Rights and Liabilities of the Consignees/Endorsees:
A Comparative Study of the Rotterdam Rules and English Law

A thesis submitted to the University of Manchester
for the degree of PhD Law in the Faculty of Humanities

2018

Kourosh Majdzadeh Khandani

School of Law
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Abstract

In the context of an international carriage of goods by sea contract, the consignees and endorsees are the two important categories of the parties whom their rights and liabilities have not been legislated for in any international carriage of goods by sea convention until the adoption of the Rotterdam Rules. The truth is that, in contrast to the rights and the correlative liabilities and obligations of the shippers and carriers, the rights and liabilities of the consignees and endorsees have always been dealt with by the domestic and national laws. However, the Rotterdam Rules, with the goals of promoting legal certainty, improving the efficiency of international carriage of goods and harmonization and modernization of the carriage rules, for the first time at an international level, have attempted to regulate the provisions governing the rights and liabilities of the latter parties. Thus, the application of the Rotterdam Rules, in case they gain the force of law, will be broader than any other international maritime convention. Therefore, this has compelled the necessity of carrying out a profound and detailed critical analysis of the new, and somewhat innovative, regulations, since the impact of the application of the Convention on the existing carriage of goods by sea rules, both nationally and internationally will be crucially significant.

The UK as one of the major actors of the maritime industry has a long-established set of rules particularly in the field of rights and liabilities of the parties, both in the common law and statutory senses, governing the carriage of goods by sea affairs for centuries. This thesis aims to evaluate the relevant provisions of the Rotterdam Rules by way of comparison with their corresponding rules of the English law in order to find out whether these new sets of regulations can establish a reliable source of reference for the consignees and endorsees who wish to ascertain their rights and become aware of their obligations and liabilities. In other words, the main objective of this study is to examine whether the Rotterdam Rules clearly define and specify the rights and liabilities of the consignees and endorsees to a contract of carriage of goods by sea. Further, it is going to investigate whether the Convention succeed in achieving its goals with respect to the rights and liabilities of these parties. Also, ratification of the Rotterdam Rules is believed to have a significant impact on the English maritime law and therefore, the question whether it is reasonable for the UK to ratify the Convention will be answered in this research. It is suggested that the findings of this thesis in addition to the solutions proposed to solve the difficulties, ambiguity and complexity of the existing rules, will be of assist to the UK authorities as well as the legislative bodies in other jurisdictions in order to obtain a more effective decision on the adoption of the Rotterdam Rules. This study ends with illustrating an alarming vision of the future of maritime law which will be largely affected by the evolution of smart technologies in the shipping industry.
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Acknowledgement

First and foremost, I would like to express my sincere gratitude to my supervisors, Professor Gerard McMeel and Professor Andrew McGee for their continuous guidance and endless support. It has been an honour to work under their supervision.

I would like to truly thank all the people, including the helpful staff of University of Manchester School of Law PGR Office as well as the Document Supply team of the University of Manchester Library who generously assisted until the completion of this thesis.

I am also sincerely grateful to all the legal officers and staff of the UNICTRAL with whom I had the privilege to discuss the Rotterdam Rules during my internship program, and their enlightening advice.

Lastly, I am indebted to my parents, my true heroes, for all their love and encouragement from the very beginning of this journey till the end. I would also like to thank my brother and sisters for their faith and support. I am also very grateful to my dearest friends Mr Mohsen Sajjadian, Dr Yasin Tabatabee and Dr Masoud Sajjadian for their support and encouragement.
To My Parents
"Bad laws are the worst sort of tyranny."

- Edmund Burke

Introduction

It is generally established, as a rule of international trade, that an international sale of goods contract consists of two main characteristics: firstly, as opposed to the domestic sale of goods, it involves the transport of goods from one state to another state. This may give rise to the problem with seller not being paid on delivery, since the transaction is made between the two parties located in different territories. On the one hand, the seller is reluctant to deliver the goods to his buyer until he is paid, and on the other hand the buyer is not very keen to finalize the payment before the goods reach the point of delivery. Secondly, it is a commercial necessity for some goods to be sold and resold during the carriage, once they are shipped. Therefore, while they are in transit, the risk of loss of or damage to the goods are more considerable than otherwise.¹

Essentially, when a contract of international sale of goods is made, it means that an international seller of goods is commonly required to conclude a contract of carriage with a carrier for the interest of the buyer. In principle, the seller enters into a contract of carriage in his own name but with the objective of securing the benefits of the buyer. Various types of shipment contracts, such as cif, cfr and fob can be made by the shipper and each of which has its own advantages and disadvantages, but the common goal of all of these contracts is to avail the buyer of contractual protection in case he bears the risk of transit. The buyer will, therefore, be the primary person who has interests in the goods, whether they are to be delivered to the final destination, redirected to another person or even delayed, damaged or lost at the sea.

Consignees and endorsees are the two main categories of the parties who although the contract of carriage is usually made directly for their benefits, are not considered as the original parties to such contracts. Moreover, the terms and conditions of the agreement, made between the shipper and the carrier, have direct impact on the legal and commercial interests of the consignees and endorsees, while they are not usually involved in the negotiation process. The reason to choose these two categories among all of the potential third parties to a contract of carriage is that their interests are either concerned in the goods carried under the contract or in the shipping documents relating to the goods. In fact, they are the third edge of the international carriage of goods triangle, the two other being the shipper and the carrier.

The Rotterdam Rules,2 for the first time at an international level of legislation, have incorporated a number of provisions to provide for the rights and liabilities of the parties other than shippers and the carriers. This has not been taken into account in any other international maritime convention before, and although the attempt itself is believed to be of value especially for the regulation purposes, it is not carried out in an acceptable way. Thus, the main argument of this thesis is that the Rotterdam Rules have failed to clearly identify, define and specify the rights and liabilities of the consignees and endorsees in the context of an international carriage of goods by sea contract. Furthermore, considering the objectives of the Rotterdam Rules, it is claimed that the Convention will fail to achieve its goals with respect to the topics within our concern, whether it will be promotion of legal certainty and enhancement of efficiency and commercial predictability in the international carriage of goods or harmonization and modernization of the rules governing international contract of carriages.

The truth is that the question of rights and liabilities of the consignees and endorsees are generally dealt with by the national laws, and each jurisdiction

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based on its legal system and many other important factors, takes different approaches towards the issues possibly caused by the disputes surrounding these subjects. It will be seen in this study that, for example, the question of rights of suit of the consignee/endorsee is dealt with in different ways in various jurisdictions, and in some, it is not even regulated properly. Now that the Rotterdam Rules have provided for these subjects in form of an international body of regulations, a detailed study of the subject is deemed necessary.

For this purpose and to evaluate and analyse the characteristic and specifications of the provisions of the Rotterdam Rules, and also to assess whether these rules will be functioning properly in case the Convention gains the force of law, a set of standards had to be assigned and defined. This is where the rules of English law, both at statutory and common law senses, based on their long established history and functionality, are decided to be appointed as the set of standards according to which the provisions of the Rotterdam Rules are being evaluated by way of point-by-point comparison.

Another point to be clarified is that the provisions of the Rotterdam Rules are often lengthy, unnecessarily detailed and complicated. The present work attempts to make these provisions digestible firstly by reviewing the preparatory works of the UNCITRAL\(^3\) in drafting sessions, the ancillary discussions relating to the provisions, if applicable, and secondly, by precisely examining the rules in terms of drafting, the language, rationale and the context. Throughout this study, it is going to extract and define the rights potentially appointed by the Convention to the consignees and endorsees.

In this way, in addition to critically analysing the provisions of the Convention, a comprehensive evaluation of the English law rules themselves is also carried out, and this is claimed to be the first study in which the rights and liabilities of the consignees are attempted to be defined and clarified in details. The fact is that most of the existing studies have concentrated particularly on the provisions of the

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\(^3\) The United Nations Commission on International Trade Law (hereinafter referred to as the ‘UNCITRAL’).
Carriage of Goods by Sea Act 1992\textsuperscript{4} or its earlier legislations and although there has been a satisfactory number of researches and papers on the question of rights and liabilities of the shippers or carriers, there is little comprehensive literature on the rights and liabilities of the consignees or endorsees. Moreover, the Rotterdam Rules, despite being the newest convention on international carriage of goods by sea, have received little attention in this respect.

Since the United Kingdom has not signed nor ratified the Rotterdam Rules, at the time of submission of this thesis, and also adoption of the Convention will have significant effects on the topics within our concern, an analytical examination is absolutely needed, since there is also a clear uncertainty regarding the issues of transferring rights and assumption of liabilities under the provisions of the Rotterdam Rules. Therefore this study will be of interest to purchasers of the goods carried by sea, researchers, lawyers, insurance companies and also the policy makers in the UNCITRAL in terms of further revision of the Convention or any other form of necessary future amendments. More specifically, since the consultative committee established by the UK Department for Transport has not yet reached a decision regarding signing or ratifying the Rotterdam Rules, it is hoped that the results will inform UK authorities in order to assist the review and assessment of the mentioned aspects of the Convention.

Moreover, the findings obtained from this study will contribute to the progress of a scheme for more comprehensive, adequate and effective approaches to the question of rights and liabilities of the cargo interests in the context of international arrangements. Further, in particular, this information will help to develop a source for future academic researches on these specific topics as well as attempting to provide operable and reliable answers to the concerns of interested parties. Lastly, the solutions provided in this thesis are believed to be of value to those countries who are interested in adopting the Rotterdam Rules, in the sense that it will help the policy-makers and legislative bodies of the states to be aware

\textsuperscript{4} The Carriage of Goods by Sea Act 1992 (c. 50) (Hereinafter referred to as ‘the COGSA 1992’).
of the flaws of the Convention as well as to know how to fill the gaps and deal
with the difficulties arising out of such defects, as with the current status of the
Rotterdam Rules, many countries are still engaged in the process of examination
of adopting the Convention and its possible effects on their laws.

This thesis is comprised of two main chapters, a mini chapter and a brief
conclusion. It starts with describing, examining and analysing the rules of English
law regarding the rights of the consignees and endorsees. The rights will be
precisely defined. The bases of the rights will be evaluated and the discussions
surrounding this matter will be illustrated. There are various difficulties with
regard to the nature of some of the rights as well as the question of presentation of
the documents to attain those rights. This will be addressed in details and possible
solutions will be provided.

Moreover, the status of the consignees, endorsees and, to some extent, shippers’
rights will be examined depending on the type of shipping documents which are
used. This means that it will be discussed how these rights are ascertained by or
vested in the parties, how they are to be transferred from one party to another,
and what the position of the original owner of the rights will be after the transfer.
The last part of the first chapter is devoted to evaluate the question of liabilities of
the consignees and endorsees, also possible solutions to overcome with the
difficulty in interpretation, examination of the liabilities of the original shipper, the
extent of liabilities of the third parties and how the consignees and endorsees must
be advised in order to limit their liabilities.

The second chapter mainly focuses on critically analysing the relevant provisions
of the Rotterdam Rules. Therefore, when assessing the rules of the Convention, the
 corresponding rules of the English law will be highlighted and somehow
reiterated in order to set a standard with which the provisions of the Rotterdam
Rules to be compared to. This will be shaped in two main parts, the first of which
will concentrate on the rights which have been removed from or never
incorporated into the final draft of the Convention. The second part will focus on
the rights and liabilities which currently exist under the Rotterdam Rules. This will also include the most significant and controversial topic of the modern age of international carriage of goods by sea, which is the electronic documents.

It has to be mentioned that there will be a deviation from the usual structure of the thesis regarding the section on ‘electronic documents’. This part of the study is entirely and only discussed in Chapter 2 which is dedicated to analysis of the Convention and comparing it with English law. The reason is that in all other parts of the thesis, the rules of English law are set as standard, therefore they have to be examined first in order to from a basis for further discussions and analogy. However, because the English law currently does not accommodate the use of electronic transport documents and thus cannot shape a set of standards, and also since the Rotterdam Rules have a relatively better answer to this issue, this particular topic is included in the second Chapter.

The defects, uncertainty, ambiguity and complexity of the Rules will be then illustrated and when it is possible, solutions as for redrafting the provisions, amending certain provisions or revising the structure of the Convention will be presented. It has to be noted that some provisions of the Rotterdam Rules are new to the English law and, therefore, there is no corresponding rule to be found under the English law in order to carry out a comparison. Thus, in such cases, the potential impacts of legislation of the Rotterdam Rules into the English law in case the Convention comes into force will be illustrated.

There are, of course, several advantages in certain parts of the Rotterdam Rules which are acknowledged and must be appreciated, however, due to the uncertainty surfing through the provisions of the Convention, this piece of regulations cannot guarantee the international uniformity or legal and commercial certainty it seeks and is anticipated by its drafters. This thesis will be terminated by an attempt to pose the general question of ‘uniformity’ and to assess whether the Rotterdam Rules is ‘the’ answer to this question.
To sum up, the aim of the present study is to answer the following questions: a) what are the rights and liabilities of the consignees and endorsees under the English law and the Rotterdam Rules?; b) are these rights and liabilities are clearly defined under these legislations?; c) which body of rules is a more reliable source for these parties to refer to in order to ascertain their rights and become aware of their liabilities?; d) what are the defects and flaws of the provisions of the English law and the Rotterdam Rules in respect of the rights and liabilities of the consignees and endorsees, and what are the possible solutions?; e) are the rules of English law adequately prepared to deal with the legal and commercial needs of the modern age?; f) can the Rotterdam Rules assist the English law in order to cope with such needs?; g) is it reasonable for the UK to ratify the Rotterdam Rules, and if yes, what are the impacts?; h) has the time come for the English law to be updated, or are the traditional approached of the English law are properly answering the questions of rights and liabilities of the consignees and endorsees?; i) are the Rotterdam Rules capable of being the only uniform international maritime conventions?

This is a comparative study. Throughout this thesis, mostly analytical comparison as well as evaluative comparison will be conducted by which the provisions of the Rotterdam Rules will be compared on a conceptual basis with the rules of English law including the principles of common law, case law, statutes and the authorities. For this purpose, initially the rules of English law are discussed, examined and evaluated in order to build a foundation for further discussions on the Rotterdam Rules. Narrative or descriptive style of writing is attempted to be avoided, however, wherever such a tone is evident, it is because of the explanatory nature of the subject. This thesis is to a large extent library-based; however, certain ideas have been shared and discussed with a number of well-known experts on this subject during the academic events the author has attended. The author also successfully completed a two-month internship program at the UNCITRAL office in Vienna, Austria during spring 2015; a part of his tasks had been to assist the legal officers with preparation of the accession toolkit for the Rotterdam Rules.
Also, during the time of internship, the author had the opportunity to discuss and receive comments on some of his ideas on the subject matter of this thesis with specialized legal officers of the UNCITRAL who had been working at the Secretariat during the drafting sessions of the Rotterdam Rules.
Chapter I

The English law
Chapter I: The English Law

1. Overview

Commonly, it has been a commercial practice for decades that the carrier of goods by sea issues the shipper a transport/shipping document, mainly a bill of lading, covering the goods to be shipped on the vessel. Both historically, as it can be traced back to the 16th century, and also in the current custom, the substantial role of the transport documents especially the bills of lading in the international trade has been made very clear. It is generally established that a bill of lading has three main functions, namely; (i) it is an evidence of the contract of carriage, (ii) it serves as a receipt for the goods shipped, and finally (iii) it acts as a transferable document of title to the goods.

One of the main functions of a bill of lading is to operate as a contract or evidence of a contract, under which the original parties can benefit from their contractual rights and be exposed to the liabilities. In essence, the common law principle of privity of contract provides that it is the original parties to a contract who may sue on it and to be sued. The application of this rule involves contracts of carriage, which means that a buyer of goods who has not originally signed a shipping contract with the carrier is not able to bring an action against him in case of a breach of contract.

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8 *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.; *Gandy v Gandy* (1885) 30 ChD 57.; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.; Scruttons Ltd v Midland Silicons Ltd [1962] AC 446.
Therefore, if the consignee of an order bill of lading made out to him, or an endorsee of a bill of lading had to bring an action against the carrier, their claims would be dismissed based on the fact that they were not entitled to the contractual rights as against the carrier. As it is usually the shipper (seller) who concludes a contract of carriage with the carrier, he seemed to be the only person who was entitled to enjoy the contractual rights against the carrier.\(^{11}\) Furthermore, he was apparently deemed to be liable to the carrier for freight, demurrage or other agreed contractual charges.\(^{12}\)

On the other side, although the buyer was the person who had more interests in the goods than the original parties to the contract of carriage evidenced by or contained in the shipping document, the effectiveness of his right to claim delivery of the goods, often had been made subject to specific requirements set by different and disparate rules of common law. The buyer was not a privy of contract of carriage, thus he could not claim delivery of the goods merely based on the contractual rights which he did not possess.

However, throughout the time, these problems, to a large extent, have been resolved by the evolution of various principles and legislations under the English law. The aim of this section is to examine how these rules have emerged, what their backgrounds have been, how they are operating in their current mode and what their achievement is in context of rights and liabilities of the consignees and

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\(^{12}\) Sanders v Vanzeller [1843] 4 QB 260. However, there were situations in which a shipper might retain the ownership of the goods shipped. In such cases, it was still the shipper who suffered the loss, thus he naturally had the right to sue the carrier under the contract of carriage. For instance, the shipper might retain the possession of a bearer bill of lading, or ‘of an order bill of lading to his order without endorsing it over’. Alternatively, there were cases (such as Gardano & Giampieri v Greek Petroleum Mamidakis [1961] 2 Lloyd’s Rep 259) in which the shipper was held to have the right to sue, because the property in goods had not been passed with regards to the requirements provided by the Bills of Lading Act 1855. Before the adoption of the Bills of Lading Act 1855, there was an opinion of Ryan J. in the Canadian Federal Court of Appeal in Amjay Cordage v The Margarita [1979] 28 N.R. 256 at 269 arguing that the shipper retains the right to sue even if the property in the goods passed when the shipper transferred the bill of lading to the consignee.; Cf Section 25(6) of the Judicature Act 1873 under which, the effect of an assignment was the fact that the transfer of rights to the assignee rendered the assignor incapable of suing on them. Nevertheless, as the Bills of Lading Act 1855 was adopted, it was argued that the consignee named in the bill of lading would be entitled to all rights of suit which had been transferred to him by the shipper, because the passage of property and consequently of the right of suit to the consignee by way of delivery of the bill of lading, would set aside no rights for the shipper.; Sewell v Burdick [1884] 10 App Cas 74, 84.
endorsees. For this purpose, it has to be studied what exactly the rights and liabilities of the consignees and endorsees are under the English law.

2. Rights of the consignees/endorsees

Generally, the parties\(^\text{13}\) to a contract of carriage of goods by sea are entitled to certain rights by terms of a the contract, either governed by the common law rules or specifically the English law statutory provisions such as those under the COGSA 1992. By virtue of the common law doctrine of privity,\(^\text{14}\) the only persons who are entitled to the rights under the contract and also bound by the obligations imposed by the contract are the parties to it,\(^\text{15}\) which in the context of a contract of carriage, these parties are consist of the shipper /consignor and the carrier.

Apparently, this means that the consignees as the third parties are not considered parties to the contract, therefore they cannot benefit from the rights incorporated in the contract. In the following sections, the common law rules of the English law as well as the statutory provisions under the COGSA 1992 will be discussed and evaluated in order to find out whether the consignees/endorsees are entitled to any rights under the English law, and if yes, what these rights are and how these rights are to be obtained by, or transferred to, or vested in them. Subsequently, their obligations and liabilities will be examined since these are on the other side of the same coin as rights. Briefly, as far as the consignees/endorsees are concerned, these rights are comprised of the right to claim delivery of the goods, the rights of suit and the right to redirect the goods.

2.1. Right to claim delivery of the goods

Typically, a contract of carriage of goods by sea is concluded to fulfil an obvious purpose; to receive the goods from one person, to carry them on board a ship and finally to deliver them to another person. As mentioned by UNCITRAL, delivery

\[^{13}\] Hugh Beale (ed), *Chitty On Contracts* (32\(^{\text{nd}}\) edn, Sweet & Maxwell 2015) para 18.004: the general rule is that ‘the parties to the agreement are the persons from whose communications with each other the agreement between them has been reached’.

\[^{14}\] According to M. G Bridge (ed), *Benjamin’s Sale of Goods* (9\(^{\text{th}}\) edn, Sweet & Maxwell 2014) para 18-137 the issue with creating a contractual nexus between the consignee/endorsee and the carrier had arisen before the doctrine of privity as a legal principle in *Tweddle v Atkinson* (1861) 1 B. & S. 393.

\[^{15}\] H Beale (ed) (n 13) para 18.003; Carver (n 7) para 5.002.
‘is a key concept for the carriage of goods. Among other things, it typically marks the completion of the contract of carriage and the termination of the carrier’s responsibilities’. The ultimate goal of a contract of carriage, therefore, is to deliver the goods to the person to whom delivery is to be made in accordance with the agreement made between the shipper and the carrier; i.e. the terms of the contract. This person is either specified in a transport/shipping document relating to the goods as the only person to whom the goods are deliverable, or following the transfer of a document representing property in the goods, becomes the holder and therefore becomes entitled to delivery. In either case, this person is entitled to the right to claim delivery of the goods from the carrier.

The following section is an attempt to find the underlying foundation of consignee/endorsee’s right to claim delivery. Therefore, three solutions will be discussed, two of which namely the ‘document of title’ function and ‘bailment’ are dealt with as the common law’s answers to our question of delivery prior to enactment of the COGSA 1992 and also in terms of the situations falling outside of the ambit of the Act. The last solution is the Act itself and the transfer of rights mechanism it currently provides.

2.1.1. Document of title

It is mentioned that one of the main features of a bill of lading is that it functions as a document of title. According to Benjamin, no uniform definition can be found for what exactly is meant by the ‘document of title’ under the English law. However, it has to be mentioned that this is not because of the vagueness or ambiguity of this term, for the concept of document of title in the goods can be interpreted so broadly that may possibly include any single subject relevant to the possession of or property in the goods; from the right to claim delivery and transfer of this right to the title to sue the party who lost or damaged the goods.

16 UNCITRAL Possible future work on transport law A/CN.9/497, para 41.
17 Benjamin (n 14) para 18-007.
This is one of the most debatable topics among the scholars. Most of the confusion regarding the definition of the ‘document of title’ is derived from the distinction between the interpretation of this concept in the statutory sense and the common law sense. Traditionally, the common law recognizes a document as a document of title if the transfer of that document ‘operates as a transfer of the constructive possession of the goods’ as well as transfer of property in them, if it is intended by the parties. This is often referred to as the ‘conveyancing’ function of the bill of lading which allows its holder (possessor) to transfer the constructive possession of and, if intended, the property in the goods incorporated in the bill by mere transfer of the document to the transferee. In addition to the traditional common law definition of document of title, there is a second interpretation that recognizes a document as a ‘document of title’ if the person claiming delivery of the goods has to produce that document to the carrier in order to take delivery of the goods.

However, what is concerned here is not the unanimous definition of the document of title but its effect on the contractual rights of the persons entitled to the goods. The legal effect of a document of title is in fact its ability to confer on its lawful holder the right to receive delivery from the carrier. As rightly explained by Dromgoole and Baatz, ‘as far as a document of title to goods is concerned, the obligation is that the party with physical possession of the goods [carrier] promises to deliver the goods to the holder of the document.’ This ‘means that possession of the document will provide sufficient control over the goods that the

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18 Benjamin (n 14) para 18.007.; Charles Debattista, Bills of Lading in Export Trade (Tottel 2009) paras 2.2-2.3; Richard Aikens and Richard Lord and Michael Bools, Bills of Lading (Informa 2006) para 6.2.; Carver (n 7) para 6.002.

19 Carver (n 7) para 6.002; Ji MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S) [2005] UKHL 11; the basis for such definition is the decision of the court in Lickbarrow v Mason (1787) 2 T.R. 63 based on a merchants’ custom to recognize a bill of lading as negotiable and transferrable by endorsement and delivery where the goods were said to have been shipped by any person or persons to be delivered to order or assigns.; The fact is that this case and other traditional authorities used ‘document of title’ in a way that it purports the meaning of a document representing ownership, and this is absolutely not of avail in interpretation of the term.

20 The Rafaela S [2005] UKHL 11 and [2005] 2 AC 423: where a bill of lading, although indicated as non-negotiable, identifying a named person as the consignee was held to be a ‘document of title’ for the purpose of Section 1(4) of the COGSA 1971 or Article I(b) of the Hague or Hague-Visby Rules.
holder will obtain constructive possession of the goods ... Transfer of the
document will therefore give constructive delivery of the goods.21

Constructive possession is where a party has legal possession over the goods but
the goods are in another party’s actual and physical possession.22 It is worthy to
note that there are two prerequisites to be met in order to pass the constructive
possession with transfer of document of title from the original holder to another
person. Firstly, the transfer has to be carried out with the intention of parties,23 and
secondly, the subject matter of transfer has to be identifiable.24 Having met the
requirements, once the carrier issues the bill of lading as a document of title, it is
deemed as an acknowledging the fact that the goods relating to that document are
in his hands on behalf of the holder of that document. This mechanism should not
be intertwined with ‘attornment’ in bailment.25

In contrast to attornment in bailment which has to be made separately for each
successor in title, the carrier is not required to make acknowledgement to each
new transferee of the bill to transfer the constructive possession for once the
document of title is transferred, the constructive possession accordingly passes.
Further, the special character of bill of lading as a document of title in common
law and its functions will be subverted if it is assumed that attornment is required
for constructive possession to transfer.26 This is the point where a distinction can
be drawn between the ‘document of title’ function of the bill of lading and the
concept of ‘bailment’.

Nevertheless, as a result of recognizing the ‘document of title’ function of bills of
lading to mean that once it is transferred the constructive possession of the goods
is also transferred, it can be said that one of the rights entitled to the new holder of
the bill of lading is the right to claim delivery of the goods from the carrier on

21 Sarah Dromgoole and Yvonne Baatz ‘The bill of lading as a Document of Title’ in N Palmer and E
22 MA Clarke et al., Commercial law: text, cases, and materials (Oxford University Press 2017) 78.
24 S Dromgoole and Y Baatz (n 21) 552.
25 It will be discussed that for bailment to have effect on the rights of third parties, an attornment in form
of an acknowledgment by the bailee is required.
26 S Dromgoole and Y Baatz (n 21) 552.
production of the bill of lading. Consignee and endorsee can become holder of the bill respectively by being named on the document and through endorsement of the bill by its original holder.\textsuperscript{27} Any further transfer of the bill of lading will then be regarded as transfer of constructive possession and therefore the new transferee will be entitled to the goods related to the bill.

Although the process of entitlement of the transferees of bill of lading as a document of title seems to be straightforward, the difficulty with the ‘document of title’ to be the basis of the right to claim delivery is that it is only limited to transferable/negotiable bills of lading. Therefore, any transport document lacking the characteristics of a negotiable/transferable bill of lading, cannot entitle its holder to right to claim delivery based on ‘document of title’ mechanism. Also, it is not always the case that the preconditions of transfer of constructive possession are met, and this might hinder the new holder’s status regarding his rights to the goods.

It is not common but there may be a contract of carriage without involving any shipping documents at all.\textsuperscript{28} The shipper and the carrier may agree not to use a document at all, for example, where the voyage is short though international. Therefore, there will be no document to decide whether it is a document of title or not in order to give its holder the right to claim delivery of the goods.

Theoretically, it is true that the consignee/endorsee as holders of an order bill of lading can benefit from its advantages such as being entitled to right to claim delivery from the carrier and also being able to sue him for misdelivery in conversion,\textsuperscript{29} however the enactment of COGSA 1992 has provided relatively more straightforward mechanism and a wider scope of application for these parties to

\textsuperscript{27} Sanders Bros v Maclean & Co (1883) 11 QBD. 327, 341 per Bowen LJ.; I Carr (n 7) 173.
\textsuperscript{28} Such contracts of carriage of goods by sea may not be subject to COGSA 1992, and therefore it may be said that they are to be governed by the Contracts (Rights of Third Parties) Act 1999 to confer rights of the original contract to third parties. The 1999 Act explicitly states that it does not apply to contract of carriage by sea and confer no rights to third parties thereunder. This is true; however, charterparties are excluded from such exception and therefore are to be operated by this Act. The reason why this part of the discussion is not discussed further under English law is that the Rotterdam Rules exclude charterparties from their scope of application, thus it serves no purpose to explain this subject in more details.
\textsuperscript{29} This will be later explained under the section of rights of suit.
obtain their rights. This becomes more important when it is recalled that non-negotiable documents fall outside the ambit of ‘document of title’ solution. Therefore, a consignee named on a sea waybill, which is not recognized as a document of title, is not able to obtain the right of delivery based on this solution.

2.1.2. Bailment

Having discussed the limitations of operation of ‘document of title’ notion with respect to founding the right of delivery for consignees/endorsees, the other common law solution is discussed presently to find out whether it can be helpful to reaching the goal of finding the basis of right to claim delivery of such parties under English law before enactment of the COGSA 1992 and also in circumstances where the statutory mechanism cannot be operated for any reason.

Bailment which is described as a ‘secret weapon of the common law’ is regarded by some authors such as Debattista to be the common law’s answer to question of right of delivery of third parties prior to the COGSA 1992. He asserts that the holder of an order bill of lading, which is recognized as a document of title in common law, ‘was considered a bailor of goods bailed to the carrier as bailee. Consequently, the buyer could, as bailor, demand delivery of the goods from the carrier as bailee.’ Essentially, he suggests that where the bill of lading is a document of title, the common law regards the carrier as a bailee for any person who qualifies as the holder of the bill. Therefore, it can be implied from Debattista’s assertion that the holder, in this context the consignee or endorsee, as the new bailor can claim delivery of the goods from the carrier, and also if the carrier fails to deliver or commits misdelivery, the holder can bring an action against him.

31 C Debattista (n 18) para 2.7 is of opinion that the ‘rights of suit’ transferred through operation of COGSA 1992 also involves the right to claim delivery. This will be discussed later in details under the heading ‘statutory approach’.
32 C Debattista (n 18) para 2.7.
The difficulty with readily accepting this submission is that although there is obviously a bailment relationship between the shipper and the carrier,\textsuperscript{33} the conventional view is that the successor in title cannot sue the bailee on bailment unless the carrier as the bailee attorns to it.\textsuperscript{34} Seemingly, Debattista’s view is in line with the idea of ‘attornment in advance’ which proposes that when the carrier as bailee issues the bill of lading as a document of title, he promises to deliver the goods to anyone who holds the bill as the lawful holder.\textsuperscript{35} In Lord Hobhouse’s words, this approach contends that ‘the bill of lading acknowledges the receipt of the goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor.’\textsuperscript{36}

The problem with the attornment in advance idea has been raised by Aikens, Lord and Bools.\textsuperscript{37} Opposing the Goode’s theory of attornment in advance\textsuperscript{38} and Lord Hobhouse \textit{obiter} in \textit{The Berge Sisar},\textsuperscript{39} they argue that there is not a general proposition to effect that the delivery of the goods to the carrier creates a bailment relationship between the consignee and the carrier, however, such a proposition might be true depending on the facts of each case. Therefore, for example, reiterating Mance LJ’s explanation of Lord Hobhouse’s comment, in the context of

\begin{footnotesize}
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\item Barclays Bank Ltd v Commissioners of Customs and Excise [1963] 1 Lloyd’s Rep 81, 88 as per Diplock LJ.
\item Simon Baughen, ‘Bailment or conversion? Misdelivery claims against non-contractual carriers’ (2010) 3 LMCLQ 411, 421.; For a contrary view that attornment is not necessary, see Gerard McMeel, ‘The Redundancy of Bailment’ (2003) LMCLQ 169, 196. McMeel while arguing that bailment is ‘a redundant concept in English personal property law’ is of opinion that attornment is only necessary in land-based transactions and is not required on bill of lading transfers. He reasons that since the bill of lading issued with respect of the goods which are in possession of the carrier and it is ‘the only document of title recognized in Common law’, the transfer of the bill eliminates the need for an attornment.; Paul Todd, ‘The bill of lading and delivery: the Common law actions’ (2006) 4 Lloyd’s Maritime and Commercial Law Quarterly 539, 553-554.
\item P Todd (n 34) 554.; Also Todd in p 555 submits that Debattista’s proposition is based on Devlin J’s statement in Heskell v Continental Express Ltd (1949) 83 Lloyd’s Rep 438, 453 which ‘had nothing to do with bailment’ and Debattista’s suggestion is ‘to stretch the authority far beyond what was intended.’
\item Borealis AB (formerly Borealis Petrokemi AB and Statoil Petrokemi AB) v Stargas Ltd (The Berge Sisar) [2002] 2 AC 205, 219.
\item R Aikens and R Lord and M Bools (n 18) paras 5.19-5.30.; They also rejected the idea that mere possession of the bill of lading whether by giving the holder symbolic possession of the goods or by creating a bailment through attornment in advance or transferable attornment gives the holder a right to claim delivery.’ Another criticism to the idea of transferable attornment is that non-negotiable transport documents such as sea waybills that are not categorized as document of title, are not capable of creating a bailment relationship between the carrier and the consignee thus entitling the consignee to the right to claim delivery.
\item R.M. Goode, \textit{Propriety Rights and Insolvency in Sales Transactions} (Sweet & Maxwell 1989), pp 9-10
\item \textit{The Berge Sisar} at 219 where he states that ‘the bill of lading acknowledges the receipt of goods from the shipper for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor.’
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an f.o.b. contract, a shipper may readily be regarded as acting as agent for a named consignee,\textsuperscript{40} thus creating a bailment between the carrier and the consignee once the carrier issues the bill.\textsuperscript{41} In addition to the facts of the case, the terms of the sale contract between the shipper and the buyer also need to be analysed\textsuperscript{42} to find out whether the shipper is acting on his account or on behalf of the buyer. In case of the former, the shipper will be presumed as the bailor in a relationship with the carrier and in the latter; the consignee will be the bailor and promptly be entitled to the right to claim delivery.

However, this is not the entire picture, since not all of the carriage contracts are created on f.o.b. terms.\textsuperscript{43} Therefore a question arises whether a consignee/endorsee under, for instance, a c.i.f. or a c. & f. contract, where the consignor acts as principal and on his own account\textsuperscript{44} with property and risk remaining in him during carriage,\textsuperscript{45} will also be able to rely on the bailment relationship with the carrier in order to claim delivery of the goods. A possible solution to this may be the attornment by the bailee as Staughton LJ in \textit{The Gudermes} stated that ‘attornment by a bailee consists in an acknowledgement that someone other than the original bailor now has title to the goods and is entitled to delivery of them.’\textsuperscript{46} This suggestion can also be supported by referring to Lord Brandon statement in \textit{The Aliakmon} where he has pronounced that ‘if the shipowners as bailees had ever attorned to the buyers, so that they became the bailors in place of the sellers.’\textsuperscript{47}

Nevertheless, an attornment by bailee may create a bailment relationship between the carrier as bailee and the consignee/endorsee as the new bailor, thus entitling him to right of delivery of the goods. However, the role of the attornment in

\textsuperscript{40} \textit{East West Corp v DKBS 1912 AF A/S} [2003] EWCA Civ 83; [2003] QB 1509, para 34.
\textsuperscript{41} See also \textit{The Future Express} (1993) 2 Lloyd’s Rep 542, 550 as an authority against the idea of attornment in advance.
\textsuperscript{42} Ibid, para 35.
\textsuperscript{43} R Aikens and R Lord and M Bools (n 18) para 5.23 suggest that such a relationship ‘rarely’ made between the carrier and the consignee.
\textsuperscript{44} \textit{Swain v. Shepherd} (1832) 1 Mood. & R. 223; \textit{Coats v. Chaplin} (1842) 3 QB 483.
\textsuperscript{45} \textit{East West Corp v DKBS 1912 AF A/S} [2003] EWCA Civ 83; [2003] QB 1509, para 34.
\textsuperscript{46} \textit{Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)} [1993] 1 Lloyd’s Rep 311 (CA), 324.
\textsuperscript{47} \textit{Leigh & Sillavan v Aliakmon Shipping Co (The Aliakmon)} [1986] AC 785, 818.
bailment will be better distinguished when it is used as the basis of non- contractual claim by consignee/endorsee against the carrier.

2.1.3. Statutory approach

The primary thesis of the statutory method is that although the main purpose of the Act was essentially to resolve the problems caused by the insufficiency of the BLA 1855\textsuperscript{48} towards the issues caused by doctrine of privity of contract of carriage, the COGSA 1992 has initiated a legal as well as a practical solution to answer the question of delivery, for while it tries to bridge the gap of privity by providing the potential rights of suit against the carrier for third party cargo-interests in addition to the original shipper, the carrier is also made aware of the possible defendants against whom he can defend himself.\textsuperscript{49}

The notion of this approach is in fact the transfer mechanism offered by the Act through which the consignees and endorsees being named on or holding certain types of transport documents can be entitled to the contractual rights, including the right of delivery, initially belonged to the original holder who has been a party to the contract of carriage.\textsuperscript{50} The foregoing discussions have mainly focused on the usefulness of common law solutions before passing of the COGSA 1992. The question is whether the Act provides a sufficient and reliable answer to all of the ‘delivery’ questions, rendering those solutions purposeless.

The starting point of this discussion might be the situation regarding non-negotiable documents to which the ‘document of title’ basis cannot be applied. Therefore, for instance, the consignee named on a sea waybill neither could rely on the BLA 1855, nor the document of title function of the document in his hands, would be divested of his right to claim delivery of the goods, therefore he might resort to the bailment solution for which it has been discussed that an attornment

\textsuperscript{48} The Bills of Lading Act 1855, repealed by the Carriage of Goods by Sea Act 1992 (Hereinafter referred to as ‘the BLA 1855’).

\textsuperscript{49} C Debattista (n 18) paras 2.7-2.8.; He states that in this way, from carrier’s point of view, the COGSA 1992 has a second outcome which is to bring a simpler method of recognizing the parties who have the right to claim delivery of the goods he carries.

\textsuperscript{50} By Section 2 of the Act which will be examined later under the Rights of suit section.
is deemed necessary. Without an attornment made by the carrier as bailee and merely by being named on the sea waybill, his right of delivery would not be very certain.

Therefore, if it is presumed that the ‘rights of suit’ conferred by the COGSA 1992 to, in this example, a person named as a consignee on a sea waybill only and simply comprised of the rights of suit but no other contractual rights such as the right of delivery, therefore the purpose of the 1992 Act would be undermined as there had been difficulties with the BLA 1855 and other common law solutions in ascertaining third parties’ rights.51 Debattista rightly submits that although ‘the purpose of the COGSA 1992 was to bridge a privity gap, its effect was far wider.’52 In fact, there had been a need for a new mechanism other than those operating at the time; otherwise passing a new Act would have been superfluous.

Another argument in favour of statutory approach is that an inconsistency existed under the BLA 1855, in the sense that if the property had not vested in the holder of a bill of lading through an endorsement or consignment, he could not obtain the contractual rights evidenced by the bill although he was entitled to ask for delivery of the goods from the carrier. By removing the property link, the COGSA 1992 has removed that inconsistency and now provides for a lawful holder of the bill of lading both rights of suit and the right to demand delivery of the goods.

However, the status of authorities with respect to this question is also diverse. On the one hand, Lord Hobhouse in *The Berge Sisar*53 while rejecting interpretation of delivery under the Law Commissions report and also in the context of the COGSA 1992 as performance of a bailment obligation54 stated that ‘where there is a contract of carriage, the contract certainly includes a contractual obligation to

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51 The difficulties with ‘document of title’ and ‘bailment’ for the purpose of right of delivery have been earlier assessed. The insufficiencies of the BLA 1855 will be discussed later.; See also Lord Hobhouse’s statements titled as The 1992 Act: its genesis’ in *The Berge Sisar* [2001] UKHL 17, para 18ff.
52 C Debattista (n 18) para 2.8.
53 *The Berge Sisar* [2001] UKHL 17.
54 Ibid, para 31; with reference to Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No 196, 1991) (hereinafter referred to as ‘Law Commissions Report’) he admits that the statements in the report ‘are expressed in terms which refer explicitly to “the contract of carriage” and not to the right of the holder of the endorsed bill of lading to the possession of the goods as the bailor as against the bailee. It is thus categorising the delivery up of the goods in this context as the performance of a contractual obligation not a bailment obligation.’
deliver the goods'. 55 This statement as mentioned by Debattista supports the proposition that the rights conferred by the Act also gives the transferee the right to ask the carrier for delivery of the goods. 56 On the other hand, however, Aiken J in *The Ythan* 57 referring to Lord Hobhouse’s statements has suggested that the Act is intended to deal with the privity question and not the proprietary rights of a holder of the bill of lading. 58

Nevertheless, the statement of Thomas J in *East West* case approves the statutory regime for inclusion of right of delivery in rights of suit in the context of the Act. He asserts: 'although “rights of suit” have been described as rights of “suing upon the contract” (as in *The Freedom* (1871) LR 3 PC 594 at 599), the phrase was not used to distinguish “rights of suit” from “rights under the contract”. It is clear, in my view that the phrase refers not merely to the right to sue, but the rights under the contract. These include the contractual right as against the carrier to demand delivery against presentation of the bill of lading and hence the right to possess.' 59

However, one may argue that, by a literal interpretation, neither the BLA 1855 nor the COGSA 1992 were intended to deal with the delivery rights. In other words, it may be argued that the BLA 1855 was legislated to address the issue of privity of contract and to extend the rights of suit to the endorsees and consignees of a bill lading upon passing of property. The COGSA 1992 then replaced its predecessor to unlink the passage of property with the rights of suit given to the parties other than original holder, and to extend the rights of suit to documents other than the bills of lading. Both statutes are, literally, speaking of the ‘rights of suit’ not the rights of delivery.

56 C Debattista (n 18) para 2.8 footnote 16.
58 Ibid, para 70.; Also he argues that argues that when the goods under a bill of lading are lost, the possession of the bill of lading no longer gives a contractual right to possession of the goods to which the bill relates.; See also Andrea Lista, *International Commercial Sales: The Sale of Goods on Shipment Terms* (Informa Law Routledge 2016) para 6.5.2.
It can be replied that the Law Commissions in their report, which led to draft of the COGSA 1992, at several points impliedly refer to the right of delivery as an issue that had to be considered. Most important of such occasions is where the right to sue the carrier and right of delivery are mentioned as reciprocal concepts, in the sense that when the right of delivery is acquired by a party, he also should be able to sue the carrier. Further, Section 2 of the Act clearly speaks of ‘the person to whom delivery of the goods … is to be made’ as the person to whom the rights will be transferred by virtue of the Act. It can be seen that being entitled to delivery of the goods is a determining factor in ascertaining the rights of suit.

Moreover, in terms of the liabilities, taking or demanding delivery is deemed by the Law Commissions as enforcing the rights under the contract of carriage. Therefore, it can be suggested that even the intention of the drafters of the Act could be to include the right of delivery within the rights of suit.

After all, it seems that the weight of authorities and views of commentators are to some extent in favour of this approach. Though, it has to be noted that although the statutory solution is far more advantageous than the common law solutions, for one its privileges is that it can be extended to other types of transport documents in addition to merely an order bills of lading, however this does not mean that the ‘document of title’ basis or the ‘bailment’ solution are completely out of the picture. It has been mentioned that there are situations that the COGSA 1992 cannot operate, for example where a claimant of delivery is not regarded by the act as a lawful holder, or a consignee of an electronic transport document and

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60 Law Commissions Report (n 54) para 2.22.; Also see para 2.34 where the necessity to set out a definition in legislation for ‘rights of suit’ is observed.

61 Law Commissions Report (n 54) para 3.18: ‘we see, in general, no unfairness in making the person who either claims delivery or who takes delivery of the goods, from being subject to the terms of the contract of carriage, since in both cases the person is enforcing or at least attempting to enforce rights under the contract of carriage’; In terms of the BLA 1855, see para 3.19 of the report where it is stated that ‘when the “key to the warehouse” is transferred, the common law does not, so to speak, allow the transferor to have another one cut for use in emergencies. The 1855 Act recognised the good sense in this, so that the shipper lost his rights over the goods and his rights of suit when someone else acquired them.’

