill is made without reservation concerning the inaccuracies of the specifics of the Article 3(3) of the *Rules* and the carrier or his representative acted negligently; it is, also, justified where there is a *bona fide* dispute about the sufficiency of the packaging and other matters. However, the letter of indemnity will be declared invalid when it conceals a collusion of the shipper and the carrier to defraud the recipient of the bill, who may be a third holder, the insurer or the bank. The agreement will be declared void due to abusive behavior, based on Article 178 of the Greek Civil Code, as a legal act which is contrary to public

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<sup>106</sup> Wilson, p.127.

<sup>107</sup> Kiantou-Pampouki, p.415.

<sup>108</sup> Poulantzas, p.255.

morality<sup>109</sup>. The carrier will, nevertheless, be liable to the third party based additionally on the provisions for tort<sup>110</sup>.

However, there is no Greek case law which indicates the factors that should be taken into account regarding the subjective behavior of the carrier and thus analysis is restricted to a theoretical approach.

#### 4.2.3 Norwegian Law

As mentioned in Introduction (4.1), an indemnity letter is a declaration by the shipper that in consideration of the carrier issuing a clean B/L, the shipper will undertake all costs of the carrier ensuing of his failure to make marginal clauses. The costs, under this meaning, are considered all claims that the holder of the B/L could raise when realizing that the goods received do not correspond to the ones mentioned on the document<sup>111</sup>.

According to Article 301 of the NMC, the shipper is liable towards the carrier for the accuracy of all statements which have been inserted at his request. Contrary to the provision of the *HVR* which refers only to statements regarding identity marks, number, quantity or weight, the Norwegian legislator has expanded the application of the rule to all statements which are provided by the shipper<sup>112</sup>. The justification for this is that the *Rules*, *ab initio*, aimed at protecting the carrier from any statement that the shipper has provided to him. In addition, the Nordic system of Article 301 NMC includes both the fictional damage liability of Article 299 NMC and the misrepresentation liability of Article 300 NMC, in order to achieve the goal of protecting the carrier from any insertions made by the shipper.

The second paragraph of the referred Article is of particular importance; the paragraph introduces the invalidity of the indemnity letter in case the issuing was intended to mislead an acquirer of the B/L. It is important to note that there is not a corresponding provision in the *HVR* and that Article 301 NMC is corresponding to Article 17(2) of the *Hamburg Rules*, verifying the existing dual-system of Norwegian Law.

Correspondingly, it is of interest that the shipper will bear no liability in a situation where he is at fault along with the carrier but he has, additionally, gained an economical profit. The

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<sup>109</sup> Kiantou-Pampouki, p.405.

<sup>110</sup> Article 919 of the Greek Civil Code.

<sup>111</sup> Holmberg, p.53.

<sup>112</sup> Swedish Maritime Law Association, *Cargo Liability in Future Maritime Carriage*, p.197.

shipper must establish the carrier's intention to defraud, in order for the back letter to be considered void, which seems, also, problematic<sup>113</sup>. It could be argued that this regulation could lead in a complex situation where the carrier cannot rely on the indemnity letter if he is aware that the statements of the shipper do not correspond to reality and he would, thus, be obliged to stop the loading process of the goods at once. This position seems prejudicial for commercial practice and as a result the provision should be interpreted in a way that applies only where the carrier acts dishonestly<sup>114</sup>.

The subjective behavior of the carrier needs to be intentional; contrary to Article 300 NMC, according to which the carrier is liable towards a third party "*if he understood or ought to have understood*" that the inserted information was incorrect, Article 301 NMC requires that the carrier must have been in co-operation with the shipper with a common purpose to mislead a holder of the bill, in order for him to lose the right of claiming under the indemnity letter.