62 See R Aikens and R Lord and M Bools (n 18) para 5.52 footnote 84 where it is suggested that the carrier through Section 2(1) of the Act may owe a duty to deliver the goods to a consignee named on non-negotiable bill.; Also see P Todd (n 34) 539 referring to Thomas J statement in East West (n 62) suggests the contractual regime, will suffice to give the holder of the bill to claim delivery. It seems that he speaks of the contractual regime as the statutory transfer mechanism of contractual rights of suit including the right of delivery.
so forth. This is where other concepts of common law can be of avail. Therefore, returning to the question posted earlier, it can be said that the operation of 1992 Act does not mean that common law solutions serve no purpose, for when one fails to be effective, another method can be approached and implemented.

2.1.4. The rule of presentation

Following a distinctive aspect of the bill of lading, the delivery of the goods has to be made against the presentation of the bill. The general rule of the common law is that the carrier shall not deliver the goods to the consignee named in the bill without production of that document. Therefore, it is determined at common law that the delivery without presentation of a bill of lading is at carrier’s own risk and considered as a breach of contract. Two purposes are sought by establishing this rule: firstly, the obligations of the carrier with respect to the goods will be discharged after such delivery, and moreover, it assures the original holder of the bill of lading that the carrier is bound by the contractual terms to deliver the goods against the production of the bill.

It has been discussed that prior to the enactment of the COGSA 1992, the right to claim delivery of the goods was either based on the ‘document of title’ function of the bill of lading or on the holder’s rights as the bailor. The passing of this Act has established that the right of delivery can now be based on the contract of carriage itself. The question is whether the person claiming delivery of the goods must comply with the rule of presentation, since as opposed to the bailment, the contract of carriage would abolish the need for the document, functioning as an indication of bailment, to be presented.

63 These are rightly enumerated in S Baughen (n 1) 45.
64 Motis Export Ltd v Dampskilbesselskapet AF 1912 [1999] 1 Lloyd’s Rep 837, 840.
65 The Stettin [1889] 14 DP 142; London Joint Stock Bank Ltd. v British Amsterdam Maritime Agency Ltd. (1910) 11 Asp MLC 571; Bernard Eder and others (eds), Scrutton On Charterparties And Bills Of Lading (22nd edn, Sweet & Maxwell 2011) para 13-008.
66 SA Sucre Export v Northern River Shipping Ltd. (The Sormovskiy 3068) [1994] 2 Lloyd’s Rep. 266, 272.; Consequently, the defaulting carrier will be dispossessed of contractual limitations and exclusions.; Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd (the SS Glengarry) [1959] AC 576.
68 C Debattista (n 18) para 2.7.
The answer to the above question is affirmative, based on two reasons: firstly, the transfer of the bill of lading has the effect of transfer of the right to delivery. Consequently, delivery of the goods may be claimed by any transferee of the bill who may be not known to the carrier at the port of discharge. There has to be a mechanism for the carrier in order to identify the rightful party to whom the goods have to be delivered. Secondly, the rights under the shipping documents, including the right to delivery, are granted to the lawful holder of the bill of lading by Section 1(2). Further, it is made clear in the wordings of the Act that by virtue of section 5(2) as a part of definition of the ‘holder’, the cargo claimant must be ‘a person with possession of the bill’. On these bases, it can be concluded that the party claiming delivery of the goods, although has already obtained the rights by being the holder of bill of lading; needs to present the bill to the carrier in order to receive the goods. Moreover, in cases where the carrier breaches the contractual terms by delivering the goods to a claimant without presentation of the bill, the shipper has the right to bring an action against the carrier for wrongful delivery.69

2.1.4.1. Exceptions to the presentation rule
Despite the harsh operation and severe consequences of the presentation rule against the parties,70 there are a number of exceptions to this rule. To begin with, there may be some types of custom or established practice at the destination port,71 or even the governing law at the port of discharge that require or authorize delivery without presentation of the bill.72 Also, the terms of the contract may exclude the requirement of production of the bill in some jurisdictions.73 The final

69 The Stettin [1889] 14 DP 142.
70 In a more general context, a buyer’s claiming delivery of the goods from the carrier will be rejected if he does not possess the bill of lading. As the buyer’s request for an interim order in the Trucks & Spares, Ltd v Maritime Agencies (Southampton) Ltd [1952] 2 All ER 982 was refused by the Court of Appeal since the bill of lading had not been endorsed to him and he was not in possession of the bill. The carrier with the agreement of the shipper (seller) kept possession of the bill since the buyer had not paid his debts to the seller.
71 In The Sormovskiy 3068 (n 6) the carrier delivered the goods without production of the bill of lading, and the claimant sued him for loss of cargo. The carrier argued that ‘it had complied with its delivery obligation because it had delivered in accordance with the practice, custom and law of the port’. Clarke J while distinguishing between law and custom recognized this exception to the presentation rule and stated that ‘there was no legal requirement of Russian law that there should be delivery without a bill’.
72 C Debattista (n 18) para 2.20; for example a buyer can avoid the requirement of presenting a bill of lading by contracting for delivery ex ship, therefore the seller will have the duty of discharging the cargo out of the ship.
73 In Chilewich Partners v MV Alligator Fortune [1994] 2 Lloyd's Rep. 314 in the United States; also in the UK, in Motis Export Ltd v Dampskibsselskapet AF 1912 [2000] 1 Lloyd's Rep. 211, 217 the shipowner was
exception can be established in a case where the bill of lading is lost.\textsuperscript{74} This was highlighted by Clarke J in \textit{The Sormovskiy 3068} when he pointed out the necessity of existence of such exceptions when the bills of lading ‘might have been lost or stolen.’ He suggested that implying a term that the carrier must deliver the goods without the need for bill of lading to be produced in case where he is reasonably satisfied that the person claiming delivery is entitled to possession of the bill of lading and also what has happened to the bill. However, he suggested that the ‘precise nature’ of such an exception must be further considered.\textsuperscript{75} The current status of the English law is still unclear in this regard.\textsuperscript{76}

The problem with these exceptions is that they may cause uncertainty. For example, in the last case the practical problems involved in the exception especially on the side of carrier cannot be easily overlooked. The carrier has to establish a mechanism in order to find out whether the person claiming to be entitled to the goods by being entitled to a lost or stolen bill of lading is, in fact, the actual person he claims to be. It is not clear what sort of proof the claimant has to provide the carrier with, to convince him that he is the rightful person. This is why these exceptions have not received sufficient support in judicial sense.\textsuperscript{77}

Nevertheless, the problems surrounding the requirement of presentation of the bill of lading by the consignee\textsuperscript{78} and the delay in the physical delivery of the bill of lading has led to inventing practical solutions. In order to elude delays in the

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\item exception can be established in a case where the bill of lading is lost.\textsuperscript{74} This was highlighted by Clarke J in \textit{The Sormovskiy 3068} when he pointed out the necessity of existence of such exceptions when the bills of lading ‘might have been lost or stolen.’ He suggested that implying a term that the carrier must deliver the goods without the need for bill of lading to be produced in case where he is reasonably satisfied that the person claiming delivery is entitled to possession of the bill of lading and also what has happened to the bill. However, he suggested that the ‘precise nature’ of such an exception must be further considered.\textsuperscript{75} The current status of the English law is still unclear in this regard.\textsuperscript{76}
\item The problem with these exceptions is that they may cause uncertainty. For example, in the last case the practical problems involved in the exception especially on the side of carrier cannot be easily overlooked. The carrier has to establish a mechanism in order to find out whether the person claiming to be entitled to the goods by being entitled to a lost or stolen bill of lading is, in fact, the actual person he claims to be. It is not clear what sort of proof the claimant has to provide the carrier with, to convince him that he is the rightful person. This is why these exceptions have not received sufficient support in judicial sense.\textsuperscript{77}
\item It is not clear whether there should be term incorporated in the contract of carriage that the carrier under certain circumstances can deliver the goods without the need to require production of the bill, for example when the bill is lost or stolen and the carrier is reasonably made convinced or the whereabouts of the bill is specified by the person claiming the goods.
\item The consignee may sell the goods while in transit to another person, therefore he may be held liable for delay in delivery. Also, he may employ agents to collect the goods from the ship for him and store them before handing over to the consignee, so the delay in delivery may cause him additional costs.
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process of discharge of the goods, for example, when the vessel reaches the port of delivery before the bill of lading, the carrier may agree to deliver the goods against a letter of indemnity instead of presenting the bill of lading.\textsuperscript{79} Also, one solution, as occasioned in line with the oil industry practice, for the benefit of the consignee and to facilitate the delivery to him is to provide the bills of lading in set and to give the consignee one of the originals at the port of destination in order to produce and obtain the goods.\textsuperscript{80}

2.1.5. Right of delivery and presentation rule under sea waybills

Sea waybills\textsuperscript{81} are commonly used as substitutes for bills of lading when the owner of the goods (typically the buyer) does not intend to sell the goods while they are in transit. The document of this kind is non-negotiable; therefore the carrier is obliged to deliver the goods only to the consignee named on the waybill. The benefits of using sea waybills instead of bills of lading for a cargo-interest include avoiding the abovementioned problem with the delay in arrival of the bills of lading.

The common law view of the presentation of the document when a sea waybill is issued is that the consignee, in order to be entitled to the goods, only needs to identify himself as the person named on the document to the carrier. The result would be what is called as the main advantage of using sea waybills which is to exclude the presentation rule.\textsuperscript{82} Therefore, the consignee is not required to present the actual document to the carrier in order to be entitled to his right of delivery.

\textsuperscript{79} Hansen-Tangens Rederi III A/S v Total Transport Corp (The Sagona) [1984] 1 Lloyd's Rep 194; held when was the case of delivering oil cargoes, the common practice for masters was to not insist on production of the bill of lading; Carver (n 7) para 6.009; the purpose of providing such a letter is to protect the carrier in case where a claimant with a better right than the one to whom the delivery is already made, presents a bill of lading; Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) [2005] EWCA Civ 519.

\textsuperscript{80} Mobil Shipping & Transportation Co v Shell Eastern Petroleum (Pte.) Ltd (The Mobil Courage) [1987] 2 Lloyd's Rep. 655.

\textsuperscript{81} For the purposes of the COGSA 1992, sea waybill is a document which is not a bill of lading, but it is an evidence of receipt of the goods and contains the terms of contract according to which the person to which the delivery is to be made by the carrier in accordance with that contract is identified.

\textsuperscript{82} Law Commissions Report (n 54) para 5.7: ‘the main advantage of the sea waybill is that, unlike a bill of lading, it does not have to be transmitted to the consignee in order for the goods to be surrendered by the carrier on arrival’.
Before the enactment of the COGSA 1992, the situation was not clear as to whether the buyer (consignee) named in the sea waybill had a right to claim delivery as if he was a bailor. So if the buyer did not follow the presentation rule as a mechanism to represent the constructive possession of the goods, there was no way left for the carrier to deliver the goods to the consignee, although he had promised the seller to do so.\footnote{C Debattista (n 18) para 2.26} One of the solutions proposed to solve the problem was to establish a contract between the consignee and the carrier, so that the consignee would be a party to the contract and could be entitled to the right of delivery. The standard conditions for sea waybills drafted by the General Council of British Shipping\footnote{The Shipper accepts the said Standard Conditions on his own behalf and on behalf of the Consignee and the owner of the goods and warrants that he has authority to do so. The Consignee by presenting this Waybill and/or requesting delivery of the goods further undertakes all liabilities of the Shipper hereunder, such undertaking being additional and without prejudice to the Shippers own liability. The benefits of the contract, evidenced by this Waybill shall thereby be transferred to the Consignee or other persons presenting this Waybill} and CMI Uniform Rules for Sea Waybills 1990\footnote{Article 3 of the Rules states that ‘the shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee and warrants to the carrier that he has authority so to do.’} are the examples of implementing this solution.

These issues following the statutory approach\footnote{See section 2.1.3.}, have been resolved by Section 1(3) of the COGSA 1992 which gives ‘the person to whom delivery of the goods to which a sea waybill relates ... all rights of suit under the contract of carriage.’ With this proposition, similar to the bills of lading, the rights of suit brought by the Act must contain the right to claim delivery. Thus, the person whose name is written as the consignee on the sea waybill, as long as he remains the consignee,\footnote{This will be discussed later under the right to redirect the goods (section 2.3) where the shipper may replace the original consignee with another person and direct the carrier to deliver the goods to the new consignee.} has a contractual right to claim delivery of the goods by virtue of Section 2(1)(b) of the Act. In addition to this proposition, the carrier is contractually bound to deliver the goods to the consignee named in the bill. In fact, he owes such a duty to the shipper by the terms of document.\footnote{R Aikens and R Lord and M Bools (n 18) para 5.52.} Therefore, the consignee named on a sea waybill, is contractually and by virtue of the statute, entitled to right to claim delivery.
It is reviewed that at the common law, the person who is named as a consignee on the document is not required to present the actual transport document to the carrier in order to claim delivery, for he solely needs to provide evidence to show that he is the person named on the waybill. The reason behind this non-necessity is that, from a commercial standpoint, the trade practice compels that sea waybills are used when such presentation is not needed. As it has been mentioned earlier, in contrast to order bills of lading, the sea waybills are mostly used when there is no intention to sell the goods to on-buyers. This means that there is one buyer for the goods, named as the consignee, who is entitled to the goods and will usually claim delivery of them.

However, the fact that delivery should be made to the right person should not be overlooked. When there is a document in question which is needed to be surrendered or presented, that document is suggested to be the best form of proof of being entitled to the goods, however when there is no such requirement, it is important that the carrier attempts to identify the right person, claiming to be the consignee named on the sea waybill, by seeking the most secure proof.

In terms of the necessity of presenting the sea waybills in order to demand delivery under the COGSA 1992, it is suggested that there is nothing in the Act to compel such a requirement on the consignee named on a sea waybill. Moreover, if the Law Commissions Report is considered as the travaux préparatoires of the Act, exempting from presentation rule was deemed as the main advantage of the sea waybills when compared to the bills of lading. Therefore, it can be concluded that the consignee named on a sea waybill does not require presenting the document to the carrier in order to be entitled to his right to claim delivery of the goods.

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89 Law Commissions Report (n 54) para 5.7.
2.1.6. Right of delivery and presentation rule under straight bills of lading

A common form of transport document, though less frequently used than sea waybill, is straight bill of lading. Straight bills of lading are non-transferable/non-negotiable bills of lading which provide for the delivery of goods to a named consignee not ‘to order or assigns’. Similar to the sea waybills, straight bills of lading are used when the consignee does not intend to resell the goods. Moreover, they are being used for transfer of the goods within different branches of the same large companies. The last but not least of the occasions where the use of this type of bills is common is between trade partners who have regular business for many years, thus are well known to and trusted by each other.

Under the common law, the consignee has a certain right to claim delivery under a straight bill of lading. This certainty is based on the special characteristics and legal effects stemming from the nature of straight bills of lading. The bill is non-transferable; therefore the shipper cannot transfer the straight bill to a person other than the named consignee and then ask the carrier to deliver the goods to the new transferee. More importantly, the goods under a straight bill of lading are only deliverable to the named consignee. Therefore the carrier’s obligation to delivery of the goods is based on his contractual promise to the shipper to deliver the goods to the person specifically named in a document that evidences the contract of carriage, not to the order of the person entitled to the delivery, which may be the shipper as the original person.

As far as the COGSA 1992 is concerned, it has to be mentioned that the Act does not recognize the straight or non-order bills as bills of lading for its purposes. This category of bills of lading is excluded from the Act by Section 1(2)(a), which means that the consignees named on the non-order bills of lading without the

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90 Although back in 1924 the bills of lading lacking the words ‘to order or assigns’ were considered to be unusual; Thrige v United Shipping Co Ltd (1924) 18 Ll. L. Rep. 6, 8.
92 Nicholas Gaskell and Regina Asariotis and Yvonne Baatz, Bills of Lading: Law and Contracts (LLP London 1999) para 1.47.
93 References in the Act do not include ‘a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement’.
word ‘order’ are not considered as the lawful holders by the Act in order to be entitled to the right of delivery under the contract of carriage. However, the consequences made by such exclusion can be very surprising, as it would result in a bizarre situation where a regular buyer of the goods, known to the seller and the carrier, only because he holds a non-order bill, is not entitled to delivery of the goods.

Of course, this would also contradict the intention of the Law Commissions as to recognize the non-transferable bills of lading as sea waybills for the purposes of the Act. Rather, the Commissions were of opinion that “Where a bill of lading is not transferable, it will undoubtedly fall within the definition of sea waybill to be found in [Section 1(3) of the Act].” By that definition, a sea waybill is a document which is not a bill of lading but “(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.”

Clearly, this shows that the Law Commissions intended to regard the consignee named on a straight bill of lading, though not falling within the definition of “lawful holder” of the bills of lading, as a consignee named on a sea waybill, thus to entitle him to delivery of the goods from the carrier. This is also the upshot of suggestion made by Debattista that through operation of Section 2(1)(b) of the Act, the person named as consignee on a straight bill of lading will be treated as the named consignee on a sea waybill and therefore, he will be able to demand delivery of the goods.

However, it can be argued that the problem with the above suggestion is that the provision explicitly deals with the sea waybills. Also, it can be said that there is nothing in Section 2(1)(b) of the Act to suggest an extended interpretation of the rule, so that it would include straights bill of lading. It is true that the Law

94 Law Commissions Report (n 54) paras 2.50 and 4.12.
95 Ibid, para 2.50.
96 Section 1(3) of the COGSA 1992.
97 C Debattista (n 18) para 2.33.
Commissions suggested that the straight bills of lading resembled sea waybills; however, they did that only for legislation purposes. To answer, it is suggested that undoubtedly the notion of the Act is to facilitate the transfer of contractual rights to the third parties. Therefore, it can be said that this is more of a structural issue and without any prejudice to the main purpose of interpretation of the rules, which is for the consignee to be entitled to the right of delivery through operation of Section 2 of the Act.

What is controversial about the straight bills of lading is the uncertainty surrounding the application of presentation rule to this type of bills; in other words, whether the named consignee must produce the straight bill of lading to the carrier in order to claim delivery of the goods. Until *The Rafaela S*, the English authorities have been controversial and not entirely uniform. On the one hand, Hill J in *Evans & Reid v Cornouaille* stated and years later confirmed by Diplock LJ in *Barclays Bank v Commissioners of Customs & Excise* that when a bill of lading is made out to a named consignee, the carrier shall not deliver the goods without production of the document. On the other hand, there are statements such as one made by Scrutton LJ in *Thrige v United Shipping Co Ltd* in which he referred to *The Stettin* and pointed out that if there was a duty to deliver upon presentation of the bill of lading, ‘it may require consideration.’

It is reckoned that *The Rafaela S* can be marked as the turning point in the English law authorities on straight bills of lading. The case was initially intended to deal with the question whether the straight bills of lading were to be governed by the Hague/Hague-Visby Rules, and the issue of presentation was considered in the *obiter* statements of the Judges. The bill of lading in that case provided that ‘one of the bills of lading must be surrendered duly endorsed in exchange for the goods or delivery order.’ At the first instance, Langley J stated that because these words

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98 Law Commissions Report (n 54) para 4.12.
99 (1921) 8 LL Rep 76, 77.
100 *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd’s Rep 81, 89.
102 (1889) 14 PD 142.
103 (1924) 18 LL Rep 6, 9; *The Brij* [2001] 1 Lloyd’s Rep 431.
could be used either for straight or transferrable/order bills of lading, agreeing
with the arbitrators, presentation of the bill of lading was deemed not necessary
for delivery of the goods.\textsuperscript{104}

This was opposed by Rix LJ in the Court of Appeal where he indicated that ‘[the
shipper] is entitled to redirect the consignment on notice to the carrier, and,
although notice is required, a rule of production of the bill is the only safe way, for
the carrier as well as the shipper, to police such new instructions. In any event, if
proof of identity is necessary, as in practice it is, what is wrong with the bill itself
as a leading form of proof?’\textsuperscript{105} Jacob J, in line with Rix LJ, stated that ‘it is true that
without these words the carrier could fulfil his obligation by delivery to the
named consignee. But these words add more to the arrangement—that the
consignee is not to be given the goods unless he produces an original bill.’\textsuperscript{106}

In the House of Lords, in addition to Lord Steyn,\textsuperscript{107} Lord Bingham approved the
statement made by Rix LJ, and stated that ‘I would, if it were necessary to do so,
hold that production of the bill is a necessary precondition of requiring delivery
even where there is no express provision to that effect’.\textsuperscript{108} Other lords including
Lord Rodger, Lord Brown of Eaton-Under-Heywood and Lord Nicholls, while
affirming that the ratio of the case did not include the issues of presentation,
approved the obiter made by Rix LJ.\textsuperscript{109} Although the initial issue for consideration
under The Rafaela S was not the status of presentation rule in a straight bill of
lading, the obiter dicta made by the judges has also received acceptance in cases
outside English law jurisdictions.\textsuperscript{110}

Moreover, the views among the authors are very different towards this issue.

Tetley, without any hesitation, suggests that the named consignee may obtain

\textsuperscript{104} [2002] 2 Lloyd’s Rep 403, 407.
\textsuperscript{105} [2004] QB 702, 752.
\textsuperscript{106} [2004] QB 702, 753.
\textsuperscript{107} [2005] UKHL 11; [2005] 2 AC 423, 459.; Where he affirmed the Rix LJ’s analysis and found that entirely
convincing; also Lord Steyn in [2005] 2 AC 423, 458 stated that the decision of Singapore Court of Appeal in
Voss v APL Co Pte Ltd [2002] 2 Lloyd’s Rep 707 to require presentation of a straight bill of lading in order to
claim delivery of the goods was right.
\textsuperscript{110} In Australia in Beluga Shipping GmbH v Headway Shipping Ltd [2008] FCA 1791; in Hong Kong in Carewins
Developments (China) Ltd v Bright Fortune Shipping Ltd [2009] 3 HKLRD 409.
delivery from the carrier only upon surrender of the straight bill. Clearly, this requirement is even stricter than the mere presentation/production of the document. The point is that he is entirely against the idea suggesting that the COGSA 1992 governs the straight bills of lading as much as sea waybills. He founds his argument on the basis that ‘the nominate (straight) bill is non-negotiable’, therefore the Act does not apply to this type of bill of lading in respect of rights of suit. Subsequently, he challenges those authors in favour of the opposing suggestion by stating that their view ‘overlooks the true nature of the straight bills as a document of title.’\textsuperscript{111} Furthermore, in Schmitthoff the authors have followed the same approach. It is stated that ‘even a bill of lading which is not made negotiable operates as a document of title, because the consignee named therein can only claim delivery of the goods from the shipowner if able to produce the bill of lading.’\textsuperscript{112}

On the other side, Debattista argues that the \textit{obiter} statements made by the judges in \textit{The Rafaela S} do not form part of the ratio of the case, and the decision in that case was for the purposes of the COGSA 1971.\textsuperscript{113} He, therefore, suggests that the requirement of presentation must be limited to those straight bills of lading that state the bill need to be presented for delivery.\textsuperscript{114} Treitel in Carver also submits that the carrier when the goods are deliverable to a named consignee does not have to ‘see the bill to determine the identity of person entitled to delivery.’\textsuperscript{115} He further suggests that the best explanation for the presentation rule is that the requirement is based on an express or implied term in the bill to that effect.\textsuperscript{116}

Neutral views are also expressed by some commentators. Among them, Girvin considering the judgements in \textit{The Rafaela S} as a ‘considerable measure of uniformity’ suggests that if there is a clause requiring surrender of the bill, the rule of presentation has to be complied with. If there is no such a clause or if there is a

\begin{itemize}
\item \textsuperscript{111} W Tetley (n 9) 446-448.
\item \textsuperscript{112} Carole Murray and David Holloway and Daren Timson-Hunt, \textit{Schmitthoff The Law And Practice Of International Trade} (12th edn, Sweet & Maxwell 2012) 336.
\item \textsuperscript{113} The Carriage of Goods by Sea Act 1971 (c. 19) (Hereinafter referred to as ‘the COGSA 1971’).
\item \textsuperscript{114} C Debattista (n 18) para 2.34.
\item \textsuperscript{115} Carver (n 7) para 6.017.
\item \textsuperscript{116} Ibid, para 6.021.
\end{itemize}
term allowing delivery without production of the bill, it needs to be further clarified since such a clause might affect the status of bill of lading as a document of title.  

After all, it is submitted that the uncertainties relating to the ‘presentation’ are based on the fact that generally there is no legal principle in the maritime law requiring a consignee named in the contract of carriage, evidenced by or contained in a transport document to produce that document in order to claim delivery. Subsequently, assume that the contract of carriage resembles a bailment relationship in a way that the carrier as bailee promises the shipper as bailor to deliver the goods to the consignee as the third party. The bailee in order to perform the contract by delivering the goods to the third party does not require him to present or surrender any document containing or evidencing the bailment contract. In fact, there is no principle of law establishing such a requirement.

The straight bill is nor transferrable neither negotiable, therefore the shipper cannot transfer the document to a person other than the named consignee while the goods are in transit. Moreover, the shipper can redirect the goods only if he gives a notice to the carrier. Accordingly, the next consignee will only be one person who is known to the carrier. Logically, there is no need for the document itself to be presented since what matters is, indeed, the performance of the promise/contract and getting a good discharge by the carrier. What he needs in such circumstances is very similar to that of sea waybills, which is a mere proof of identity by the person claiming delivery in order to show that he is the named person entitled to the goods.

However, the opposing view which is to ask for presentation of document is justified from a practical standpoint. The carrier needs to be sure that the person

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117 Stephen Girvin, *Carriage Of Goods By Sea* (Oxford University Press 2011) para 10.19.; See also various examples of possible arguments made in R Aikens and R Lord and M Bools (n 18), paras 5.39-5.40.
118 *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd’s Rep 81, 88 per Diplock J: ‘the contract for the carriage of goods by sea, which is evidenced by a bill of lading, is a combined contract for bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners.’
119 Benjamin (n 14) para 18-097.
claiming the goods is in fact the one entitled to them under the contract, so that he can fulfil his promise to the consignor by delivering the goods to the ‘rightful’ third party. Also, requiring production of the document gives the shipper an option to control over the goods by retaining the bill in case the buyer/consignee fails to make the payment.

In sum, although the judicial authorities are more inclined in favour of requiring the named consignee to present the straight bill to the carrier to be able to claim delivery, it seems wise to submit that if an implied or express term requiring the production of the bill is incorporated in the document, the parties have to comply with it, if no such clause or term is anticipated; there is no need to impose such a requirement. As it is suggested by Benjamin, to determine whether presentation is required, search shall be done for the ‘term in the bill to that effect’ which ‘seems to be a safer explanation than those based on considerations of convenience to the shipper or the carrier’. After all, this is a contract made by the agreement of the parties, and it will obviously operate as a symbol of their intentions. Straight bills of lading have a simple function; there is no need to make it complicated.

2.1.7. Right of delivery and presentation rule under ship’s delivery orders

Transfer of a single bill of lading may be not feasible where the goods are sold in bulk and more than one receiver expects arrival and delivery of the goods sent as a part of the parcel. Therefore, when the vendor sells different portions of the cargo to several buyers, since he is bound to give a transport document to each of the buyers enabling them to claim delivery of the goods, he may provide delivery order for the buyers rather than bills of lading. Delivery orders are being used to facilitate the performance of the contract as a response to delay in post or arrival of bills of lading. Ship’s delivery orders are the most secure type of delivery orders in

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120 Benjamin (n 14) para 18-099.
121 Re Keighley Maxted & Co and Bryant Durant & Co (No 2) (1894) 70 LT 155.
favour of the buyers, as they impose an undertaking on the carrier to deliver a stated quantity of the goods shipped to a named person.\textsuperscript{122}

For a ship’s delivery order to have effect at the common law, the document must contain an implied or express promise to deliver the goods to the person to whom the ship’s delivery order is issued, made by the shipowner/carrier.\textsuperscript{123} Therefore, at common law, ship’s delivery orders can be issued by the carrier or the seller/shipper followed by an attornment by the carrier and a promise made by him to deliver the goods to the person/consignee in whose favour the document is issued.\textsuperscript{124} Although the buyer/consignee does not have a contractual right of delivery since he is not an immediate party to the contract made between the seller and the carrier, he is entitled to the right to claim delivery as the person identified in the delivery order upon the attornment to him by the carrier.

In the statutory sense, Section 2(1)(c) of the COGSA 1992\textsuperscript{125} gives ‘the person to whom delivery of the goods to which a ship’s delivery order relates is to be made in accordance with the undertaking contained in the order’, all rights of suit under the shipping document. The Act defines ship’s delivery order in Section 1(4) as ‘any document which is neither a bill of lading nor a sea waybill but contains an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person’. In this sense, the person identified in a ship’s delivery order to whom delivery of the goods to be made based on the promise/undertaking made by the carrier in the document, will have the statutory and contractual right to claim delivery of the goods from the carrier.\textsuperscript{126}

\textsuperscript{122} Section 1(4) of the COGSA 1992.
\textsuperscript{123} Waren Import Gesellschaft Krohn & Co v Internationale Graanhandel Thegra N.V. [1975] 1 Lloyd’s Rep 146; see also Colin & Shields v W. Weddel & Co [1952] 2 All ER 337 where the order was not a ship’s delivery order since there was no such a promise made by the shipowner; Konrad Zweigert, \textit{International Encyclopaedia Of Comparative Law: Instalment 12} (Springer 1981) 20.
\textsuperscript{124} Laurie & Morewood v Dudin & Sons [1926] 1 KB 223, 236-238.
\textsuperscript{125} Ship’s delivery orders were incorporated into the Act following the recommendation of Law Commissions Report (n 54) para 5.30 in order to strengthen the buyer’s position where he is not able to obtain a bill of lading because delivery orders are issued for part of the bulk cargo.
\textsuperscript{126} C Debattista (n 18) para 2.41; S Girvin (n 32) para 4.18.
Accordingly, by definition, other types of delivery orders fall out of the scope of application of the Act and therefore will be governed by the rules of common law. The difference for the cargo interest will be that if the delivery order does not qualify as a ship’s delivery order under the definition of the COGSA 1992, he will not be entitled to the contractual rights as against the carrier. Therefore, he may seek the contractual rights under an implied contract\textsuperscript{127} or with the carrier’s attornment to him to turn the promise to a contract.\textsuperscript{128}

As far as the presentation rule is concerned, it seems, before the enactment of the COGSA 1992, presentation of the ship’s delivery order to the carrier was deemed necessary for the person named in the document in order to claim delivery.\textsuperscript{129} However, by referring to the wordings of Section 2(1)(a) of the COGSA 1992 which provides for the rights to be given to the person identified in the document, it can be concluded that the person named in the ship’s delivery order needs only to prove his identity in order to demand delivery. However, it is suggested when a delivery order is made out to order, the carrier himself should seek for extra protection in order to immune from unpredicted liabilities.

2.2. Rights of suit

From consignees’ perspective, the main concern is that the person who actually suffers loss is not usually the shipper (seller), since in most international sales such as c.i.f.\textsuperscript{130} and c&f, generally, the risk of damages to and loss of the goods passes from the seller (shipper) to the buyer (consignee) when the goods pass the ship’s rail. Thus, often it is not the shipper who, in fact, suffers from loss or damages to

\textsuperscript{127} As in Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd [1924] 1 KB 575 which will be discussed later under the rights of suit section 2.2.
\textsuperscript{128} In Cremer v General Carriers S.A. [1974] 1 WLR 341 it was held that there was a contract between the buyer and the carrier since the contractual terms evidenced by or contained in the bill of lading were expressly incorporated in the delivery order.
\textsuperscript{130} The Aliakmon [1986] AC 785, 808; however, English law provides that, under a c.i.f. contract, the risk of damages to and loss of goods may pass as from shipment.; per Lord Porter in The Julia [1949] AC 293, 309.

Since the title of this research is not intended to cover the issues related to the question of risk in international sales, further discussion on details can be found in P.S. Atiya and J N. Adams and H MacQueen, Atiyah’s Sale of Goods (12th edn, Longman 2010), Roy M Goode, Commercial Law (4th edn, Butterworths 2009), Ewan McKendrick, Sale of Goods (LLP 2000).
the cargo during the carriage. The main questions to be answered are: what are the rights of actual cargo-interests under the contract of carriage? How they can benefit from their rights? What are the English law’s mechanisms for the transfer of these rights? On the other side, what are their liabilities and how these liabilities can be limited or transferred? These issues have been considered under the common law rules prior to the enactment of the BLA in 1855. However, the ratification of the BLA 1855 did not provide an accurate solution, thus the general question of rights of suit, its relevant issues and imposition of liabilities were reconsidered under the COGSA 1992.

This section is thus aimed to examine the abovementioned questions with respect to the current position of English law, and also to provide a foundation for further discussions on the corresponding provisions of the Rotterdam Rules through a comparative analysis. The legal gaps and potential defects of the English law rules will also be analysed.

2.2.1. Transfer of risk and the impact on rights of suit

Generally under most of international sales contracts the risk of loss or damage to the goods is on buyer, on or as from shipment. Prior to the BLA 1855, since the purchaser was not a party to the original contract of carriage, although the document of title representing the constructive possession or ownership of the goods might have been transferred to him, he was unable to sue the carrier under the contract.

Clearly, it is essential for a transferee or a holder of a bill of lading to obtain all contractual rights against the carrier, specifically in the event of loss of or damage to the goods. Further, the bill of lading will be of less value when it is taken as security, by banks or other financial institutions, if there are no contractual rights

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131 W Tetley (n 11) 154; Scrutton (n 65) para 1.005.
132 Benjamin (n 14) para 18.140.
embodied in it. However, the main problem was that the doctrine of privity of contract raised various difficulties for the parties who were not original parties to the contract of carriage, such as banks, consignees or endorsees of the bill of lading who were dealing with the bills, out of contractual relationships, for the right of suit against the carrier was exclusively granted to the shippers.

Having considered these facts, since the issue had not been addressed by common law, the BLA 1855 was enacted to provide a solution to resolve the problems arising from the doctrine of privity. In other words, the reason was that not only common law had failed to provide an adequate answer to the question of acquisition of contractual rights by the purchaser, but also the problems with respect to the imposition of liabilities on the consignee or transferee of the bill of lading had still been remained unsolved.

2.2.2. Common law failure and the Bill of Lading Act 1855

The general rule of common law was that the transferee/consignee/endorsee of a bill of lading did not have a right to claim damages from the carrier. In fact, it was the judgment of the court in *Thompson v Dominy* that led to enactment of the BLA 1855. In that case the endorsees of a bill of lading, as plaintiffs, sued the carrier because of the part delivery of the cargo. The court held that the effect of endorsement of the bill was only to transfer the right of property in the goods, but not the contract itself. Therefore, the endorsees could not bring an action against the carrier, since they were not parties to the initial contract of carriage, and the transfer of the bill could not effect as transfer of contractual rights. Furthermore, because there was no contractual relationship between the transferee and the

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135 H Beale (ed) (n 13) para 18.021; Carver (n 7) para 5.002; the doctrine of privity cannot be regarded as the sole source of this difficulty as it had arisen in English law before that doctrine.; *Tweddle & Atkinson* [1861] 1 B & S 393; also the statement of Viscount Haldane LC in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847 where he said that the rule ‘that only a person who is a party to a contract can sue on it’ was a fundamental principle of English law.
136 Benjamin (n 14) para 18.140.
137 Law Commissions Report (n 54) para 2.1.
138 *Howard v Shepherd* (1850) 9 CB 297, 137 ER 907; where it was held that the endorsee of a bill of lading could not maintain an action against the carrier for non-delivery of the goods at the port of destination.
139 (1845) 14 M & W 403, 150 ER 532.
carrier, the carrier could not hold the transferee liable for the freight.\textsuperscript{140} After all, the transferees of a bill of lading could not sue the carrier on the bailment, because the bailment relationship was deemed to exist as between the shipper and the carrier.\textsuperscript{141}

As a result of failure of the common law to provide a solution for transfer of contractual rights to and imposition of liabilities on the transferee/endorsee of and a consignee named on a bill of lading, the BLA 1855 was passed to satisfy the needs. Under the newly passed legislation, the transfer of contractual rights to, and imposition of liabilities on the consignee named in the bill of lading, or the endorsee of the bill, had been linked to the transfer of property to that person. In fact, the imposition of liabilities on the consignee or endorsee of the bill was made dependent on his acquisition of contractual rights. While under Section 1 of the BLA 1855\textsuperscript{142} a solution was provided to the problem resulted from application of privity of contract by way of a ‘statutory transfer of rights of suit in contract to accompany the transfer of the property’,\textsuperscript{143} it restricted the function of transfer to circumstances under which the passage of property was upon or by reason of consignment or endorsement.\textsuperscript{144}

\textbf{2.2.2.1. The insufficiency of BLA 1855}

One of the main problems of the BLA 1855 was its limited scope of application. This is particularly of importance when the modern transport documents are in question, in the sense that the Act could not be able to apply to documents falling out of the definition of the bill of lading,\textsuperscript{145} i.e. sea waybills or ship’s delivery orders.

\textsuperscript{140} Sanders v Vanzeller (1843) 4 QB 260.
\textsuperscript{141} Benjamin (n 14) para 18.138.
\textsuperscript{142} Section 1 of the Bills of Lading Act 1855 provided that ‘every consignee named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been with himself.’
\textsuperscript{143} R Aikens and R Lord and M Bools (n 18) para 8.10.
\textsuperscript{144} Section 1 of the BLA 1855.
\textsuperscript{145} Note that the BLA 1855 did not define bill of lading. It is the meaning of the bill of lading in the Act which is concerned.
Another detrimental defect of the Act is that Section 1 transferred the rights of suit to a consignee or an endorsee only if the property passed to him.\textsuperscript{146} There were cases in which the fulfilment of these conditions evolved various difficulties, particularly when the property did not pass at all, or where the property passed separately from the transfer of bill of lading. This was true where the parties were willing for the property to pass before or after the documentary exchange as it is a common practice in oil trade.\textsuperscript{147} Therefore, the buyer’s rights against the carrier were again deprived because of the privity rule.\textsuperscript{148}

Furthermore, one of the issues concerned by the Law Commission was the cases where the endorsee did not obtain full property in the goods, for it was only the ‘special property of a pledgee’.\textsuperscript{149} An example of this is the decision of the House of Lords in \textit{Sewell v Burdick}.\textsuperscript{150} It was held that an endorsee,\textsuperscript{151} did not obtain the ‘full or general property’, thus neither did acquire the right of suit under the contract,\textsuperscript{152} nor was liable against the carrier for freight and charges.\textsuperscript{153} Moreover, there are situations in which the buyer is on risk but the property in the goods has not passed to him.\textsuperscript{154} This was the issue posed in \textit{The Aramis},\textsuperscript{155} in which the goods were not delivered at all; therefore the property did not pass to the buyer.

Similarly, this problem arose in \textit{The Aliakmon}\textsuperscript{156} in which the seller had reserved the right of disposal, and thus the property did not pass.

Further defects in the Act were discovered when the application of Section 1 had been combined with the rule under Section 16 of the Sale of Goods Act 1979.\textsuperscript{157}

\textsuperscript{146} Thomas Gilbert Carver, ‘On Some Defects in the Bills of Lading Act 1855’ (1890) 6(3) Law Quarterly Review 289.
\textsuperscript{148} M. G Bridge, \textit{The International Sale Of Goods} (3\textsuperscript{rd} edn, Oxford University Press 2013) para 8.04.
\textsuperscript{149} Law Commissions Report (n 54) para 2.2.
\textsuperscript{150} [1884] 10 App Cas 74.
\textsuperscript{151} In this case, the endorsee was a bank as a pledgee.
\textsuperscript{152} R Bradgate and F White (n 133) 189.
\textsuperscript{153} Law Commissions Report (n 54) para 2.2.
\textsuperscript{154} It is stated before that in the international sales contracts the risk of loss or damage, generally, passes to the buyer on or as from shipment.
\textsuperscript{155} [1989] 1 Lloyd’s Rep 213.
\textsuperscript{156} [1986] AC 785.
\textsuperscript{157} Section 16 of the Sale of Goods Act 1979 is made subject to Section 20A of the Sale of Goods (Amendment) Act 1995. The position provided by Section 16 is now altered by Section 20A. Though, the problem discussed here is related to the time prior to the Carriage of Goods by Sea Act 1992 which was passed three years before the Amendment of the Sale of Goods Act.
Section 16 provided that the property in goods did not pass to the buyer unless and until the goods were ascertained. Since, in most standard sales contracts, such as c.i.f., the goods will be identified as subject matter of the contract during the voyage not on shipment; property in the goods cannot be passed to the buyer on shipment. This passage of property needs a procedure called ascertainment in which the goods must be identified and ascertained as subject matter of the contract of sale. The requirements in this Section led to a difficulty occasioned in relation to bulk cargoes. In *The Aramis*\(^{158}\) it was not possible for the property to be passed until the goods were discharged from the ship, since the goods were undivided parts of bulk cargoes. The property did not pass to the buyers, so that they had no right of suit against the carrier.\(^ {159}\) This was considered by the Law Commission as a situation in which the property passed after consignment or endorsement.\(^ {160}\)

Finally, there were instances, such as *The Delfini*,\(^ {161}\) in which the property passed before or independently of consignment or endorsement. At first instance Phillips J held that the contract of carriage had been discharged when the goods had been discharged, despite the incomplete delivery. As a result, the following endorsements had not been effective for the purpose of transferring the right of suit, thus the final endorsees could not sue the carrier. The Court of Appeal approved the judgment due to almost same reasons. Since the BLA 1855 transferred the rights of suit only when property in the goods passed ‘upon or by reason of the endorsement’, and there had been no causal connection between the passage of property and the endorsement, the endorsees were unable to enjoy the statutory rights of suit.\(^ {162}\)

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\(^ {159}\) *The Gosforth S en S* 1985 Nr. 981; this is a case brought to the District Court in Amsterdam in which the English Law applied by the Dutch court. It was held that the buyers of the bulk cargo had no contractual relationship with the carrier, therefore could claim any rights against him.

\(^ {160}\) Law Commissions Report (n 54) para 2.2(c).

\(^ {161}\) Enichem Anic Spa v Ampelos Shipping Co Ltd (*The Delfini*) [1990] 1 Lloyd's Rep 252; the endorsement was done 11 days after the delivery of the goods.

\(^ {162}\) T Howard (n 7) 185.
With all those difficulties, the Act remained a workable solution for more than a century, but the ‘property gap’ made by the rule in Section 1, resulted in disappointing circumstances by the end of 1980s, for the buyers could not sue the carriers to remedy the loss or damages to the goods. As the Law Commission stated, all these difficulties were aspects of the same problem. The problem was that the buyer of goods, who had the risk of loss or damage to the goods during the sea carriage, had no remedies against the carrier, in the event of loss or damage. The Law Commission described this as ‘a serious defect’ of English Law.

2.2.3. Alternative English law devices

Apart from discussing the legislation regarding the rights and liabilities under the contract of carriage of goods by sea, there have been several exceptions to the principle of privity, as alternatives, to be utilized by the party who was unable to sue by resorting to the statute. Also, this variety of alternative methods could be the buyers’ only way of pleading their claim, because of the uncertainties surrounding the application and effectiveness of the BLA 1855. The following discussions comprise of analysis of these mechanisms which have had a long history of usage under the English law. This is of particular importance to our study, since one of the questions to be answered by this thesis is whether the non-statutory English law rules can be applied to the transport issues in modern era.

2.2.3.1. Implied contract

The implied contract is an established rule under the common law that neither the BLA 1855 nor the COGSA 1992 has extinguished its effects. As it is already discussed, the person who had obtained property in the goods could sue the carrier by means of statutory right of suit provided by the BLA 1855. Thus, in this

164 R Aikens and R Lord and M Bools (n 18) para 8.16.
165 Carver (n 7) para 5.011.
166 Law Commissions Report (n 54) para 2.3.
167 Ibid.
respect, others such as pledgees,\textsuperscript{169} including banks or financing institutions, could not sue under the Act. Decades later, although its origin can be found in earlier cases,\textsuperscript{170} in \textit{Brandt v Liverpool},\textsuperscript{171} a legal theory was proposed with purpose of giving the pledgee the right of suit. In other words, it was implied that the purchaser (consignee) of a cargo became a party to the contract with the carrier by claiming the delivery of the goods, from the carrier who complied with the claiming person’s request, against presentation of the bill of lading.\textsuperscript{172}

In \textit{Brandt v Liverpool}, Brandt, who obtained the bill, were pledgees. On discharge of the cargo from the ship, they presented the bill and paid the charges to the shipowner and took delivery of the goods. The Court of Appeal held that an ‘implied contract’ between pledgees and the carriers had been established. Thus the pledgees would be able to sue the carriers for breach of the contract and were entitled to recovery of damages. However, implied contract has not been a flawless method which would operate under any circumstances. One of the factors to be considered by the courts is the contractual intention. The Court of Appeal in \textit{The Aramis}\textsuperscript{173} held that the presentation of the bill of lading itself could not establish an implied contract,\textsuperscript{174} for in this case the freight had been paid in advance and nothing was left remaining, a small part was delivered to one of the buyers and no delivery made to the other, so ‘there was nothing from which to imply a contract.’\textsuperscript{175} In other words, there was no contractual intention based on the facts of the case to convince the court that there had been an implied contract.  

\textsuperscript{169} \textit{Sewell v Burdick} (1884) 10 App Cas 74.; The bank, as pledgee, was held not liable for the freight by only claiming to be entitled to the proceeds of sale. There was no evidence of an implied contract in that case.  
\textsuperscript{170} \textit{Cock v Taylor} (1811) 13 East 399; \textit{Wegener v Smith} [1854] 15 CB 285.  
\textsuperscript{171} \textit{Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd} [1924] 1 KB 575.  
\textsuperscript{172} \textit{Carver} (n 7) para 5.111.; \textit{Cock v Taylor} (1811) 13 East 399.; \textit{Stindt v Roberts} (1848) 17 LJQ 13 166.  
\textsuperscript{173} [1989] 1 Lloyd’s Rep 213.  
\textsuperscript{174} Although, Treitel (n 168) 169 has argued that the crucial point in this case was lack of contractual intention rather than lack of consideration.  
\textsuperscript{175} T Howard (n 7) 186; in \textit{Compania Portorafiti Commerciale S.A. v Ultramar Panama Inc.} [1990] 2 Lloyd’s Rep 395, the special arrangements between the shipper and the consignee were held to create an implied contract, without paying any freight or presenting a bill of lading.
Therefore, the question whether the courts have to follow the implied contract method is not a matter of law, but a matter of facts of the case.\textsuperscript{176}

Although the decision of the Court of Appeal in \textit{The Aramis} seemed to be the end of doctrine of ‘\textit{Brandt v Liverpool}’,\textsuperscript{177} in \textit{The Captain Gregos (No 2)},\textsuperscript{178} even though there seemed no evidence of the actual facts happened at the port of destination, it was held that such a contract could be implied.\textsuperscript{179} It seems where there had been a degree of co-operation between the carrier and the receiver, which can only be interpreted as a contractual relationship between them, the courts in order to give ‘business reality’\textsuperscript{180} to the commercial transaction, were keen to imply a contract between the parties.\textsuperscript{181}

In \textit{The Captain Gregos (No 2)} the cargo was sold by Ultramar Panama Inc to sub-buyers PEAG and BP respectively. Delivery was made against a letter of indemnity. The claimants sued the carrier for short-delivery of an oil cargo in conversion. The consignee named on the bill of lading was Ultramar Panama Inc, therefore the property did not pass to the PEAG or BP upon endorsement of the bill of lading. Accordingly, the claimants could not bring an action based on the BLA 1855 since they became the holder of the bill of lading after the delivery.\textsuperscript{182} However, Bingham LJ decided that a contract was implied between BP and the

\textsuperscript{176} S Girvin (n 117) 9.06.; Ackner LJ in \textit{Iyssia Compania Naviera SA v Ahmed Bamaodah (The Elli) (No 2)} [1985] 1 Lloyd’s Rep, 111 stated that: ‘it is common ground that the implication of such a contract is a matter of fact to be decided in the circumstances of the case...’.

\textsuperscript{177} Also in \textit{Mitsui & Co Ltd v Novorossysk Shipping Co (The Gudermes)} [1993] 1 Lloyd’s Rep 311 (CA) where the Court of Appeal rejected the claimants’ contention stating that the facts of the case did not support their claim, thus there could not be a new contract implied between the them and the carrier.

\textsuperscript{178} \textit{Compania Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2)} [1990] 2 Lloyd’s Rep 395.

\textsuperscript{179} The advantages and weaknesses of all these approaches will be discussed later in this study as it is necessarily needed to assess all types of possible solutions in order to accommodate the introduction of any new approaches.

\textsuperscript{180} \textit{The Elli} 2 at 115 per May LJ: ‘no such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, in order to give “business reality” to a transaction and to create enforceable obligations between the parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.’

\textsuperscript{181} J F Wilson (n 67) 141.; S Girvin (n 117) para 9.07.

\textsuperscript{182} The bill was endorsed and delivered to PEAG after delivery had been made but the BP did never come into possession of a bill. PEAG provided BP with letter of indemnity because of their promise to do so if the full transport documents were not available before delivery had to be made.
carrier based on the principles of Brandt v Liverpool to give business reality to the transaction between them.183

However, there is a slight degree of authorities indicating that the rights of the consignee under an implied contract are not the same as those of the shipper, when the bill of lading is endorsed to the consignee. In The Athanasia Comninos, Mustill J while referring to the cases from which the implied contract had been derived, pointed out: ‘the consignee, by taking delivery of the goods under the bill of lading, assumes only those rights and liabilities created by the contract of carriage which concern the carriage and delivery of the goods, and the payment therefore.’184

Furthermore, a practical problem to the implied contract method is that, usually, it is applied where delivery of the goods is made against the presentation of the bill of lading. Therefore, delivery and presentation are the essential parts of this doctrine. It is discussed that under the sea waybills and straight bills of lading, presentation rule is exempted. Consequently, it seems that where there is a sea waybill issued, the consignee named on the waybill cannot resort to the implied contract in order to sue the carrier.

Having considered the advantages and disadvantages of the implied contract device, it is suggested that this was mostly a mechanism to deal with the problems raised by failure of the BLA 1855 in resolving the consignees/endorsees’ rights against the defaulting carrier prior to enactment of the COGSA 1992. Moreover, the limits on the application of this method especially where freight was prepaid or where the endorsee merely presented the bill and took delivery of the goods, can be considered as a defect in this method. Also, the fact that the Law Commission had taken these issues into account and attempted to incorporate relevant solutions into the new legislation seems to be an indication that the doctrine of implied contract has had its days. However, it should be noted that

183 (The Captain Gregos) (No 2) [1990] 2 Lloyd’s Rep 395, 403; Paul Todd, Principles Of Carriage Of Goods By Sea (Routledge 2016) 287.
where the COGSA 1992 fails to provide an effective answer, the implied contract can be of avail. These occasions will be examined later in this study.\textsuperscript{185}

2.2.3.2. Negligence

It is reviewed that the risk of loss of or damage to the goods is usually on the buyer in the context of international sales. Had the consignees or endorsees failed or could not establish a contract on the implied contract theory to sue the carrier for damages to the goods occurred during transit, they might be able to get round the difficulties by resorting to a claim in tort for negligence of the carrier provided that, at the time of loss or damage, they had legal ownership\textsuperscript{186} in, or immediate possessory title\textsuperscript{187} to the goods since the carrier’s duty of care is generally owed to such a person.\textsuperscript{188} Also, the claimant must be able to prove that the damage is occurred due to the carrier’s negligence.\textsuperscript{189}

The requirements for the title to sue in negligence can be found in the court decision in \textit{The Wear Breeze}.\textsuperscript{190} In this case, the cargo (sold under c.i.f. terms) was damaged during the voyage before the property in them had passed to the buyers, holders of delivery order, but after the passing of risk. The court dismissed buyers’ action against the carrier in tort for negligence on the basis that when the damages had happened, the buyers were neither the owners of the goods, nor had immediate possessory title to them.\textsuperscript{191} The same rule was followed and applied in \textit{The Aliakmon},\textsuperscript{192} where the property in the goods did not pass to the buyer because the seller had reserved the right of disposal of the goods. Therefore the consignee

\textsuperscript{185} The discussions will be where the transfer of rights and liabilities under the Rotterdam Rules are compared to those of English law, also under the subject of right of estoppels for transferee of the bills of lading.
\textsuperscript{186} This depends on the terms of the contract of sale made between the seller and the buyer. For example in c.i.f. and f.o.b. contracts, the parties agree for the property to pass when payment is made against documents.
\textsuperscript{187} Possession can be built on possession of bill of lading or a ship’s delivery order, but the possessor should be acting on his behalf not as an agent for another person. However it should be noted that in \textit{East West Corp v DKBS 1912} [2003] QB 1509, paras 40-42 it was stated that ‘the delivery to the buyers of a bill under which they were named consignees, with the intention that they should present and take delivery under it, did not confer on them any possessory title to the goods.’
\textsuperscript{188} \textit{Homburg Houtimport BV and others v Agrosin Private Ltd and others (The Starsin)} [2003] UKHL 12.
\textsuperscript{191} Ibid.
\textsuperscript{192} [1986] AC 785.
was not able to sue the carrier since he did not have the immediate possessory title to the goods when the damage occurred.\(^{193}\)

It is made clear that, in cases where the buyer has become owner of the goods and he has no other option to acquire the contractual rights against the carrier, for example when the bill of lading has not been transferred to him, if the carrier is proved to have negligently damaged the goods, he will be capable of bringing an action in tort against the carrier as the owner of the goods. In *The Filiatra Legacy*\(^ {194}\) the buyers complained for short delivery against the shipowner for a cargo of oil sold under c.i.f. terms. The buyers had no contractual claim against the carrier because the bill of lading did not come in their possession until after the discharge of the goods. The Court of Appeal held that the property had passed to the buyers on commencement of the discharge; however their claim against the carrier in tort was dismissed because the buyers could not show that the short-delivery was due to the carrier’s negligence.

The restrictions on application of this device make it a less favourable tool for the claimants to rely on. Further, those claimants who are seeking to recover the pure economic loss for example due to delay of the cargo, have a more difficult case to prove since the courts often take more restrictive approach to imposing duty of care with respect to pure economic or financial loss than physical damage or loss, and also a special relationship must be assumed between the claimant and the carrier who owes duty to care to him.\(^ {195}\) However, where there is no contractual relationship between the claimant and the carrier, or where it falls out of the scope of application of the COGSA 1992,\(^ {196}\) or if the claimant is willing to sue the carrier while avoiding the carrier’s contractual limitation or exemption clauses, the cargo owner may bring an action against the carrier in tort. Otherwise, the practical problems for the claimant, for instance to specify the exact time damages have


\(^{196}\) When the claimant is not a lawful holder as defined by the COGSA 1992.
occurred, as well as legal restrictions and the burden of proving the negligence makes the tortious claims less desirable than contractual claims.\footnote{Law Commissions Report (n 54) para 2.14.}

2.2.3.3. Bailment

Bailment has been examined earlier as a common law solution to found the basis of right of delivery for consignees and endorsees. Another aspect of the bailment under the common law is that it can be employed as a device based on which a person who has interests in the goods but is not a party to the contract of carriage, bring non-contractual claims against the carrier in case of misdelivery. Therefore, in our context, a bailment relationship has to be created between the consignee/endorsee as bailor and the carrier as bailee.

It has been mentioned that the successor in title to original bailor cannot sue the bailee on bailment unless the carrier as the bailee attorns to it. It is worthy to recall the statement of Lord Brandon in \textit{The Aliakmon} that ‘if the shipowners as bailees had ever attorned to the buyers, so that they became the bailors in place of the sellers, the terms of the bailment would then have taken effect as between the shipowners and the buyers’.\footnote{\textit{The Aliakmon} [1986] AC 785, 818.} The right to claim in bailment has a retrospective effect, in the sense that the claim can be brought even with respect to the losses occurred prior to the attornment.\footnote{\textit{Sonicare International Ltd v East Anglia Freight Terminal Ltd} [1997] 2 Lloyd's Rep 48.} This can be regarded as an advantage of suing on bailment rather than in negligence. Another privilege of bailment for cargo owners is that the burden of proof is on the carrier as bailee to prove that he has taken reasonable care of the cargo.\footnote{P Todd (n 34) 552.; S Baughen (n 1) 48.}

An attornment can be made in writing or verbally;\footnote{AS Burrows and M. G Bridge, \textit{Principles of English Commercial Law} (Oxford University Press 2015) pp 272-273.} either way it has to be communicated to the new bailor to be constituted, the effect of which would be that the bailee is estopped from denying the rights of the new bailor regarding the goods. To be effective, the attornment should be more than bailee’s alteration of
his own records, or receiving delivery orders without objections. Also, as suggested by Baughen, merely naming of a party as consignee in the bill of lading cannot be regarded as an attornment.

There are, of course, cases where attornment is not deemed necessary for a bailment relationship to be established. One view as accepted by HJ Hallgarten QC in Sonicare International case is where the bailment rights are assigned along with the contract and bailment is on terms of the bill of lading which represent that contract. In this way, when the contractual rights incorporated in the bill of lading, by any mechanism, transfers, then there is no need for an attornment since the benefit of the contract is for the transferee as the successor in title. Also, the consignee does not need to rely on attornment if it is intended that a sale or pledge shall be completed on the delivery of goods to the carrier. Further, it is supported by authority that where a sub-bailee owes duties to the cargo owner, there is no need for an attornment to be made.

Nevertheless, as suggested by Todd, based on the decisions in The Aliakmon and The Future Express, it can be said that the courts are not very inclined to grant actions based on bailment, in fact the extent of bailment action is rather unclear. Also, certain commentators such as McMeel has concluded that bailment is a ‘redundant concept in English personal property law’ and the contractual regime existed in the commercial law make the bailment irrelevant in determining the rights and liabilities of the parties.

On the other hand, Girvin asserts that the bailment concept can be useful to a potential claimant where the rights cannot be obtained under the COGSA 1992.

This is also approved by Baughen who is of opinion that the 1992 Act has not

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202 Laurie and Morewood v Dudin & Sons [1926] 1 KB 223.
203 S Baughen (n 1) 48.
205 However, where the terms of the original bailment are different, attornment is required as in The Gudermes [1993] 1 Lloyd’s Rep 311.
206 P Todd (n 34) 554.; S Baughen (n 1) 48.
207 S Baughen (n 1) 48.
209 P Todd (n 34) 558.
210 McMeel (n 34) 198.
211 S Girvin (n 32) para 9.31.
made non-contractual methods of cargo claims redundant. It is reasonable to submit that this is the better view for, although may rarely happens, not all of the consignees and endorsees are able to rely on the regime offered by the COGSA 1992. Therefore, the co-existence of the devices does not seem to be purposeless.

2.2.3.4. Conversion

It has been discussed that the general rule of the common law is that the carrier shall not deliver the goods to the consignee named in the bill without production of that document, otherwise the carrier will be liable for misdelivery. Misdelivery claims can be made in contract and in conversion. Conversion is a tort under common law described as ‘dealing with goods in a manner inconsistent with the right of the true owner.’ In order to make an action in conversion, the claimant has to prove that he has an immediate right to possession of the goods at the time of misdelivery.

According to Lord Nicholls of Birkenhead in Kuwait Airways Corp v Iraqi Airways Corp, the factors of conversion are threefold: ‘First, the defendant’s conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.’

The question is whether a consignee or an endorsee as transferees of bill of lading can rely on the conversion in order to sue the carrier for misdelivery for the doctrine of privity provides that there is no contract between the carrier and these parties, therefore they cannot bring a contractual action against the carrier under the common law.

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213 S Baughen (n 34) 411.; S Girvin (n 32) para 10.31.; P Todd (n 34) 540.
214 Lancashire and Yorkshire Railways Co v MacNicoll (1918) 88 LJ KB 601, 605 per Atkin J.
In general, if the transfer of bill of lading means to transfer property in the goods, the transferee can bring an action in conversion. Mere ownership or possession cannot found a claim in conversion. Therefore, when the property in the goods was not intended to be transferred or the transfer of property had been made separately from the bill of lading, there would be no title to sue in conversion for transferee. This should not be confused with the independent possession of property and bill of lading, since title to sue in conversion can be based on the possession of property itself. Contrary to bailment, there is no attornment needed for immediate right to possession to be transferred by transfer of a bill of lading. Therefore, upon meeting the conditions abovementioned, a consignee or endorsee can bring an action against the defaulting carrier in conversion.

2.2.3.5. The Dunlop v Lambert approach
Another alternative, in some literature called as ‘seller suing on buyer’s behalf’, is a doctrine providing that the consignor can claim damages in respect of a loss sustained by a third party/consignee, which is to some extent an exception to the general common law rules in commercial contracts. This approach was established as a principle in the case of Dunlop v Lambert. On the basis of this so-called rule, provided that the property in the goods had passed to the buyer/consignee/endorsee before loss of or damage to the goods and the buyer/consignee/endorsee was unwilling or could not be able to bring an action in

219 P Todd (n 34) 543.; Sewell v Burdick (The Zoe) (1884) 10 App Cas 74.
220 In The Filiarta Legacy [1991] 2 Lloyd’s Rep 38 the plaintiffs were given title to sue in conversion even when they were not in possession of the bill of lading since the property was retained by the plaintiffs to be passed at a later time.
221 Official Assignee of Madras v Mercantile Bank of India Ltd [1935] AC 53 (PC) as cited in S Baughen (n 34) 414.; However, there may be the risk that the claim in conversion be declined where a party who does not have immediate right to possession takes delivery of the goods and therefore the bill of lading continues its function as a document of title, transferring the immediate right to possession to the wrong party after delivery has been made. Baughen suggests that such a transferee must make a fresh demand of delivery and establish his right to sue in conversion.
222 (1839) 6 Cl & F 600; 7 ER 824.
223 It is also often named as ‘the special contract’ derived from Lord Cottenham LC’s speech in Dunlop v Lambert (1839) 6 Cl & F 600, 621.; S Girvin (n 117) para 9.12.
224 Strong objections have been made to call this approach a ‘rule’ since it itself is an exception to the general rule.; Benjamin (n 14) para 18.155.; Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, 523 per Lord Clyde.
225 The general rule of English law is that a contractual party, who has suffered no loss or damage pursuant to a breach of contract, can only recover nominal damages.
226 Carver (n 7) para 5.064.
227 (1839) 6 Cl & F 600; 7 ER 824.
tort, he could ask the seller/shipper/consignor to sue for breach of the contract of carriage to recover substantial damages under the bill of lading. Even if the risk of loss or damage had passed to the consignee, the shipper was able to recover damages where he had property in the goods. Thus the buyer could fully recover the damages from the shipper, who was responsible for amount of damages he had recovered and held in trust.\textsuperscript{228}

The truth is that the so-called rule established in \textit{Dunlop v Lambert} was laid down at the time when there were no other options available to the party who had actually suffered loss since there was no contractual relationship between him and the carrier.\textsuperscript{229} Sixteen years later, the BLA 1855 was passed proposing a fresh mechanism for transfer of the contractual rights to a person who had not been an original party. Although the BLA 1855 was not completely reliable, it would abolish the necessity and rationale of the decision made in \textit{Dunlop v Lambert}. This is why in \textit{The Albazero}\textsuperscript{230} the scope of ‘special contract rule’ was made limited.\textsuperscript{231} After all, passing of the BLA 1855 and, subsequently, the COGSA 1992\textsuperscript{232} even placed more restrictions on application of this approach, so much as lessened its necessity.\textsuperscript{233}

\textbf{2.2.3.6. The equitable assignment}

Traditionally, the common law did not give effect to assignment of choses in action. Therefore, since the contract of carriage is a legal form of chose in action, the transfer of bill of lading did not transfer contractual rights from the original party to the transferee against the carrier.\textsuperscript{234} Thus, in the context of carriage of

\textsuperscript{229} Thus this approach is not operable in contracts of carriage which envisage that carrier will enter into separate contracts of carriage with whoever may become the owner of the goods, i.e. a charterparty which provides for the issue of bills of lading.; \textit{Ademuni-Odeke (n 189)} 161.
\textsuperscript{230} \textit{Albacruz (Cargo Owners) Respondents v Albazero (Owners) Appellants (The Albazero)} [1976] 3 WLR 419; [1977] AC 774.
\textsuperscript{231} Particularly see the speech of Lord Diplock in \textit{The Albazero} [1976] 3 WLR 419 [1977] AC 774, 844-847.
\textsuperscript{232} It is provided under Section 2(4) of the Act that the lawful holder of a bill of lading can claim for loss suffered by a third party. However, since this provision does not apply to charterparties, the Dunlop v Lambert approach can be of use.
\textsuperscript{233} It can be still used where for example the goods were shipped under a bill of lading to the consignee but the bill was never delivered to the buyer.
\textsuperscript{234} Carver (n 7) para 5.804.
goods by sea, the assignment of chose in action had to be made in equity. The shipper could assign the benefit of carrier’s undertaking under the contract of carriage to the assignee in equity. The statutory version was then made available by Section 136(1) of the Law of Property Act 1925.

However, the question is whether the equitable assignment can solve all of the problems encountered by the cargo owners in ascertaining their rights against the carrier. First, the extent of assignee’s rights is the same as enforceable by the assignor himself as if there was no assignment. Thus, the assignee can exercise the rights against the carrier, but not the estoppels, since he is not the transferee of the bill of lading.

Furthermore, the equitable or statutory assignments have never been the most reliable and effective choice for the merchants because of their certain requirements. One of them is that a notice has to be given to the carrier (the debtor) on the assignment. Practical difficulties raised by the requirement of notifying the carrier because he had not always been readily available at the time when communications could not be easily and rapidly made as it can be today. Also, in order to sue the carrier, the assignee must join the assignor as a plaintiff. The problem is that the assignor might be unwilling for such an action to take place. Finally, there is a fear that the assignee’s claim might conflict the transferee’s action against the carrier. This might happen in a case where the benefits of a contract of carriage would be assigned without transfer of bill of lading.

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236 Kaukomarkkinat O/Y v Elbe Transport-Union GmbH (The Kelo) [1985] 2 Lloyd’s Rep 85; the assignee must have a genuine commercial interest in enforcing the claim.

237 Both in equity, although it is not required, it has to be given in order to obtain priority over competing assignments, and in statutory context by virtue of Section 136(1) of the Law of Property Act 1925.

238 This requirement is also cumbersome in today’s business, since the bill of lading could be transferred many times through the chain of sub-buyers.


240 Carver (n 7) para 5.122.
2.2.4. The Carriage of Goods by Sea Act 1992

The difficulties encountered by cargo interests have been a source of concern for almost a century. The attempts made by legislation of the BLA 1855 could not adequately present a reliable solution and the alternative devices under the English law have had their flaws in certain circumstance as examined earlier. More issues came into light by developing new shipping documents as the limited scope of the application of statutory rules created more obstacles towards acquiring the rights by transferees of those documents. As a result, in 1985, the Law Commissions were asked to take into account the rules regarding rights of suit in contracts of carriage, along with the view to possible reform.241

The Commissions observed three main options to provide solutions to defects and inadequacies of the BLA 1855 and the existing techniques in addition to addressing problems relating to non-negotiable bills of lading, delivery orders, and paperless transactions. This was published in a Report called Rights of Suit in Respect of Carriage of Goods by Sea242 in 1991. Appended to this report was a draft Bill which was enacted in 1992 and is now the COGSA 1992.243

The first approach was to take a wide interpretation of Section 1 of the BLA 1855. Thus any lawful holder of the bill of lading would be allowed to sue the carrier if at some stage property passed to him under a contract in pursuance of which he became the lawful holder. It was asserted that although this approach would solve the problem in cases such as The Delfini,244 and principally most bulk cargo cases, it would not help those holders who had not obtained property in the goods where they were part of a bulk and lost before they could be ascertained.245
The second option was to replace the reference to property in Section 1 with risk. This would be in line with other carriage of goods statutes by virtue of which the consignee can sue the carrier irrespective of whether he had property, however the defect in the latter approach was that it would exclude the holders such as pledgees who wanted to realize their security. Also, the unclarity regarding the definition of risk and its usage as a decisive factor for ascertaining the rights and liabilities of a party in the context of carriage of goods led to the rejection of this view.  

Accordingly, the outcome of these examinations was adoption of the third approach. This method, which was also the broadest one, simply allowed ‘the lawful holder of a bill of lading to sue the carrier in contract for loss or damage to the goods covered by the bill, irrespective of whether property in the goods had passed to the holder and regardless of whether the holder was on risk at the time of loss.’ According to the Commissions, ‘this would follow the practice in the U.S.A. and in a number of European countries.’ As a result of the Law Commissions’ deliberations and suggestions, the COGSA 1992 was passed to give statutory effect to the selected techniques regarding the rights of suit in the contracts of carriage of goods by sea.

2.2.4.1. Statutory rights of suit
The primary subject of the COGSA 1992 is transfer of rights of suit to the persons who are not the original parties to the contract of carriage. This is why the statutory rights of suit are of significance to our study, as consignees/endorsees are entitled to such rights through operation of the Act. If a case does not fall within the scope of application of COGSA 1992, the common law rules, as previously examined, will apply. As set out in Section 1(1) of the Act, the shipping documents which are primarily governed by provisions of this Act are bills of lading, sea

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246 Ibid, paras 2.19-2.20.
247 Ibid, para 2.21.
248 I Carr (n 7) 189: such as Germany, France, Netherlands, Sweden and Greece.
249 The Act received Royal Assent on 16 July 1992 and came into force on 16 September 1992, and affects all shipping documents covered by the Act issued after that date. As a consequence, the Bills of Lading Act 1855 was repealed.
waybills and ship’s delivery orders. The Act explicitly includes the received for shipment bills under Section 1(2)(b). Straight bills of lading are also covered as they fall into the definition of sea waybills under Section 1(3).

The parties, who are entitled to the rights to sue the carrier, are identified in Section 2(1) of the Act. Under this provision, all rights of suit, under the contract of carriage, ‘shall have transferred to and vested in the person (a) who becomes the lawful holder of a bill of lading; (b) to whom delivery of the goods covered by a sea waybill is to be made by the carrier; or (c) to whom delivery of the goods covered by a ship's delivery order is to be made in accordance with the undertaking contained in the order, as if he had been a party to that contract.’ It means that the consignees named in sea waybills and straight bills of lading, irrespective of being the lawful holder, are entitled to rights of suit. Endorsees, on the other side, will ascertain their rights by being the lawful holder as a result of endorsement and delivery of the bill of lading.

2.2.4.2. The lawful holder and obtaining possession

Section 2(1)(a) imparts the rights of suit to the ‘lawful holder of a bill of lading’. The ‘lawful holder’ of a bill of lading is the person who has become the holder of the bill in good faith. The term ‘holder’ is defined in Section 5(2) of the Act as ‘a person with possession of the bill’ in three situations. This means that the holder must be a person who has the bill in his hands; the bill must be in his or his agent’s ‘actual custody’. The holder of a bill of lading is categorized as a person who is either (a) identified in the bill as consignee, or (b) an endorsee of the order bill (in the case of a bearer bill, the transferee), or (c) a person who would have become a holder falling within paragraph (a) or (b) if he became the holder, when

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250 The merchant’s delivery orders, according to Law Commissions, are fundamentally different from ship’s delivery order and should not be covered by their reforms (now the Act).
251 Section 5(2) of COGSA 1992.
252 R Aikens and R Lord and M Bools (n 18) para 8.38.; Thus, where the bill is endorsed and posted, the transferee will have no possession of it until he receives it since the reference in Section 5(2)(b) is to ‘completion by delivery’; see also Rix J in The Giovanna [1999] 1 Lloyd’s Rep 870, 874 where he was of opinion that the endorsee was in possession of the bill once the endorser handed them to the courier.
253 Section 5(2)(a).
255 Section 5(2)(b).
the possession of bill ceased to give a right (against the carrier) to ownership of the goods to which the bill relates.256

The first crucial change made by the new Act to be considered is that it is made clear, by the wordings of Section 2(1), that the transferee of rights should have exactly the same rights ‘as if he had been a party’. This is likely to be the first place where doctrine of privity is, to some extent, targeted by the new statute. However, it has been argued that whether the transferee is to have the rights instead of the original party or to have the right jointly with the actual original party to the contract of carriage is still obscure.257 This question was considered in East West Corp v DKBS 1912258 in which the banks were named as consignees in the bills of lading. The banks were in fact the agents of the claimant sellers, to collect the price on their behalf. The Court of Appeal held that Section 2(1) functioned to transfer the rights of suit under the bill and the original claimants (sellers) were precluded from suing the shipowners. It has been stated that the conclusion of this case is not surprising with regards to the definition of the holder provided by Section 5(2) of the Act.259

The term ‘good faith’, although not defined by the Act, is a well-established, though flexible concept in the law.260 Further, the Law Commissions in their report of 1991, referring to Article 510 of the Dutch Commercial Code, has not considered a person who ‘acquires a bill by theft, fraud or violence’ as a lawful holder.261 Reference to the ‘honest conduct’ is also made to define the scope of ‘good faith’ by Thomas J in The Aegean Sea262 where he has excluded ‘the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned.’263 However, the problem is that the

256 Section 5(2)(c); the holder of a ‘spent’ bill of lading. Carver (n 7) para 5.017.
257 R Aikens and R Lord and M Bools (n 18) para 8.34.
258 [2003] 1 Lloyd’s Rep 239.
259 R Aikens and R Lord and M Bools (n 18) para 8.39.
260 For instance, under Section 61(3) of Sale of Goods Act 1979, ‘a thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not.’
261 Law Commissions Report (n 54) para 2.21.
'honest conduct' is also a flexible abstract concept which can be interpreted differently.

It seemed that the definition of ‘lawful holder’ given by the Act was uncomplicated and accessible. In fact it had been true until it was proved contrary few years later in *The Aegean Sea*\(^\text{264}\) where it was held that the Section 3 of the Act did not apply because the transferee had never become a lawful holder of the bill of lading. The problem was that the endorsement was not valid because the bills had been transferred and endorsed to the wrong person in error.\(^\text{265}\)

More recently in Singapore\(^\text{266}\) in *The Dolphina*,\(^\text{267}\) a case which was held to be subject to the English law based on a term in the bill of lading incorporating charterparty, the plaintiffs who brought an action against the carrier for misdelivery were held not to have the right of suit. The plaintiffs were endorsees of a bill of lading which was transferred to them by the previous holder who had no knowledge of the bill being fraudulent. However, the seller who had tendered the bill to the first transferee was aware of the fact that the cargo had already been delivered under another contract. The court reasoned that the fraudulent endorsement had not been a valid endorsement; therefore any subsequent transferee of the bill could not have been regarded as lawful holder.

The uncertainty is believed to be because the Act does not clearly specifies at what point the transferee of a bill should be tested for becoming the holder in good faith. The views are also different in this regard; on the one hand it has been suggested that if the transferee becomes the holder of a bill having known that the bill contains false statements or untrue representations, he will not be considered

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\(^{265}\) This was of course a case for liabilities, however, the same decision with respect to the rights seems right.; Paul Todd, *Principles Of Carriage Of Goods By Sea* (Routledge 2016) 279.; See also *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)* [2016] QB 1 where the mere transfer of possession of a bill of lading was not sufficient to constitute completion of an endorsement by delivery. It was necessary for the transferor and transferee both to intend that the rights under the bill should pass from one to the other by the combined effect of the endorsement and the transfer of possession.

\(^{266}\) Also Singapore Bills of Lading Act (1994) as amended in 1999 was adopted from and modelled on the UK COGSA 1992.

to have acted in ‘good faith’. On the other hand, it has been argued that the focus of the Act should be on the ‘circumstances in which the person becomes the holder of the bill not his knowledge of any defects in it.’

It is suggested, however, that this unclarity can be dealt with by the courts based on the facts of the case and the extent of the knowledge of the transferee of the bill of its untruth. In this way, the transferee, if becomes the holder of a bill knowing that there have been misrepresentations or misstatements in the bill or a fraudulent activity in the underlying transaction, he should be divested of his right to sue to the extent that he has knowledge of. He should not be deprived of his entire rights of suit based on, for example, overstating the quantity of goods if the correct quantity of goods are damaged or lost. Therefore, in *The Dolphina* it seems that the decision of the Singaporean court has been harsh and unjust on the ultimate endorsee, since he could not have had any knowledge of the fraudulent act of the seller, therefore he should not have been deprived of his right of suit in its entirety. After all, the question of when a person becomes holder of a bill is not likely to be very effective on the entitlement of that person to the right of suit itself.

It is noteworthy to mention that the surrender of bill of lading by the holder to the carrier as a mean to take delivery of the goods does not deprive the holder of his contractual rights. Though, if the holder transfers the bill to another person to vest contractual rights in that person, he will lose such rights which he has acquired by having become the lawful holder.

2.2.4.3. The Bill of Lading

The term ‘bill of lading’ is not expressly defined within the Act. Section 1(2) gives some information about the references to bill of lading governed by the Act that excludes ‘documents incapable of transfer, either by endorsement or as a bearer bill, by delivery without endorsement.’ Therefore, by definition, the Act does not include non-negotiable or straight bills of lading in the ‘bills of lading’

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268 Carver (n 7) paras 5.025-5.026.
269 R Aikens and R Lord and M Bools (n 18) para 8.56.
271 Scrutton (n 65) para 2.004; Carver (n 7) para 5.014.
category. The Act also covers the received for shipment bills of lading.\textsuperscript{272} There are two observations to be made with respect to semi-definition given by the Act. Apparently, the bill of lading in the context of the COGSA 1992 includes order and bearer bills of lading. At least, this is what can be construed by the face of the provision.

However, Carver has argued that it will cause difficulty that the Act considers the bearer bills of lading as the only documents to be transferred by mere delivery and no need of endorsement, since the bills issued to the order of a named consignee can be transferred to that consignee without endorsement and by mere delivery.\textsuperscript{273} This argument seems to be true at the first sight, however, it can be responded that first, this is neither a definition nor a list; therefore it cannot be exhaustive and should not be narrowly interpreted. Secondly, using the word ‘as’ before ‘a bearer bill’ indicates that naming of ‘bearer bill’ is only a matter of example, and it is not intended to limit the scope of definition of those bills which are transferable by delivery to only ‘bearer bills’.

The second point of interest is that it has been argued that the wordings of this provision is somewhat ‘misleading’ since there seems to be a contrast between ‘by endorsement’ and ‘by delivery’,\textsuperscript{274} perhaps by using ‘or’. Therefore, it has been argued that the terminology of this provision suggests that the ‘order bills’ can be transferred by endorsement and there is no need for delivery. It can be responded that firstly, there is no mentioning of ‘order’ bills in this provision. Therefore, again this definition seems not to intend to restrict the bills of lading to specific types. Secondly, wherever in the Act order bills are referred to, it is emphasized that the transfer will be deemed complete ‘by delivery of the bill of any endorsement of the bill’.\textsuperscript{275} Therefore, it is clear that for a transferee of an order bill of lading to be the lawful holder in order to acquire rights of suit under that document, the order bill must be transferred by endorsement and delivery. In fact,

\begin{footnotes}
\textsuperscript{272} Section 1(2)(b) of COGSA 1992.
\textsuperscript{273} Carver (n 7) para 5.014.
\textsuperscript{274} Ibid.
\textsuperscript{275} Section 5(2)(b) of the COGSA 1992.
\end{footnotes}
what is important under the Act is the transferability function of an order bill not its definition.

2.2.4.4. Consignees and endorsees under Bills of Lading
It is now clear that a named consignee with possession of the bill of lading is identified as the holder of the bill of lading pursuant to transfer of document by mere delivery without any need for endorsement. In other words, the consignees, as transferees of order bills of lading, are entitled to all rights of suit under the contract of carriage. In case if the consignor wishes to replace the named consignee with another person, he is allowed under Section 5(3) of the Act to do so only by endorsement. Therefore, the next consignee will be regarded as an endorsee and will be covered by paragraph (b) of Section (5)(2).

The endorsees of order bills of lading are also entitled to the rights of suit if the bill is transferred to them by endorsement and delivery. In case of the bearer bill, ‘any other transfer’ of the bill suffices for the rights to be transferred to the transferee. However, as was stated earlier, the mere physical endorsement and delivery cannot be regarded as accomplishment of a ‘transfer’. In other words, the language used in Section 5(2)(b) purports that the endorsement must be to the intended person, or endorsed in blank. Thus, it is clear that the factor of ‘intention’ is relatively involved. This view is supported in The Erin Schulte where it was held that ‘it was necessary for the transferor and transferee both to intend that the rights under the bill should pass from one to the other by the combined effect of the endorsement and the transfer of possession.’

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276 It has no effect on the status of the holder if he has received the bill directly from the shipper or through intermediaries.
278 It provides that ‘references in this Act to a person’s being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue’. This issue will be further discussed under the Rights of Control in the Rotterdam Rules.
279 Section 5(2)(b) of COGSA 1992.
280 It is also to be noted that mere redelivery of the bill to the original holder (shipper) without a duly endorsement, would not make the shipper holder of the bill within Section 5(2)(b).
281 See footnote 265.
2.2.4.5. Spent bills of lading
The common law principle used to be that the ‘key to the warehouse’ feature of a bill of lading is terminated when the goods to which it relates are delivered to the person who is entitled to them. Therefore, the contractual rights would not be transferred to the transferee of a bill of lading which was spent by delivery of the goods. The Law Commissions took into account the harsh and unsatisfactory effects of the rules regarding spent bills of lading on ultimate holders of the bills who may receive the document in as so far as one year after delivery of the goods. In order to facilitate the transfer of rights of action to such holders, paragraph (c) of Section 5(2) of the COGSA 1992 now provides that ‘a person with possession of the bill as a result of any transaction by virtue of which he would ordinarily have become a holder either as a consignee named on an order bill or an endorsee of an order bill or a bearer of a bearer bill ‘had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates’. Therefore, by virtue of Section 2(2), in case a person becomes the holder of a spent bill of lading, he will be entitled to rights of suit against the carrier. In other words, such a holder would have been either a consignee under paragraph (a) or an endorsee under paragraph (b) if he became the holder of the bill at the time when possession of the bill would normally give its holder the right to possession of the goods under that bill. This entitlement to the rights takes place when the person becomes the lawful holder of bill of lading in either of the two following circumstances: a) ‘by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill’. What is important here is the time when arrangements made for the transfer of bill of lading.

283 This is from the famous description of the bill of lading made by Bowen LJ in Sanders Bros v Maclean & Co (1883) 11 QBD 327 at 241 where he stated: ‘it is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.’
285 Law Commissions Report (n 54) paras 2.42-2.44.
286 Section 2(2)(a) of COGSA 1992.
holder/endorsee must establish that the arrangements were made before discharge of the goods in order to fall within this category. It does not matter when the actual transfer of bill of lading takes place. Thus, if the transfer of bill of lading takes place pursuant to the arrangements made after the discharge, this provision will not be applied.

It is reckoned that in *The Delfini*, the ultimate receiver paid for the charges and took delivery of the goods, before the bill of lading related to those goods was endorsed to him. There was a shortfall in the delivery, and the receiver attempted to sue the carrier for breach of contract. This provision would have solved the problem in this case, for at both first instance and The Court of Appeal it was held that the bill of lading had ceased to be effective as a transferable document of title when the cargo was discharged, so that he had no contractual rights of suit against the carrier.

More recently, in *The Pace*, the arbitration award was upheld by the court stating that the claimant was held to became lawful holder of the bills of lading and therefore had the right of suit ‘as a result of the payment of the price under the contracts of sale ... and the immediate and proximate cause of the transfer of the bills was the sale contracts and the payments made thereunder.’ The phrase ‘contractual or other arrangement’ therefore makes reference to reason or cause for the transfer. In addition to cases in which the cargo is lost during the voyage before the bill of lading comes into possession of a consignee, Section 5(2)(c) is likely to deal with the cases where before the cargo is delivered against a bank security the bill comes into the hands of a consignee or an endorsee.

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290 *The Ythan* [2006] 1 Lloyd's Rep 457.; It was held that where a vessel had sunk and cargo had been lost, the question of whether a party had become a ‘holder’ of the bills of lading after the event was to be dealt with under the Carriage of Goods by Sea Act 1992 Section 5(2)(c).
292 See Also *The Delfini* [1990] 1 Lloyd's Rep 252.; *Meyerstein v Barber* [1870] LR 4 HL 317, 330 per Lord Hatherley.
The second situation where the transferee of a spent bill of lading can be entitled to the contractual rights is when he becomes the holder ‘as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.’ In other words, where the consignee or an endorsee of a bill of lading rejects the goods or documents, including bill of lading, upon arrival, the new transferee as a result of rejection will be entitled to the rights of suit under the spent bill by virtue of Section 2(2)(b) of the Act.

In addition to the usefulness of this provision in cases with chain of buyers, it will also assist the seller/shipper, in case the bill is transferred back, to become the holder of such a document and enjoy the rights it evidences. One may argue that the seller/shipper is already a party to the contract of carriage with the carrier and he is able to sue the carrier on the basis of that original contract, therefore, it seems there is no usefulness in this provision, since it gives the shipper the rights he is originally entitled to. To answer to this proposition, the effect of Section 2(5) of the Act shall be emphasised, which is to extinguish any entitlement of rights ‘where that document is a bill of lading, from a person’s having been an original party to the contract of carriage’, who in this case is the seller/shipper.

### 2.2.4.6. Sue for another person’s loss

Another essential feature of the COGSA 1992 is that the link between transfer of contractual rights and transfer of property is broken. Thus the pledgees, and other persons holding bills of lading as security, can sue the carrier on the contract of carriage. This has eliminated the problems raised by *Sewell v Burdick* and would reverse the position in favour of the pledgees. On the other side, it might spring to mind that the separation of passing of property and transferring of the rights of suit will lead to cases where the holder of the bill of lading will be entitled to the right of suit even if he is not the person who has actually suffered

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293 Section 2(2)(b) of COGSA 1992.
294 R Bradgate and F White (n 133) 194.
295 [1884] 10 App Cas 74.
the loss, such as forwarding agents acting on behalf of ultimate holder of bill of lading. 296

The general rule of English law 297 is that a person can sue in contract only for his own loss, and that the claimant can only claim for recovery of damages he himself has suffered. Therefore, when a holder of a bill of lading is not the owner of the goods or the one who has actually suffered loss or damage, he is not generally allowed to sue the carrier for the loss someone else has sustained. The COGSA 1992 under Section 2(4) provides an exception to this principal providing that if such a holder exercises his rights of suit, he may do so for the benefit of the person who actually sustained the loss or damage, 298 although it seems that he is not obliged, by the Act, to do so. 299 The holder may require the cargo interest to secure an indemnity in order to recover the potential costs. 300 In any event, if the holder refuses to exercise the rights of suit for benefits on the cargo owner, the cargo owner may resort to sue the carrier in tort.