It is notable, that Norwegian Maritime Law is the only legal system, from the ones examined under this chapter, which statutorily regulates the matter of validity of the indemnity letter in a specific provision of Maritime Law. Hence, Article 301 NMC is not a special regulation but derives from the general principle of Scandinavian Contract Law that no court will lend its aid to a person who founds his cause of action upon an immoral or illegal act ("*ex dolo malo non oritur actio*"). Specifically, *Kong Christian Den Femtis Norske Lov* ("NL") 5-1-2 embodies this customary Rule:

*"A contract which is based on a content which is against the law or honour, or demand is invalid."*

Except for the civil law sanctions, a B/L issued with the intention of misleading an acquirer may, also, lead to penalty law sanctions and more precisely to fraud, according to Article 270 of the penal code of 1902<sup>115</sup>. If an indemnity letter is issued regarding a cargo that has a visible defect and the carrier has signed a clean B/L being aware of the defect, then both the carrier and the shipper can be prosecuted for fraud committed against the holder of the bill who relied on the accuracy of the information provided.

It is worthy to note at this point that Nordic law, in an effort to protect the consignee from the carrier's fraudulent actions, has implemented a provision by which the consignee can

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<sup>113</sup> Honka, p.132.

<sup>114</sup> Ibis.

<sup>115</sup> Corresponding Article 371 of the penal code of 2005.



learn if the carrier was party to a letter of indemnity contract<sup>116</sup>. However, this duty of information imposed on the carrier is of doubtful value since it is not sanctioned in any way, but non-compliance may be an indication of the carrier's fraudulent intentions.

Furthermore, for the sake of clarity, I will refer briefly to an example where the guarantee agreement is justified<sup>117</sup>; if the ship's tally indicates a lower quantity than the shipper's tally and the difference is relatively unimportant, then the master may insert the shipper's tally without reservation. Under these circumstances, even if the shipper's figure was false and the carrier is held liable, he will be entitled to claim his expenses based on the indemnity<sup>118</sup>. Concerning ante-dated Bs/L, the carrier will never be able to enforce the indemnity letter from the shipper because there would no excuse to establish his ignorance<sup>119</sup>.

#### 4.2.4 Conclusion

While English and Greek Law have implemented the Rule *verbatim*, Norway has special provisions regarding the B/L and the indemnity letter. Even though the validity of the back letter is not regulated by the Convention, national laws reach to the same result based on the general principles of, *inter alia*, good faith; it is unenforceable when the issuing was intended to mislead the receiver of the B/L.

Although in practice the use of such indemnity letters is widespread and generally accepted, the courts do not take the same view and invalidate the enforceability of those letters as long as it is proved that the carrier acted with knowledge and intention. The reason for maintaining a principle so strict for the carrier is that although the carrier gains no direct economic profit from the insertion of such statements, the B/L holds an important place as a document in international trade and as such, the banks and purchasers should always be able to trust it and its content.

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<sup>116</sup> Article 300(2) NMC.

<sup>117</sup> Gard P&I Club, p.208.

<sup>118</sup> *Ibis*.

<sup>119</sup> *Ibis*.

## 5. Conclusion

### 5.1 Summary of major findings

This thesis concentrates on the investigation of the system of misdescription of cargo in bills of lading. A comparative analysis has been held between three different regimes in dealing with their advantages and disadvantages on the security of Bs/L. English common law, as well as Greek and Norwegian law, recognizes the B/L as a multi-functional document; as a receipt of the goods, a document of title and as an evidence of the contract of carriage. These functions have given significant value to the document for the reason that the bill, characterized as a document of title, incorporates the value of the cargo and, correspondingly, the right of ownership to the cargo, innovating in such a manner to other transport documents.

The thesis is a dogmatic international study with a focus on the letter of indemnity of Article 3(5) of the *Hague-Visby Rules*. In order to set this legal issue in context, it seemed helpful to outline the commercial and legal functions of bills of lading and to consider the practical difficulties arising when they contain misstatements about the cargo shipped.