In order to identify the person who has actually suffered loss, Section 2(4)(a) of the Act requires that person must have ‘interest or right in or in relation to goods’. This is in fact a ‘broad terminology’ and has been suggested to include anyone with a ‘legitimate’ right to claim damages. 301 Nevertheless, the rule set out in this provision can be called as recognition of the old approach in Dunlop v Lambert, 302 although if a person with ‘right or interest’ cannot apply Section 2(4) of the Act, it

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296 J. Beatson and J.J. Cooper, ‘Rights of Suit in Respect of Carriage of Goods by Sea’ (1991) Lloyd’s Maritime and Commercial Law Quarterly 196, 199; this has been one of the primary concerns of the Law Commissions to deal with.; Law Commissions Report (n 54) para 2.24.
297 However, the House of Lords in The Albazer [1977] AC 774 ‘recognised in principle that a consignor of goods could recover damages against the carrier where he had entered the contract for the benefit of the ultimate consignee, although not where the consignee had rights under the Bills of Lading Act.’ as cited in Law Commissions Report (n 54) para 2.26.
298 Section 2(4) continues on to state that the exercise of the rights of suit must be to recover the loss or damage ‘to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.’
299 The word used is ‘entitled’, thus it appears that there is no duty on him to sue for another person’s benefit.
300 N Gaskell and R Asariotis and Y Baatz (n 92) para 4.31.
301 R Aikens and R Lord and M Bools (n 18) para 8.83.
302 W Tetley (n 9) 460.
seems that he still can rely on the so-called rule of Dunlop v Lambert in order to recover damages.\textsuperscript{303}

\section*{2.2.4.7. Sea waybills}

It has been earlier discussed that in the modern era of sea carriage, it is commonly the case that the goods may arrive at the port of discharge before the bill of lading comes into the possession of the receiver. Clearly, the requirement of presenting the bill to the carrier to obtain delivery of the goods causes delays and difficulties, thus results in commercial unsatisfactory. Accordingly, one of the alternatives for bills of lading, especially in short and regular voyages is the use of sea waybills.\textsuperscript{304}

Similar to the bill of lading, the sea waybill operates as evidence of contract of carriage and a receipt for goods. Although sea waybill, unlike the bill of lading, is not a document of title to the goods, it contains an undertaking by the carrier to deliver the goods to the person named, for the time being, as consignee on it. It is also pointed out that an important benefit of using sea waybill is that the consignee is not required to present the document to obtain delivery of the goods, as it suffices to show an evidence of identity,\textsuperscript{305} thus unlike the bill of lading, the concept of holder is irrelevant.\textsuperscript{306}

Moreover, it is already mentioned that the COGSA 1992 brings within its scope shipping documents other than bills of lading, including sea waybills and ship’s delivery orders\textsuperscript{307} in order to extent the repealed Act of 1855 beyond bills of lading. To that effect, Section 2(1)(b) of COGSA 1992 provides that when the relevant document is a sea waybill\textsuperscript{308} ‘the person in whom the rights of suit are transferred

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{303} See section 2.2.3.5.
\item \textsuperscript{305} This results from the fact that sea waybill is not a document of title, so that delivery is made to a named consignee. Presenting a form of identification is to show that he definitely is the named person on the waybill.
\item \textsuperscript{306} R Aikens and R Lord and M Bools (n 18) para 8.74.
\item \textsuperscript{307} John Bassindale, ‘Title to Sue under Bills of Lading: the Carriage of Goods by Sea Act 1992’ (1992) 7(10) Journal of International Banking Law 414, 415: ‘the decision to extend the legislation to waybills and ship’s delivery orders is an extremely important one which may well lead to increased use of such documents in place of bills of lading in a number of trades.’
\item \textsuperscript{308} Section 1(1)(b) expressly names sea waybill as one of the shipping documents that the Act applies to. Although, similar to the bill of lading, sea waybill is not defined under the Act, Section 1(3) provides that references to a sea waybill under this Act are references to any document which is not a bill of lading is a receipt of goods by sea or evidence of contract of carriage and identifies the person to whom delivery is to
\end{itemize}
\end{footnotesize}
is the person to whom delivery of the goods is to be made’ in accordance with the terms of the carriage contract. In other words, by virtue of COGSA 1992, a consignee named on a sea waybill, without being a party to the contract of carriage, is enabled to sue the carrier on terms of the contract of carriage originally made between the shipper and the carrier.

As it is already noted, the concept of holder is irrelevant to the person who is to be entitled to the rights of suit under such documents. This is where it differs from the bill of lading which transfer of possession of the document is needed to give effects to the transfer of rights it contains or evidences. Therefore, the consignee identified in the waybill, acquires rights against the carrier without the need to become holder or lawful holder of the waybill. Also, the wordings of this provision suggest that the ‘transfer’ takes place when the ‘transferee’ becomes the person to whom delivery is to be made and this is when the sea waybill is issued.

It is mentioned that the shipper is allowed to vary the identity of the person in a document to whom delivery is to be made under Section 5(3) of the Act. This provision explicitly includes the rule in Section 1(3)(b) which deem a document as a sea waybill when it identifies the person to whom delivery is to be made according to the terms of the contract of carriage. Therefore, a question may arise whether such variation leads to a change in nature of the document, so that it will not be regarded as a sea waybill under the Act and the consignee would be deprived of the rights of suit conveyed by the waybill. It is argued that such a document is still regarded as a sea waybill, therefore the new person identified as the consignee by the shipper will be the person who will be vested in the rights of

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309 Ademuni-Odeke (n 189) 165.
310 The distinction between bills of lading and sea waybills sometimes cannot be easily established. In International Air and Sea Cargo GmbH v Owners of the Chitral (The Chitral) [2000] 1 Lloyd’s Rep 529 although the document provided for delivery of the goods to a named consignee “or assigns”, it was held to be regarded as a sea waybill since the requirement of completion of the box annotated “if order state notify party” had not been satisfied.
311 R Aikens and R Lord and M Bools (n 18) paras 8.74-8.75.
suit against the carrier, since he is the person to whom delivery is to be made, and the rights of suit transferred by sea waybill under the Act is tied with the right to claim delivery.

Another question that may arise is that if the shipper replace the consignee named on a sea waybill with another person under Section 5(3) of the Act, and the carrier without knowledge of this variation, delivers the good to the initial person named as the consignee on the sea waybill, since the goods are discharged and the waybill is accomplished, whether this sea waybill can be treated as a spent bill of lading so that the new consignee to whom the delivery had to be made applies the rules under Sections 5(2)(c) and 2(2) to be entitled to the rights of suit.

On the one hand, it can be argued that the rule under the Section 2(2) only applies to bills of lading; therefore this can be regarded as a defect in the Act which does not provide a solution for such circumstances. On the other hand, it can be suggested that, by virtue of Section 2(1)(b) once the sea waybill is issued, the transfer of rights takes place. Therefore, the person who is entitled to the rights is the consignee, thus the shipper has no rights to vary the person named on the waybill and direct the carrier to deliver the goods to a new person.

However, Section 2(5) of the Act clearly excludes the operation of Section 2(1) in case where a sea waybill or ship’s delivery order is issued. It provides that the operation of Section 2(1) ‘shall be without prejudice to any rights which derive from a person’s having been an original party to the contract’ of carriage. The shipper clearly is the party to that contract and therefore, if such a right (to redirect the goods) derives from the terms of the contract, the transfer of rights under the sea waybill cannot amount to the shipper’s losing the right. The solution is that the consignees are suggested to negotiate with the shipper on incorporating such terms in the contract of carriage, in order to be certain about their rights in case where the shipper wishes to exercise them. Otherwise, it might

312 This has also been the intention of the Working Group as provided in the Law Commissions Report (n 54) para 5.23: ‘it is crucial to the utility of a sea waybill that a shipper should be capable of retaining his contractual rights until the time of delivery. Having a non-transferable document, he is able to direct the carrier to deliver to another person at his pleasure before delivery’.

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lead to a situation where the consignees who have already paid for the goods to be deprived of their rights of action against the carrier. In any event, the consignee can sue the carrier in tort if the provisions of the Act do not apply to its case.

Briefly, it has to be noted that, as far as the straight bill of lading is concerned, since this type of document is classified as a sea waybill for the purposes of Section 1(3), by virtue of Section 2(1)(b) the rights of suit are transferred to and vested in the consignee named and identified in the bill. Thus the consignee named on a straight bill of lading seeking to sue the carrier will have to do so as if he is a named consignee on a sea waybill, which means that he does not have to be in possession of the bill in order for the rights to be transferred to him.

2.2.4.8. Ship’s delivery orders

The other type of documents which is inserted into the scope of COGSA 1992 is ship’s delivery order the issue of which triggers the application of Section 2(1)(c) of the Act which states that the rights of suit are transferred to the person to whom delivery of the goods is to be made in accordance with the undertaking contained in the order (given by the carrier). Similar to the sea waybills and unlike the position in cases where the bill of lading is the document in question, the person who is identified in the ship’s delivery order as the person to whom delivery is

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313 Carver (n 7) para 1.014: ‘Bills of this kind are those which make the goods deliverable to an identified person as consignee and either contains no words importing transferability or contains words negativing transferability.’


316 It has to be noted that the status regarding ‘delivery orders’ in general is not changed by the COGSA 1992, in the sense that where there is no promise made by the carrier, or the carrier has not attorned to the holder of the document to deliver the goods, the holder of delivery order does not have any right against the carrier.

317 The commercial need for ship’s delivery orders, according to the Law Commissions Report (n 54) para 5.27, comes from the fact that a seller may have a bulk cargo in transit, and wishes to sell smaller parts of that bulk to various buyers. This process cannot be operated through a single bill of lading because the seller is not able to give the bill to each buyer. To overcome the problem, the seller stipulates for the right to give a ship’s delivery order in respect of each of the smaller parts.

318 Ademuni-Odeke (n 189) 165.

319 Although the ship’s delivery order is not defined under the Act, Section 1(4) makes reference to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates,
to be made is not needed to become the lawful or even the holder of the document for the purpose of acquisition of contractual rights against the carrier. As a matter of law, this Section is made subject to Section 2(3)(a) which provides that the rights ‘shall be so vested subject to the terms of the order’. This means that the terms of the order may ask for delivery of the goods only against the presentation of the order. In such situation, the contractual rights, definitely, will be acquired only by the person who is in possession of the order.320

A change in the consignee of the goods under a ship’s delivery order is also allowed by virtue of Section 5(3), however any change has to be made ‘in accordance with the terms of the document’. Therefore, where the order contains carrier’s undertaking to deliver the goods to the consignee/buyer, if the consignee/buyer ask the carrier to deliver the goods to a successive consignee/sub-buyer, no rights will be transferred to the sub-buyer by operation of Section 2(1)(c) and the consignee/buyer will remain the person to whom delivery is to be made in accordance with the undertaking contained in the order, because this change in consignee has not been made ‘in accordance with terms of the document.’321

The final point to be made is the essential aspect of the ship’s delivery order required by the Act. That is to say, under Section 1(4)(b), reference is made to an undertaking which must be given by the ‘carrier’. This can be a source of problem when it comes to identifying the carrier, especially if the goods are shipped on a time-chartered ship. The identification of the carrier is important in the sense that whether the document issued is a ship’s delivery order to be governed by the Act depends on who has issued it. If the contract of carriage is between the shipowner and the shipper, the document issued by the shipowner as the carrier is regarded as a ship’s delivery order under the Act. If the charterer issues the document, it will not be a ship’s delivery order. On the other side, if the person enters into a

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320 In Owners of Cargo Lately Laden on Board the Rewia v Caribbean Liners (Caribtainer) Ltd (The Rewia) [1991] 2 Lloyd’s Rep 325, it was held by the Court of Appeal that ‘a bill of lading signed for the master cannot be a charterer’s bill unless the contract was made with the charterers alone, and the person signing has authority to sign, and does sign, on behalf of the charterers, not the owners’.
321 Carver (n 7) para 8.053.
contract of carriage with the shipper is the charterer, the document either issued
by the shipowner or the charterer is a ship’s delivery order for the purposes of the
Act.

2.2.4.9. Rights of the original shipper after transfer

As a common law tradition, the original shipper could retain the contractual rights
under the bill of lading, although he had transferred the bill. In other words, the
transfer of a bill did not function as a transfer of contractual rights. Hence, the
shipper was able to sue the carrier for loss or damage, even when he was not the
actual person who had sustained the loss. This relatively unfair rule was modified
by Section 1 of the BLA 1855 in the sense that the word ‘transferred’ was construed
by the courts to mean that the contractual rights once transferred to the consignee
or endorsee, would no longer be available to the original shipper.

The draftsmen of COGSA 1992 did not rely on the construction of the word
‘transferred’ in Section 2(1), therefore, a further alteration has been made by
Section 2(5)(a) which provides that where rights are transferred by virtue of
Section 2(1), the transfer ‘shall extinguish any entitlement to those rights which
derives where that document is a bill of lading, from a person’s having been an
original party to the contract of carriage’. It is clear from wording of the related
provisions that this rule is limited to cases where the goods are shipped under a
bill and the bill is transferred. Thus, the shipper who sends the goods covered by
sea waybills, or uses ship’s delivery orders is able to retain his rights. Similarly,
where the shipper sells the goods by endorsing a bill of lading in name of his

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322 The rights of the shipper are not in principal concerned within this study, however because of their
impacts on the consignees/endorsees’ rights after being transferred, the status of their rights are discussed
in this section.
323 Sewell v Burdick (1884) 10 App Cas 74, 84: ‘...to make it just and convenient that all rights of suit under
the contract contained in the bill of lading should be “transferred to” the endorsee, and should not any
longer “continue in the original shipper or owner”.’; Short v Simpson and Others (1865-66) LR 1 CP 248
where it was held that the re-endorsement of a bill of lading remitted to him all rights of suit that had
been transferred to the consignee.; Benjamin (n 14) para 18.155; Carver (n 7) para 5.065.
324 East West Corp v DKBS 1912 [2003] 1 Lloyd’s Rep 239: In this case bills of lading had been endorsed to
bankers for the purpose of documentary credits and the buyer had failed to pay the price of the goods. The
bills were given back to the shippers without endorsement, thus the shippers had no rights of suit.
325 R Bradgate and F White (n 133) 198 the transferability is what is meant by the references made by the
Act to documents which are capable of being endorsed and delivered, or endorsed.
326 Section 2(5) COGSA 1992.
buyers and ships the goods under a charterparty, he retains the title to sue which stems from the contract of carriage contained in the charterparty.

2.2.5. Conclusion

The evolutionary process of finding and providing solutions to rectify the difficulties regarding transfer of rights of suit under the English law has been examined. It has been illustrated how the consignees/endorsees of a shipping document may ascertain their contractual rights under both common law and statutory regulations. The COGSA 1992, as the leading statute on this matter, by extending its scope of application to sea waybills and ship’s delivery orders, has brought flexibility to the English maritime law and has been accommodating various cases in this regard for many years. The rules are to a large extent effective, reliable and operational bringing legal certainty to the contracts of carriage of goods by sea.

Although sometimes the COGSA 1992 is described as ‘the lawyers’ law’ due to its technicality, the reliable mechanism offered by its rules for transferring rights of suit to the consignees/endorsees efficiently copes with the commercial realities as it has been applied by the courts for almost 25 years. The statutory rules of English law on rights of suit, as examined, may have some defects particularly with regards to the question of paperless transactions, non-contractual claims, or interpretation of certain concepts such as being the lawful holder, however, the fact is that there is no perfect law. Moreover, many of these issues can be resolved by resorting to the alternative devices provided under the English law. The main purpose of the Act has been to deal with the ‘title to sue’ problems and it has

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328 R Bradgate and F White (n 1 33) 198.
329 As stated, this was initially started by finding solutions for problems stemmed from the application of principle of privity of contract.
331 The question of electronic bills of lading under the English law will be discussed in details in Chapter II section 8.
332 See section 2.2.4.2.
333 For example, when delivery is taken by the receiver under a letter of indemnity, or also where the document issued is a delivery order which may not be categorized as ship’s delivery order to fall within the ambit of COGSA 1992. In such cases, the implied contract approach can be employed to address the rights of suit issues.
certainly fulfilled the intentions, having preserved its attractiveness even for foreign parties after more than two decades of its genesis.

2.3. Right to redirect the goods

It has been mentioned earlier that the shipper may have the right to ask the carrier to redirect/deviate the goods to a person other than the named consignee on the shipping document ‘at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it.’\textsuperscript{334} This right can be exercised in case of a bill of lading made out to the order of a named consignee\textsuperscript{335} and also, somewhat limited, under a sea waybill. The shipper’s right to redirect the goods will be extinguished once the contractual rights are transferred to the consignee. This can be based both on what had to be the rule under Section 1 of the BLA 1855\textsuperscript{336} as well as the rules regarding transfer of contractual rights in COGSA 1992.

The current English law position is that the transfer of contractual rights from the shipper to any other person has to be governed by the COGSA 1992. It has been seen that the shipper’s right under the bills of lading will be extinguished once transferred to another person through operation of Section 2(1).\textsuperscript{337} Therefore, the shipper of goods under a bill of lading once transfers his rights, cannot replace the consignee named on the bill with another person and requires the carrier to redirect the goods to that person. Also, it has been mentioned that the rights of the original shipper will be retained when the document in question is either a sea waybill or a ship’s delivery order.\textsuperscript{338} This has been already discussed under the relevant sections.\textsuperscript{339}

The main question which arises is whether the right to redirect the goods can be transferred to a consignee. The common law position would be that the delivery of

\textsuperscript{334} Mitchell v Ede (1840) 11 Ad & El 888; 113 ER 651, 657.
\textsuperscript{335} Elder Dempster Lines v Zaki Ishag (The Lycaon) [1983] 2 Lloyd’s Rep 548.
\textsuperscript{336} In case where the contractual rights had been transferred to the consignee named in the bill of lading upon passing of property in the goods prior to delivery of bill of lading to the consignee, the shipper could no longer be able to instruct the carrier to redirect the goods to a new consignee, for he had lost his rights under the contract of carriage.
\textsuperscript{337} Section 2(5)(a) of COGSA 1992.
\textsuperscript{338} Tailpiece of Section 2(5) of COGSA 1992.
\textsuperscript{339} Sections 2.2.4.6-2.2.4.7.
the bill of lading to a consignee named in it would deprive the shipper of his rights to redirect the goods and because the consignee is not a privy to the contract of carriage, the doctrine of privity precludes him from acquiring such a right.\footnote{Mitchel v Ede (1840) 113 ER 651; 11 Ad & El 888, 903.; Carver (n 7) para 1.025.} The COGSA 1992, however, provides that all contractual rights of suit are transferred to the transferee of a bill of lading. If these rights are to be construed narrowly, therefore it seems that the right to redirect the goods cannot be included, and therefore will not be transferred to the consignee.

However, it is arguable that the main purpose of COGSA 1992 has been to facilitate the transfer of contractual rights to the parties who are not privy of a contract of carriage, i.e. endorsees, consignees. Therefore, it can be induced and suggested that the rights of suit under the COGSA 1992 also includes the right to redirect the goods, thus the transferee of an order bill of lading,\footnote{In all other cases where the bill of lading is not made out to order, the consignee must have been authorized by the shipper to redirect the goods, and when exercising such a right, he is not exercising his independent right to redirect the goods, but the shipper’s. Therefore the carrier must be notified of any exercise of such a right by the consignee.} once through operation of the Section 2(1)(a) of the Act becomes the lawful holder of the bill, will be entitled to the right to redirect the goods. Thereafter, the shipper’s rights will be ceased and the only person entitled to give instructions to the carrier is the consignee. This can be of avail in cases where there are sub-buyers involved to which the consignee needs to redirect/deliver the goods.

Another important question is whether the same suggestions can be made for cases where the document in question is a sea waybill. It is already discussed that the shipper’s right under a sea waybill will be retained even after transfer of the rights embodied to the consignee.\footnote{By virtue of Section 2(5) of the COGSA 1992.} These rights are comprised of those which derive from the shipper’s being a party to the contract of carriage. Therefore, if under the contract of carriage, contained in or evidenced by a sea waybill, the shipper is allowed to redirect the goods, once the contractual rights are transferred
through operation of Section 2(1)(b) of the Act to the consignee, the right to redirect the goods will also be preserved.343

Furthermore, it can be argued that the proposition made for the bills of lading can be extended to sea waybills. To that effect, the rights of suit transferring from the shipper to a named consignee in a sea waybill to include the right to redirect the goods, therefore the consignee will be entitled to such a right. However, a contrary view344 seems to have more support at least from the authorities. In AP Moller-Maersk v Sonaec Villas,345 the shipper exchanged the initial sets of bills of lading (straight bills) with new sets issued by the carrier naming a new consignee. It was held that although the rights of suit were vested in the consignee on issue of the first bill (since the transfer of rights under sea waybills is the time of issuing of the bill), the shipper preserved the right to redirect the goods and also terminated the contract of carriage evidenced by the initial bills and made a new one on the new bills. Therefore, since the first contract of carriage was deemed terminated, the first consignee had lost all of his contractual rights.

Accordingly, it can be concluded that where a contract of carriage is evidenced by or contained in a sea waybill, once the shipper exercise his right to change the consignee named on the waybill, the contract of carriage is deemed terminated and therefore no mechanism exists by which the contractual rights including the right to redirect the goods to be transferred to the consignee. However, it is suggested that if the shipper does not exercise his right, it seems, principally, there is no reason why the right to change the consignee/redirect the goods should not be vested in the consignee of a sea waybill.

3. Liabilities of the consignees/endorsees

Generally, the person who will be liable for the freight and demurrage under the terms of a contract of carriage evidenced by or contained in a bill of lading is the

343 This is in fact one of the features of sea waybills for the shipper to be able to redirect the goods.
original holder of the bill. The holder will also be liable for damages resulting from
the loading of dangerous cargo.\textsuperscript{346} Under the present law, the transferee
(consignee/endorsee) of a bill of lading incurs the liabilities for matters occurring
in the common course of carriage and may also, as suggested by a number of
scholars,\textsuperscript{347} be held liable for liabilities due to the fault of the shipper to which the
transferee has had no access or control. The most notable instance of the latter is
liabilities arising for shipping of dangerous goods. The main argument is with
regards the second assumption which is suggested to thrust unreasonable degree
of liabilities on the beneficiary of a contract of carriage.

The general common law rule was that the transferee of a bill of lading
(consignee/endorsee) was not liable for the freight or other charges to the carrier.\textsuperscript{348}
The BLA 1855, in a similar approach towards the transfer of contractual rights,
attempted to provide a solution for the unsatisfactory rules of common law. This
was also implemented in Section 1 of the Act which provided that the shipper’s
liabilities would pass to the consignee/endorsee if property passes "upon or by
reason of" the consignment or endorsement. The difficulties arising from the
limited scope of application of BLA 1855 as well as the linkage between the
property and transfer of contractual rights have been discussed earlier. The same
problems are also true in case of imposition of the shipper’s liabilities on the
transferees of bills of lading.

3.1. Imposition of liabilities under COGSA 1992

As a legislative solution, the COGSA 1992 was passed and repealed its forerunner
and presented an approach based on principle of mutuality.\textsuperscript{349} Section 3(1) of the
Act provides that ‘the persons in whom rights are vested, by virtue of subsection
(1) of Section 2, shall become subject to the same liabilities under that contract as if

\textsuperscript{346} S Baughen (n 1) 44.
\textsuperscript{347} Scrutton (n 65) para 2.033.; Carver (n 7) para 5.103.
\textsuperscript{348} Sanders, Snow and Cockings v Vanzeller (1843) 4 QB 260.; The common law rule could be weakened if a
contract could be implied as between the carrier and the endorsee/consignee who had presented the bill of
lading in order to take delivery and the goods were delivered by the carrier as requested. However, the
requirements such as contractual intention had to be satisfied; therefore it was never regarded as a reliable
device.
\textsuperscript{349} The Berge Sisar [2001] UKHL 17, para 31.
he had been a party to that contract where (a) takes or demands delivery of the goods, or (b) makes a claim under the contract of carriage, or (c) before the rights were vested in him, took or demanded delivery of the goods.\(^{350}\) In other words, anyone who obtains rights of suit, through operation of Section 2(1), shall also incur liabilities under the related shipping document if he takes or demands delivery of the goods or makes a claim regarding them.\(^{352}\) Therefore, Section 3(1) will not apply where the requirements of Section 2(1) are not satisfied, i.e. where the transferee did not become a lawful holder of a bill of lading, or where an order bill of lading is transferred by endorsement but delivery is not completed, or where the person is not in possession of the bill of lading and so forth.

However, although the transferee must acquire the rights of suit to meet the condition set by Section 3(1) in order to incur contractual liabilities, it can be seen that, under the COGSA 1992, the transfer of liabilities is made independent of transfer of contractual rights.\(^{353}\) Further, the way the Act treats the liabilities within Section 3 is different from the way it conducts the rights under Section 2. Firstly, while the rights of suit are transferred from the original shipper to the transferee, the liabilities are not detached from him, thus the continuing liability of the shipper is not terminated, although at the same time they are imposed on the transferee.\(^{354}\) In this way, it has been suggested that this Section has adopted the legal structure of Section 1 of the BLA.\(^{355}\) The Lord Lloyd of Berwick described this

\(^{350}\) By virtue of Section 2(1) of the COGSA.
\(^{351}\) Paragraph (c) includes cases where the receivers took delivery against a bank indemnity before they became lawful holder of the bill by virtue of Section 2(1).
\(^{352}\) J Bassindale (n 307) 416.
\(^{353}\) J F Wilson (n 67) 139.; Obviously, the separation of rights from liabilities will in fact protect a holder of the bill as security, such as a bank, from incurring contractual obligations and liabilities until it seeks to take active steps to enforce the security. This will be discussed in details later.
\(^{354}\) Section 3(3) of the COGSA.
assumption in *The Giannis NK*, and he concluded that the liability of the transferee is ‘by way of addition, not substitution.’

Secondly, the transferee of the bill of lading acquires liabilities under more restricted circumstances than when he obtains the rights. To clarify the matter, it is useful to remind that the scope of application of this Section is limited to situations where the requirements under Section 2(1) are met. In this respect, it should be noticed that the policy of establishing the new scheme, in respect of imposition of liabilities, has been to avoid making liable the banks or such holders of bill who only hold the bill as a security, unless they themselves attempt to exercise or enforce their contractual rights.

### 3.1.1. The difficulty of interpretation

Under Section 3 of the Act, reference is made to ‘taking’ or ‘demanding’ delivery of the goods by the person who has acquired the rights in order to trigger the imposition of liability. None of these words are defined within the Act and may result in difficulties with interpretation of the facts of the contract. The scope of this provision and the difficulties created by the wording of its paragraphs were observed by Lord Hobhouse in *The Berge Sisar*. As Lord Hobhouse suggested, the phrase ‘demands delivery’ would be read as referring to ‘a formal demand made to the carrier asserting the contractual rights as endorsee of the bill to have the carrier deliver the goods to him.’ Also, he described ‘taking delivery’ as ‘the

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356 [1998] All ER 495, 503 per Lord Lloyd of Berwick: ‘Whereas the rights of the contract of carriage were to be transferred, the liabilities were not. The shippers were to remain liable, but the holder of the bill of lading was to come under the same liability as the shipper.’

357 R Aikens and R Lord and M Bools (n 18) para 8.86.

358 Some difficulties may arise in the case of ‘spent bill’, since the acquisition of rights is provided under Section 2(2), whereas Section 3(1) only refers to the first subsection of Section 2. Though, Carver (n 7) para 5-087 has suggested that Section 2(2) is in the nature of a qualified restrictions on Section 2(1), so where Section 2(2) permits transfer of rights to a lawful holder of a spent bill, those rights are vested by virtue of Section 2(1). Thus, such a holder will be liable under Section 3(1). Additionally, this view is supported by Section 3(1)(c).

359 R Aikens and R Lord and M Bools (n 18) para 8.87.

360 [2002] AC 205; [2001] UKHL 17. In this case, after the ship had reached the port of discharge, the consignees asked for samples of the goods for testing. The result was unsatisfactory, as the samples were not of what had been specified. The receivers rejected the goods and resold it to other purchasers. The bill of lading was passed on to the ultimate buyers. The carriers attempted to recover damages from the buyers because of the damages the cargo had caused to the vessel. The main question in the considerations of House of Lords was whether the buyers had demanded delivery within the ambit of Section 3(1)(a), or made a claim under the contract for purpose of Section 3(1)(b).

361 *The Berge Sisar* [2001] UKHL 17, para 32.
voluntary transfer of possession from one person to another.”362 With this interpretation, the reference to constructive or symbolic possession is out of question since it would be inconsistent with the intention of the Law Commissions for breaking the link between transfer of rights and imposition of liabilities.363

However, a further question was raised by his lordship that what the situation of an endorsee would be where the carrier rejects his ‘demand’. In other words, whether the endorsee be held liable against a carrier who had not complied with his demand of delivery of the goods. He continued ‘a rightly rejected demand for delivery by one who is not entitled to delivery is an act devoid of legal significance’ and suggested that the person making such a demand will not be subject to liabilities under Section 3 of the Act.364 Nevertheless, it is not clear what is exactly meant by ‘rightly rejection’ of demand, as to whether it refers to the cases where the carrier cannot make delivery because the goods are lost due to perils of the sea, or where the endorsee asks for delivery to be made at a particular port and the carrier cannot comply with such a demand and rejects it.

This has been to some extent observed by the Law Commissions where they stated that ‘although it may seem odd to impose liabilities on the person who claims delivery but who actually receives nothing, this will not invariably be so’. The example given by the Law Commissions is that where the goods are destroyed as result of buyer’s demand to take delivery at a particular dock where the ship delayed due to the shortage in water level at the dock. They have suggested that it is not unreasonable to hold the buyer liable for demurrage even where he has received nothing.365 In this particular case, it seems reasonable to suggest as such, however, the issue is not always as narrow as the one described by the Law Commissions and it is submitted following the above approach may result in exercise of questionable justice if the endorsee is to be held liable for more than the mere demurrage while he is left empty-handed. Thus, it is suggested that the

362 Ibid, para 33.
363 Law Commissions Report (n 54) para 3.15.; Carver (n 7) para 5.088.
364 The Berge Sisor [2001] UKHL 17, para 35.
365 Law Commissions Report (n 54) para 3.18.
question has to be interpreted based on the facts of each case in order to achieve fairness as much as possible.

3.1.2. Liability of the holder suing on behalf of another person

A question may arise is that whether a lawful holder of a bill under Section 2(4), who may exercise the rights acquired by virtue of Section 2(1) for benefits of another person who has actually suffered loss or damage as a result of breach of the contract of carriage, will be liable within the ambit of Section 3(1), or it is the beneficiary who should incur liabilities under the contract. It can be argued that, since the holder is the person who makes claim, he seems to be the person who is liable. On the one hand, this may seems to result in an unfair situation for the holder who bother the time and cost to sue on behalf of another person. On the other hand, however, it has to be reminded that there is nothing in Section 2(4) to oblige the lawful holder to exercise his rights in favour of the beneficiary of the claim.366

Therefore it can be suggested whenever the lawful holder ‘makes the claim’ he shall also incur liabilities. However, the story does not end here, since Section 3(3) provides that the liabilities imposed by this provision shall be without prejudice to the liabilities a person incurs by virtue of being a party to the contract of carriage. Thus, in this case if the shipper is the lawful holder and wishes to exercise his rights of suit against the carrier for benefit of the consignee, he may be placed under excessive degree of liabilities which seems neither justifiable nor reasonable. In any event, it is suggested that any exercise of the right under Section 2(4) of the Act shall be anticipated in an agreement between the holder and the beneficiary and also the person who makes the claim has to be protected with a type of indemnity from the person who actually has interests in the claim, in case any additional liabilities or costs may incur.

It has to be added that the same liability rules which apply to the bills of lading will also apply in respect of liabilities of the transferee when the shipping

366 Carver (n 7) para 5.097.
document issued is a sea waybill. However, when the goods covered by a ship’s delivery order form a part of the goods under the contract of carriage, Section 3(2) provides that the liabilities of a person entitled to take delivery of that part of the goods to which the order relates, are limited to those which relate to the goods covered by that order, but not more.

3.1.3. The extent of liabilities

The COGSA 1992 while adopting similar, though not identical, wordings compared to the BLA 1855, to specify the extent of liabilities to be imposed on transferee of a bill of lading, refers under Section 3(1) to ‘the same liabilities ... as if he had been a party to that contract’. Under the former legislation, there was no certainty as to whether those liabilities included all liabilities of the original shipper, or it was only extended to those which had been imposed and was related to the time after the shipment, or after the endorsement of the bill of lading. This issue has been, to some extent, responded at common law under the implied contract approach, in the sense that necessarily the liabilities imposed on the receiver of the goods are not equal to the original shipper’s liabilities under the contract of carriage. Liabilities arising from shipping of dangerous goods can be a good example in this regard. The view supported is that the receiver’s liabilities may not extend as much, at least based on the factor of ‘intention’ of parties.

However, the problem with the current legislation is that no similar factor is implemented for determining the extent of transferee’s liabilities under the COGSA 1992. Therefore, the abovementioned question is still unclear, in statutory sense, for no limitation is provided under Section 3(1) of the Act. The fact is that, under COGSA 1992, the transferee is regarded as if he had been a party to the original contract. Thus, on the appearance of the provision, it seems that he may

367 Ibid, para 5.103.
368 The Athanasia Comninos and George Chr Lemos (1979) [1990] 1 Lloyd’s Rep 277, 281 in which a contract was held to be implied as between the carrier and the consignee who took delivery of goods upon presentation of the bill of lading. It was held that the consignee could not be made liable with respect to the dangerous goods by virtue of an implied contract since from mere presentation of the bill and taking delivery it could not be assumed that there would be a that “the parties intended the consignee to be made subject to a retrospective liability for acts with which he had nothing to do.”
incur all range of liabilities which would rest on him as an original party. This is likely to include liabilities for freight, demurrage, or loss or damage to other goods and also those liabilities sustained by the carrier because of carrying dangerous goods on his vessel.

Following the aforementioned assumption, if *Brandt v Liverpool* was to be decided based on Section 3(1) of the Act, the facts of the case would suggest that the claimants (cargo receivers) would be held liable for carrier’s loss due to shipper’s breach in bad state of the goods before shipment which led to unloading by the carrier fearing damage to the ship and other cargo. Furthermore, it may be argued that this may extend the liabilities of the holder even beyond that imposed under the BLA 1855. However, it has also been argued that the holder of a bill is not held liable under the new Act only based on the fact that he has obtained the contractual rights as it is well established that he is held liable only if he takes one of the steps provided in the provision. Accordingly, it is suggested in Carver that ‘it seems reasonable to impose more extensive liabilities on the holder than may have been imposed under the BLA 1855.’

In contrast, one may insist on the fact that the wording of this provision imposes a liability for events and activities occurred at the port of shipment on which the holder (transferee) has had no control, such as alleged shipment of dangerous goods. As it has been argued in Scrutton, this reading is incorrect and the beneficiary in addition to the liabilities common to the carriage of goods by sea, i.e. freight and demurrage, will be liable for the liability resulting from shipper’s fault to which even the beneficiary has no association at all. Although the Law Commissions observed the same issue, they decided not to make special rules exempting the transferee from liability in the case of dangerous goods.

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369 *Brandt v Liverpool* [1924] 1 KB 575.
370 *Carver* (n 7) para 5.103.
371 Ibid, para 5.103.; J Bassindale (n 307) 416: ‘If, however, banks elected to exercise their rights by presenting the bill and taking delivery, there was felt to be no reason why they should not then meet the liabilities involved in doing so.’
372 Scrutton (n 65) para 2.033
373 Law Commissions Report (n 54) paras 3.20-3.22.; Ademuni-Odeke (n 163) 167.
However, it is asserted that commercial certainty dictates that ‘retrospective liability’ shall not be imposed on transferee of a bill of lading who could have reasonably no knowledge of or control over the pre-shipment activities. It is true that ‘a satisfactory line cannot be drawn at the moment of shipment’\(^\text{374}\) in order to decide which activities have been taken place before shipment or after it, however, it is argued that a reasonable degree of certainty can be achieved with regards to distinguishing the pre-shipment from post-shipment activities, since these are not abstract concepts and can be associated with real instances and acts. Therefore, it is submitted that the decision not made as to avoid extending the liabilities of the shipper to the transferee cannot be justified based on the reasons given by the Law Commissions in their report.\(^\text{375}\)

Furthermore, an advantage of this approach is that it can also be exempted in certain circumstances in order to offer an acceptable level of rationality. For instance, in cases where the transferee’s interests have been the core motivation of shipment of goods of dangerous nature, it will be sensible to impose the liabilities which have directly resulted from shipment of those goods on the transferee. Therefore, the facts of the case will be the decisive factor. Further, it is difficult to understand why the Law Commissions avoided making special rules with regards to, at least, the dangerous cargo. Not fully but a reasonable degree of limitation of liabilities of transferees would have been welcomed if had been incorporated into the Act offering certainty and fairness to the cargo interests.

Moreover, in more recent cases the attitude of English courts towards this issue seems to support this proposition. In both *The Berge Sisar*\(^\text{376}\) and *The Ythan*,\(^\text{377}\) although apparently the courts have followed the contrary view which was to assume the transferee liable for shipper’s liabilities with regards to loss or damage caused by dangerous cargoes, they have not held any transferee liable on behalf of

\(^{374}\) Ibid, paras 3.21.

\(^{375}\) Ibid, paras 3.18-3.22.


the shipper by way of a restrictive interpretation of the conditions to be satisfied under Section 3 of the Act.

Nevertheless, in any event, the consignee/endorsee shall be held liable to the extent that he has been notified by the original shipper.\(^{378}\) Furthermore, the liabilities arising from the matters out of the terms of contract of carriage are also not imposed on the consignee/endorsee.\(^{379}\) Therefore, it is wise to suggest that the parties who have interests in goods and seek to take or claim delivery, or make claims against the carrier, may seek advice before negotiating with the shipper or original holder of the shipping document on terms of the contract of carriage. Based on the context of the contract and also the underlying transactions, specific provisions or clauses may require to be incorporated into the terms of contract with regards to potential liabilities which might be incurred by or imposed on the cargo interest. In this way, the shipper and the consignee/endorsee are able to settle the issues regarding the liabilities, incurred by them to the carrier as a result of shipper’s breach, under the contract between themselves after the transfer was made.

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\(^{378}\) *Hain Steamship Co v Tate & Lyle Ltd* [1936] 2 All ER 597.

\(^{379}\) *The Helene* (1865) BR & L 415, 424-425: ‘The rights and the liabilities which the assignee of the bill of lading … has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him; but in these cannot be included the rights and liabilities as between the shipper and the master dehors of that contract in respect of other goods, or of the charterparty.’
Chapter II
The Rotterdam Rules
Chapter II: The Rotterdam Rules

Overview

It has been almost eight years since the Rotterdam Rules were open to signatures and so far, a total number of 25 countries have signed the Convention, three of them namely; Congo, Spain and Togo have also ratified the Rules. This is undoubtedly not what was anticipated by the UNCITRAL, and its Working Group, of the Convention’s fate. The Rotterdam Rules may be regarded as an improvement for the betterment of international carriage of goods by sea regime, only if they are accepted universally; a goal, given the present circumstances, which is not going to be achieved in the near future. A sporadically adopted uniform system will not only be an impediment to enhancement of global sea transport law, but also augments the conflicts of laws as well as commercial disputes.

It is reasonable to assume that certainty, harmonization, uniformity and modernization of laws form the Utopia which any international lawyer would dream of; however, are the involved regulators willing to pay the price to reach that destination? A question remains to be answered. Since the Rotterdam Rules do not fully provide a set of rights and liabilities for the consignees, and left a number of important issues out of their scope, this chapter will be divided into two principal and an additional mini chapter.

The first part is comprised of the consignees/endorsees’ rights which are not furnished in the final text of the Convention and the second part entails those rights and liabilities of the consignees/endorsees that are contained in the adopted version of the Rules. Also, the question of harmonization and modernization of the rules will also be provided in this part of the study. An additional third section is further provided which addresses the general question of uniformity. The Convention will then be assessed under these topics to see whether it is or will be capable of dealing with the relevant subjects.
The section on the rights that are eliminated from the Rotterdam Rules or those which have never been incorporated into the Convention is largely based on the discussions over the question of ‘right of suit’, for it is claimed to be the most crucial right of the consignees/endorsees that has been removed entirely from the instrument. As this is one of the many issues left by the Rotterdam Rules to be dealt with by the national or applicable laws, in addition to the rules of English law, the laws of a number of other jurisdictions, including the Continental European laws and Iranian law will also be examined to prove the significance of the shortfall of the Convention and that the decision to delete it from the instrument, has not been a logical choice.

The second part of this chapter deals with the consignees/endorsees’ rights and liabilities which are provided by the Rules in different capacities. The aim of this section is to illustrate the gaps, unclarity and deficiencies in the Rotterdam Rules regarding these rights and it will be explained how these provisions could be improved in order to firstly, serve the goals of the Convention efficiently and secondly, to protect the cargo owners by offering a reliable balance of interests as against the carriers. Besides the assessment of the Rules themselves, comparison with their counterparts in the English law will be conducted in each section in order to achieve the highest level of efficiency in analysis. Some of the provisions of the Convention are completely new to the English law, therefore where there is no exactly corresponding rule under the English law, it will be attempted to point out the most analogous concept of English law that shares the same purpose or gives the same effects.

The main argument of this chapter is that the Rotterdam Rules will fail to achieve their goals with respect to the rights and liabilities of the consignees/endorsees. Accordingly, general provisions of the Convention will not be addressed, thus not examined, as they fall out of the ambit of this study. In order to develop the argument in a thematic method, it is suggested that the examination of the
following questions throughout this chapter will facilitate the path to resolve the very fundamental issues within our concern:

a) Are the rights and liabilities of the consignees/endorsees or in a broader sense, the cargo interests, distinctly and clearly defined and specified by the Rotterdam Rules?

b) In case the Rotterdam Rules come into force, will they be able to maintain a flawless balance among the shippers, carriers and consignees’ interests?

c) Given the complicated, extensive and relatively ambiguous wordings of the Rotterdam Rules, will they be capable of forming a reliable international carriage of goods by sea regime for parties with weaker bargaining power?

d) Is the Convention fit for the diverse purposes and practices of international trade in order to provide solutions to potential conflict of laws, thus being capable of ending the coexistence of different treaties on international carriage of goods by sea?

e) Are the rules of English law, either provisions of Carriage of Goods by Sea Act 1992 or common law, prepared to deal with the issues related to the rights and liabilities of the consignees in the modern era? If not, is it reasonable for the UK to ratify the Rotterdam Rules?

f) Will the Rotterdam Rules, in case of gaining the force of law, be the ‘only’ uniform international maritime regime?

g) Are the Rotterdam Rules prepared effectively to cope with the realities of new technologies? In other words, is the Rotterdam Rules a convention for future?
Part I - The rights which are removed from or never implemented into the Rules

Naturally, it is expected that any update to the current maritime regime presents solutions to the existing problems. Regrettably, this is not the case where the Rotterdam Rules are the subject matter. The Convention could have been an improvement to the international carriage of goods by sea system provided that it had offered a clear, well-established and effective body of rules. However, what the Convention offers in certain aspects such as rights of delivery, transfer of rights, or the rights of controlling party, is mostly a compilation of unsatisfactory provisions in the eye of cargo interests. This becomes even more unpleasant when it is made clear that a number of essential issues of the maritime law are omitted from the application of the Convention.

To answer the questions posted in the introduction, in this section we shall review the goals of the Rotterdam Rules set by their drafters to find out whether once the Convention gains the force of law it will be able to accomplish those targets from the cargo interests’ perspective. In other words, now that the Convention does not contain regulations for certain matters, will this be an impediment towards the way reaching its goals? A comparison between the English law and the Rotterdam Rules will be conducted in each section in order to analyse the weaknesses and strengths of the Rules. Since the fundamental issues discussed in this section have been eliminated from the scope of application of the final text of the Convention, and accordingly left to be judged by national or applicable laws, additional legal systems will be compared in a number of sections in order to examine what will be their state if the Convention comes into force. If any, suggestions will be made at the end of each part respectively.

1. Will the Rotterdam Rules achieve their principal goals?

It is believed that the answer to this broad question is a matter of foreseeability, feasibility and functionality. At the time of writing of this thesis, the Rotterdam Rules have not come into force thus there is no case law to study on the application of the Rules to examine how efficient the provisions of the Convention
can be in use. This leaves us with the only option of assessing the goals of the Rotterdam Rules to be achieved once it is adopted and ratified by States around the globe to see whether this convention, within its current capacity, is capable of resolving the issues of current practice and modern world of commercial transport by sea.

The preamble of the Rotterdam Rules sets a number of targets to be accomplished by enforcement of the Convention. These can be divided into three general categories: a) promotion of legal certainty and enhancement of efficiency and commercial predictability in the international carriage of goods; b) harmonization and modernization of the rules governing international contract of carriages; and finally c) promotion of the development of trade in an equal and mutually beneficiary. 380

1.1. Promoting legal certainty and commercial predictability

Typically, one of the main purposes of any form of trade instrument, whether national or international, must be to promote legal certainty and predictability. Legal certainty is a principle of law that allows the individuals or legal entities to establish their rights and responsibilities and act accordingly by making reference to the precise and clear rules of the community. 381 In the context of trade law, this means that traders and business entities will be able to plan their prospective commercial activities according to a clear set of rules and to know what the consequences of their acts are. Therefore, promoting legal certainty by an international transport law instrument can be done by clearly specifying, through its provisions, the rights and obligations of the parties to a contract of carriage.

In other words, an international transport convention can offer legal certainty only if it provides a comprehensive and accessible distinct set of rules identifying the


parties rights and their correlative obligations as well as the potential liabilities. Clarifying how these rights are transferred and the corresponding liabilities are imposed will be the next step towards the promotion of legal certainty and predictability. Succeeded to establish such an exhaustive scheme, it is submitted that the parties will be aware of a) how enforcing rule of law through application of a convention can protect them by entitling them of certain privileges; and respectively, b) what duties are expected to be carried out by them; finally, c) what the consequences will be if they do not comply with their contractual and statutory obligations.

The Rotterdam Rules’ attempt to provide a detailed compilation of rules regulating shipper’s obligations and liabilities,\(^{382}\) which were out of the scope of previous sea carriage conventions, is thought to be a step forward, but simply inadequate. Therefore, failure to properly create a functioning system to precisely define any of the aforementioned statements will result in chaos and uncertainty, thus adding more problems to the existing ones. It is argued that either this lack of success is based on avoiding to deal with certain matters in order to reach a political consensus among the consulting States or organizations, or it is merely subject to a technical drafting reason, does not justify the existence of deficiencies.

To clarify how the Rotterdam Rules will fail to fully offer legal certainty and predictability with regard to the question of rights of the consignees/endorsees, the ‘Achilles heel’ of the Convention; i.e. the rights of suit will be analysed afterwards. Why the relevant chapter was deleted and what could be the alternatives will be discussed accordingly. It has to be reminded that one of the key research questions of this thesis is to assess the rights of the consignees/endorsees under the Rotterdam Rules. Earlier, it has been reviewed that one of the essential rights of the cargo interests; i.e. the right of suit was eliminated from the scope of the Convention during the 18\(^{th}\) session of the

\(^{382}\) Chapter 7 of the Rotterdam Rules.
UNCITRAL Working Group III\textsuperscript{383} and the decision was to hand over the relevant issues to be settled by national laws. Further, it is also reminded that one of this research’s targets is to illustrate that the Rotterdam Rules have failed to gain the legal certainty through guiding the parties to their rights.

In other words, while it is attempted to extract those provisions and rules dealing with the rights of cargo interests from the Convention, it is also shown that even when a general understanding of these rights is attained, it is still not clear whether the Rotterdam Rules in this capacity can ensure such rights would be transferred to or vested in the rightful persons. For example, in case of non-negotiable transport documents, it will be shown while the English law provides a reliable and effective solution to the question of transfer of rights, application of the Rotterdam Rules will not achieve such efficiency. Also, more defects will emerge when it comes to the use of electronic equivalents to paper-based transport documents.

As is considered, it is strongly claimed that the absence of ‘right of suit’ as one of the vital rights of the consignees/endorsee or any third parties with interests in the goods is one of the elements that will lead to failure of the Convention accomplishing its task of promoting legal certainty. The right of suit or the right to claim damages is one of the most essential rights for an aggrieved party to a trade contract. In case of a contract of carriage of goods by sea, this means that when the goods are lost, damaged or delayed, the interested party will have the right to ask for compensation. Unfortunately, as it will be discussed, ‘who’ will be entitled to this right is a matter left out of the Convention.

As a result, inevitably, deletion of the entire chapter on right of suit will have considerable impacts on cargo interests in case of any dispute over the goods, since the Convention, left the issue to the national laws who do not address it in the same manner. In fact, it is well known that even when written established laws exist; it is predictable that different jurisdictions have different approaches

\textsuperscript{383} UNCITRAL Report of Working Group III (Transport Law) on the work of its eighteenth session A/CN.9/616, para 118.
towards interpretation of those rules, thus, leading to potential contradicting results. Of course, the question of rights of suit, which is not a procedural matter, as will be explained, is not addressed in a same fashion in different States with diverse legal systems and backgrounds. Even the most optimistic lawyers do not believe that this is going to help the Convention reach its goal of legal certainty. Subsequently, examination of the issue under the laws of a number of continental European countries as well as Iranian law and, lastly, a comparison with the English law will aid to develop this argument.

1.1.1. Brief History

The initial references to the rights of suit were made by the UNCITRAL in its provisional agenda titled as ‘Possible future work on transport law’ at its 34th session in 2001, in which it was decided to define the rules dealing with ‘identifying the party that is entitled to bring an action against a carrier for loss, damage or delay’ in a more precise way. This was decided due to the suggestion made by International Subcommittee who reported that in many legal systems, the issue of ‘who’ has the rights of suit could be problematic. Accordingly, the UNCITRAL Working Group III laid out the earliest provisions governing the issue of rights of suit at its ninth session in the draft Chapter 13 under the same name.

1.1.2. General contractual rights

In general, two methods of obtaining the rights are assumed by the draft instrument. The first one is draft Article 13.1 which applies generally to contracts of carriage without the need for any transport document being issued or in case a document is issued, irrespective of its nature. And the second one is when ‘a negotiable transport document or negotiable electronic record is issued’. Cases of

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384 UNCITRAL Report of the Secretary-General in thirty-fourth session - Possible future work on transport law A/CN.9/497 para 49.
this kind are governed by draft Articles 13.2 and 13.3. In all events, the person to be sued is either the carrier\textsuperscript{386} or the performing party\textsuperscript{387}.

Draft Article 13.1, without prejudice to Articles 13.2 and 13.3, states that the rights of suit under the contract of carriage can be asserted by a) the shipper, b) the consignee, c) any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage, and d) any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer. In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.\textsuperscript{388}

1.1.3. When a transport document or an electronic transport record is issued

The second paragraph of draft Article 13 is intended to deal with the situations where a negotiable transport document or an electronic equivalent is issued. It provides for the holder to be entitled to the contractual rights against the carrier or performing party states, ‘without having to prove that it itself has suffered loss or damage.’\textsuperscript{389} It continues in case the holder himself does not suffer the loss or damage, ‘it is deemed to act on behalf of the party that suffered such loss or damage.’\textsuperscript{390} It seems that an unconditional right to claim is given to the holder of a negotiable transport document or a negotiable electronic transport record.

\textsuperscript{386} Carrier defined in Article 1(5) of the Rules as ‘a person that enters into a contract of carriage with a shipper’.

\textsuperscript{387} Under Article 1(6)(a) of the Rotterdam Rules the performing party refers to ‘a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control’. Article 1(6)(b) excludes any person who is employed by anyone other than the carrier.

\textsuperscript{388} Ibid, Article 13.1.

\textsuperscript{389} A/CN.9/WG.III/WP.21.

\textsuperscript{390} Ibid.
The third paragraph of same Article, however, envisages a situation where transport document or an electronic equivalent is issued but the claimant, being one of the persons in draft Article 13.1 is not the holder. In this case, the burden of proof is on the claimant to show that he has suffered loss or damages and also he must ‘prove that the holder did not suffer such loss or damage.’

1.1.4. Deficiencies in the preliminary draft

One of the deficiencies pointed out by the Working Group was that two parties listed in the Article 13.1 could suffer loss at the same time, so that it should be made clear that both of them would have the right to sue the carrier or performing party with respect to their portion of loss. Another problem raised was that listing the parties might be considered ‘unduly restrictive’ and it could exclude certain parties whose ‘legitimate right of suit should be recognized’. There were also some concerns with regard to limiting the rights of suit in a way that it would contradict with the fundamental rights of those parties who had sufficient interest to be recognized to have a right to claim. Moreover, objections made to the general structure of the provision as it was thought that the approach taken was an indication of recognizing an ‘action’ rather than a ‘right’ which was believed to be in contrast with the approach taken by many legal jurisdictions. Therefore, the Secretariat was asked to prepare an alternative version of this provision while taking account of the issues raised by the delegations.

Of course it can be seen that the conjunction of the last two paragraphs would lead to a problematic situation where the holder of a transport document is given the right of suit without the need to prove that he has suffered the loss or damage. This was also raised by the Working Group itself and it was decided that more clarification needed to be made in that regard as well as the possible difficulties with subrogation. All in all, the only positive point of this provision is the rule incorporated in second sentence of draft Article 13.2, which is purposed to avoid

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391 Ibid.
393 Ibid, paras 160-162.
for the carrier paying twice; an issue which is commonly called the ‘multiplicity of claimants’ and will be later discussed under the English law.

1.1.5. Initial changes to the first draft

Although there had been strong support expressed for deletion of the first paragraph entailing the general rule on rights of suit,394 the Working Group postponed any decisions on this issue to completion of reviews and further discussions. The problems with the preliminary draft of the Convention led to additional deliberations and resulted in alteration and modification of the initial provisions. Taking into account the proposals made by the delegations during several sessions of the Working Group III as well as discussions conducted in unofficial gatherings such as the London Seminar,395 the rules governing the rights of suit were also changed in order to serve the purposes intended by the law makers in a more efficient way. The outcome was prepared as a slightly revised version of previous chapter in addition to a new alternative to the first paragraph and delivered at the Working Group’s twelfth session.396

The most outstanding change made in the revised draft provisions on rights of suit was formulation of an alternative (Variant B) to the initial general rule (Variant A).397 Variant B was introduced to recognize the right of suit for any person with actual interests in the goods who had suffered loss under a contract of carriage. Draft Article 63 Variant B states that ‘Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, where that person suffered loss or damage.’398

395 Two-day Round Table discussions in London held in February 2004 in which all of the UNCITRAL delegates and interested parties were invited by Professor Francesco Berlingieri. It was discussed that the rules on rights of suit might conflict with the provisions of other transport law conventions on the rights of suit, particularly when the contract of carriage was of a multimodal form.
396 UNCITRAL Draft instrument on the carriage of goods [wholly or partly] [by sea] A/CN.9/WG.III/WP.32.
397 Article numbers were also changed in this order: Article 13.1 changed to Article 63, 13.2 to 64 and 13.3 to 65.
398 A/CN.9/WG.III/WP.32.
This again, in a similar way to Variant A, offers a very general and extensive contractual right of suit to the potential claimant without referring to a known mechanism for assigning how the ‘legitimate interest’ should be ascertained or how the claimant must prove his loss or damage. Another deficiency of this rule is that it refers to claimant’s interest in ‘performance of any obligation’ while there is no definition of ‘performance’ provided by the instrument. The vague wording of the provision also creates the possibility of interpreting the rule in divergent ways. Finally, the application of the rule would be too ambitious given its inclusivity.

Following the patterns adopted by the Commission in order to minimize possible difficulties, draft Articles 64 (formerly 13.2) and 65 (formerly 13.3) were also, to some extent, modified. In draft Article 64, in addition to a minor change in the wordings, the last sentence was unreasonably removed. As it has been submitted earlier, this was the only useful rule in the entire provision which had been designed to prevent the issue of ‘multiplicity of claimants.’ No explanatory note has been given as to why this sentence was deleted and the unpleasant side is that this alternation was carried out without any request being made to the Secretariat. Draft Article 65, on the other hand, was subject to less important changes. The reference to the person in Article 63 (13.1) was eliminated and minor drafting adjustments were made to the wording of the provision.

1.1.6. The final draft provision

For the purpose of evaluation of the Rotterdam Rules with respect to the rights of suit, the final draft chapter before omission from the Convention will be assessed and compared to the rules of the COGSA 1992 to analyse what would have been the results, provided that the Convention contained those provisions. This examination is merely conducted to find out whether deletion of the chapter by UNCITRAL has been a reasonable choice or at least justifiable on its merits. The aim of this analysis is to argue that even when these provisions are not offering the

399 The phrase ‘without having to prove that it itself has’ was changed to ‘irrespective of it itself having’.
400 Read as ‘If such holder did not suffer the loss or damage itself, it is be deemed to act on behalf of the party that suffered such loss or damage.’
401 A/CN.9/WG.III/WP.32, footnote 212.
best solution, leaving the issues to be answered by national applicable laws would only aggravate the situation.

At its sixteenth session in September 2005, the Working Group III made its final amendments to the provisions governing the rights of suit. Draft Chapter 14 titled as ‘rights of suit’ envisages two principal categories under which the parties may assert their contractual rights against the carrier or performing party. In this way, the Convention made difference between the situations when a negotiable transport document or an electronic transport record had been issued and when there was no transport document at all.

To form the latter, draft Article 67, following the previous approach taken by drafters, provides two different alternatives (aka Variants). Variant A grants the rights under the contract of carriage to a) the shipper b) the consignee and c) any transferee of rights of the shipper or the consignee, or any person who has obtained contractual rights by subrogation under the applicable national law, such as an insurer. A similar condition provides that all of these parties can enjoy their rights of suit to the extent that they have suffered loss or damage as a result of a breach of the carriage contract. Also, without any substantive change to the earlier draft, in case of obtaining the rights through transfer or subrogation, the second part of the draft Article entitles the carrier and performing party to ‘all defenses and limitations of liability that are available to them under the contract of carriage and the Convention.’

Alternatively, no changes has been made to Variant B of draft Article 67 which recognizes a much unspecified, unlimited and unreasonably extensive right of suit for a broad range of parties. It states: ‘any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.’

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402 As a formatting matter, the number of chapter was changed from 13 to 14. Paragraph (d) of Article 63 was combined with paragraph (c) of the same Article. Also, Article 63 was renumbered to 67 and the text of Article 65 was moved to paragraph (b) of Article 68 (formerly 64).
403 Article 67.1 (Variant A).
Furthermore, the second category of this chapter alludes to the cases when there is a negotiable transport document or an electronic equivalent is involved. Draft Article 68(a) entitles the holder of that document to the rights of suit to be brought against the carrier or performing party without being suffered the loss or damage himself. On the other hand, when the claimant is not the holder, draft Article 68(b) provides him with the rights of suit on two conditions: firstly, he has to prove that he has suffered loss or damage and secondly, he must prove that the holder is not the aggrieved party.

1.1.7. Deletion of the rights of suits

Eventually, in an unexplained and unreasonable manner, the UNCITRAL at its 18th session decided to delete the entire chapter on the rights of suit from the draft convention. Why the rules were eliminated is difficult to understand since firstly the published notes of drafting sessions are not helpful to understand the Working Group’s underlying intention; and secondly, the brief explanations given by the draftsmen is neither legally nor technically convincing from a maritime lawyer’s point of view. Nevertheless, it can be said that this decision was made on the basis that they simply could not reach a consensus on the substance of the issue.

It is absolutely unsatisfactory since the actual purpose of a uniform international regime is to provide a solution which, although not favourable to each one of the parties, may be regarded as an acceptable method to the majority or the one that can be supported by the majority. Additionally, this is how delegations in any decision-making forum reach consensus. Thus, the mere fact that the Working Group could not achieve a general agreement, to finalize a ‘two-provision chapter’ after a series of discussions and deliberations on such a substantive subject, is strongly claimed to be the result of insufficient consideration of the issue, an evasion of responsibility and lack of devotedness.

405 Ibid, para 116.
It can be clearly found out by a thorough study of travaux préparatoires of the Rotterdam Rules that the subject of ‘rights of suit’ has been taken into consideration in the least possible deliberation sessions comparing to other fundamental matters, thus received lesser attention. Hence, the results would not be surprising when sufficient amount of time and endeavour have not been dedicated to prepare a clear, precise and efficient collection of rules. Consequently, an acceptable solution could not be multilaterally agreed on.

1.1.8. What if the Chapter was not deleted?

Having discussed that the deletion of the rules governing rights of suit was not a reasonable decision made by the UNCITRAL, it is useful to observe the other side of the story which is what would have been the results, if the chapter on rights of suit had been retained in the Rotterdam Rules. The main question to be answered by the result of this discussion will be whether the Rotterdam Rules, provided that they had contained the regulations on rights of suit, if ever ratified in the UK, would offer more certainty to the existing English law rules on this subject. In short, the answer is negative.

The argument in this section is based on the assessment of the provisions of the COGSA 1992 together with the common law principles of English law, analysed in the first Chapter of this thesis, and follows that the English law a) firstly address the common issues of international trade by coping with its legal nature and commercial realities; and b) secondly, in contrast to the imprecise, loosely drafted and misleading provisions of the Rotterdam Rules, the English law set out a precise range of detailed, practically effective and insightful regulations.

1.1.8.1. Contract-based rules

In contrast to the COGSA 1992, under the variants of Article 67 of the draft convention, being entitled to the right of suit is not dependant on the issuance of the bill of lading or in the Convention’s term, the transport document. Therefore the scope of application of this Article is, unnecessarily, broader than of the COGSA 1992 that provides for the rights of suit to be vested in or transferred to
certain shipping documents.\textsuperscript{406} The draft Convention ties the entitlement to the rights to the ‘contract of carriage’ instead of referring to ‘transport documents’ as the basis of imparting the rights. The term is defined under Article 1(1) of the Rotterdam Rules as ‘a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.’ The effect of using the words ‘other modes of transport’ leads to the multimodality feature of the Convention.

It is worthy to remind that one of the main objectives of introducing the COGSA 1992 was to remove the difficulties associated with the common law doctrine of ‘privity of contract’. In other words, the Act offers opportunity to the consignees/endorsees who have not been involved in the initiation of the contract of carriage, made between the shipper and the carrier, to enjoy the rights incorporated in the shipping document which is functioning as an evidence of the contract of carriage. In a similar approach, Article 7 of the Rotterdam Rules provides that ‘…this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention.’ The effect of this Article seems to be that the Convention \textit{a fortiori} applies as between the carrier and consignee or a holder of transport document who is not an original party to the contract of carriage included in the application of the Convention. Therefore, it seems that if the rights of suit had been included in the Convention, Article 7 would have operated to extend the rights of suit even to a wider range of persons including those under charterparties, contracts for the use of a ship or non-liner transportation.

\textsuperscript{406} This is very surprising since the scope of Article 57 governing transfer of rights under the Rotterdam Rules is very limited compared to that of the COGSA 1992, given the fact that the Convention applies to ‘any contract of carriage’. So how they would wanted to manage the contradiction between the Articles on ‘rights of suit’ and ‘transfer of rights’ is very unclear.
Thomas\(^{407}\) suggests that the purpose and effect of Article 7 is ‘to make it clear that where such a contract is established the Rules will apply provided that they are otherwise applicable.’ The problem with this proposition is that it contradicts the intention of the Working Group which was to protect the third parties ‘by the mandatory provisions of the Instrument even when the Instrument is not applicable due to the provisions of exclusion relating to the original contract and the original contracting parties’.\(^{408}\) Therefore, it makes good sense to suggest, by definition, that the effect of this Article 7 is not to be limited to the situations where the Convention is otherwise applicable, because many of those events are already covered by the Convention.

It has been reviewed in the first chapter on English law\(^{409}\) that Section 2(1) of the COGSA 1992 entitles the following persons to the rights of suit under specific shipping documents: (a) the lawful holder of a bill of lading; (b) the person to whom delivery of the goods covered by a sea waybill is to be made by the carrier; or (c) the person to whom delivery of the goods to covered by a ship’s delivery order is to be made in accordance with the undertaking contained in the order, as if he had been a party to that contract.

In contrast to the precondition set out in Section 2(1) of the COGSA 1992 for the holder to be ‘lawful’ in order to be entitled to the rights, there is no such requirement entailed in the draft Article 67. This Article, following a very simple method, grants the rights of suit to any party who can by any means becomes involved in the contract of carriage. The first one is the shipper who is obviously has the rights of suit under the terms of the contract he made with the carrier. This person cannot be compared to ‘the lawful holder of the bill of lading’ under the COGSA 1992, since the basis of this rule, as it is pointed out, is the contract of carriage and not the transport document.\(^{410}\) Further, the range of persons who can

\(^{407}\) D R Thomas (n 280) 450.
\(^{408}\) A/CN.9/WG.III/WP.51 para 30.
\(^{409}\) See Chapter I section 2.2.
\(^{410}\) However, it has been discussed that where the bill of lading is endorsed back to the shipper, he may be entitled to the rights of suit though operation of Section 2(2)(b) of COGSA 1992.
become lawful holders under bills of lading is much wider than those who are identified as ‘the shipper’ under the draft Article 67.

Under draft Article, the consignees are also given the rights to assert against the carrier or a performing party. This category cannot be compared to the position of consignees under the English law since the definition of the ‘consignee’ is different under the two systems. Under the COGSA 1992, the consignee of the goods, to which the bill relates, falls within the definition of holder as ‘a person with possession of the bill [in good faith] by virtue of being the person identified in the bill’. Article 1(11) of the Rotterdam Rules defines consignee as ‘a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record’. The position under the COGSA 1992 is restricted to possession of the shipping document while the Rotterdam Rules recognize a person as the consignee even when there is no transport document issued. The wider scope of the latter clearly would result in uncertainty since in case of successive consignees, where several persons are named as consignees in succession, the question is to which of the consignees the rights are transferred. In other words, which of the successive consignees is the lawful holder and which of them is in possession of the bill.

The final category of draft Article 67 comprises of transferee of shipper’s or consignee’s rights or the person who has obtained the contractual rights ‘by subrogation under the applicable national law’. An insurer is an instant example given by the provision in this case. The broad scope of the draft Article is once again highlighted in the third category, since the person who becomes entitled to the rights by virtue of ‘transfer’ of those rights, would enjoy the same rights as the shipper and consignee. It is considered that the unlimited scope of the shipper and consignee category can result in inclusion of many potential parties who may have not suffered loss or damage. Thus, that extensive range of parties can transfer their

411 Section 5(2)(a) of the COGSA 1992.
rights to other parties and vest in them the rights of suit. The rule is submitted to be unnecessarily broad and unsatisfactorily unclear.

The second part of this subsection is however an innovation to the concept of rights of suit, as the COGSA 1992 does not expressly refer to the question of insurance or subrogation. Although the difficulties surrounding the insurance had been raised in the report of Law Commissions,\textsuperscript{412} this issue was not incorporated in the Act. Under the insurance law, it is established that when the underwriters settle the assured’s claim, they are subrogated to all of the respective rights of the assured.\textsuperscript{413} This appears to include the rights of suit. Comparing to the COGSA 1992, this rule of the Rotterdam Rules can be regarded as an additional security measure to protect the interests of those who are indirectly involved in the underlying transaction. However, as it is stated earlier, because of the loosely drafting of the provision of the Convention and their unclear scope of application, it would seem difficult to acknowledge how the effectiveness of this rule could be achieved in practice. Also, the reference to subrogation is made unconditional, thus it would result in double insurance which is already solved by the doctrine of subrogation under common law.\textsuperscript{414}

All of the above parties under draft Article 67 may assert their rights of suit to the extent that they have ‘suffered loss or damage in consequence of a breach of the contract of carriage’. It is not clear whether the loss incorporated herein also includes the loss as a result of delay. Apparently, this part of the draft Article was intended to act as a general rule to limit the loss or damage to what has actually been suffered by the aggrieved party; however a fair interpretation of this rule seems not possible as no published records are available by the Working Group to understand the \textit{raison d’être} of this added condition.

In an even more general approach, Variant B of the draft Article 67 was presented to provide an alternative version to the original drafted version, with the intention

\textsuperscript{412} Law Commissions Report (n 54) para 2.15.  
\textsuperscript{413} Simpson v Thomson [1877] 3 App Cas 279.  
\textsuperscript{414} Yorkshire Insurance v Mlsbet Shipping [1930] 46 TLR 451.
of extending the scope of application of the rule to those who have ‘legitimate interest’ in the contract of carriage in case they have suffered loss or damage. This provision is drafted in general terms and it is doubtful that it would have been approved by the Commission if the chapter was decided to be existed in the final Convention. It seems impossible to find any equivalent to this provision under any operating legal system since the scope of application of this rule can be triggered by any imaginable single act of any of the parties. Therefore, no counterpart provision can be found under the English law to be compared to this very extensive regulation.415

1.1.8.2. Documentary rules
In a very irregular fashion, the draft Convention divided the rights of suit owners into two categories: a) where there is no document issued or at least it is not known whether it is issued or not; and b) where a negotiable transport document or negotiable electronic transport record is issued. The second assumption is regulated by draft Article 68. The very first dissimilarity of the rule incorporated therein with as of the COGSA 1992 is that the draft Article 68 only applies to the negotiable416 shipping documents. Therefore, it appears that only ‘order’ and ‘bearer’ bills would fall in the ambit of this rule, which could be regarded as an equivalent to Section 1(2)(a) of the COGSA 1992 which gives the rights of suit to the holder of the negotiable bill of lading. It follows that the seaway bills, which are ordinarily being used in everyday business of the maritime sector, and ship’s delivery orders are excluded by this draft provision.

The draft Article 68, provided that a transport document or its electronic equivalent is issued, entitles two persons to the rights of suit: a) the holder; and b) the claimant who is not the holder. Regarding the holder, the same aforementioned discussions have to be restated. The rights are granted to the

415 The only mention of ‘interest’ is made in Section 2(4) of the COGSA 1992 which deal with the situations where a holder who has not actually suffered loss is allowed to exercise his rights of suit for benefit of the person with ‘any interest or right in or in relation to goods’.
416 It is defined in the Article 1(15) of the Convention as ‘a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

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holder in an unconditional manner. Even more problems arise here with respect to
the second part of this subsection which provides that the holder is entitled to the
rights ‘irrespective of whether it suffered loss or damage itself’. The immediate
result would be any holder of the transport document, whether or not has
obtained the document lawfully or in good faith, and without even having
suffered the loss or damage can bring an action against the carrier. It seems that
the Working Group suddenly came up with an idea to make the situation even
more unclear.

It is made even more complicated by the second part of the Article which provides
that ‘when the claimant is not the holder, it must, in addition to proving that it
suffered loss or damage in consequence of a breach of the contract of carriage,
prove that the holder did not suffer the loss or damage in respect of which the
claim is made’. The cases where the person who suffers loss or damage but has not
yet come into possession of the transport document, is readily addressed by the
COGSA 1992 under Section 2(2). In form of two exceptions to the general rule, it
entitles the rights of suit to a) the receiver of the goods who obtains delivery prior
to being in possession of the bill; and b) the holder who comes into possession of
the bill after delivery of the goods ‘as a result of the rejection’ of the goods or bill
by an on-buyer.

Moreover, under the draft Article 68, the burden of proof is on the claimant, who
in addition to proving his loss, has to show that the holder has not suffered the
loss. The main question here is: who is usually the claimant in such events? If the
claimant is a person who does not possess any transport document, and also it
appears that he is not the transferee of any document, so if he is in position of a
‘consignee’, he can resort to the rules incorporated in draft Article 67 and refer to
the contractual terms. But the main problem is that the consignee is not usually the
original party to the contract of carriage. Therefore, his only means of remedy is to
rely on the contract evidenced in the transport document. Consequently, when he
is neither in possession of the document, nor an original party to the original
carriage contract, on what terms could he prove that he is the one who has actually suffered and not the holder who is in a better position to prove that he is the one entitled to the rights of suit?

On the one hand, having examined the Rotterdam Rules deleted provisions, it seems convincing that the respective Chapter is deleted. On the other hand, when the draft provisions are compared to those which have been finalized, it can be certainly suggested that the needed effort to improve the rights of suit provisions have not been devoted by the draftsmen. The concept of rights of suit with all its complexities and legal technicalities is not a very accessible subject matter to be readily digested. It obviously needs careful consideration and delicate examination in order to reach the satisfactory level of reliability.

Nevertheless, the provisions do not exist and that is the only ‘certain’ thing about the ‘rights of suit’ under the Rotterdam Rules. As it has been reviewed earlier, any matter which is left out of the application of the Convention has to be dealt with by the applicable law. It is argued that while more efforts could have been endeavoured on this subject during the deliberations of the UNCITRAL to reach an agreement on a precise, clear and uniform set of provisions to regulate the rights of suit and the draftsmen of the Convention decided to refer this very fundamental issue to the national laws, this decision will only augment the existing difficulties and disharmony of laws since different jurisdictions address the question differently and even, sometimes they provide no answer.

1.1.9. Continental Europe law

Europe as the world’s second largest exporter of goods plays a central role in the world trade market.417 Also, European nations are largely relying on the maritime trade. It is worth mentioning that in addition to 43% of Intra-Europe, an estimate of 90% of the Europe’s trade with countries outside European Union is handled through sea carriage. Moreover, European shipowners possess 40% of the world’s

commercial fleet. Based on these statistics, it suffices to say that the European shipping industry forms an important part of international carriage of goods by sea.

Of course, conducting business with or performing trade activities in the Europe thus require a clear understanding of the rules governing commercial contracts. These rules, however, are not similar from one European country to another, although almost all of the continental European legal systems are derived from the same root which is civil law.

Occasionally, in case of any dispute arising from the contract, the abovementioned differences may lead to problematic situations where for example the parties cannot predict the legal consequences of their acts. Also, it might be the case where the parties to a contract are not fully aware of their rights when, following a loss; they need to sue the other party in a foreign court. On the other hand, for a party against whom an action is brought in a country other than his own, it might be difficult to be informed of his potential defences, or to have access to the correct legal information to protect his interests.

As it has been discussed earlier, certain matters are removed from the Rotterdam Rules’ scope of application. One of them, i.e. the rights of suit, is to be decided by the national applicable laws. European countries which form an essential part of the international sea transport will also be affected by this regulation, in case the Convention gains the force of law. This impact will even lead to more complicated situations in certain jurisdictions. Therefore, in the following sections, the question of ‘who’ has the right to sue the carrier will be answered by examining the laws of a number of continental European countries to show that how destructive can be the consequences when an international instrument fails to offer uniformity and integrity.

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1.1.9.1. Dutch law
The reasons for choosing the Dutch law as the primary example of a continental European country are firstly, although the Netherlands is a civil law nation, the shipping industry in that country is so engaged with the custom and practice that solving the maritime issues without referring to case law is not an easy task. Therefore, what provides answers to the issues of carriage of goods by sea is a mixed legal system, not a mere codified legal regime. Secondly, the scope of application of the Dutch law is very broad since Article 5(1) of the PIL Statute Maritime and Inland Waterway Law provides that regardless of the chosen applicable law, determining who has the title to sue must be carried out according to the law of the State in which the port of discharge is located. Thus, any contract of carriage naming a port in the Netherlands as the port of discharge has to be governed by the Dutch law with respect to the question of who has the title to sue.

Finally, studying a number of cases brought to Dutch courts shows that the question of ‘who’ is allowed to sue the carrier can be so problematic that there have been several cases resulted in failed claims, only because they have been brought by the wrong party, thus put the carrier in a stronger defending position. This means that ‘who’ has the right of suit is not completely settled under the Dutch law, which makes it an interesting example to show how an effective and uniform international maritime set of rules could avoid inconsistency and conflict of rules, hence offering legal certainty to differing systems of law across the globe.

In the Netherlands, by virtue of Article 8:441(1) of the Dutch Civil Code, the person who is both the regular and lawful holder of the bill of lading is entitled to the right of delivery as well as the rights of suit. Unlike the English law whose emphasis is on the good faith of the holder of the bill of lading as a prerequisite of becoming the lawful holder, the Dutch law does not bear such a

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419 N.H. Margetson, ‘Who Can Claim or Sue under a Bill of Lading?’ in M.L. Hendrikse and others (eds), Aspects of Maritime Law Claims under Bills of Lading (Kluwer Law International 2008) para 8.1. It provides that: if a bill of lading has been issued, only the lawful holder of that bill of lading has the right to demand delivery of the goods from the carrier under the bill of lading in accordance with the carrier’s obligations, provided that lawful holder became the lawful holder in a lawful manner.
420 Regelmatige houder.
421 Rechtmatige houder.
condition upon being the lawful holder. The lawful holder of a bill of lading is defined by Dutch scholars as ‘the consignor of the bill of lading or in case of a straight bill, the consignee named on the bill, or the holder identified by a lawful series of endorsements in an order bill or finally the bearer of a bearer bill.’

Unless it is proved otherwise by a third party, generally the right of suit is given to the lawful holder of the bill of lading. The lawful holder presents the bill to the carrier and if it is in order, he will be entitled to take delivery of the goods. However, this is not always the case, since there are occasions when the lawful holder is not the same person entitled to take delivery of the goods. This is where the Dutch law makes difference between the ‘regelmatige’ or regular holder and ‘rechtmatige’ or the lawful holder. Therefore, if the carrier can prove that the person presenting the bill is not the ‘rechtmatige’ holder, he can refuse to deliver the goods, although that person can still enjoy the right of suit.

The key problem with the subject of consignee’s rights under the Dutch law arises when it comes to practice. Generally, cargo buyers hire forwarding agents to obtain delivery of the purchased goods from the ship at the port of discharge. In case of an order bill, the buyer endorses the bill in blank, rendering it as a bearer bill, thus the forwarding agent as a lawful holder, acting as the representative of the actual cargo interest, can take delivery of the goods by presenting the bill to the carrier. Under the Dutch law, however, because of the problem mentioned in the above paragraph, despite the fact the forwarding agent acting on behalf the cargo interest to take delivery of the goods, there are cases showing that the actual cargo interest ultimately loses his right of suit.

In Brouwersgracht the cargo interest Thiemann hired CTA as the forwarding agent to take delivery of the goods upon presentation of a bill of lading, endorsed

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422 N.H. Margetson (n 419) pp 205-206.
423 By way of a broad interpretation, the ‘rechtmatige’ holder is defined as ‘a holder who has become the holder of the bill of lading in a manner that is allowed by the law, e.g. by way of ownership or pledge’. In a narrower approach, it is said that in a way similar to the general Dutch law of negotiable instruments, the person who has substantive title to sue (the rechtmatige holder) is ‘the person who has obtained the property of the right contained in the paper.’
424 The difference between regelmatige holder and rechtmatige holder of the bill of lading
425 Hoge Raad, NJ 1993, 690.
in blank, to the carrier. The goods were found damaged so Thiemann sued the carrier. The carrier claimed that only the CTA was entitled to right of suit since they were the lawful holder of the bill of lading. The court of first instance, allowed Thiemann’s claim on the basis that the carrier was informed by the agent that the agent had acted on behalf of the actual cargo interest. It was said that although the general rule entitled the lawful holder of the bill to sue, and in that case the agent was the lawful holder not Thiemann, an exception could be made, thus rendered Thiemann as the lawful holder and entitled to the right of suit. The court of appeal reversed the judgment reasoning that an exception could not be made to the generally accepted rule in the Netherlands, as the right to claim delivery and right of suit were both vested in the lawful holder and a distinction between them could not be made.

At its final stage, the Dutch Supreme Court assuming that the agent informed the carrier that he was not acting principally and only on behalf of Thiemann, stating ‘the lawful holder of a bill lading is exclusively entitled with respect to the carrier to exercise the rights contained in that bill of lading’ and therefore, continuing ‘it is only the lawful holder and not the agent who has the right to exercise the rights contained in the bill of lading’ reasoning since the court of first instance recognized the agent as the lawful holder and there had been no complaint made by the cargo interest to that decision as a cross appeal, held that Thiemann’s claim therefore failed. As a result, the actual cargo interest left without the right to sue the carrier. It is clear that how unsatisfactory this situation can be for example for an English trader who runs business through a branch in the Netherlands.

1.1.9.2. Belgian, French and German laws
Under Belgian law, the right to claim damages is exclusively reserved for the holder of bills of lading. This was also the case in France, where the courts used to only allow the proper holder of bills of lading to bring an action against the

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426 Article 89 of the Maritime Act of Belgium.
defaulting party. However, again this is not the whole picture as in practice; the person who actually suffers the loss is not the holder of bill of lading. This leads to a potential legal gap since often the real cargo interest is left without a remedy to compensate his loss.

In response to such instances, Belgian law attempts to solve the issue by granting the holder of bill of lading, title to sue, solely because of his capacity as a holder. In contrast, the French law requires the claimant to have suffered a personal loss in order to make a lawsuit. German law, on the other hand, has a more effective approach to deal with the abovementioned scenario.

Under German law, the contract of carriage is recognized to be made between the carrier and the shipper while the bill of lading is known as a legal relationship between the carrier and the holder of bill of lading. Thus, if the goods are lost, damaged or delayed, the parties to the contract of carriage; shipper of the consignee as well as the holder of the bill of lading can sue the carrier. However, following the 2013 maritime law reform in Germany, Section 519 of the German Commercial Code prioritize the claims made by the holder of the bill of lading rather than the parties to initial contract of carriage.

It can be seen that there are relatively significant differences among the domestic laws when it comes to deal with the rights of suit or its connection with the right to claim delivery. This is one of the places where uniformity and harmonization of the laws are deemed necessary in order to avoid legal inconsistency. The provisions guiding the interested parties to a contract of carriage have to be clear and contriving to its predictability.

1.1.10. Iranian law

As another example of civil law jurisdictions, Iranian law is selected to examine how it deals with this general question. The reason is that Iranian Maritime

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Code\textsuperscript{428} can be regarded as one of most out-dated maritime regimes as it is largely based on provisions of the Hague Rules with only a few technical amendments in more than half a century. The necessity to reform the Iranian maritime law is increasingly felt\textsuperscript{429} especially after implementation of the nuclear deal\textsuperscript{430} which leads to relief of the sanctions thus allowing international traders’ access to Iran’s market. This is an opportunity for Iranian authorities to investigate the possible ways of reforming the Maritime Code, thus making the Rotterdam Rules, the newest international maritime convention, a potential option to be considered. The impact of ratification of the Rotterdam Rules by Iran is out of the scope of this study, however, examination of Iranian law is claimed to be important as an example of the situation in a developing country that is planning to reform and modernize its maritime law system.

Iranian Maritime Code does not expressly deal with the question of who can sue the carrier under a contract of carriage or bills of lading. It has to be mentioned that several issues regarding the contract of carriage especially the duties of carrier are out of the scope of Maritime Code and governed by the eighth book of Iranian Commercial Code 1932.\textsuperscript{431} Although the Commercial Code does not either explicitly deal with the rights of suit, it can be deduced from the relevant provisions that the Code recognizes an implied right of action against the carrier in case of loss of or damage to the goods while they are in transit. In case the aggrieved party is not the shipper, this right of action is given to a) receiver of the goods (consignee), b) endorsee of the bill of lading. This means that any person named on the bill of lading as ‘consignee’ to whom the goods are shipped or any person holding the bill of lading as an endorsee of the bill can claim for the damages against the defaulting carrier. It is not clear whether either of these

\textsuperscript{428} Iranian Maritime Code 1965.
\textsuperscript{430} The Joint Comprehensive Plan of Action (JCPOA), commonly known as Iran Deal or Iran Nuclear Deal is an international agreement on the nuclear program of Iran reached in Vienna on 14 July 2015 between Iran, the P5+1 (the five permanent members of the United Nations Security Council—China, France, Russia, United Kingdom, United States—plus Germany), and the European Union.
\textsuperscript{431} Titled as ‘Contract of Carriage’ through Articles 377-394.
parties have to exercise any actions in order to be entitled to the rights of suit, or how they must prove that they have any interests in the goods.

It can be seen that the Iranian law is vastly vague towards the issue of rights of suit and there are no requirements, such as being the lawful holder of the bill of lading as exists in the English law, for a claimant in order to be qualified to bring an action against the carrier. This is very unfortunate since Iran is a both cargo owner and shipping country with total coastline of more than 3200 kilometres, utilizing its major trading ports for inward and outward transport of goods, oil and petroleum by sea. The obsolete and out-dated Iranian Maritime Code needs an immediate reform in order to be in line with the global carriage of goods by sea legal regimes. This could have been carried out by signing and ratification of a modern international uniform convention, but unfortunately the Rotterdam Rules have frustrated the hopes so far.

1.1.11. Conclusion

With respect to the right of suit as one of the consignees/endorsees’ fundamental rights under the contract of carriage, it is submitted that the Rotterdam Rules, in case of gaining the force of law, will fail to promote legal certainty, because when such a right is left to the national laws to decide on and the courts in different jurisdictions do not address the issue similarly, the party who has suffered the loss will not be fairly compensated.

Additionally, the possibility of the liability gap will be another problem; since when the person who has real interest in the goods is not allowed by the applicable law to sue, and also the holder of bill of lading is not willing to bring an action against the carrier, the carrier who actually lost the cargo or caused damages to the goods, can escape the liability. This also leads to uncertainty and therefore hinders the goal of legal and commercial predictability.

Moreover, the most lamentable side is that the Working Group was aware of the fact that the rights of suit were of ‘practical importance’ and needed ‘uniform
solutions’ since diverging domestic legal systems offered ‘different solutions’ leading to inconsistency and legal disparity. Moreover, it has been made evident that even some jurisdictions do not have any sort of clear rules governing such a substantive matter. On the other hand, the COGSA 1992 has been submitted to provide precise and perceptive regulations on the subject. Although the COGSA 1992 is praised even by the commentators from outside of the UK,432 the alerting question is: do all the countries, or at least a considerable number of them, have a piece of legislation equivalent to the UK COGSA 1992? The short answer is no.

So how can the draftsmen of the Rotterdam Rules claim that this Convention will offer legal certainty when it does not even address one of the core issues of international maritime transport? Furthermore, where are the ‘uniform solutions’ alleged in the Preamble of the Convention? How will ratifying the Convention guarantee that it will not aggravate the existing uncertainties, when there are obvious signs of potential conflict of laws by applying the Rules? This list of questions can be continued endlessly.

Therefore, it is strongly submitted that the deletion of the entire provisions had been the most effortless and uncomplicated way to encounter the problem. The present Convention not only is incapable of providing uniformity regarding rights of suit, but also prepares the ground for more conflict of laws in this area and as it has been argued earlier, this is while we expect a new international convention, by assessing the gaps and deficiencies, to present more helpful and practical solutions to the existing difficulties, not to generate new problems by abandoning the gaps and, instead, regulating complicated and rigid alleged innovative provisions.433

432 N.H. Margetson (n 419) 204.
433 Suggestions as to how the current situation of the Rules can be improved will be proposed later in this chapter.
Part II - The Rights of the Consignees/Endorsees Provided by the Rotterdam Rules

It is often commented by scholars that the Rotterdam Rules are more than a liability regime, presenting innovative regulations to deal with the needs of modern carriage of goods by sea, from containerization to multimodal transport and electronic commerce. Considering this statement, it can be argued that when the Rotterdam Rules are treated as a comprehensive body of rules to offer solutions to maritime transport problems, it can be expected from the Convention, at least, to provide for a clear identification of the rights and liabilities of different parties involved in the carriage of goods by sea. This part of the study is aimed to show that the Rotterdam Rules have failed to clearly specify the rights of consignees, whether acting as consignees, holders or the controlling parties. It is believed that this ambiguity of the Rules may lead to legal uncertainty in case the Convention gain the force of law.

In general, the Rotterdam Rules do not entitle the consignees or endorsees to many rights. However, the consignees under the Rules are often considered as the ‘holder’ of transport documents or electronic transport records, or as the ‘controlling party’. Therefore, they will be able to benefit from additional privileges when qualifying as holders or the controlling parties. Accordingly, the rights of the consignees under the Rules will be discussed, depending on their capacities, in three categories, each of which will be compared to the corresponding provisions of the English law.

1. The Rights of Consignee as ‘Consignee’

The very fundamental right, indirectly entitled to the consignees by the Convention, is the right to take delivery of the goods. This right is established through the definition of ‘consignee’ under Article 1(11) which defines him as ‘a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record’. By this definition, the endorsees of transport documents or electronic equivalents would also be entitled to the right
of delivery. In fact, it is worth mentioning that the consignee itself is defined by the right of delivery since Article 31(1) of the Rules states that the consignee’s name may or may not be on the transport document or electronic transport record. This is differing from the common concept of the consignee in the market which is the person(s) to be included in the consignee box on the face of the transport document.