Statements in the B/L concerning the condition in which goods are shipped function as *prima facie* evidence in favour of the shipper, but are conclusive evidence once the B/L comes into the hands of a third party who has relied on it. The consequences for the carrier, in case of misdescription of the goods in a bill of lading are serious; the main one is exposure to claims as the carrier is likely to be held fully liable for misdescription -depending on his subjective behavior- with the consequence of compensating the cargo owner for the full value of the cargo which could amount to a substantial sum.

Regarding the validity of the letter of indemnity- perceived as a recourse claim against the shipper- despite the silence of the *Rules*, the vast majority of legal systems agree to the issue by invalidating the letter, when the receipt is signed dishonestly or in bad faith. Doubtlessly, the carrier should be held liable for his statements on a document with overriding importance to international trade and commerce. Nevertheless, I am of the view that there is room for

improvement, since the invalidity of the letter of indemnity does not seem to be a panacea solution; for instance, the shipper succeeds in avoiding any liability in a situation where he has immediate profit.

## 5.2 Problems – Outlook

It is of my opinion that the primary purpose of the law in the area of carriage of goods by sea must be to balance the commercial interests of the parties that are involved in a B/L contract namely, the carrier, the shipper and the receiver of the B/L. Contrariwise, if the law does not protect the interests of the parties or imposes onerous duties on certain parties, then the *animus* of the law becomes ineffectual.

As it is presented, it is usual that the carrier will succumb to the intense pressure placed upon him by the shipper who, in order to get paid, must have clean Bs/L. In such circumstances, the carrier or owner will be taking a double risk; firstly he is risking his insurance cover, if he is held liable for some misdeed, and secondly he takes an additional risk in that there will be a question over whether the indemnity he is receiving can be enforced. Here the carrier, having neither caused the damage, nor contributed to it, is held responsible, by national laws, for the condition of the cargo by reason of having been a party to the fraud. Hence, the carrier is responsible because he has signed an indemnity contract that has as its object the commission of a fraud<sup>120</sup>.

The invalidity of the indemnity letter imposes an onerous burden on the carrier who has sustained an economical loss, through compensating the endorsee, but cannot be indemnified. At the same time, the shipper has been remunerated by the endorsee for the full value of the goods, although the cargo he shipped did not correspond to the agreed at the sales contract. Therefore, this whole arrangement allows to the shipper to receive money for goods that he has not sent. One could even ask whether it is fair to make a carrier subject to such forceful consequences based on tort law<sup>121</sup>.

For the foregoing reasons, I am of the view that the current scheme is susceptible to revision in order to transfer part of the liability to the shipper, who urged the carrier towards the

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<sup>120</sup> *Brown v. Jenkinson & Co., Ltd v Percy Dalton* (London), Ltd. [1957] 2 Lloyd's. Rep. 1.

<sup>121</sup> Article by Trond Solvang, *Sections 299 and 300 of the Maritime Code – carrier's liability for misleading statements in bills of lading*, p.2.

fraudulent misrepresentation and additionally gained an economical profit. On account of the fact that the courts should not lend their aid to resolve the disagreement of two crooks<sup>122</sup>, legislative intervention is required.

The suggestion that the carrier could claim his loss from the shipper on the legal basis of unjust enrichment is estopped due to the absence of a legitimate reason for the claim; the legal cause, which is the letter of indemnity, is already characterized as a fraudulent collusion.

An equitable solution could be that the interrelationship between the carrier and the shipper shall be regulated as joint and several liability (“solidairement”). Under this scheme, several people are liable and the creditor can sue and collect the entire from any one of them. Subsequently, the person that paid must then pursue the other obligors for a contribution to their share of the liability.

Regarding the legal connection, the receiver of the B/L has a contractual relationship with the shipper because the B/L is signed, also, by the shipper. In particular, the *bona fide* holder of the bill of lading- who received goods not corresponding to the description on the document- will be entitled to a claim towards either the carrier or the shipper, at his discretion. Most probably, the holder will raise his claim against the economically stronger and approachable carrier and will, correspondingly, receive a full compensation. Thereafter, the party that compensated the endorsee will sue the other party for his share of liability. The liability will be, legislative, distributed in equal shares so that, on one hand the carrier assumes his responsibility for the accurate issuance of the document and on the other hand the shipper is held liable for the direct economical profit he gained. In other words, through the proposed system, the distribution of liability is allocated proportionally, in a way that both the carrier and the shipper are liable for the fraudulent misrepresentation which they colluded.