The right to take delivery is also emphasized under Article 11, in shape of one of the carrier’s duties. This obligation is imposed on the carrier in a different way from The Hague and Hague-Visby Rules under which the carrier is only obliged to carry the goods, not to deliver them. This is, in fact, based on the cargo interests’ expectation of a contract of carriage, naturally, to result in delivery of the goods. Usually, the main purpose of the contract of carriage in the eye of cargo interests is to have the goods delivered to them. Although it is claimed that the Rotterdam Rules address the uncertainties regarding misdelivery, it will be shown that from cargo interests’ perspective, the Convention does not perfectly protect the consignee’s interests when the carrier does not make delivery of the goods or misdeliver them.

Moreover, another problem is that there is no definition of ‘delivery’ under the Convention. This can be added to the other essential items in the list of ‘undefined terms’ under the lengthy Rotterdam Rules. It is rather interesting that whenever the Convention encounters difficult circumstances, either in defining a term or to deal with a complicated subject, the drafters have decided to simply avoid any kind of engagement in resolving the difficulty without providing any justifiable explanation. Nevertheless, it is said that ‘delivery’ can be defined by referring to combination of provisions on ‘carrier’s period of responsibility’ under Article 12

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434 ‘The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.’

435 Article III(2) of the Hague-Visby Rules; Also it is worth noting that ‘delivery’ is mentioned by the Hague and Hague-Visby Rules only as the starting point of the notice of claim and time for suit periods. Article III(6).


437 It has been discussed that ‘negotiable’ is neither defined in the Rotterdam Rules.
and, also, through the detailed regulations made by Article 48 for cases where carrier’s period of responsibility is over but the goods are still under his supervision; i.e. undelivered goods.\(^{438}\) It is suggested that the Convention could have entailed clear definition of ‘delivery’ in order to avoid any misinterpretation of this essential concept by the courts in potential disputes.

Additionally, recognition of the delivery concept as a ‘right’ for the consignee by the Rotterdam Rules is questionable. Chapter 9 of the Rules which is allocated for the provisions on the delivery of goods illustrates a different image in this regard. The introductory Article 43 of the Rules simply assigns a duty on part of the consignee to accept delivery of the cargo at the time and location agreed in the contract of carriage and when there is no such an agreement, it should be carried out according to the contractual terms, customs, usages or practices of the trade. Therefore, combination of Article 43 and previously discussed Articles 1(11) and 11, in a theoretical way, leads to a double-edged situation raising the question whether this is a clear right allotted to the consignee or an obligation imposed on him.

To clarify the situation, reviewing the basis of establishing Article 43 might be helpful. The draftsmen’ intention of imposing the obligation of acceptance on consignee is based on dealing with specific problems where the consignees were aware of arrival of their goods but decided to avoid taking delivery of the cargo by not claiming them.\(^{439}\) However, to trigger the application of Article 43, the consignee must ‘demand’ the delivery in order to be obliged to accept the delivery of goods. This is unclear in the sense that when the consignee wishes to avoid claiming the goods, naturally he does not ‘demand’ the delivery. And when he does not demand delivery, he will not be obliged to take delivery by the virtue of Article 43. As a result, the carrier will be still unprotected by the Rules. Thus, how

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\(^{438}\) Carver (n 7) 10.056.; M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 8.011.

\(^{439}\) Report of the UNCITRAL on its 41\(^{st}\) session A/63/17, para 140.
this regulation is going to provide a solution to the problem which ‘carriers were regularly faced with’\textsuperscript{440} will remain unclear.

It is suggested that one solution could be to reorganize the first part of the Article as: When the goods have arrived at their destination, ‘the consignee to whom the goods are to be delivered under the contract of carriage, shall accept delivery of the goods.’\textsuperscript{440} In this way, the ‘demand’ requirement is eliminated and the consignee will face the duty to accept the delivery. Accordingly, the carrier will be able to rely on the virtue of Article 43 in order to deal with the situation where consignee avoids taking delivery of the goods, regardless of whether the consignee demands delivery or does not. Nevertheless, it is still not clear that this Article can be construed as giving the consignee a ‘right to delivery’ since its structure does not seem to support this notion.

On the other hand, under English law, there is no similar duty expressly imposed on the consignee neither in the COGSA 1971 nor in the COGSA 1992 to accept delivery of the goods. However, as a part of Section 3 of the COGSA 1992 on liabilities of the consignee, a duty to accept delivery may be constructed. Under Section 3, the lawful holder of a bill of lading becomes subject to the contractual liabilities in certain circumstances. In a similar way to the Rotterdam Rules, the result is that the consignee must act in one of the three ways set by the Act in order to be obliged to accept the delivery and thus becomes liable vis-à-vis the carrier. To activate the application of the Act, the consignee must (a) takes or demands delivery; or (b) makes a contractual claim; or (c) be a person who, at a time before contractual rights were vested in him, took or demanded delivery from the carrier of any of those goods.\textsuperscript{441}

There are, of course, significant differences between the two sets of rules which make the English law a more reliable system by reference to which both carriers and consignees can point out their rights and liabilities in this case. Firstly, the application of the Act is broader than the Rules, in the sense that the COGSA 1992

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\textsuperscript{440} Ibid.
\textsuperscript{441} This has been discussed in details in section 3 of Chapter I.
includes any person who is subject to the same liabilities under the contract of carriage as if he had been a party to that contract, while in a limited approach, the Rotterdam Rules impose the duty only on the consignee who demands delivery. Secondly, Section 3 applies to the documents to which the Act applies, that will be when shipping documents such as bills of lading, sea waybills, or ship’s delivery orders have been issued. As it has been discussed earlier, Article 43 of the Rules covers all situations where there is a contract of carriage, thus there is no need for any document to be issued. This may lead to an unnecessary wide application of the Convention causing potential conflict of laws resulting in legal uncertainty.

If, however, the consignee demands delivery, there are certain requirements laid down by Article 43 of the Rules to be met regarding the place and time of delivery. The consignee has the duty to take delivery of the goods ‘at the time or within the time period and at the location agreed in the contract of carriage’. The problem is that, although the carrier and the shipper normally set the place of discharge, by default and in practice, there is usually not a precise time or time period agreed between them, which may make this rule not in consonance with the normal practice.

This is while the position as between the carrier and the consignee under English law is that the time and location must be those which are set in the transport document that is transferred to the consignee, not those fixed in the contract of carriage between the carrier and the original shipper. For example, the oral agreements between the carrier and the shipper made prior to the issue of the transport document which prevail the terms in the bill cannot affect the consignee because, violating the main principle of contract law, he has no notice of the terms other than those recorded in the transport document.

The Rotterdam Rules attempt to provide an alternative in case where no agreement can be found regarding the time and location of delivery. Second part of Article 43 offers a default position that the delivery has to be made ‘at the time

442 Leduc & Co v Ward (1888) 20 QBD 475.
443 S. S. Ardennes (Cargo Owners) v S.S. Ardennes (Owners) (The Ardennes) [1951] 1 KB 55.
and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.’ This can be impliedly deemed as a codification of the English law rule, however, it has to be noted that if the default position is to be interpreted by considering the time when contract was made, it would be in contrast to the position under English law since the consignee might not have knowledge of the agreements made between the two original parties. Thus, it is suggested that the default rule of the Convention should be examined by considering the time that the consignee could fairly know of the goods arrival.

Nevertheless, the practical effect of the rule is limited mostly on the part of carrier since, as it is discussed, the consignee may simply avoid demanding delivery of the goods. Moreover, in case where the consignee does not accept delivery of the goods, the Convention does not specifically provide to what remedies the carrier can resort. It seems that this question, similar to many other issues, is left to the national laws and, again, will be interpreted differently in different jurisdictions resulting in anything except uniformity and harmonization of the international maritime rules.

Further, the consignee is placed under a duty by Article 44 of the Rules to acknowledge receipt of the goods from the carrier if the carrier or performing party request so. There is no comparable rule to be found under the English law to that purpose, however, if the cargo claimant fails to provide a notice of loss or damage before or on discharge of the goods, it will be presumed that he takes delivery of the goods as described in the bill of lading which, by default, says that the goods have been shipped in apparent good order and condition. Of course this presumption can be denied, however, it puts the cargo claimant in a very difficult position to prove that the loss or damage had happened before discharge of the goods.

444 “On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.”

The position under the Rotterdam Rules is clearly different. Under the Convention, the consequence flows from failure of the consignee to acknowledge the receipt of the goods is that the carrier may refuse delivery of the goods. Moreover, unlike the rule in Article 44, there is no obligation on the consignee to notify the receipt under the Hague-Visby Rules. The severe problem with the provision of Rotterdam Rules is that the carrier is completely free to require the consignee acknowledge the receipt of the goods in good order and condition. In fact, there is nothing provided in this Article to stop the carrier from doing so. The consignee, who has not had the proper opportunity to inspect the goods to find out whether they have been received in good order and condition, is not willing to issue a clean receipt which would be an obstacle to his subsequent claims. However, the carrier may refuse to accept a clauscd receipt or a limited acknowledgment, therefore, refuses to make delivery of the goods, since no obligation is set for the carrier to accept such acknowledgement. As it is suggested by Debattista and confirmed by Diamond, this article seems to ‘prove a fruitful source of dispute’ between the carrier and consignee, putting the consignee in ‘a difficult evidential position in any later cargo claim’.446

Nevertheless, followed a controversial447 approach, the Rotterdam Rules ambitiously attempt to legislate for subject of delivery of the goods through Articles 45 to 47. This is a major shift from previous carriage of goods by sea conventions which did not provide detailed provisions on this topic. The Convention embarks on this new area by addressing three different categories; a) when no negotiable transport document or negotiable transport record is issued; b) when a non-negotiable transport document that requires surrender is issued;

447 Report of the UNCITRAL on its 41st session A/63/17, para 146: “It was generally acknowledged that the problems faced by carriers when cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, represented real and practical problems for carriers. However, concerns were expressed in the Commission regarding whether the text of draft article 49 (now Article 47) was the most appropriate way to solve those problems. In particular, the view was expressed that draft article 49 undermined the function of a negotiable transport document as a document of title by allowing carriers to seek alternative delivery instructions from the shipper or the documentary shipper and thus removing the requirement to deliver on the presentation of a bill of lading.”
and c) when a negotiable transport document or negotiable transport record is issued. Therefore, the carrier’s obligations with regard to delivery of the goods differ depending on the type of transport document issued.

1.1. Delivery when no negotiable document or record is issued

Article 45 sets out the primary rule when no negotiable transport document or electronic record has been issued. This means that, by reference to the definitions given in Articles 1.15 and 1.19, Article 45 comes into play when the issued document does not contain the words ‘to order’, ‘to shipper’s order’, ‘to the order of the named consignee’, or ‘to bearer’. Also, for that purpose, the document may contain the words ‘non-negotiable’ or ‘not-negotiable’. In this way, Article 45 applies to a broad range of non-negotiable documents and electronic records including consignment notes, sea waybills and even most simple receipts in addition to their electronic alternatives. Additionally, Article 45 applies when there is no transport document or electronic record is used at all.

It is argued that Article 45 does not provide an effective mechanism for ascertaining rights and duties to be used by the consignees; rather it merely contrives a series of legal impediments towards that goal. When no negotiable transport document or negotiable electronic transport record is issued, Article 45(a) places the carrier under the duty to deliver the goods to the consignee according to the time and location referred to in Article 43. It has been discussed earlier that there are difficulties with the interpretation of that provision which may lead to legal gaps. Any reference to Article 43 at any other part of the Convention, thus, will highlight those uncertainties which may be occurred by application of the Rules.

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448 The last one is when the consignee may also be entitled to certain rights as a holder of transport documents.
449 This is for example when the electronic cargo data cannot be qualified as electronic transport record as required by Article 1.18 of the Rules.; M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 8.02.
450 "The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier."
Moreover, Article 45(a) gives the carrier an option to refuse delivery if the carrier requests identification from the person claiming to be the consignee and he does not properly identify himself as the consignee. There are critical problems with respect to the functionality of this provision, especially when it is compared to the rules of English law. It seems that the default rule of the Rotterdam Rules regarding the identification by the consignee in case of non-negotiable transport documents is similar to the current position of English law on presentation rule when it comes to sea waybills. In this case, English law provides an advantage in using the sea waybills in the sense that there is no need to present the actual document in order to take delivery of the goods. Therefore, the person who is going to obtain the goods has to prove that he is the person named as consignee on the document to be entitled to delivery.

However, as it has been discussed, the current position of English law regarding the presentation of straight bills of lading is that the person claiming delivery, has to produce the document to the carrier to be entitled to such a right. The reference made under Article 45 of the Rules, can also be made to the case where non-negotiable documents or electronic records are issued but do not require surrender. It is suggested by Benjamin that such a concept is wide enough to include straight bills of lading, and the distinction drawn by the Rules between non-negotiable documents that requires surrender and non-negotiable documents that do not, support the view that “there is nothing in the legal nature of such a document that requires its production by a person claiming delivery of the goods”.

In the eyes of the consignee, therefore the Rotterdam Rules are more advantageous since he will be under less strict set of provisions. More importantly to this discussion, it has to be mentioned that the wordings of Article 45(a) clearly suggest that the provisions are not compulsory, since firstly it is for the carrier to request identification from the claiming consignee; and secondly, if the carrier

451 Chapter 1 section 2.1.6.
452 Benjamin (n 14) para 18-099.
requests so, there is no duty on him to refuse delivery in case no proper identification is made. Therefore, if literally interpreted, using the word ‘may’ appears to result that the carrier is allowed to deliver the goods to any person claiming to be the consignee even if no proof is presented.

The general rule is that if the carrier delivers the goods to anyone other than the rightful consignee, he should be held liable for misdelivery. Under English law, in case of non-negotiable transport documents such as sea waybills, the carrier must refuse to deliver the goods if the consignee fails to identify himself, since such identification waives the prerequisite of presentation rule before delivery. Also, this is true in case of straight bills of lading and the requirement for presenting the bill when claim for delivery is made. When no identification has been made in sea waybill, or no presentation is made in straight bill, the carrier shall not deliver the goods; also the consignee has no right to claim the goods. Consequently, if Article 45(a) is construed as in previous paragraph, there will be a significant difference between the current English law and the Rotterdam Rules provisions.

Furthermore, the identification to be made by the claiming consignee is required to be ‘proper’. It is not clear what are to be the consequences of the situation in which the person claiming to be the rightful consignee, identify himself and after delivery has taken place, it becomes apparent that he is not the true consignee. Has the carrier made every effort to carry out a proper identification so that he would be discharged of his duty to deliver to the true consignee? Would the carrier be held liable against the true consignee for misdelivery if it is proved that the identification had not been properly carried out? Thus, it is submitted that how this ‘proper identification’ can be tested and what would be the results in either case, is also not clear.

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453 This is also dealt with in UNCITRAL Report of Working Group III (Transport Law) on the work of its sixteenth session A/CN.9/591, para 226 that the request of the carrier for identification to be made by the consignee should be a carrier’s right and not an obligation since it is not always needed in practice.; Also M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 8.027 which interestingly states that this right is given to the carrier in order to decrease the risk of misdelivery. It is believed that changing the nature of this concept from an obligation on to a right for the carrier is itself potentially leading to situations in which a misdelivery might happen.
Another new aspect of delivery of goods is introduced by the Convention in paragraph (b) of Article 45 in shape of imposing a duty on the controlling party. There is no similar rule under English law. Article 45(b) provides that if the name and address of the consignee are not referred to in the contract particulars, the controlling party shall before or on arrival of the goods, advise the carrier of such name and address. Normally the non-negotiable transport documents contain the name of the consignee. The question arises here is that whether this Article only applies to situations where the controlling party advises the carrier of consignee’s address, since it is rare in practice for the consignee box to be left in blank. However, it may be suggested that since Article 45 applies even when there is no document issued at all, therefore Article 45(b) can be effective in such cases. Nonetheless, the main issue is that there are no consequences envisaged in this provision for failure of notifying the carrier by the controlling party. Who will be liable for damage or loss borne by the carrier in case the controlling party fails to advise the carrier is not specified.

The third paragraph of Article 45 instructs the carrier in details on how to deal with the goods if they are not deliverable. There are three cases envisaged by the provision in which the carrier may not be able to deliver the goods, namely: i) when the consignee does not claim delivery of the goods at the agreed time and location; ii) when the consignee fails to identify himself properly and the carrier refuses delivery; and iii) when after reasonable efforts, the carrier cannot locate the consignee to request delivery instructions. In all these three cases, if reasonable efforts and sufficient research have been made by the carrier and he is not yet able to ask the consignee for delivery instructions, he is allowed to request the controlling party for such guidance. If he fails to locate the controlling party, the next person to resort to will be the shipper, and if the failure repeats, the last person will be the documentary shipper for the carrier to request delivery instructions from.
One major problem of this provision is that, similar to the first paragraph, the language used does not suggest that these rules are compulsory. None of the persons to whom the carrier is allowed to refer in order to request instructions, are obligated to give him such information. What if the carrier requests any of them for instructions and they simply refuse to do so? Will they be held liable if the carrier suffers loss or damage following their refusal to give instructions? Apart from this, when any of these parties give instructions to the carrier, for example by naming a new consignee, will the named consignee be under a duty to accept delivery? How should the carrier deal with the situation if the new named consignee refuses to take delivery? Who will be responsible for the carrier’s time spent on locating the parties to ask for instructions? The answers to all these questions are unclear; a fact which cannot guarantee the practicality of this provision.454

Also, it is not specified how the ‘reasonable efforts’ on part of the carrier can be assessed. The concept of reasonable effort is very relative; therefore a consignee can argue that the carrier has not made sufficient effort to locate him. There are no measures designed in this provision to test the reasonableness of carrier’s efforts or his other investigations and researches in order to find the right party to ask for the instructions. There is also the risk that the carrier would first ask the shipper named on the transport document for instructions without putting sufficient effort to follow the order given by this Article. This becomes more important when the named shipper is not the controlling party.

Further, since the procedures of Article 45 are not obligatory for the carrier, he can invoke his rights under the Article 48 of the Convention which deals with the goods remaining undelivered. Finally, paragraph (d) of Article 45 states that the carrier, who delivers the goods according to the instructions of any of the parties mentioned in paragraph (c), is discharged from the contractual duty to deliver the

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454 There can be cases when no one wants to be involved in taking delivery of the goods for example a cargo of fresh fruits was to be delivered and because of the extra time carrier spent on locating the instructing party, they are spoiled.
goods. It is clear that, under Article 45, the carrier is entitled to many options with respect to delivery of the goods. The major drawback from the cargo interests’ perspective is that the carrier is allowed and entitled to choices that he may or may not make. During the negotiation of a contract, how can making that contract subject to the Rotterdam Rules guarantee to protect the consignee’s interests when there are ambiguous and excessive options made available to the carrier who may choose not to apply them? There are certain rights and privileges given to the carrier without specifying the correlative duties. Therefore, while it is clear that the carrier benefits from applying his rights, it not made clear whether he will be liable if he fails to invoke one of those options.

1.2. Delivery when non-negotiable document is issued that requires surrender

Commonly, the non-negotiable transport documents must not be surrendered by the consignee in order to take delivery of the goods. However, in April 2006, it was brought to the attention of the UNCITRAL by Netherlands delegates that in many jurisdictions, there is a third type of document which is between the negotiable and non-negotiable transport documents; the so-called ‘recta or nominative bills of lading’, and that the rules governing these types of documents are not uniform.\(^{455}\) Therefore, the UNCITRAL had to make provisions for this specific category of documents which are issued to a named person and require the document to be surrendered. As a result, the Rotterdam Rules now include a separate rule for delivery when non-negotiable transport document which requires surrender is issued. This is laid out in Article 46 which only applies to paper-based documents.

Unlike many other rules of the Convention, Article 46 does not address the electronic transport records or any other types of electronic equivalent to the paper transport documents. Although the most recent version of draft convention included a provision on non-negotiable electronic transport record requiring

\(^{455}\) UNCITRAL A/CN.9/WG.III/WP.68.
surrender,\textsuperscript{456} it was later decided to delete that article because there was no existing practice of using the electronic equivalent of a non-negotiable transport document that required surrender.\textsuperscript{457} However, the problem with this reasoning is that since the use of electronic documents is increasing and it can be easily anticipated that paper-based documents will be out of use in a near future, we may see electronic equivalents to non-negotiable transport documents that require surrender to be used and exist in practice. Thus, if the Rotterdam Rules comes into force, there will be a legal gap with respect to this type of documents and the certainty goal of the Convention will sustain hardship.

As regards to non-negotiable paper transport documents, Article 46, in a similar way to Article 45, also imposes a general duty on the carrier to deliver the goods at the agreed time and location as referred to in Article 43. The same previously discussed problems with Article 43 will also be raised here. Moreover, the rules regarding proper identification of the consignee on request of the carrier are repeated in Article 46. However, there is an additional requirement set by this provision which is the surrender of non-negotiable document to the carrier.

Clearly, when the consignee does not surrender the document, the carrier shall refuse delivery. This is very similar to the position under English law, in the sense that if it is stated by the document that it has to be surrendered in order to take delivery, the document has to be surrendered for the delivery to be made. This rule is made clear in case of straight bills of lading in \textit{The Rafaela S}.\textsuperscript{458} Further, it is required by the Rotterdam Rules that “if more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.”\textsuperscript{459} The same rule is true under the English law.

\textsuperscript{456} UNCITRAL A/CN.9/WG.III/WP.81, Article 48.
\textsuperscript{458} J I MacWilliam Co Inc (Boston) v Mediterranean Shipping Co SA (\textit{The Rafaela S}) [2005] 1 Lloyd’s Rep 347, 350.
\textsuperscript{459} Article 46(a).
The Convention, however, makes distinct rules for the carrier in case the abovementioned requirements are not met. In fact, the wordings of this Article provide separate specifications. When the document is not surrendered, the carrier ‘shall’ refuse delivery, while in case when the consignee does not properly identify himself, the carrier ‘may’ refuse delivery of the goods. The English law position, which has been discussed earlier, requires the consignee to identify himself in order to obtain delivery in case of non-negotiable transport documents. In such cases, ‘identification’ can be presumed as a substitute for ‘presentation’ rule in English law. The carrier, therefore, will be liable if he delivers the goods to the person who has failed to identify himself as the true consignee.\(^{460}\)

It is clear that under the English law, the carrier would be liable for misdelivery if he chooses not to require the consignee to identify himself and deliver the goods to the wrong person, or if despite the fact that the person claiming to be the consignee fails to identify himself, the carrier makes the delivery. The rule is simply that the carrier must refuse delivery if the consignee does not identify himself as the named person. It has to be recalled that in non-negotiable transport documents such as sea waybills, based on the nature of these documents, the identification substitutes presentation.

Obviously, under the Rotterdam Rules, the identification requirement is at carrier’s choice. Based on what is made available to him under Articles 45 and 46, he is free to choose whether to ask the person claiming to be the consignee to identify himself or not. This can be regarded as a change to the English law status, where identification is compulsory. The main difficulty imagined here is mostly the same as that has been discussed under Article 45, and of course more complicated, since a further condition needs to be met. Under the English law, when there is no express term of the document requiring it to be surrendered, identification suffices. In fact, the identification is made available in order to avoid the difficulties surrounding presentation.

\(^{460}\) C Debattista (n 18) 2.34.
However, what is not clear in Article 46 is that when a document states that it has to be surrendered in order to take delivery, does the carrier really need an extra layer of assurance that the person presenting the document is the same as the one named on the document? Will the carrier be liable for misdelivery if he delivers the goods to the person surrendering the document but not identifying himself? If the same liability is envisaged for the carrier for misdelivery when surrender is not required, as in Article 45, and when it is required, under Article 46, what would be the difference between the two provisions? It seems that difference should be made regarding the level of liability of the carrier when surrender is required and when the only measure is identification to make sure that the person claiming to be consignee is the rightful consignee. However, it is more sensible to suggest that, in either case, the carrier should be deemed liable for misdelivery if he makes delivery to the person who is asked to identify himself and has refused or failed to do so.\footnote{A Diamond QC (n 446) in 514 points out the difficulty in reconciling the provisions relating to identification of the consignee with those requiring the carrier to refuse delivery if the document is not surrendered. This is also highlighted in C Debattista (n 446) paras 44.06-44.09. It is believed that most of the complications arising out of this provision is stemming from its hybrid nature. This is one of those areas which could have been left to the national laws to deal with, following the usual custom of draftsmen of the Convention, since even this type of document has different names in different jurisdictions, let alone the governing rules. For example what is called straight bill of lading in Scandinavia can be regarded as an equivalent to recta bill of lading in the US, while what is called straight bill of lading in the US is something very close to the nature of sea waybills in Scandinavia. It is not just the terminology that differs, it is the approach taken by different jurisdictions towards this type of document since it swings between the negotiable and non-negotiable documents without representing a specific character.}

In a similar but less complicated method to Article 45(c), Article 46(b) provides detailed guidance for the carrier on how to deal with the goods when they are not deliverable. Therefore, when the consignee i) does not claim delivery; ii) refuses or fails to properly identify himself as the named consignee or does not surrender the document; iii) cannot be located by the carrier after his reasonable efforts, the carrier after advising the shipper, is allowed to request delivery instructions from him and if he cannot be located, the next party to resort to is the documentary shipper. The difference between this article and the previous one is that the carrier does not need to refer to the controlling party before he can ask the shipper for
instructions. This is because the controlling party in this case is either the shipper or the named consignee.

The carrier, by virtue of Article 46(c) will be discharged of his contractual delivery duty by following the procedure and delivering the goods according to the shipper’s or documentary shipper’s instructions, regardless of whether the document has been surrendered or not. A crucial difficulty with this provision is that it apparently contradicts the express terms of the document as well as the virtue of Article 46(a). Delivery is allowed to be carried out without surrender of the document, an act which is the notion of the entire provision. Consequently, an ultimate consignee, for example a buyer who has already paid for the goods, may be left empty-handed and without any recourse to sue the carrier for misdelivery, even if he surrenders the document, simply because the carrier has acted based on the shipper’s instruction.

Again, it can be argued that the ‘reasonable efforts’ factor cannot be measured, either efforts cannot be monitored to find out whether there have been sufficiently done by the carrier to locate the consignee. The Rotterdam Rules have introduced a measuring tool without any scale to assess its effectiveness. Therefore, the burden of proof is on the consignee, perhaps the rightful consignee entitled to delivery, to prove that the carrier has not put reasonable efforts to locate him for delivery instructions and should be held liable for misdelivery. Of course, the consignee will have the remedy against the shipper, however, is there any mechanism provided in the Convention to deal with such a situation? The unfortunate answer is negative. It is, thus, suggested that the cargo interests should take considerable care regarding the use of Article 46 documents, particularly if they need to control the goods during the voyage in order to avoid any unforeseeable legal and commercial consequences.

2. The Rights of Consignee as ‘the holder’

In addition to the right of delivery given to the consignee acting in his own capacity, under the Rotterdam Rules, the consignee may also be entitled to the
right of delivery if he becomes the holder of a negotiable transport document or an
electronic transport record. Article 47, in general, deals with the delivery of the
goods when a negotiable transport document or negotiable electronic transport
record is issued. It is divided into two categories: i) when the paper document is
required to be surrendered for delivery or the holder of electronic record is
required to demonstrate that he is the holder; and ii) when the document
expressly states that the goods may be delivered without the surrender.

The rules provided by the Convention are generally consistent with the existing
provisions of most legal systems including the English law, in the sense that the
carrier has the duty to deliver the goods to the holder of a bill of lading upon
surrender or presentation of the document. In this way, the carrier fulfils his
undertakings made to the shipper under the contract of carriage by making a good
discharge. However, the Rotterdam Rules take a step further and provide
legislation for delivery of the goods when the negotiable transport document or
bill of lading does not require to be surrendered. It will be argued that the
application of this rule may cause serious difficulties both in legal and practical
sense.

2.1. Delivery when a negotiable document or record is issued

It seems that the consignee/endorsee is entitled to a more secure right of delivery
under Article 47(1)(a) in comparison with the two previous provisions; since
instead of expressing a duty for the carrier to delivery, it states that the holder is
entitled to claim delivery of the goods from the carrier. The holder of the
negotiable transport document or electronic transport record, then, has to meet
certain conditions in order to trigger the duty of the carrier to deliver him the
goods. In a similar method to the previous articles, the delivery duty has to be
taken place in the time and location referred to in Article 43 which has been
discussed earlier.

462 The English law position on delivery of the goods to the holder of bills of lading has been discussed in
Chapter I section 2.1.
The first requirement to be met is that the negotiable transport document should be surrendered by the holder. This is set out by Article 47(1)(a)(i) which also specifies that the holder is one of the persons under Article 1(10)(a)(i).\textsuperscript{463} According to the definition of ‘holder’, the person named as the consignee and also the final endorsee of the document can be holders. Therefore, the consignee/endorsee is given a right to claim delivery of the goods as the holder of negotiable transport document or electronic transport record under the Rotterdam Rules. However, there are several difficulties arising out of the inconsistent rules of the Convention regarding surrender of the document and identification of the holder, especially when compared to the current status of English law. These problems are believed to cause delay in delivery, unpredicted costs, commercial disputes and legal uncertainty.

In case the Rotterdam Rules gain the force of law, the surrender rule with regard to the negotiable transport documents would bring no change to the position of the common law as well as English law.\textsuperscript{464} The main change to what is currently established under the English law is, however, the second condition set out by the Article 47(1)(a) which requires the holder to properly identify himself. Generally, under the English law, the holder of a negotiable bill of lading has to tender the document in order to obtain delivery of the goods. Therefore, there is no need to identify himself, whether properly or not, to the carrier. The carrier, on the other hand, is only required to ask the claiming holder to present the document, presentation of which is the carrier’s only mechanism to identify whether he is the rightful person to claim possession of the goods.

It is believed that one of the reasons making the Rotterdam Rules unduly lengthy and complex is the repetition of some of the provisions, presence of which seems not justifiable. The article in question is one of these provisions. It has been discussed under Article 46 that when surrender of a document is needed to obtain

\textsuperscript{463} It states that a holder ‘if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed.’

delivery, it seems unnecessary to add the identification test. It can be seen that this excessive unnecessary mechanism is repeated to be used in Article 47. This is not only different from the current position under English law, but also is inconsistent with the established commercial practice of the UK. Also, the difficulty with definition of ‘proper identification’ can be argued, since it is not clear what measures should be taken by the carrier in order to consider an identification a ‘proper’ one. The probable results of such complexity of the rules are delay in delivery and the extra costs the carrier might be undertaking.

The only occasion under the Rotterdam Rules where the identification requirement seems reasonable is when a negotiable electronic transport record is issued. Since it is not possible to physically hold and therefore surrender the electronic document, the only requirement set for the holder is to demonstrate that he is the holder of that document. It can be noticed that no reference has been made to the ‘proper identification’ in this section, nor proper demonstration. The manner, in which the holder has to demonstrate that he is the holder, based on Article 9(1) ‘shall be referred to in the contract particulars and be readily ascertainable’. The question arises here is that where being ‘proper’ is deemed necessary for identification of the holder of a negotiable paper document, why is it considered not necessary for the demonstration made by a holder of negotiable electronic record? Similar to other unclear rules of the Convention, this question will also remain unanswered. Nevertheless, the carrier is obliged to refuse delivery if the abovementioned requirements are not met. Unlike Article 45 and first part of Article 46, it is not the carrier’s choice whether to make or refuse delivery. The carrier is under a duty to avoid delivery, otherwise he may be held liable for delivering the goods to the wrongful persons. This is also in line with the rules of English law.

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465 Article 47(1)(b).
466 The Stettin [1889] 14 PD 142; Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] AC 576.; The carrier might lose all the exceptions and limitation liability clauses if he is found in breach of the contract of carriage.
Finally, if more than one original of the negotiable transport document is issued, Article 47(1)(c) provides that surrender of one original will suffice and the other originals cease to have any effect or validity. In case of a negotiable electronic transport record, that record will cease to have any effect or validity once the goods are delivered to the holder. The effect of this rule can be compared to the practice of carriers protecting themselves by using the phrase ‘one of which being accomplished, the others shall stand void’. Therefore, it seems that legislation of a solution to deal with the problems arising out of this practice would be helpful if the Rotterdam Rules come into force.

2.2. Delivery when a negotiable document or record is issued not requiring surrender

Article 47(2) of the Convention, in an interlaced set of rules, provides detailed instructions to be followed when it is expressly stated by a negotiable transport document or a negotiable electronic transport record that it may be delivered without surrender of that document or record. It is incorporated into the Rules in order to provide an alternative to delivery against the letter of indemnity. This has been one of the most controversial subjects during the discussions and drafting sessions of the UNCITRAL, where the views were seriously diverse.

On the one hand, those delegates who were against legalizing the delivery without surrender of the negotiable document were of the opinion that this would devalue the transport documents by undermining the main functions of traditional bills of lading and also increase the risk of conspiracy of the shipper and the carrier against the consignee. On the other hand, the supporters of the idea of legislation for delivery without surrender, while accepting that this was not a beneficial practice, argued that because of the existence of such a practice, there should be a legal solution in order to deal with the uncertainties. Ultimately, following a
compromise solution, this Article was amended and decided to be retained in the Convention at the very latest phase of deliberations.

To trigger the application of Article 47(2), the ‘negotiable transport document or the negotiable electronic transport record [must] expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record’. Once it is settled, and without prejudice to Article 48(1) dealing with the undelivered goods, the carrier has the option to deliver the goods without the need for presentation (or ‘surrender’ in Rotterdam Rules words) on certain conditions. Three situations are envisaged where the goods are deemed not deliverable: i) the holder being informed that the goods have arrived at the destination, does not claim delivery; ii) the carrier refuses to deliver the goods to the holder who fails to identify himself as one of the designated holders under the Rules; or iii) after reasonable efforts, the carrier cannot locate the holder to receive delivery instructions. In such circumstances, the carrier may advise the shipper and ask for delivery instructions from him, and if the shipper cannot be located after reasonable effort, the same procedure applies to the documentary shipper.

A number of problems will be raised regarding the first part of the Article. The initial difficulty is with the wordings the Article starts with. It says that the ‘...the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of ... the electronic record.’ This is perhaps the only occasion in the entire Convention that it is referred to the act of ‘surrender’ for an electronic transport record. It is not clear how an intangible item must be surrendered that the Article requires an express statement to be included with the effect of dispensing with the need to surrender. Diamond has suggested that it might be a drafting error particularly when it is read together with the paragraph

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469 It was decided to reorganize the provision including all the rules regarding delivery without surrender to satisfy the supporters and also to start the provision by subjecting the application of the Article to the express statement of the transport document or electronic record saying that the goods may be delivered without surrender in order to meet the expectations of the opponents.; M F Sturley, T Fujita and G. J. van der Ziel (n 437) paras 8.077-8.080.

470 Report of the UNCITRAL on its 41st session A/63/17, paras 146-165.

471 Article 47(2)(a).
(b) of the Article. Therefore, it is suggested that a correction seems necessary, perhaps as following: ‘…if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or demonstrating that the person claiming delivery under a negotiable electronic transport record is the holder respectively…’.

Moreover, the structure of the entire Article 47 does cause ambiguity. Naturally, the instructions given in section 2 should be applied when the goods are not deliverable and the document expressly states that there is no need to surrender the document. Consequently, the carrier follows the guidance in order to deliver the goods and to be discharged of his duty. However, there are no corresponding instructions for the cases in which the goods are not deliverable but the document needs to be surrendered, as in section 1 of the Article. Therefore it is not predicted in this provision whether the same procedure can be followed in case where the document has to be surrendered. Furthermore, it is not either clear whether the carrier will be discharged of his duty if he delivers the goods based on the instructions given in Article 47(2) when the document needs to be surrendered. It is, therefore, suggested that this Article also needs to be reorganized in order to clarify whether the entire provision follows the same rules or it is merely an exception made in order to avoid delay and to facilitate the delivery duty of the carrier when the document expressly states that the goods may be delivered without the surrender.

Furthermore, the permissive language of Article 47(2)(a) suggests that the carrier has no duty to follow the instructions when the goods are deemed not deliverable. However, it is not clear whether the carrier who chooses to act on the guidance given by the Article and, in any event, fails or ignores to follow the instructions incurs any liability. Interestingly, the carrier will be discharged of his contractual delivery obligations according to Article 47(2)(b) if he delivers the goods upon following the instructions given to him by shipper or the documentary shipper,
regardless of the surrender of transport document or identification made by the holder of an electronic record. When the carrier is entitled to the right to choose how to undertake his duties and discharges his obligations, it seems not reasonable that there is no explicit provision incurring liability on him in case he fails to do so.

It is noteworthy to point out that under paragraph (c) of Article 47, the person giving instructions to the carrier is obligated to indemnify him against loss if he is being held liable against the holder who becomes holder after the delivery on instruction has been made and ‘did not have and could not reasonably have had knowledge of such delivery at the time it became a holder’. Also, the carrier is given an option to refuse to follow the instructions from the person in paragraph (a) if he cannot provide ‘adequate security’. What amounts to the standard form of adequate security is not clear under this provision. Also, it raises the question that why any wise person would be willing to accept to make himself liable against someone else’s loss or failure in a risky situation as such.

It seems the operation of this rule will be highly unlikely since for paragraph (c) to apply, the steps in paragraph (a) and (b) must be followed by the carrier, and the carrier can only accomplish those tasks if he is given the instructions by the shipper or the documentary shipper who is not obligated to do so in the first place. If the shipper or the documentary shipper refuses to provide the carrier with instructions, or if they do not have the correct information to be used by the carrier with whom they are not bound to cooperate, they can readily avoid any future liability by not participating in the carrier’s adventurous undertaking of his delivery duty. Furthermore, the person who gives instructions to the carrier does not have any control on the carrier’s performance to examine whether he is precisely following the exact instructions to deliver the goods or not. Therefore, it is very doubtful that they opt-in to the terms that might be detrimental to them later.

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472 Article 47(2)(e).
The term ‘reasonable effort’ is also referred to in this provision, which recalls the discussions founded earlier. It has to be reemphasized that there is no mechanism provided by the Convention for the purpose of assessment of the carrier’s effort at any of the steps taken in order to make delivery. How can the Convention guarantee to the rightful party entitled to delivery that the carrier has expended sufficient effort to locate him in order to receive the delivery instructions? When there is no assessment tool designated, why the carrier incurs no liability if he fails to follow the rules, which are provided for facilitation of delivery? Essentially, is it even possible to design a standard form for reasonable effort?

There are no exact answers to the above questions, nor can a standard form be established through extracting the rules from the context of other provisions of the Convention. In fact, the main problem with this provision is the approach adopted by the draftsmen. It is to be noted that the most recent draft version of the Convention imposed an obligation on the shipper to give the carrier delivery instructions.\(^{473}\) This was removed from the final draft, making the provisions even more complicated. If there had been an obligation on the shipper or the documentary shipper to provide the carrier with sufficient information as to how to deal with the goods, a layer of complexity would have been lifted.

Moreover, the inconsistency surfing through the entire Article 47(2) is believed to be the basis of this and earlier discussed difficulties. Simply, the mechanism is wrong. There is no logic in giving certain options to a party to choose from and holding another party liable for giving wrong/inadequate information when he is not even obliged to do so. It could have been designed in a way that would oblige both the carrier and the person to whom he could refer for instructions to cooperate in order for the delivery to be done. In that way, all of the parties would be certain about their rights, obligations and liabilities, therefore, they could act in a manner that would seem commercially and legally acceptable.

\(^{473}\) UNCTRAL A/CN.9/WG.III/WP.101.
It is obvious that the first and foremost task of the carrier is to deliver the goods to the person who has paid for them. This could be regulated in a more straightforward manner by avoiding several cross references and innovating indecisive rules and sub-rules. The provisions on delivery could be less complex and less detailed if the draftsmen of the Rotterdam Rules decided to adopt a reasonable, practical and logical approach, not to reach a compromise at any rate instead.

The final criticism to be pointed out is that the result of Article 47(2) will be that the holder of a negotiable transport document or an electronic record may be empty-handed, since the carrier can deliver the goods to a person other than the holder, without any need for identification from the holder or surrender of the document. This can often happen when the goods are delivered but the transport document is still being circulated. The Rotterdam Rules attempt to provide solution to this potential problem in paragraphs (d) and (e) of Article 47. Two circumstances in which a person becomes the holder of the document in question are envisaged. Firstly if the delivery is made following the instructions given in paragraph (a) and the discharge of carrier of his delivery duty under paragraph (b), the person who becomes holder after such delivery but based on contract arrangements made before such delivery, paragraph (d) of this Article entitles him to all contractual rights against the carrier except the right to claim delivery. However, what the provided rights are is not clear.

It is suggested in Carver that these rights seems to include the right of suit with respect to the damaged cargo, although he is doubtful whether this type of right is appropriate for a party becoming the holder in such circumstances. However, it has been discussed that even if this assumption is true, the Convention has already left the question of right of suit to the national laws. Also, this right is only given to be exercised as against the carrier. Therefore, if the performing party’s act leads to a loss suffered by the new holder, he cannot exercise his right to recover

474 Carver (n 7) para 10.060.; See also A Diamond QC (n 446) 520.
the loss. It seems that while the carrier is given full protection in this Article, the consignee who becomes the holder cannot be guaranteed to enjoy the security he definitely requires. It is true that the carrier has to protect himself by seeking out any available alternatives when the goods cannot be normally delivered, however the other side of the contract, i.e. the cargo interest, should not be deprived of his interests. It appears that the operation of this rule may lead to unfortunate commercial disputes, conflict of interests and unbalanced distribution of legal protections.

Secondly, the paragraph (e) of Article 47 grants the rights incorporated in the negotiable transport document or negotiable electronic transport record to the holder who becomes holder after the delivery made pursuant to the rules in Article 47(a) and ‘did not have and could not reasonably have had knowledge of such delivery at the time it became a holder’. Although it is not clearly specified what rights are referred to as the ‘incorporated rights’, the presumption is that these rights include the right to claim delivery since, unlike the previous paragraph, it is not excluded. However, following the discharge of the carrier by delivery of the goods under paragraph (b), the transport document will be regarded as spent. If that is true, how does the new holder exercise his right to claim delivery of goods based on a spent transport document which is no longer a document of title?\footnote{Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami [1997] 2 Lloyd’s Rep 89, 97.} This question would not be raised under paragraph (d) since the right to claim delivery is obviously excluded.

The sub-paragraph goes on to provide an exception to its rule by saying that the holder will be presumed to be aware of the delivery if ‘the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered’. The problem with this presumption is that, in practice, not all of transport documents include such information or indications.
3. Goods remaining undelivered

Throughout the provisions of the Rotterdam Rules’ chapter on delivery of the goods, several references have been made to the Article 48 regarding the goods remaining undelivered. This provision is in fact a plan B if the previous rules fail to operate. In a set of rules, new to (at least statutory) English law, the Convention gives the carrier the rights to deal with the undelivered goods upon giving notice to the person, if any, who is to be notified according to the contract particulars and if there was no such a person anticipated in the particulars, upon notifying the consignee, the controlling party or the shipper in the said order.476

The cases in which the goods may be deemed to have remained undeliverable are listed in Article 48(1) which are consisting of (a) when the consignee does not accept delivery of the goods; (b) none of the persons to whom the carrier could refer to request delivery instructions under Article 45, 46 and 47 can be located or if located, does not give the adequate instructions; (c) the carrier refuses delivery under Articles 44, 45, 46 and 47; (d) the carrier cannot deliver to the consignee because of the law of the place of delivery; or (e) the goods are otherwise undeliverable by the carrier.

The first three cases have already been discussed however; the last paragraph is to some extent questionable. Article 48(1) opens with a statement providing that ‘only’ in the mentioned cases, the goods are regarded as remained undelivered, which presumably should be followed by an exhaustive list. The last case, however, leaves the provision open-ended and once again gives the carrier an opportunity to choose the fate of the cargo and the interested parties in the goods. Therefore, whenever the carrier wishes, he can refuse to follow the procedures given in Articles 45 to 47. Accordingly, this subparagraph is submitted to be highly risky as the carrier might misapply the rule and abuse his authority to decide whether the goods are deliverable or not.