The opposite opinion that legal systems do not solve a problem in a situation where both parties are at fraud so as not to get the support from the law to enforce the illegal arrangements, needs to be taken into consideration but does not seem convincing. The purpose of the proposed liability regime is to regard as tortfeasors both the accomplices of the fraud. Thus, through the

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<sup>122</sup> Falkanger, p.342.

joint and several liability scheme the fraudsters are not helped or encouraged but the interrelationship of the shipper and the carrier leads to a balanced result.

It is my final submission that although it would be good to have a new unified liability regime, on an international level, on the misdescription of goods in Bs/L, it is unlikely that there will be any novel international regulation to reform this area anytime soon. A more realistic solution, in my view, would be for countries to continue to develop and apply their national law in the area, which provides a satisfactory result, by invalidating the letter of indemnity. Notwithstanding room for improvement, the present regime under the *Hague-Visby Rules* ensures safety to international commerce and to the parties involved.

## Annexes

### **International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 1924 (Hague-Visby Rules).**

#### *Article III*

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) Make the ship seaworthy; (b) Properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things: (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage. (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper. (c) The apparent order and condition of the goods.

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

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection. Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen. In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

6bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of

shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.

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

## **United Nations Convention on the Carriage of Goods by Sea, Hamburg 1978 (The Hamburg Rules).**

### *Article 14 - Issue of bill of lading*

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.
2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.
3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if no inconsistent with the law of the country where the bill of lading is issued.

### *Article 15- Contents of bill of lading*

1. The bill of lading must include, inter alia, the following particulars: (a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper; (b) the apparent condition of the goods; (c) the name and principal place of business of the carrier; (d) the name of the shipper; (e) the consignee if named by the shipper; (f) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading; (g) the port of discharge under the contract of carriage by sea; (h) the number of originals of the bill of lading, if more than one; (i) the place of issuance of the bill of lading; (j) the signature of the carrier or a person acting on his behalf; (k) the freight to the extent payable by the consignee or other indication that freight is payable by him; (l) the statement referred to in paragraph 3 of Article 23; (m) the statement, if applicable, that the goods shall or may be carried on deck; (n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and (o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of Article 6.
2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this Article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.
3. The absence in the bill of lading of one or more particulars referred to in this Article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of Article 1.

### *Article 16 - Bills of lading: reservations and evidentiary effect*

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over

or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this Article has been entered: (a) The bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and (b) Proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (h) of Article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

#### *Article 17 - Guarantees by the shipper*

1. The shipper is deemed to have guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this Article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this Article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

### **United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Rotterdam 2008 (The Rotterdam Rules)**

#### *Article 35 Issuance of the transport document or the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option: (a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or (b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport



record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

#### *Article 36 Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper: (a) A description of the goods as appropriate for the transport; (b) The leading marks necessary for identification of the goods; (c) The number of packages or pieces, or the quantity of goods; and (d) The weight of the goods, if furnished by the shipper. 2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include: (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage; (b) The name and address of the carrier; (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued. 3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include: (a) The name and address of the consignee, if named by the shipper; (b) The name of a ship, if specified in the contract of carriage; (c) The place of receipt and, if known to the carrier, the place of delivery; and (d) The port of loading and the port of discharge, if specified in the contract of carriage. 4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on: (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

#### *Article 39 Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record. 2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be: (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship. 3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

#### *Article 40 Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if: (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or (b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading. 2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper. 3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if: (a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or (b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information. 4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in: (a) Article 36, subparagraphs 1 (a), (b), or (c), if: (i) The goods inside the container or vehicle

have not actually been inspected by the carrier or a performing party; and (ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and (b) Article 36, subparagraph 1 (d), if: (i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or (ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

#### *Article 41 Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40: (a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars; (b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in: (i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or (ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith; (c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record: (i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier; (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and (iii) The contract particulars referred to in article 36, paragraph 2.