476 Article 48(3).
The carrier will then have the right, at the expense of the person entitled to the goods, to (a) store, (b) unpack or to act otherwise including moving them, and (c) cause the goods to be sold or destroyed.\textsuperscript{477} It has been noted that a reasonable notice, which can be regarded as a security measure for the cargo interest, must be given before exercising any of these actions.\textsuperscript{478} What is meant by a ‘reasonable notice’ is not defined and, also, it is not clear what is exactly intended by obliging the carrier to give notice of his planned actions regarding the goods.

More importantly, the question is: what are the consequences if the person who is noticed disagrees with the carrier’s plans? The appearance of the provision indicates that the carrier is not bound by any possible reply he may receive to his notice. Thus, it seems that giving this notice in advance is of no avail, since if the person who has interests in goods wished to take delivery of them; he would have done that at a very earlier stage. Now that he is unwilling to take and accept delivery of the goods, presumably, he is not concerned about the current or future status of the cargo. If it is only a symbolic notice as a courtesy of the carrier to the person entitled to the goods, it is obviously irrelevant whether the notice is reasonable or not. Therefore, the carrier may inform that person of the results once he has completed his actions regarding the goods.

Apart from that, the phrase ‘act otherwise’ is unspecified and it is not clear what is meant to be done by the carrier and to what extent he is authorized to act regarding the goods. Furthermore, the list of available actions for the carrier is not exclusive since the chapeau of the Article 48(2) has made it clear that these actions are to be exercised ‘without prejudice to any other rights that the carrier may have against the shipper, the controlling party or the consignee.’ Moreover, if the goods are decided to be sold by the carrier, he may deduct the costs incurred and shall hold the proceeds of the sale for the benefit of the person entitled to the goods.\textsuperscript{479}

\textsuperscript{477} Article 48(2).
\textsuperscript{478} Article 48(3): The notice must be given to the person who is to be notified of the arrival of the goods at the destination, if stipulated in the contract particulars, or if there is no such person, to the consignee, the controlling party or the shipper is known to the carrier respectively.
\textsuperscript{479} Article 48(4).
Finally, the carrier is exempted from incurring any liability for loss of or damage to the goods happening during the time that they remain undelivered. The burden of proof is on claimant to show that the loss or damage is the result of carrier’s failure to act reasonably in order to preserve the goods and that the carrier has been aware of the consequences of that failure.\(^{480}\) There are no corresponding rules under the English law;\(^{481}\) at least no certainty exists regarding the position of bailee with respect to the undelivered goods. However, it can be said that the burden of proof is always on the bailee to prove that the loss of or damage to the goods are not caused as a result of his fault or those he is or has been responsible for.\(^{482}\)

It can be understood that these provisions are sharply in favour of the carrier. The carrier’s liabilities are, to a large extent, limited with regard to the goods in his custody whereas the risk of maritime fraud is made highly possible by providing him with unrestrictive and open-ended list of available actions. The carrier, by applying these rules, may expose the cargo interests to considerable costs and expenses, and this will be happening while they have no control over the goods or the carrier’s actions. More importantly, if the Rotterdam Rules come into force, these uncertainties will be aggravated since these provisions have the potential to be interpreted quite diversely by the courts in different jurisdictions.

4. Conclusion

The Rotterdam Rules provisions on delivery of the goods are unnecessarily complicated, ambitious and, somewhat, controversial. Further, alarming concerns have been expressed by a number of organizations and business-entities towards the difficulties that may be raised by the application of this particular set of regulations of the Convention. FIATA\(^ {483}\) criticized the virtue of Article 47(2) of the

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\(^{480}\) Article 48(5).
\(^{481}\) C Debattista (n 446) para 47.23.
\(^{482}\) A Diamond QC (n 395) 521; Port Swettenham Authority Appellant v T. W. Wu and Co. (M) Sdn. Bhd. Respondent [1979] A.C. 580: ‘where goods in the custody of a bailee are lost, the burden is upon the bailee to establish that such loss was not occasioned by this negligence.’; Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716.; Exportadora Valle de Colina SA and others v A P Moller Maersk A/S (t/a Maersk Line) [2010] EWHC 3224 (Comm) in which the Judge confirmed that the carrier as bailee has to prove that the loss or damage is not attributable to his acts or is linked to causes which he is not responsible for, when a cargo owner brings an action based on prima facie breach by the carrier.

\(^{483}\) International Federation of Freight Forwarders Associations.
Rules stating that a document of this kind is called ‘negotiable’ by the Convention when it is not, and if the Rotterdam Rules come into force, ‘freight forwarders must never issue such documents themselves’. It goes even further by advising that the freight forwarders must ensure that ‘such documents are not tendered to their customers by carriers’ because of the risk of maritime fraud.\textsuperscript{484}

CLEC\textsuperscript{485} also considered Article 47, as the ‘most contradicting provision’ and it has advised against it by stating that it ‘is bound to create conflict and complicated international litigations, it may also be a serious problem with regard to payments and letters of credit.’\textsuperscript{486} Similarly, the European Shippers’ Council expressed their negative attitude towards the delivery without surrender provision as well as the carrier’s rights with regard to the goods remaining undelivered by stating that ‘this could cause problems in relation to letters of credit as could the carrier’s novel rights of disposal of goods that are deemed undeliverable’.\textsuperscript{487}

It is difficult to understand the rationale of many of the detailed rules included in the Convention’s chapter on delivery of the goods. The draftsmen of the Rotterdam Rules attempted to provide solutions to the problems relating to the role of documents in delivery of the goods and the potential delay that their arrival may cause in everyday trade practice, however, with due respect for their valuable work, these provisions not only may fail to circumvent the problems, but also may create a path for further disputes. They are so deviated from the well-established principles of carriage of goods by sea that even most optimistic commentators on the Rotterdam Rules would doubt the functionality of these rules in practice.

\textsuperscript{485} European Association for Forwarding, Transport, Logistic and Customs Services.
\textsuperscript{486} CLEC\textsuperscript{AT}, The European Voice of Freight Logistics and Customs Representatives <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/4CLECAT.pdf> accessed 12 April 2016.
The more unfortunate reality is that the unsatisfactory provisions of the Rotterdam Rules are problematic on their own, but when they are compared to the English law rules on the delivery of the goods, they seem even more troublesome. While the parties, especially those who have interests in the goods such as the consignees and endorsees can readily ascertain their right to claim delivery in different circumstances under the English law, the unnecessary detailed, overcomplicated and ambiguous provisions of the Rotterdam Rules appear to be of no avail. The delivery rights of the consignees under the Rotterdam Rules are, to some extent, restricted, with the exception of straight bill of lading which is not required to be surrendered to claim delivery, whereas the carriers have, questionably, too many options to decide what to do with the goods and how to limit their liabilities.

It is, thus, submitted that the consignee’s unquestionable right of delivery which is in fact the core of contract of carriage cannot be adequately protected through the application of the Rotterdam Rules, as they have hindered the state of fairness by being examined as biased in favour of carriers. Many difficulties are also foreseen to arise from the problems with interpretation of the Convention in divergent jurisdictions because of the unclarity flowing through the concepts initiated but not defined by the Rules. If, ever, the Rotterdam Rules are adopted and ratified by the UK, the consignees are sincerely advised to negotiate with the shippers to conclude a ‘volume contract’ under Article 80 of the Convention in order to ensure that their contractual rights are fully protected, thus to avoid the unwanted costs or consequences.

5. The rights of consignee as the ‘Controlling party’

The Rotterdam Rules have attempted to provide legislation for the rights of the controlling party, which is one of the subjects that are not addressed in any of the existing international maritime conventions. The importance of this concept to

488 Article 80(1) provides that ‘…as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.’
489 The concept of right to control the goods is not new to other transport conventions such as Montreal Convention (1999) under Article 12 and CMR (1956) under Articles 12 and 14 to 16.
this study is that the consignee frequently falls under the definition of the controlling party under Article 51 of the Rules. Therefore, being identified as the controlling party, the consignee will be entitled to certain rights and liabilities under the Convention. There are no analogous provisions on the rights of control under the English law; however references will be made to certain sections of the COGSA 1992, if necessary.

The notion is that when the goods are being carried, there should be a person known to the carrier with certain rights to give the carrier proper instructions regarding the goods, including how to preserve the goods by setting or changing the temperature, or where to deliver the goods and etc. The carrier will also be able to ask such a person for any information needed during the transit. Another effect of this concept is that the shipper (usually the seller) will be able to change the person to whom the goods should be delivered or, generally, give delivery instructions in case he is not paid. Therefore, in a general sense, the right of control provides security over the goods in transit when other measures fail to do so.

5.1. What are the Rights?

The right of control is generally defined in Article 1(12) of the Convention as ‘the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10’. The contents of rights of control are expressly limited to a list of actions stipulated under Article 50(1). The list commences with a general right, mostly of operational nature regarding the goods. The first right allows the controlling party to give or modify instructions regarding the goods. Perhaps, this can include the instructions for setting the temperature, securing the effective ventilation, changing previous instructions perhaps depending on the nature of the goods and other general or specific guidance as to preserving the goods from being damaged. However, any actions

490 Chapter 10 is titled as ‘rights of the controlling party’ and gives detailed instructions on how these rights can be exercised or limited.
491 It often happens that the shipper (seller) gives an instruction to the carrier to contact him before he delivers the goods, since for example the buyer is unable to pay.
of such nature can be carried out as long as it does not ‘constitute a variation of the contract of carriage.’\footnote{492}  

The problem is that the instance of the instructions to the extent that they do not constitute a variation to the contract of carriage is not clear. The odd thing about this ambiguity is that this was raised as a difficulty by the Working Group as it was expressed that the phrase ‘give or modify instructions … that do not constitute a variation of the contract … might be read as contradicting themselves’ and a clearer drafting was acknowledged to be needed.\footnote{493} However, the wordings of the article have not been changed and the ambiguity still exists. It is suggested that a list of proper instructions could have been provided by the Rules in one of the many definitions existed in Article 1 in order to draw a distinction between those instructions that constitute the variation to the contract of carriage and those which do not.

The importance of the first type of rights to the consignee is that when he becomes the controlling party, and the carrier asks him for delivery instructions, pursuant to the provisions of the Chapter 9, he is in a better place than the shipper to give specific instructions to the carrier regarding delivery of the goods since he or his receivers are based or located at the place of destination and, for example, if the circumstances of the place of receipt at a certain time are not suitable for delivery to be made, the consignee as the controlling party can request the carrier to deliver the goods at a different time of the day. It has to be added that the condition imposed on the first right, in a sense, makes it narrower than the remaining actions available to the controlling party because they would almost lead to a variation to the contract of carriage.

The second category of the rights of control allows the controlling party to ‘obtain delivery of the goods at a scheduled port of call, or in respect of inland carriage,

\footnote{492} Article 50(1)(a).  
\footnote{493} UNCTITAL Report of Working Group III (Transport Law) on the work of its eleventh session A/CN.9/526, para 110.
any place en route’. This can be of significance because there are occasions when the shipper (seller) is willing to obtain an early delivery based on, for example, a commercial reason; the buyer becomes insolvent and the seller requires that the goods to be kept out of buyer’s reach to ensure that he will be paid before delivery is to be made. Therefore, it can be said that the effect of this right have no, or little, relevance when the consignee is the controlling party since, logically, he would not want to keep the goods out of his own reach. However, it can be of avail when the consignee chooses a different receiver to collect the goods on his behalf and that person is located at a place en route. Nevertheless, this and the next right can be varied, not to be excluded, by the agreement of the parties according to Article 56.

Finally, the controlling party is permitted to replace the consignee by any other person including the controlling party. This right can be important when the shipper wishes to reclaim the possession of the goods in case when there is a risk that the buyer might not pay for the goods. Therefore, he can name himself as the controlling party. Similar to the second right, this can also be of little relevance to the situation where the consignee is the controlling party; however, the consignee may exercise this right when he plans to resell the goods while they are in transit. Therefore, he is allowed to nominate ‘any other person’ as the ultimate consignee to receive the goods. The last two rights can be regarded as Convention’s mechanisms to facilitate enforcing of the right of stoppage in transitu and the right of disposal (jus disponendi).

The concept of the right of control, at least as provided in the first right, seems to resemble the common law right of seller to redirect the goods. However, the last two rights, although apparently similar to the right of disposal provided by Sections 18 rule 5(2) and 19 of the Sale of Goods Act 1979, are of different natures. In fact, the rights of control under the Rotterdam Rules are defined as the rights

494 Article 50(1)(b).
495 Article 50(1)(c).
under the contract of carriage, which means those as agreed between the shipper (consignor) and the carrier, or the carrier and the consignee. This is different from the legal nature of the right of disposal under the SOGA 1979 which is to be exercised in the context of a contract of sale as between the seller (shipper/consignor) and the buyer (consignee).

5.2. The extent of right of control

The last section of this Article provides that the duration for exercise of the right of control is confined to the period of responsibility of the carrier.\(^{497}\) The period of responsibility of the carrier ‘begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered’.\(^{498}\) The problem with the linking of duration of the exercise of right of control with the period of responsibility of the carrier is that the goods may still be in actual custody of the carrier while his period of responsibility expires. One of these occasions is where the right of control ceases to exist when the contract of carriage is ended but the carrier, under Article 48, still has the goods. The period of responsibility of the carrier is expired and, therefore, the right of control cannot be exercised when it is logically expected to.

Another instance that this linkage might raise difficulty is where, in a multimodal transport context, pursuant to Article 12(3), the parties agree to shorten the period of responsibility of the carrier from door-to-door to tackle-to-tackle by considering the beginning of loading on board the ship as the time of receipt of the goods and the finishing of unloading from the ship as the time of delivery. Therefore, the goods may still remain in custody of the carrier or his agent before delivery but his period of responsibility is ended. In such a case, the controlling party cannot exercise his right of control based on Article 50(2). In this case, a consignee, who has not been involved in the agreement made between the shipper and the carrier regarding the period of responsibility, and also plans to exercise his rights as the

\(^{497}\) Article 50(2).
\(^{498}\) Article 12(1).
controlling party, will be deprived of his rights and may incur loss or additional expenses.

Therefore, it is submitted that there may be circumstances in which the consignee, while being entitled to the right of control, cannot exercise his right and enjoy the benefits possibly stemming from it. It is suggested that, in case the Rotterdam Rules come into force, the consignees should, in advance, negotiate with the shipper that any agreement to be made between the shipper and the carrier regarding the period of responsibility must be confirmed with them, or at least with their awareness.\footnote{This can be also done by variation to contract of carriage allowed under Article 56 which will be discussed later.}

Also, from a legal-technical perspective, one solution could be that the period for exercising the right of control was separately specified by the Rules without any connection to the period of responsibility. In this way the right of control could be exercised as long as the carrier or his agents has actual custody of the goods.

Lastly, it is noteworthy to say that this paragraph is also made subject to the rule of Article 56 which means that the terms on period of responsibility of the carrier can be varied by agreement of the parties.

5.3. Identity of the controlling party and transfer of right of control

The question of who is entitled to the rights of control is important in this study since it must be clear under what circumstances the consignee qualifies as the controlling party to be entitled to such rights. Article 51 of the Rotterdam Rules is the source of finding out who may be the controlling party depending on what transport document or electronic transport record is issued. There are four situations provided in details when: a) a non-negotiable transport document or electronic transport record is issued or no transport document issued at all; b) a non-negotiable transport document requiring surrender is issued; c) a negotiable transport document is issued; or d) a negotiable electronic transport record is issued.
5.3.1. A non-negotiable transport document or electronic transport record or no document is issued

Article 51(1) provides that, generally, the shipper is the controlling party when a non-negotiable transport document, i.e. a sea waybill, or a non-negotiable electronic transport record is issued. Also this rule applies when the carrier does not issue any transport document at all. If the shipper nominates another person such as the consignee, the documentary shipper or any other person as the controlling party when the contract of carriage is made, the default rule will be exempted and the shipper will no longer be the controlling party. Assuming that the Rotterdam Rules are ratified by the UK and gain the force of law, to answer whether the shipper’s or the consignee’s right of control under the Convention will be in conflict with the current position of the English law, it has to be made clear which right incorporated in Article 50 of the Rules is to be exercised.

In case the first type of rights of control which is the right to give or modify the instructions in respect of the goods is concerned, the named consignee under a sea waybill by virtue of Section 2(1)(b) of the COGSA 1992, would be entitled to such rights. Therefore, as long as he remains as the consignee, he will have the right to give instructions to the carrier regarding the goods. However, the effect of Articles 50(1)(a) and 51(1)(a) of the Rules is that the only person who is permitted to give such instructions is the shipper. Accordingly, by co-existence of COGSA 1992 and the Rotterdam Rules, the carrier would be in an unclear position receiving instructions from the shipper as the controlling party under the Convention and the consignee as the controlling party under the English law. These instructions may, at any rate or event, contradict each other. In such a case, the shipper can exercise his right under Article 50(1)(c) of the Rules as to replace the consignee.

Under the English law, a sea waybill under Section 1(3)(b) of the COGSA 1992 ‘identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.’ Section 5(3) of COGSA 1992, further, provides that a sea waybill ‘allows for the identity of the person in question to be varied, in
accordance with the terms of the document, after its issue’. Reading these two provisions together, the shipper may before discharge of the goods instruct the carrier to deliver the goods to a person other than the one named on the sea waybill.\textsuperscript{500} Therefore, it seems that the status of the consignee to remain as the person named on the document to exercise his right to instruct the carrier based on the Section 2(1)(b) of the COGSA 1992, to a large extent, depends on the shipper’s authorization. Consequently, it can be concluded that the shipper’s right of control prevails over the consignee’s in case where a non-negotiable transport document is issued.\textsuperscript{501}

As the right to obtain delivery en route as provided by Article 50(1)(b) is concerned, if the exercise of that right leads to a variation of the contract of carriage, it may contradict with the position of English law. Section 2(5) of the COGSA 1992 entitles the shipper to ‘any rights which derive from a person’s having been an original party to the contract contained in, or evidenced by, a sea waybill’ even if the rights under that contract have been transferred to the consignee. Therefore, if the right of control is not incorporated into the contract of carriage, the shipper will not be given the right to obtain delivery en route. However, the effect of the Articles 50(1)(b) and 51(1)(a) will be that the shipper has such a right regardless of what has been agreed in the contract of carriage between the shipper and the carrier. Subsequently, a conflict between the two sets of rules appears to exist in such a case.

On the other hand, Section 2(1)(b) of the COGSA 1992 grants all rights of suit under the contract of carriage to the consignee of a sea waybill, but it should be mentioned that since the right to obtain delivery en route is not stipulated in the contract of carriage, giving the consignee such a right will amount to a variation of the contract of carriage. Therefore, it seems that such a right is not included in

\begin{footnotesize}
\footnote{\textsuperscript{500} C Debattista (n 18) para 2.25.}
\footnote{\textsuperscript{501} In such a case, a carrier who receives conflicting instructions at the same time from the shipper and the consignee may find it difficult to choose whose instructions to follow. It is wise for such a carrier to ask for a reasonable security measure from the party whose instructions he wishes to follow in order to be assured in case he will be held liable against the other party.; Charles Debattista, ‘Rights of the Controlling Party’ in Y Baatz (ed) (n 446) para 51.03.}
\end{footnotesize}
statutory ‘all rights of suit’ that are given to the consignee. The effect is that the consignee will not be given the right to obtain delivery en route as the controlling party when it amounts to a variation of the contract of carriage. The result, thus, is that the shipper will be the ‘only controlling party’ who can exercise that right under Article 50(1)(b) of the Rules.

The last category of right of control stipulated in Article 50(1)(c), which is the right to replace the consignee by any other person, seems to have the least conflict with the English law. Under the English law, the shipper acting as the consignor of a sea waybill is permitted to replace the consignee named on the bill and the carrier will be obliged to deliver the goods to the newly nominated consignee. This is again confirmed by Section 1(3)(b) of the COGSA 1992 which provides that the sea waybill ‘identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract’. Therefore, by virtue of Section 5(3) of the same Act, the shipper has the right to ‘vary’ the person to whom delivery is to be made. As far as the consignee is concerned, it has already been discussed that this right might be of little relevance to the consignee and may be exercised in less frequent circumstances when the consignee intends to resell the goods while they are in transit.

Article 51(1)(b) of the Rules paves the way for transfer of the right of control under non-negotiable transport document or electronic transport record and, also, when there is no document issued at all. It allows the controlling party to transfer the right to another person. It has to be emphasized that this is different from the designation of another person as the controlling party by the shipper at the time of conclusion of the contract of carriage. Furthermore, the transferor must notify the carrier upon transfer of the right; otherwise the transfer will not be effective vis-à-

502 Benjamin (n 14) paras 18.027-18.028.; Mitchell v Ede (1840) 11 Ad & El 888: where it was said that ‘the shipper’s power to substitute one consignee for another was said to be exercisable at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it’; Elder Dempster Lines v Zaki Ishag (The Lycaon) [1983] 2 Lloyd’s Rep 548.; In this case goods were shipped by the seller under a bill of lading which named the buyer as the consignee. The seller was held to be permitted to reroute the cargo from the consignee (buyer) by endorsing the bill by way of pledge to a bank.
vis the carrier. The part requiring that the carrier has to be notified of any transfer is in line with the current practice of English law.

However, the important issue is that Article 56 allows the parties to a contract of carriage to restrict or exclude the transferability under this paragraph. Therefore, the shipper/consignor and the carrier, at the time of negotiating the contract of carriage, can limit or ban the transferability of the right of control which may have been given to the consignee as the controlling party designated by the shipper in the contract, and the consignee is excluded to transfer his own right to another person when it is deemed necessary because of the agreement made in the contract of carriage in which he was and could not have been involved. This seems to cause an unfair situation for the consignee.

The last point to be made in this respect is that Article 51(1)(c) requires the controlling party to ‘identify properly’ himself when he exercises the right of control. Unlike the provisions of the Convention on delivery of the goods, the identification has to be made regardless of the request of the carrier. Therefore, it seems that the carrier has the obligation to not recognizing a person who cannot properly identify himself as the controlling party, and to refuse receiving any instructions as a part of right of control. The main difficulty with this provision, however, is that it is not clear how the controlling party would identify himself ‘properly’. The reason is that this Article governs the situations where a non-negotiable transport document not needing to be surrendered is issued, or when there is no transport document issued at all. Subsequently, there is no transport document to be presented as a mechanism of identification. Also, the same old question will be raised here as to what is meant by the ‘proper identification’ or what are the requirement of a ‘proper identification’ and how these are met.

Similar to many other unclear terms of the Rotterdam Rules, there is no answer to this question.

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503 Pursuant to Article 51(1)(a).
5.3.2. A non-negotiable transport document requiring surrender is issued

The general rules of the identity of the controlling party are those provided in the first paragraph of Article 51. The second paragraph of this provision is a document-based rule to be applied when the carrier issues a non-negotiable transport document ‘which indicates that it must be surrendered in order to obtain delivery of the goods.’\(^{504}\) There is no mention of the carrier in this section of the Article; however, following the same rule in Article 46, it seems that the document has to be surrendered to the carrier.

In general, the shipper is the only original controlling party when such a document is in question;\(^{505}\) however, he may transfer his right of control to ‘the consignee named in the transport document by transferring the document without endorsement.’\(^{506}\) It is similar to the current English law that a straight bill of lading or a sea waybill does not need endorsement from the shipper to the consignee. Also, there is no requirement to notify the carrier of such a transfer since the reason behind notifying the carrier is for the latest person entitled to controlling rights to be made known to the carrier. The transfer of right of control under these circumstances is limited in two ways; either by naming a person on the document or by transferring the document that needs to be surrendered. In either case, the carrier will be aware of the new transferee of the rights without the need to be notified.

In case more than one original document is issued, Article 51(2)(a) requires the transfer of all of the originals in order for the transfer to be effective. Therefore, the shipper who wishes to transfer the rights of control to the named consignee shall be in possession of the documents and transfer all of them to the consignee.\(^{507}\) The other effect of this rule is that if more than one document is issued, the shipper or

\(^{504}\) Article 51(2).

\(^{505}\) It seems to be a slightly important difficulty as a result of the conflict between the Article 51(2) and Section 2(1)(b) of the COGSA 1992. On the one hand, the only controlling party is the shipper under the Rotterdam Rules when the instructions are contractual. On the other hand, the consignee under the English law would have the rights of control as part of his contractual rights entitled to him by vesture of Section 2(1)(b). The same conflict as discussed earlier under 5.3.1 is probable, and the same suggestions are made.

\(^{506}\) Article 51(2)(a).

\(^{507}\) Article 51(2)(b)
the transferee of the right of control (the named consignee) will have to present all of the originals to the carrier in order to exercise the rights of control. There is no corresponding rule under the COGSA 1992 requiring the sea waybills or the straight bills of lading to be produced when claiming delivery; neither when only one document is issued, nor when issued in sets. Therefore, this seems to be a new rule to the English lawyers.

Lastly, the same requirement as discussed under Article 51(1)(c) is repeated by Article 51(2)(b) obliging the controlling party to ‘properly identify’ himself in order to exercise the right of control. Apart from the earlier discussions on the definition of ‘proper identification’ which is also true here, it is argued, again, that when the document is to be surrendered, no mechanism would be working more effectively for purpose of identification than the document itself. Therefore, this appears to be an extra layer of protection for the carrier which is, thought to be, excessive and may expose the consignee to additional costs and expenses caused by delay in delivery.

5.3.3. A negotiable transport document is issued

In general, the third paragraph of Article 51 recognizes the ‘holder’ of a negotiable transport document as the controlling party. It then provides that where more than one original document is issued, the holder of all originals is the controlling party. The ‘holder’ is defined in Article 1(10) of the Rules as ‘a person that is in possession of a negotiable transport document’, so the holder will be the shipper in case of an order document, or the consignee or the endorsee of the document; or the bearer if it is a bearer document or endorsed in blank. Therefore, the consignee can be the holder of a negotiable transport document to be entitled to the rights of control as the controlling party under Article 51(3).

The question is whether this rule, while following the current practice of bill of lading, corresponds to those of COGSA 1992 regarding the holder of a bill of

508 It is under 1.2 when delivery is to be made against surrender of a non-negotiable transport document.
509 Article 51(3)(a).
510 Article 1(10)(a).
lading, and if yes, whether the holder in English law sense can be entitled to the controlling rights given by the Article 50(1) of the Rotterdam Rules to the holder as controlling party under Article 51(3). Section 2(1)(a) of the COGSA 1992 gives all rights of suit to the holder of a bill of lading which is defined by Section 5(2) as ‘(a) the consignee with possession of the bill; or (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill.’ The only difference between the two bodies of rules is that the shipper is not regarded as a holder under the Act. This can be readily resolved by reminding that the Act gives the rights to the person with possession of the bill of lading. This person, therefore, can be the shipper in the context of Article 51(3), so he would be able to qualify as the controlling party.

To answer the second question posted above, it has to be examined what type of rights provided by the Article 50(1) of the Convention can be exercised by the holder of a bill of lading under the COGSA 1992. Such a holder seems to have the right to give or modify instructions with respects to the goods by acquiring the rights under the Section 2(1) of the Act. As for the second category of rights which is to obtain delivery en route, the same operation of Section 2(1) will give the holder the rights, however, the difference is that these rights should have been stipulated in the terms of the contract of carriage. The reason is that the holder under the COGSA 1992 is only given the rights ‘under the contract of carriage’ and, therefore, not those which amounts to the variation to the contract. So, if the right to obtain delivery en route does not establish a variation to the contract of carriage, the holder, in English law sense, will have the rights of control as provided by the Article 50(1)(b) of the Rules.

The position is somewhat different regarding the third right of control, which is the right to replace the consignee as provided by Article 50(1)(c). The holder of a bill of lading under the COGSA 1992 as a controlling party, naturally, does not need such a right, since whenever he wishes to transfer his rights to another
person; he would then do so by transferring the bill of lading. If he wishes, on the other hand, to remain as the controlling party, he retains possession of the bill.\(^{511}\)

The final requirements for the holder of a negotiable transport document to meet in order to be able to exercise the right of control are; firstly he must ‘produce’ the document to the carrier. This condition seems to be similar to the position of English law under which such an action is more frequently referred to as ‘presenting’ the bill of lading, not ‘producing’ it. It is not exactly clear whether the draftsmen of the Convention had a specific meaning in their minds or this is only a matter of the language employed. The second condition of this provision, in contrast, generates a more substantial difference between the two bodies of rules. Under the Rotterdam Rules, if the holder is the shipper, or the consignee or the endorseee of an order transport document,\(^ {512}\) Article 51(3)(c) requires that holder to ‘properly identify’ himself in order to operate his rights of control when a negotiable transport document is issued. As it has been discussed earlier, the consignee and endorsee of a bill of lading under the English law qualify as the holder by possession of the bill through operation of Section 2(1) of the COGSA 1992 and there is no such requirement anywhere else under the Act. Therefore, this is completely new to English lawyers.\(^ {513}\)

The third and final requirement of the Article 51(3)(c) is that when the carrier has issued more than one original of the document, ‘all of the originals shall be produced’, otherwise ‘the right of control cannot be exercised’. It has to be recalled that under the 47(1)(c) on delivery of the goods, it was provided that when more than one original document is issued, ‘the surrender of one original will suffice and the other originals cease to have any effect or validity’. However, the rule is different in case of exercising the right of control. For claiming delivery of the

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\(^{511}\) C Debattista (n 501) para 51.18; The holder of a negotiable transport document is permitted by Article 51(3)(b) to transfer the right of control by transferring the document to another person. This is made subject to the rules of Article 57 of the Convention on transfer of rights. Since this subject needs a separate set of discussions, it will be examined in the next part of the study.

\(^{512}\) I.e. one of the persons referred to in article 1(10)(a)(i).

\(^{513}\) Two more points have to be repeated here: i) the same discussions regarding the proper identification made before are also true here; ii) it has been discussed that the shipper is not considered as a holder under the COGSA 1992. However, it has been suggested that the shipper by possessing the bill of lading can qualify as the holder and will therefore be able to exercise the rights of control under the Rules.
goods, the draftsmen of the Convention are of the view that the surrender of one of the originals would suffice, but when it comes to the right of control, all of the originals, if issued in set, have to be produced to the carrier. In view of the supporters of the Rotterdam Rules, this rule is intended to protect the carrier from the risk of being exposed to adverse and conflicting instructions from more than one person acting as the controlling party.\textsuperscript{514}

However, the problem with such argument is that the carrier has already been given a type of protection which is the requirement for the holder to properly identify himself to the carrier in order to exercise the right of control. Therefore, the carrier can simply refuse to recognize the holder as the controlling party if he fails to properly identify himself. In this way, in addition to the fact that the carrier is given the security he needs, the transport document will not be deprived of its effect or validity on the transfer or exercise of the right of control.

5.3.4. A negotiable electronic transport record is issued

Article 51(4) of the Rotterdam Rules recognizes the ‘holder’ as the default controlling party when the medium in question is a negotiable electronic transport record which is defined by Article 1(19) as an electronic transport record\textsuperscript{515} that by using the words ‘to order’ or ‘negotiable’ or similar words recognized under the applicable law indicates that ‘the goods have been consigned to the order of the shipper or to the order of the consignee’. Also, for that purpose, the record must not have the words ‘non-negotiable’ or ‘not negotiable’. The basis of the rules regarding the transfer and exercise of the right of control in this case is, to some extent, similar to those of paragraph 3 regarding negotiable transport documents, however, the possibility of the issue of more than one original record is not addressed here since it seems reasonably not conceivable.

\textsuperscript{514} M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 9.024.

\textsuperscript{515} Electronic transport record is defined in Article 1(18) as: “information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage”.

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According to the definition given in Article 1(10)(b), a person can become the holder of a negotiable electronic transport record in two ways: the record is either issued or transferred to him, in accordance with the procedures referred to in Article 9(1). What is meant by issuing of an electronic record is set by Article 1(21) as ‘the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.’ The transfer of an electronic transport record is defined in Article 1(22) as ‘transfer of exclusive control over the record’. It has been discussed before that the major problem with this phrase is that there is no definition made by the Rules for ‘exclusive control’. Therefore, a great deal of legal uncertainty would be caused by this unclarity. Moreover, both ‘issuance’ and ‘transfer’ of the electronic transport record are tied with the ‘exclusive control’. Thus, it is difficult to understand how the exclusive control can be transferred in order for the electronic record and, thus, the right of control embodied in it to be transferred. Nevertheless, the holder of negotiable electronic transport record is permitted by Article 51(4)(b) to transfer his rights of control to another person. This requires transfer of the record itself following the procedures set in the Article 9(1).

Also, in order to exercise the right of control, the holder shall ‘demonstrate’ that he is the holder of that record. The demonstration, likewise, has to be made in accordance with the rules of Article 9(1) which are provided for the recognition and use of electronic transport records. One of the advantages of the use of a negotiable transport document is the function of legitimating its holder. Legitimation of its holder means that it can be understood from the document whether the holder is the person entitled to the rights embodied in that document. How this function can be replicated by the electronic records is not made clear in these provisions. Also, it is not exactly specified by the Convention what has to be done in order to satisfy the requirement of ‘demonstration’. Whether a registry system or a token system should be used in order to record the identity of the holder is not stated either.
Therefore, because of the unclarity surfing through the provisions related to the issuance and transfer of electronic transport records, it is not clear how a consignee can actually obtain the exclusive control over the record in order to be entitled to the rights of control. The only certain thing is that once the consignee becomes the holder of the record, he shall demonstrate to the carrier that he is the holder so that he will be permitted to exercise the rights of control entitled to him under Article 50(1).

It will be discussed that the English law has not regulated the rules regarding the use of electronic documents, and although the Secretary of State is permitted by the Section 1(5) of the COGSA 1992 to modify the rules, it has not been carried out yet. Therefore, these rules and procedures are absolutely new to the English law and since there has been no general system for the commercial use of these documents, it is hard to foresee what the position of a holder or a consignee would be under the COGSA 1992 when he wishes to exercise or transfer his rights of control granted to him under a negotiable electronic transport record by Article 51(4) of the Rotterdam Rules.

It can be seen from the provisions related to the electronic transport records under the Rotterdam Rules that the regulations are not precise and well-defined. This is perhaps because of the nature of the subject that they are related to. It is true that the technology is rapidly growing, especially in the commercial practice; however, their development needs to be regulated through specialized laws. This is where the Rotterdam Rules, although attempting to establish a general framework, is submitted to have failed. It is, for instance, apparent from Article 9, which is the source of reference in nearly all of the electronic record related provisions, despite bearing the title ‘procedures’, obviously lacks the sufficient amount of ‘technicality’. This is even more disappointing when the seed of the UNCITRAL’s project leading to adoption of the Rotterdam Rules is known to have been planted during their sessions of Electronic Data Interchange project with the goal of facilitating electronic commerce and not to introduce a new maritime liability
It is thus submitted that although the English law does not, yet, provide for the use of electronic transport records or in general term, the electronic bills of lading, the provisions of the Rotterdam Rules in case of ratification by the UK will not be, at any rate, of use to deal with the electronic documents.

5.4. Carrier’s execution of instructions

Having examined the provisions on rights of control, an important question may be raised that whether the carrier is obliged to unconditionally follow and carry out the instructions given by the controlling party. The general rule set by Article 52 of the Rotterdam Rules answers this question positively. The carrier, therefore, under Article 52(1) has a duty to ‘execute the instructions’ referred to in Article 50 which provides different types of rights of control. Before carrying out the instructions, the carrier must make sure that ‘the person giving these instructions is entitled to exercise the right of control.’ In other words, when the requirements under Article 51 are met, the carrier shall comply with the instructions from the person who, pursuant to satisfying the conditions, is or becomes the controlling party.

The effect of the above condition if the Rotterdam Rules are ratified by the UK is that when a person obtains his status as the lawful holder under the COGSA 1992 and, therefore, acquires the rights incorporated in the contract of carriage with the assumption of including the rights of control, he would be required to meet an additional condition, i.e. proper identification, under the Rotterdam Rules in order to be entitled to exercise the rights of control in the eye of Article 52(1)(a). Otherwise, the carrier will not be bound to execute his instructions, simply based on the holder’s failure to properly identifying himself, which has been argued earlier to be an unnecessary and excessive measure of protection in favour of carrier in case a negotiable transport document is issued.

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517 Article 52(1)(a).
Furthermore, even when the condition in sub-paragraph (a) is satisfied, obeying such instructions is not unconditional. In addition to the permission given by Article 56 to the parties to vary the effect of this provision, there are also three exceptions made to the general rule of Article 52 as following: firstly, when due to their terms, the instructions cannot be reasonably carried out at the moment they reach the carrier.\(^{518}\) The carrier, therefore, has the right to reject the controlling party’s instructions, although this condition is not as simple as it seems to be. The provision uses the word ‘reasonably’ which might be the basis for further disputes between the carrier and the controlling party. This is an abstract concept which can be applied to a wide range of instances. How this is going to be interpreted seems to be dependent on the carrier’s judgement. Also, when there is a ‘reasonableness’ condition for the controlling party’s instructions, why is there no correlative standard required for the carrier’s execution of instructions in order to balance the parties’ rights?

Further, the wordings of the Article suggest that the instructions should be capable of being executed immediately once they reach the carrier. This seems to be contradicting with the nature of many of the rights of control, therefore it is suggested that literal interpretation should be avoided. It is believed that this part of the provision simply means that the instructions must be given at the right time, so that the carrier could be able to carry them out. However, the provision could be reorganized or redrafted in order to avoid amphibology. One suggestion is as following: *the instructions can reasonably be executed according to their terms in a timely manner when they reach the carrier.*

The second exception is when the instructions interfere with normal operations of the carrier, including his delivery practices.\(^{519}\) The problem is that there is no clarity as to what is meant by the ‘normal’ or ‘delivery practices’. Also, what amounts to interference with the carrier’s operations is not exactly specified. These terms can be interpreted in any direction and may constitute a considerable deal of

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\(^{518}\) Article 52(1)(b).
\(^{519}\) Article 52(1)(c).
disagreements. This can be better illustrated by an example: suppose that an unpaid seller, who has been very recently made aware of his buyer’s insolvency, wishes to exercise his right of control to obtain delivery en route to keep the goods out of the consignee’s (buyer) reach, so that he would be able to find a new buyer to redirect the goods to him. The carrier reasoning that his ‘normal’ operation, including delivery practice, at the time is to deliver the goods to the consignee named on the transport document claims that execution of shipper’s (seller) instructions will interfere with his ‘normal’ operations; therefore, he rejects the shipper’s instructions. Then the seller is deprived of his right of control which could be his only option to deal with the goods he has shipped but has not been paid for. The unpaid seller as the shipper can solve the problem by exercising the right to replace the consignee with himself.\(^{520}\) However, the consignee in similar circumstances cannot even exercise this right as it has been discussed earlier that the third type of rights of control is of little relevance to the consignee. Therefore, he will be left without any option when the carrier refuses to comply with his instructions by applying Article 52(1)(c).

The last exception to the general rule of carrier’s execution of instructions is when the controlling party does not provide the carrier with the security for the ‘amount of additional expenses, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction’. This is provided by Article 52(3) in form of a right for the carrier and a responsibility for the controlling party. This and the Article 52(2) are intended to protect the carrier against the costs that may be raised by following the controlling party’s instructions. If the controlling party fails to provide security, the carrier may reject the instructions.

The difficulty with this provision is, again, the test of ‘reasonableness’ which is to be done by the carrier. It is true that the controlling party can be a person with whom the carrier has no contractual relationship, so it is necessary for the carrier

\(^{520}\) Article 50(1)(c); C Debattista (n 501) para 52.06.
to be entitled to some type of security. However, it is argued that the literal interpretation of the rule could lead to an excessive amount of security asked by the carrier and because he has the authority to follow or reject the instructions, he may use that supremacy as leverage. Therefore, a controlling party in distress has to provide the carrier with any amount of security that the carrier consider as ‘reasonable’. This is even more emphasized when it is made clear that the carrier’s seeking security is a matter of ‘right’ whereas the controlling party’s reimbursement of carrier’s costs is a matter of ‘obligation’. Moreover, the ‘form’ of the security to be provided by the controlling party is not specified. Thus, the wordings of this provision not only may create potential disputes between the parties but also may harm the balance of rights and liabilities between them.

Similarly, Article 52(2) imposes a threefold obligation on the controlling party; firstly to reimburse the carrier for any ‘reasonable’ additional expense; secondly to indemnify the carrier against loss or damage may be suffered by the carrier while he ‘diligently’ carries out the controlling party’s instructions; and finally, to compensate the carrier’s liability if other goods carried on the same vessel are lost or damaged due to the execution of controlling party’s instructions.

The same argument with respect to the carrier’s authority to decide on reasonableness of the expenses is repeated here. Furthermore, it is argued that the attribution of the loss of or damage to other goods on board the same ship to the execution of the instructions made by the controlling party can also be a source of dispute. The problem is that the controlling party does not have any access to the log of the actions made by the carrier or his crew when he executes the instructions, therefore the only person who has the authority to decide whether the execution of instructions has led to the loss or damage to other goods is the carrier himself. The burden of proof, thus, seems to be on the controlling party to prove the contrary, and this is suggested to be not equitable, placing the controlling party in a weaker position.
However, the very important feature of this provision is that for the first time in all of the rules relating to the rights of control, the performance of the carrier is to be qualified. It is provided that the carrier has to execute the controlling party’s instructions ‘diligently’.\footnote[521]{This condition was added by the Woking Group in order to protect the controlling party against the additional expenses or damages due to carrier’s lack of diligence; UNCITRAL Report of Working Group III (Transport Law) on the work of its twentieth session A/CN.9/642, para 97.} This is, of course, significant for the controlling party in the sense that in any case of carrier’s request for reimbursement under this provision, he can apply the test of ‘diligence’ in order to stop the carrier from making extravagant demands. It is, regrettably, suggested that this qualification could have been extended to the remaining provisions of the Rotterdam Rules’ chapter on rights of control in order to maintain a balance between the rights, obligations and liabilities of the carrier and controlling party.

The final paragraph of the Article has a different function than the previous provisions. Article 52(4) is furnished to regulate the carrier’s liability for loss, damage or delay if he fails to follow the controlling party’s instructions and if the conditions in Article 52(1) are met. The basis of carrier’s liability is then made subject to Article 17 to 23 and, of course, the liability is limited to the extent as referred to in Articles 59 to 61.\footnote[522]{Since the carrier’s liability and its limitation require a separate detailed study and also these subjects are not within this thesis’s concern, they are not addressed here.} Two points have to be made here: firstly, it can be argued that the loss resulting from carrier’s non-compliance would not always be physical. The controlling party who is giving the instructions, basically, exercises his right of control due to an economic reason. In fact, most of the concerns of the person entitled to the goods, when he becomes the one who can control the goods in transit, are economical. For example a named consignee who has pledged the goods on board, wishes to exercise the right of control by nominating the pledgee as the controlling party in order to receive extra credit on the verge of a new transaction.

In such a case, there is no loss of or damage to the goods or delay in delivery involved if the carrier fails to comply with the instructions. It is purely an economic loss which is not furnished in this provision. Any issue that is not
addressed in the Convention is thus to be dealt with by the national or applicable laws. Also, it is believed that the reason given by the Working Group for not addressing the economic loss in this provision is not justifiable in any sense. The fact is that they decided to leave this matter to the national law because of ‘the very complicated provisions that would be required to cover economic loss.’ Many other issues are even more complicated than the possible regulation for economic loss and are still addressed in the Convention in lengthy detailed provisions with an excessive amount of cross references. Thus, being ‘complicated’ does not seem to be a valid reason for not dealing with a subject which is deemed necessary in this section.

The second point to be made is regarding the double standard presented by the Rotterdam Rules in terms of the limitation of liability. It is argued that it is simply not impartial when the parties are not treated equally. The carrier’s liability in case he fails to comply with the controlling party’s instructions is limited to a certain amount provided in the provisions of the Convention, whereas the only limitation on the controlling party’s reimbursement for the carrier’s additional expenses, loss or damage is to be decided by the carrier based on his own interpretation of what is ‘reasonable’. It is suggested that the Convention could have included specific regulations according to which the liability of the controlling party could be limited.