## **The Norwegian Maritime Code**

#### *Section 298 Carrier's duty of inspection*

The carrier shall to a reasonable extent check the accuracy of the information on the goods entered in the bill of lading according to Section 296 paragraph one. If the carrier has reasonable grounds for doubting the accuracy of the information or has not had a reasonable opportunity to check its correctness, the carrier shall make a reservation to that effect in the bill of lading.

#### *Section 299 The evidentiary effect of a bill of lading*

A bill of lading is evidence that the carrier has received the goods or, if a shipped bill of lading has been issued, that the carrier has loaded the goods as stated in the bill of lading in so far as no reservation has been made as mentioned in Section 298 or nothing to the contrary is shown. If the bill of lading lacks a statement of the apparent condition of the goods and packing, it shall, unless the contrary is shown, be assumed that the goods were in good apparent condition.

A bill of lading which does not indicate the amount of freight or otherwise shows that freight will be paid by the receiver, cf. Section 296 paragraph two no. 10, is evidence that the receiver is not to pay freight unless the contrary is shown. The same applies correspondingly if the amount payable for demurrage is not stated in the bill of lading.

If a third party in good faith has acquired a bill of lading in reliance on the accuracy of the statements in it, evidence to the contrary according to paragraphs one and two is not admissible. If the carrier<sup>2</sup> knew or ought to have understood that a statement concerning the goods was incorrect, the carrier cannot invoke a reservation as mentioned in Section 298, unless the reservation expressly states that the information is incorrect.

#### *Section 300 Liability for misleading information in bills of lading*

If a third party incurs a loss by acquiring a bill of lading in reliance on the accuracy of the information it contains, the carrier is liable if the carrier understood or ought to have understood that the bill of lading was misleading for a third party. No right of limitation of liability under this Chapter<sup>3</sup> applies.

If the goods do not correspond to the statements in the bill of lading, the receiver can demand that the carrier state whether the shipper has undertaken to indemnify the carrier in respect of incorrect or incomplete information (letter of indemnity). If so, the carrier is obliged to acquaint the receiver with the contents of the undertaking.

*Section 301 Guarantee by the shipper*

The shipper is responsible to the carrier for the accuracy of the statements relating to the goods entered in the bill of lading at the request of the shipper.

If the shipper<sup>1</sup> has undertaken to indemnify the carrier for losses arising from the issuing of a bill of lading containing incorrect information or containing no reservation, the shipper is nevertheless not liable if the issuing was intended to mislead an acquirer of the bill of lading. Nor is the shipper in such a case liable according to paragraph one.

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- Case 4/1996 Appeal Court of Piraeus.
- *Coventry v Gladstone*.
- *Mason v. Lickbarrow* (1794) 5 TR 683, 101 ER 380.
- *Sanders Bros v. Maclean & Co* (1883) 11 QBD 327, 341.

### B. Treaties

Hague Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924).
Hague-Visby Rules	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 1924) as amended by the Visby Protocol of 1968 and the SDR Protocol of 1979.
Hamburg Rules	United Nations International Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978).
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## **Abbreviations**

BIMCO- Baltic and International Maritime Council

B/L- Bill of Lading

CMI RULES- Commite Maritime International

COGSA 1971- Carriage of Goods by Sea Act 1971

HVR- Hague Visby Rules

Ibid- Ibidem

IMB- International Maritime Bureau

IMO- International Maritime Organization

LoI- Letter of Indemnity

NMC- Norwegian Maritime Code

UCP- Uniform Customs And Practice For Documentary Credit

UNCITRAL- United Nations Commission on International Trade Law

UK- United Kingdom

USA- United States of America