5.5. Variations to the contract of carriage

It is recalled that under Article 50(1)(a) the right to give or modify instructions with respect to the goods was permitted as long as it does not ‘constitute a variation of the contract of carriage’. Article 54 is the provision which regulates how this variation should be conducted. Despite the title of the article which is ‘variations to the contract of carriage’, there is no substantive regulation or definition as to what would amount to variation to the contract of carriage. The entire provision is, therefore, filled with procedural standards, the first of which is

that the controlling party is the only person who is entitled to agree with the carrier to variations to the contract of carriage.\footnote{Article 54(1).} However, the rights under paragraphs (b) and (c) of Article 50(1) are excluded. Although the face of the article may pave the way for different interpretations, however, it is believed that the essence of this provision is that, other than those rights that normally lead to variation to the contract of carriage,\footnote{Article 50(1)(b) and (c).} whenever the right of control may constitute a variation to the contract of carriage, it has to have the carrier’s agreement.

Furthermore, there are certain formalities to be complied with for the purpose of recording any type of variation to the contract of carriage. These are set by Article 54(2)(2) and are categorized into two aspects: firstly, all the variations, even those in Article 50(1)(b) and (c) shall be recorded in the transport document whether this document is negotiable or non-negotiable requiring surrender, also in negotiable electronic transport record and if the controlling party requests, in a non-negotiable transport document or a non-negotiable electronic transport record. Secondly, all of the recorded variations shall be signed according to Article 38.\footnote{Article 38 states that: “1. a transport document shall be signed by the carrier or a person acting on its behalf; 2. an electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.”}

The Rotterdam Rules’ requirement as to state the variations in the transport document has no corresponding statutory provision under the English law, in case an agreement is made between the carrier and the shipper as the controlling party. However, under the English law, if a consignee or an endorsee obtains the rights by becoming the holder of a bill lading, the rights are those ‘contained’ in the bill of lading not those stipulated in the contract of carriage that is evidenced by the bill of lading.\footnote{Leduc & Co v Ward and Others (1888) 20 QBD 475.: In which the endorsee brought an action against the carrier for non-delivery of the goods. The carrier attempted to rely on an exclusion clause, however the endorsee argued that deviation of the vessel had divested the carrier of his right to apply the clause. The carrier responded that the vessel was deviated due to an express oral agreement between him and the shipper. The Court of Appeal held that the deviation was not incorporated in the bill of lading, therefore, the oral agreement between the carrier and the shipper had not been a part of the contract between the carrier and the endorsee.; Also Owners of Cargo Lately Laden on Board the Ardennes v Owners of the Ardennes (The Ardennes) [1951] 1 KB 55.} Therefore, it can be considered as the same requirement under the
Rotterdam Rules when the controlling party is a consignee or an endorsee of a bill of lading or in the Convention terms, the transport document.

The effect of the second requirement of this provision when reading together with the Article 38 is that the carrier, or a person acting on his behalf, shall sign the variations. Therefore, any variation to the contract of carriage, even agreed by the carrier and stipulated in the transport document or record, must be signed by the carrier. This provision does not mention what would be the consequences if the carrier does not sign the variations. The variations are recorded and contained in the transport document, so a consignee or an endorsee under the English law can rely on them even if they are not signed. It seems that the rules will contradict with each other at this point and difficulties may arise. Would the carrier be able to disregard the terms incorporated into the transport document by his agreement but without his signature? These issues are suggested to be the result of unsatisfactory drafting of this article. It is suggested that this provision could have ended as following: ‘if so stated or incorporated, the carrier or a person acting on its behalf shall sign the variations in accordance with Article 38. Unsigned variations have no effect or validity.’

Apart from the problem of ‘lack of remedy’ of Article 54, several practical problems may arise in different circumstances. In case of negotiable transport document or electronic record and non-negotiable transport document requiring surrender, the variations shall be incorporated in the document or record. This means that the controlling party, who agrees with the carrier on variations to the contract of carriage, must be in possession of the document or record to have those agreed variations stated in the document. However, it is not always the case that the controlling party has the document in hand. So, for example, pursuant to Article 54(1), a shipper as the controlling party and the carrier agree on certain terms which constitute variation. The negotiable transport document is, currently, in possession of a financial institute as a pledge and will be released to the

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528 By virtue of Article 51(1)(a).
controlling party in two days. So, the controlling party is certain that, in two days, he can produce the transport document to the carrier in order to exercise his right of control. However, although at the time of exercise of the right of control he will be able to produce the document, at the time he agrees with the carrier, he is not in possession of the document for the terms to be incorporated in and also to be signed by the carrier. How the Convention deals with such a situation is not clear.

Furthermore, it is not provided by this provision that when there is more than one original transport document issued, whether all of the documents are required to be annotated and signed. However, it is suggested that this can be resolved by referring to Article 51(2) for non-negotiable transport documents requiring surrender and 51(3) for negotiable transport documents since, in order to transfer the right of control, the initial controlling party must transfer the document to the transferee. Therefore, the transferee naturally notices the variations once he receives the document, and when the transferee wishes to exercise his rights of control, he is required to produce all of the originals, if more than one is issued. Accordingly, the annotated document and the unvaried ones will be all in one place, avoiding any problem. However, this puzzling solution could have been avoided if the same rule for transfer of right of control had been replicated here.

5.6. Controlling party obligation to provide additional information, instructions or documents

The controlling party is obliged by Article 55(1) to provide additional information, instructions or documents relating to the goods if the carrier or the performing party requests so. Also, two conditions have to be met in this regard: i) the shipper has not yet provided the information or etc.; and ii) the carrier cannot reasonably obtain those information or etc. If these conditions are met, the controlling party shall provide, in a timely manner, what carrier may reasonably need in order to perform his contractual obligations. It has to be mentioned that these obligations have no corresponding under the English law.
Originally, the obligation imposed on the controlling party is the shipper’s. Under Articles 28 and 29 of the Rules, the shipper shall provide the carrier with the necessary information, instructions and documents relating to the goods that the carrier cannot reasonably access. These are defined as information or instructions for proper handling and carriage of the goods, and also those for the purpose of compliance of the carrier with the laws and regulations related to the carriage. The intention of Article 55 is, therefore, to furnish such details for the carrier when the shipper has not provided them. This obligation is however extendable in the sense that the carrier, by virtue of paragraph 2 of this provision, can apply to the shipper or the documentary shipper in this order to receive the necessary information, instructions or documents if any of these persons cannot be located after carrier’s reasonable effort.

The difficulty with this provision is that when the controlling party is not the shipper, there is no remedy introduced to the carrier in case the controlling party does not provide the necessary information, instructions or documents the carrier requests and needs. Of course, when the shipper is the controlling party and does not comply with the request of the carrier, the shipper’s liability for breach of his obligation will be dealt with by Article 30 of the Convention. But the Convention is silent on the liability of the controlling parties other than shipper. It has been discussed earlier that the lack of certain necessary provisions for the controlling party might lead to legal uncertainty and provoke significant disputes. The solution is that the Rotterdam Rules should have had a separate clear set of provisions to deal with the controlling party’s liability and limitation of liability.

5.7. Variation by agreement

It has been discussed under previous sections that at several points, references are made to Article 56 which permits the variation to the contract of carriage by the parties. It has to be noted that Article 79 of the Rotterdam Rules excludes those contract terms which are inconsistent with the rules of the Convention. In other words, this provision is the ‘centre of gravity’ of the Rotterdam Rules making
Convention the mandatory law. However, the chapeau of this article allows for the contrary by stating that ‘unless otherwise provided in this Convention’. Therefore, Article 56 can be considered as one of the instances that are provided ‘otherwise’.

Under Article 56, the parties to the contract of carriage are allowed to: firstly, restrict or exclude the transferability of the right of control when there is a non-negotiable transport document or a non-negotiable electronic transport record or no transport document is issued. Secondly, the parties are permitted to vary the effect of Article 52 which deals with the carrier’s execution of instructions. The apparent problem with such permission is paragraph 4 of Article 52 which makes the liability as well as limitation of liability of the carrier subject to mandatory provisions of the Convention. Obviously this paragraph is not excluded from the application of Article 52 and may result in conflict of the rules. It is not clear whether this conflict should be governed by Article 79 to preserve the mandatory nature of the carrier’s liability under relevant provisions or it is excluded from the application of Article 79 by its chapeau. Thirdly, the parties can limit or exclude the controlling party’s rights under Article 50(1) paragraphs (b) and (c), namely; the right to obtain delivery en route and the right to replace the consignee.

The final and most important permission given by Article 56, as far as the interests of the consignee are concerned, is the one that refers to variation of the effect of Article 50(2) which applies to the extent of the right of control. It has been discussed earlier that the linkage of the extent of the right of control with the period of responsibility of the carrier may lead to a situation where the consignee as the controlling party is deprived of his rights of control simply because the goods are in actual custody of the carrier but his period of responsibility is over. It was then suggested that the consignee must negotiate with the shipper that the period of responsibility of the carrier should be confirmed with the consignee before the contract of carriage is concluded. By the permission given to the shipper as the party to the contract of carriage to vary the effect of Article 50(2), he can be

529 Discussed under 5.2.
advised by the consignee to extend the period of carrier’s responsibility to a further stage at which the consignee claims delivery. Therefore, the consignee would be in control of the goods during the entire carriage until he takes the actual custody of them.

5.8. Conclusion

The position of the English law on the concept of ‘rights of control’ is not very clear and adoption of the Rotterdam Rules on this specific subject might be beneficial to its current status. This would be particularly useful in cases where the goods are sent under bills of lading or straight bills of lading, since the provisions of the Convention make it clearer when the shipper or the transferee/endorsee can give instructions to the carrier while the goods are in transit.\(^{530}\) Another effect of the Rules on the English law is that they facilitate the use of transport documents by giving the force of law to the rights of control. Therefore, the shipper is now permitted to easily and readily transfer his right to the consignee once he is paid and vice versa. The consignee also benefits from this clarification in the sense that the circumstances under which he may become the controlling party are made clear. Thus, under the Rotterdam Rules, he is legally more involved in controlling the goods while they are being carried than under English law.

The Rotterdam Rules also facilitate the use of electronic documents, since the rights of control are enabled to operate even when there is no transport document issued at all. Getting rid of the paper documents, therefore this can be regarded as a legal foundation for developing the electronic commerce, which seems to be the future of trade business. Moreover, if the relative illumination introduced by the Rotterdam Rules on the rights of control is accepted with acclaim by the English lawyers, it might also encourage the law-makers of the UK to accelerate the process of legislation for the use of electronic documents under the COGSA 1992.

\(^{530}\) It has been reviewed that the COGSA 1992 grants the right to the shipper under the sea waybills, therefore the English law provisions are sufficiently clear.
In general, the attempt of the draftsmen of the Rotterdam Rules to legislate one of the most practical aspects of the carriage of goods by sea, i.e. the rights of control, is truly admired and is acknowledged as one of the productive chapters of the Convention. The benefits of the clarifications that would be introduced by the provisions of the Convention to national laws, in our case the English law, are understandable. However, the unsatisfactory drafting, lack of clear definitions, convoluted structure, absence of necessary regulations, imbalance of a number of rules, and complexity are the major problems that make this part of the Convention unreliable and discouraging. It is suggested that the provisions on the rights of control to be re-examined with the possibility of revision in order to address the issues discussed throughout this section. Therefore, it is submitted that with regard to the provisions of Chapter 10, ratification of the Rotterdam Rules must be avoided by the UK until further revision and amendments.

6. Transfer of rights and assumption of liabilities

The only parties involved in the contract of carriage are not always the shipper and the carrier. Third parties, including the consignees/endorsees are often the other parties interested in the contract of carriage, although being not original parties to it. Subsequently, in order for the third parties to be entitled to the rights under the contract of carriage, there has to be a mechanism for transferring those rights. The transfer of rights has been the subject of many legal regimes, especially the laws of the common law countries, for decades making it one of the most crucial aspects of the carriage of goods by sea.\footnote{In the UK it is traced back to the nineteenth century as it was addressed in the Bills of Lading Act 1885.}

The Rotterdam Rules, in contrast to the preceding international maritime conventions, attempt to provide regulations to deal with the transfer of rights under the contract of carriage. However, the heading of Chapter 11\footnote{It is titled as ‘Transfer of Rights’.} is misleading because firstly, the provisions also include the transfer of liabilities and secondly, unlike the English law, the mechanism for transfer of rights excludes certain types of documents, i.e. non-negotiable transport documents and non-
negotiable electronic transport records. The provisions of the Convention are relatively similar to those of English law in the sense that both of the regimes make the holder liable when he exercises the rights transferred to him.

This section is attempted to analyse the relevant rules of the Convention by comparison with those of the English law, particularly under the COGSA 1992, with the aim of proving that the provisions of the Rotterdam Rules on transfer of rights and liabilities are imprecise, ambiguous, and will constitute an obstacle to the flow of the contractual rights to the third parties, especially the cargo-interests. The main argument, therefore, will be that the English law, in comparison to the Rotterdam Rules, is a more reliable, constructive and effective body of rules in this regard.

First of all, the scope of application of Articles 57 and 58 of the Rotterdam Rules is narrower than the English law, as stated before; the important fact about the Rules is that they are restricted to apply only to negotiable transport documents and electronic records. Therefore, the sea waybills, straight bills of lading and ship’s delivery orders, covered by the COGSA 1992, do not fall within these provisions. In a similar way to other subjects which are not governed by the Convention, the transfer of rights and liabilities when the document issued is not of a negotiable nature is also left to the national or applicable laws. This limited scope may lead to the deprivation suffered by consignees/endorsees of their rights and will be later discussed.

Moreover, one of the objections made to these rules is that they did not receive ‘the degree of attention the subject merited.’\textsuperscript{533} It can be recalled that the same argument has been made by the author with respect to the rights of suit. It seems that the draftsmen of the Rotterdam Rules have followed the same pattern when they had the subject of ‘contractual rights’ or anything related to the ‘rights’ on their agenda. This pattern is claimed to be the most effortless pursuit of the mentioned subjects, for whenever there had been a sign of complication, the

\textsuperscript{533} D R Thomas (n 330) 446.
draftsmen decided to avoid dealing with that matter and to leave it to the applicable laws.  

6.1. Transfer of rights under negotiable transport documents

Article 57(1) of the Rotterdam Rules allows the holder of a negotiable transport document to transfer the incorporated rights. The article seems difficult to follow on its face; however, it is nothing but a ‘procedural guidance’ as how to transfer the documents based on their types. By transferring the documents, the rights are therefore transferred from one holder to another holder. In fact, this provision offers no novelty in this regard and it merely restates the established principles of carriage of goods by sea regarding the bills of lading in a tangled and puzzling way.  

These procedures are to be followed as following in order to give effect to a transfer: a) if an order document, i.e. made out to order of a named consignee or to the shipper’s order, is issued, either it should be fully endorsed to the person who is going to be the new holder of the document and the rights; or it should be endorsed in blank; a blank endorsed order document will therefore be a bearer document that does not need to be endorsed; b) if an order document is issued to order of a named person, there is no endorsement needed as long as the transfer is made between the original holder/shipper/first transferor and the named person who is going to be the new holder of the document and the rights. Mere transfer of the document to the new holder will make him the holder of the document and entitled to the rights.  

Therefore, an order bill of lading made out to the order of a named consignee must be duly endorsed by the holder in order to be transferred along with the rights embodied in it, unless the transfer made directly between the shipper and the consignee. In the latter, the mere delivery of the document  

\[534\] The most recently discussed instance was the ‘economic loss’ under 5.4.  

\[535\] Cf M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 10.012.; It claims that this Article is more than a manual because if the procedures are not followed the transfer of right might not achieved. This is not true, since the transfer of right itself is also made in form of following certain procedures under this provision and there is nothing substantive involved. In fact it is a twofold manual.  

\[536\] Article 57(1)(a) and (b).
suffices, however, if the consignee wishes to transfer that document to another person, this has to be done by his duly endorsement.

As far as the English law is concerned, the COGSA 1992 does not merely address the transfer or endorsement of bills of lading, or negotiable transport documents in the language of the Rotterdam Rules. However, the Act applies to non-negotiable bills of lading, i.e. the sea waybills, straight bills of lading (regarded as sea waybills under the Act)\(^ {537}\) and also ship’s delivery orders\(^ {538}\) as well as the negotiable bills of lading, which extends its scope of application to a wider range of transport documents in comparison with the Convention.

It is recalled that the COGSA 1992 is essentially legislated to deal with the issues regarding the transfer of rights of suit. There is a view proposing that the two regimes also differs in this respect, in the sense that the transfer mechanism incorporated in the Rules does not furnish for transferring the rights of suit,\(^ {539}\) but only in respect of rights of delivery and the right of control. Accordingly, one important question with regard to the provisions of the Rotterdam Rules on transfer of rights is the definition of the ‘rights’ that are to be transferred.

Article 57(1) of the Rules, speaks of the ‘rights incorporated in the document’ as the subject of transfer mechanism it establishes. The rights incorporated in the document will therefore clearly include the right to delivery and the right of control. There are views suggesting that these rights also include the right of suit under otherwise applicable law.\(^ {540}\) This means that although the Rotterdam Rules lack a precise set of provisions dealing with the question of rights of suit, these rights may be transferred through operation of Article 57 of the Convention.\(^ {541}\)

If the suggestion made by Diamond is followed, then this obviously makes the scope of application of the Convention even narrower, since the effects of rights of

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\(^{537}\) This problem was even raised by the UK delegation at very latest stage of deliberations on the Rotterdam Rules who regrettably expressed that the fact that the straight bills of lading were not covered by this Article was ‘unsatisfactory’ UNICITRAL A/CN.9/SR.874, para 5.

\(^{538}\) Ship’s delivery order is not considered as a ‘transport document’ at all under the Convention as it does not fit into the definition under Article 1(4) of the Rules.

\(^{539}\) A Diamond QC (n 446) 529.

\(^{540}\) M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 10.010.

\(^{541}\) See also Carver (n 7) paras 6-084 and 6-085.; D R Thomas (n 330) p 447.
control can, somehow, be replicated under the rules of English common law as the rights to redirect the goods, thus, to be transferred to the consignees or endorsees,\textsuperscript{542} but it is obviously not possible for the Convention to govern the rights of suit.\textsuperscript{543}

In case of ratification of the Rotterdam Rules by the UK, a question may arise as whether the English courts would consider the \textit{travaux préparatoires} when interpreting the Convention. It can be argued that since the UK is a party to the Vienna Convention on the Law of Treaties 1969, the courts are allowed by Article 32 of the Convention to recourse to supplementary means of interpretation, including the preparatory work of the treaty. Also, to support this argument there are instances in authority such as Lord Diplock’s use of minutes of the conference at The Hague in interpretation of Article 26 of the Warsaw Convention in \textit{Fothergill Respondent v Monarch Airlines Ltd. Appellants},\textsuperscript{544} or Lord Hope of Craighead in \textit{Sidhu v British Airways plc} where he stated that the use of \textit{travaux préparatoires} ‘after proper analysis, clearly points to a definite intention on the part of the delegates as to how the point at issue should be resolved’.\textsuperscript{545}

Moreover, the effect of transferring a negotiable transport document is not made clear under the Rules. At least, the wordings of Article 57 suggest that it does not address the transfer of constructive possession or proprietary rights in the goods. However, the problem is that this Article is so generally and imprecisely drafted that one might suggest that the rights incorporated in the document include the proprietary rights in the goods. Apart from that, there is no connection made between the transfer of rights and the person who has actually suffered the loss.

\textsuperscript{542} It has been discussed in Chapter I of this thesis that under common law, delivery of the bill of lading to the consignee would deprive the shipper of the right to redirect the goods. Although, the consignee/endorsee cannot normally be entitled to those rights since the doctrine of privity does not allow him to be, by virtue of Section 2(1)(a) of the COGSA 1992 and its effect on transfer of all of rights of suit under the contract to the consignee/endorsee, it was suggested this would also include the right to redirect the goods. Therefore, not only the consignee/endorsee will be entitled to the right to redirect the goods, but also the shipper’s rights will be exhausted. It should be noted that this rule is not the same under sea waybills and ship’s delivery orders. For a full discussion see Chapter I section 2.3.

\textsuperscript{543} Although not defined in the Convention, at the very earliest sessions on the Rules, referring to the rights in Transfer of Rights Chapter, it was expressed that ‘these rights are, effectively, the right of control set out in chapter 11, including the right to demand delivery of the goods at destination.’ UNCITRAL A/CN.9/WG.III/WP.21/Add.1 para 125.


\textsuperscript{545} [1997] AC 430, 442.
This is made clear under Section 2(4) of the COGSA 1992 in which the holder/transferee is allowed to exercise his contractual rights for the benefit of the person who has interest or right in the goods. Although there is no duty imposed on the holder to comply with this provision, it is provided as a statutory mechanism for those who might agree on carrying out such an action. It is noteworthy that there is no equivalent provision anticipated under the Convention for such occasions.

Furthermore, it is not specified by these rules that what the state of the original holder/transferor will be after the rights are transferred. There are no terms in this provision to provide whether the rights of the transferor will be ceased to exist after they are transferred and vested in the transferee. This position is made clear under the COGSA 1992 Section 2(5)(a) of which provides that where rights are transferred by virtue of Section 2(1), the transfer ‘shall extinguish any entitlement to those rights which derives where that document is a bill of lading, from a person’s having been an original party to the contract of carriage’.546 Also, under the sea waybills and ship’s deliver orders, the shipper’s rights will be retained even though transferred to another person.547

Another difference between the two sets of rules is that what is to be transferred through Article 57 of the Rotterdam Rules are the rights ‘incorporated in the document’, while the COGSA 1992 refers to the rights ‘under the contract of carriage’. It is not clear whether this reference under the Rules is made intentionally or it is a result of loosely drafting. However, it can be cautiously suggested that these rights are to be interpreted as contractual rights.548 If the purpose of choosing the word ‘document’ instead of ‘contract’ has been to restrict

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546 East West Corp v DKBS 1912 [2003] 1 Lloyd’s Rep 239.: In this case bills of lading had been endorsed to bankers for the purpose of documentary credits and the buyer had failed to pay the price of the goods. The bills were given back to the shippers without endorsement, thus the shippers had no rights of suit.
547 Tailpiece of Section 2(5) of COGSA 1992.
548 Also, under Article 47 of the Rules, reference is made to ‘rights ... under the contract of carriage’ for a person who becomes holder a spent transport document.
the transferred rights to those which have been agreed with the knowledge of the transferee, it can be regarded as a positive feature of this provision.\footnote{499}

6.2. Liability of the holder

Similar to the transfer of rights, the liabilities under the Rotterdam Rules are only assumed by the holder\footnote{500} if either a negotiable transport document or an electronic transport record is issued. Unlike the COGSA 1992, the Convention is silent on assumption\footnote{501} of liabilities by a holder of non-negotiable documents or electronic records. However, as it is mentioned before, they do correspond in their purposes, as both of the regimes assume a holder/transferee liable only where he exercises his rights and not based on mere possession of the transport document. In this way, the Rotterdam Rules also follow the ‘principle of mutuality’. Therefore, as it is expressly stated under paragraph 1 of Article 58, ‘a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder’.

The problem with this rule of the Convention is that the ‘exercise of rights’ is not clearly defined. Thus, it can leave the room open for much debate. The only reference made by the Rules to the concept of ‘exercise of rights’ is embodied within paragraph 3 of Article 58 which enumerates two circumstances where a holder is not deemed to have exercised his rights. However, these are more of procedural nature than substantive, so that no delineation is made regarding definition of the issue in question. Though, it is suggested by some commentators

\footnote{499} Because the shipper and the carrier may orally agree on terms which are not incorporated into the shipping document.; Therefore, it will have the same effect as what was held under Leduc & Co v Ward and Others (1888) 20 QBD 475.

\footnote{500} Article 1(10) defines holder as: ‘(a) a person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or (b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.’

\footnote{501} Another terminological difference can be found here as the COGSA 1992 speaks of ‘imposition’ of liabilities while the draftsmen of Rotterdam Rules have preferred to employ the term ‘assumption’ instead of the word ‘transfer’ used for the rights in Article 57. Such different choice of word with regards to the BLA 1855 was pointed out in the Law Commissions Report (n 54) para 3.23 where they referred to not using the word ‘transfer’ for the liabilities by draftsmen of BLA 1855 as an implication of shipper remaining liable after endorsement.; Richard Williams ‘Transport Documentations – The New Approach’ in D R Thomas (ed) (n 496) para 9.2.1.
that exercise of rights can be construed as any ‘active involvement by the third party’ and may include exercising the right of control during transit, agreeing with the carrier to a variation to the contract, replacing document with fresh sets, and claiming delivery of the goods.\textsuperscript{552}

Also Thomas, while posing a number of questions regarding the interpretation of Article 58, suggests that presumably the holder exercises his contractual rights if he makes a claim under the contract in respect of loss or damages of the goods.\textsuperscript{553} Following this suggestion, it can be said that the scope of application of this rule is so broad that it may also include the liability for exercising the rights of suit by the holder/transferee.

It can be recalled that a similar question of interpretation was pointed out for imposition of liabilities under Section 3 of the COGSA 1992. To overcome with the difficulties, reference has been made to English authorities as to define what is meant by the terms ‘takes or demands delivery’ and ‘makes a claim’ under that provision.\textsuperscript{554} On the one hand, it can be argued that the statements made by Lord Hobhouse\textsuperscript{555} in \textit{The Berge Sisar}\textsuperscript{556} might be regarded as guidance in interpretation of these terms; however, it does not mean that the difficulties have been completely resolved. However, it can be said, at least, the circumstances under which a transferee will become liable under the COGSA 1992 are more precise than the general conditions set by the Rotterdam Rules.

Although Article 58(3) of the Rules provides a limited range of exceptions\textsuperscript{557} to the rule of assumption of liabilities of the holder, it is submitted that this unlimited state of circumstances under the Convention, in comparison with the specific procedures in incurring liabilities set by the COGSA 1992, will lead to imposing

\textsuperscript{552} M F Sturley, T Fujita and G. J. van der Ziel (n 437) para 10.030.; The last one is also suggested by D R Thomas (n 330) 449.
\textsuperscript{553} D R Thomas (n 330) 449.
\textsuperscript{554} See Chapter I section 3.1.1.
\textsuperscript{555} \textit{The Berge Sisar} [2001] UKHL 17, paras 32-35.
\textsuperscript{556} [2002] AC 205; [2001] UKHL 17.
\textsuperscript{557} It provides a holder does not exercise his rights merely if ‘(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or (b) It transfers its rights pursuant to article 57.’
harsh consequences on holders/transferees who do not, in the eye of English law, attract liabilities. One of these instances could be *The Ythan* in which it was stated *obiter* that the issue of the letter of undertaking did not amount to ‘making a claim’ under of Section 3(1) of the COGSA 1992, therefore he was not held liable. If the provisions of the Convention are to be applied to the facts of this case, the possibility of the holder incurring liabilities will be highly likely, by which it offers no predictability for third party holders.

It is believed that the earlier draft version of this provision had contained more precise and reliable rules as to the extent of liabilities of the holder. In draft Article 60(2) these liabilities were set as following: ‘i) any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record; ii) the liabilities imposed on the controlling party pursuant to Chapter 11; and iii) the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and compensation for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic transport record.’

While the first of these three factors were decided to be, and is, preserved in the final draft of the Convention, the two other items were deleted due to divergent views of delegations although support had been expressed that they would have ‘a useful substantive role to play’. However, it can be seen, once again, that the functionality and effectiveness of a provision had been sacrificed because the participants could not achieve ‘acceptable harmonization’ on one issue to agree on in a ‘fashion for completion of the draft convention’, because it could have been

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558 [2005] EWHC 2399 (Comm).
559 UNCITRAL A/CN.9/WG.III/WP.81, 44.
561 Views were generally divided into two categories, first of which supported the general approach to liabilities and the second proposed to provide a list of liabilities, or perhaps a non-exhaustive list.
‘very difficult.’ It is claimed that this has not been the first time that draftsmen of the Rotterdam Rules have chosen to take the easiest approach and, thus, to avoid encountering the complexity of the substance. The irony is that the Convention itself is a complicated set of rules.

In this way, in addition to the inconvenient and excessive efforts for interpretation to be thrust on the courts, there is a fear that this open-ended concept of ‘exercise of rights’ might result in injustice, unnecessary liabilities and deprivation of interests for holders who have, in their own judgments, acted in on a customary routine of trade.

Another defect in the provisions of the Convention with regards to the liabilities of holders is that it is not expressed whether the liabilities of the original shipper/last holder will be retained or extinguished once they are transferred to the next holder. The position of the COGSA 1992 on this subject is very clear as it is set out in Section 3(3) that the imposition of liabilities on any person shall be without prejudice to the liabilities of the original party to the contract of carriage. Thus, it is made clear that the shipper will remain liable even if his liabilities are transferred to another person through operation of Section 2(1) of the Act.

Two points shall be observed in this section in order to extract the status of the shipper’s liabilities after assumption of liabilities by the holder under Article 58 of the Rules: firstly, as it is noted earlier, a reference can be made to the choice of words made by the draftsmen of the Convention that instead of using ‘transfer’, they preferred to employ the term ‘assumption’ for liabilities. If the observation of Law Commissions in preparing the COGSA 1992 of the similar choice of words in drafting the BLA 1855 is considered, the same suggestion can be made in this

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564 This issue was pointed out by in the UNCITRAL Report of Working Group III (Transport Law) on the work of its twenty-first session A/CN.9/645 para 181 where it was stated that the phrase ‘exercise any rights’ was feared to be ‘interpreted in a way that minor action would be deemed as an exercise of rights and would thus cause liability.’ However, it was decided that the provision would be retained in its current form because ‘that approach also reflected the current practice and it was viewed as clear that minor actions would not be seen as an exercise of rights’. This is submitted to be not true as it is pointed out what the consequences of interpreting such a broad provision would be, as it is one of the most controversial issues of the current practice.
565 See footnote 551.
regard as the intention of draftsmen of the Rotterdam Rules have been the co-existence of liabilities of the shipper and the holder/transferee. Otherwise, they would have used the term ‘transfer’. Secondly, a combined reading of Article 30(1) and paragraph 2 of Article 33 of the Rotterdam Rules, suggests that the shipper will remain liable regardless of transport of document and assumption of liabilities by the holder.

It has been discussed under the English law that whether the liabilities imposed on the transferee include those for loss or damage suffered by the carrier as a result of shipment of dangerous cargo. Further, the common law rules as well as the position of English statutory laws have been examined. Although the current position, at least apparently, is to extend the liabilities of this kind to the transferee, it has been argued that the ‘retrospective liability’ or at least those liabilities that the transferee had not any association with should not be imposed on him since the fairness and rationality dictates so. A similar question may be raised under the Rotterdam Rules, since it has been reviewed that there is not provision in the Convention to define the extent of liabilities of a holder/transferee.

It is recalled that the Rotterdam Rules provide that a holder who meets the requirements of assumption of liabilities under Article 58, ‘assumes any liabilities imposed on it under the contract of carriage’. It can be seen that the word ‘it’ clearly refers to the holder who is not the shipper. The problem with the wordings of this provision is that the holder who is not the shipper (i.e. transferee of a negotiable transport document or an electronic transport record) is not a party to the contract of carriage and the whole purpose of Convention’s chapter on

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566 It provides that ‘The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper’s obligations under this Convention’. There is nothing in this provision to exclude the shipper’s liabilities when they are assumed by another person who becomes liable pursuant to transfer of document and exercise of rights.

567 It provides that where the documentary shipper incurs liabilities and obligations, it does not affect the obligations and liabilities of the shipper.

568 Also the information gathered by Swiss delegations from an informal survey answered by delegates from a number of countries as well as organizations provides that ‘there seems to be general support for the position that the transfer of liabilities does not mean that the contractual shipper and prior holders are relieved from all responsibilities’. UNCITRAL Working Group III (Transport Law) Sixteenth session Transfer of Rights: Information presented by the Swiss delegation A/CN.9/WG.III/WP.52 para 19.

569 See Chapter 1 section 3.1.3.
Transfer of Rights (and assumption of liabilities) is for the holder/transferee to be treated as if he has been a party to the initial contract of carriage.\textsuperscript{570}

Therefore, it is difficult to see how he can assume liabilities embodied in a contract to which he is not a party. This problem, however, is suggested to be a result of unfortunate drafting since the intention of draftsmen has been made clear under previous provisions. Thus, if so construed, the liabilities under the contract of carriage to be assumed by the holder seem to be the liabilities of the original shipper under that contract. With this proposition, the holder/transferee will be subject to the liabilities of the shipper with respect to the shipment of dangerous goods.\textsuperscript{571} On the other hand, the remaining part of Article 58(2) acknowledges that these liabilities are to be assumed to the extent that they are ‘incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record’. Taking this into account, it can be suggested that the holder/transferee will be subject to those liabilities which have been expressly or impliedly agreed on between him and the shipper and, subsequently, have been incorporated into the terms of the transport document or electronic record. Any liabilities falling outside the ambit of the terms of the transport document or electronic record will therefore be ineffective.

6.3. Conclusion

The analogy between the two sets of rules regarding transfer of rights and imposition/assumption of liabilities has been drawn. The main purpose of providing a mechanism of transfer under both systems is to transfer of rights to the persons who are not original parties to the contract of carriage but have interests in the transactions covered by the contract.

\textsuperscript{570} UNCITRAL Report of the Secretary-General in thirty-fourth session - Possible future work on transport law A/CN.9/497 paras 47-48.
\textsuperscript{571} Article 32 provides that ‘when goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment: (a) the shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and (b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.’

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While the underpinning intention of legislation of COGSA 1992 has been to transfer the contractual rights of suit against the carrier to the consignees/endorsees and these rights following a statutory approach also include the right to claim delivery of the goods, the application of Rotterdam Rules to rights of suit other than those relating to delivery and control of the goods is not uncontroversial. On the other side, the rights which are to be transferred via the device set by Article 57 of the Convention can be transferred under the English law both through statutory provisions and, if failed, via common law rules. Therefore, the mechanisms provided by English law may offer a more comprehensive, precise and reliable method to third parties with interests in a contract of carriage who wish to ascertain or at least be aware of their contractual rights.

As far as the liabilities are concerned, it has been pointed out that both regimes are similar in terms of following the ‘principle of mutuality’. However, the unlimited, imprecise and vague provisions of the Rotterdam Rules, although based on clear intentions, may offer nothing but uncertainty. The COGSA 1992, on the other hand, presents a clearer image of how, when and what liabilities are to be imposed on a transferee/consignee/endorsee. Furthermore, these rules have been tested over time not only by English courts but also by authorities in other jurisdictions around the globe; therefore where there might be an unclear term, good authorities exist to assist the interpretation.

Moreover, the scope of application of English law rules is wider than that of broader rules of the Convention. While more types of transport documents are covered by the COGSA 1992 in order to furnish for the reality of the commercial practice, the indistinct terms of the Rotterdam Rules apply only to negotiable documents, leaving the excluded documents to the national or applicable laws. The effect of which would be that if the Rules are adopted by the UK, the questions of transfer of rights and imposition of liabilities in sea waybills, straight bills of lading and ship’s delivery orders are to be solved under the COGSA 1992,
therefore the Convention will not present any novelty to the English law. Consignees/endorsees of goods/documents related to a contract of carriage expect to have certainty and reliability in terms of their rights and foreseeability and predictability with respect to their liabilities. It is concluded that these standard and unquestionable expectations cannot be fulfilled by the mechanisms provided in the Rotterdam Rules.572

572 The three chapters of Rotterdam Rules on delivery of goods, rights of controlling party and transfer of rights and liabilities have been widely criticized by several authors. Anthony Diamond QC, ‘The Next Sea Carriage Convention?’ (2008) 2 LMCLQ 135, 138: ‘... in my view it would have been preferable to omit altogether the chapters on delivery of goods, rights of the controlling party and transfer of rights.’; Francesco Berlingieri, ‘Revisiting the Rotterdam Rules’ (2010) LMCLQ 583, 639 on rules for assumption of liabilities under the Rules: ‘Article 58 I consider it as perhaps the least satisfactory provision of the whole Convention.’
7. Harmonization and Modernization of the Carriage Rules

One of the foremost aims of the Rotterdam Rules is said to modernize the shipping law by an attempt to facilitate the use of electronic documents. It is per se a very helpful move towards meeting the requirements of the modern age trade; however, the business community is reasonably cautious when it comes to switching from paper documents to electronic records, while there is not enough awareness of the legal consequences. The traders as well as the ship owning companies are willing to adopt an effective system which fulfils their commercial as well as technical needs.

The Rotterdam Rules are named as the first international carriage of goods by sea convention which makes specific provisions for electronic commerce. The Convention creates a platform to deal with two categories of electronic equivalents to paper documents. Firstly, the negotiable electronic transport record as an alternative to the traditional negotiable bills of lading and secondly, the non-negotiable form of electronic transport records to function as seaway bills. Article 8 of the Rules, in a broad fashion, regulates the use and effect of the electronic transport records. In essence, the Convention establishes this provision on two conditions; a) mutual consent of the carrier and the shipper with regard to the issuance and use of the electronic records, and b) granting the same effect of issuance, transfer and control over the transport documents to their electronic equivalents.

A typical situation to illustrate how an electronic transport document works can be described as following: the shipper online provides the carrier with relevant information in a bill of lading. Afterwards, the carrier signs a digital message once the cargo loaded on board the ship. This digitally signed message is regarded as an electronic bill of lading, and it is secured by a public code which only the person who has the private key of the same type, can encode and gains access to.

The original shipper, having access to that private key, both has control over the cargo during voyage, and also will be able to transfer the code to an endorsee by signing the message (electronic bill) digitally and informing the carrier. The process of signing and transferring the private key can be carried on until the goods reach their destination. At the port of discharge, the party who has the newest code as well as the required identification form can claim the delivery of the goods.

Flexibility, reliability, efficiency and precision are the most appropriate words to describe this system, however, there are serious legal and technological challenges flowing in the use of electronic transport records within the context of the Rotterdam Rules concerning the rights of consignees. These issues are of great significance that could also count for the failure of the Convention to attain the goal of modernization and uniformity of the existing carriage of goods by sea regime. An analysis of the Rules as well as comparing it to the status of COGSA 1992 will be carried out in order to prove that ratifying the Rotterdam Rules will only bring more gaps to the current state of English law regarding the electronic transport documents/bills of lading.

It is established that documents, specifically transport documents, play a vital role in carriage of goods practice. For this purpose, a bill of lading performs certain functions in the context of the sales contracts, sea carriage contracts and the documentary credits which are provided to ease the payment. Typically there are three main functions envisaged for a bill of lading: firstly, to act as a receipt of the goods; secondly, it is evidence of the contract of carriage; third and the most important one to serve as a document of title.574

In the common law sense, the ‘document of title’ feature of bills of lading has always been controversial. In fact, there is no agreement among the scholars on the answer to the very essential question of what is meant by a ‘document of title’. According to Benjamin, ‘there is no authoritative definition of “document of title”’

574 Carver (n 7), para 1.001.
at common law’; however, by way of traditional interpretation, it means that a bill of lading ‘embodies constructive or symbolic possession of the goods’. In other words, this unique feature of the bills of lading is allotted for the purpose of negotiation of the goods evidenced by the bill while they are in transit. This also provides for the underlying characteristic of the bills to be the foundation of a documentary credit system by incorporating the title and rights to the goods.

Under the Rotterdam Rules, the two first functions of the bills of lading are fairly unchallenging to be replicated into an electronic document. The receipt function of a bill of lading, regarded as a transport document, can be performed by virtue of Articles 35 to 41 of the Convention. These provisions set out the rules for the issuance of the electronic record, signature, the information that has to be furnished by the shipper in the electronic record as ‘contract particulars’, the evidentiary effect of these particulars and how they are qualified. As for the second function, the Convention under Articles 57 and 58, which are provided for transfer of rights and liabilities of the contract of carriage, allows for a negotiable electronic transport record to be used as a transferring instrument, thus making it an evidence of contract of carriage.

On the contrary, the most difficult task which needs careful consideration is to make an alternative in the electronic environment for the third function of a bill of lading; serving as a document of title or the negotiability (in the context of Rotterdam Rules). Since the Convention does not use the term ‘document of title’, the question is whether transport documents being ‘negotiable’, perform the same function as them serving as ‘document of title’. It can be argued that the use of

575 Benjamin (n 14) para 18.007.
576 LJ Bowen in Sanders Brothers v Maclean & Co (1883) 11 QBD 327, 341: ‘...the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.’
578 This is of course not flawless since the transfer mechanism provided by the Rules only deals with the negotiable electronic transport records, thus leaving the non-negotiable kinds to the applicable laws. This has been discussed in details earlier in section 6.
word ‘negotiable’ in the provisions of the Convention relating to the transport
documents can be deemed as a reference to document of title. To rebut this
argument, it should be noted that firstly, the term ‘negotiable’, surprisingly, is
not defined by the Rotterdam Rules. Secondly, it springs to mind by an overview
of the definition of a negotiable transport document in Article 1(15) that classifying
a transport document as ‘negotiable’ mostly depends on its ‘transferability’.
Thirdly, there is no indication of ‘legal effects’ of such a transfer in wordings of the
provisions.

Further, it can be seen from the structure of the Rotterdam Rules that it has been
expected by the drafters for an electronic transport record to perform the same
functions as a paper transport document. However, clearly, the Rotterdam Rules
do not deal with the third function performed by a bill of lading acting as a
document of title. The Convention instead of referring to the traditional
terminology of documents such as bills of lading or sea waybills, in a shift from
the previous maritime conventions, uses a general term called ‘transport
document’. It is defined in its Article 1(14) as: ‘...a document issued under a
contract of carriage by the carrier that: (a) evidences the carrier’s or a performing
party’s receipt of goods under a contract of carriage; and (b) evidences or contains
a contract of carriage.’

Negotiability of a bill of lading means that it is capable of being transferred to
another party along with the rights embodied in it. In many legal systems, when a
bill of lading is negotiated, the constructive possession of the goods as well as the
title to the goods is transferred. On the other hand, the Convention defines a
‘negotiable transport document’ as a document that fulfills two prerequisites; a) it
must impliedly, by any means, indicate that the document is transferable and b)
there should not be an explicit clause or wording rendering the document non-

580 This is when even the word ‘Ship’ is defined within Article 1.
581 Article 8(a) which opens with the words ‘Anything that is to be in or on a transport document under this
Convention may be recorded in an electronic transport record...’.
582 The application of The Hague and Hague-Visby Rules is attached to the issuance of bills of lading.
Likewise, the Hamburg Rules dealing with the documentary issues only limited to bills of lading.
transferable. Therefore, recalling the definition of transport documents in the Rotterdam Rules, it seems that, under the Convention, the use of electronic bills of lading instead of paper bills would not raise the potential difficulties of in terms of providing an equivalent for transfer of possession, i.e. the document of title function.

However, the importance of the concept of transfer can be highlighted when it comes to practice. The law is regulated to prevent the circumstances in which more than one party claims the goods or the rights under a contract of carriage at the same time. This can happen commonly in case of chain of negotiations where the rights embodied in a transport document or title to the goods carried under that document is transferred while in transit. It is true that the Rotterdam Rules avoid to deal with the document of title function of the transport documents and its transfer of possession effect in the common law sense, however, the concept of ‘transfer’ under a transport document or its electronic equivalent is used by the drafters for other purposes such as transfer of rights under a transport document. This may again raise the question as whether the electronic transport records provided by the Rotterdam Rules are capable of operating as effective as their paper-based predecessors.

Therefore, the main question is whether the party, who is to have control over the rights or the goods associated with an electronic transport record, can be clearly specified under the Rotterdam Rules in order to prevent conflicting claims of possession of them. To that effect, the Convention introduces ‘exclusive control’ in case of electronic transport records as an equivalent for the ‘possession’ of the transport documents. Thus, the ‘exclusive control’ can be regarded as the basis of the provisions of the Rotterdam Rules which deal with the issue and transfer of

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583 Article 1(5) states: “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

584 Under Article 57 of the Rules which is discussed in section 6 of this Chapter.

585 Article 8(b).
The key problem is that there is no definition made by the Rules of the exclusive control, neither the Rules provides for how this control can be attained or transferred. How this concept can offer harmonization and certainty thus is still an unanswered question. It may be said that exclusive control can be interpreted based on custom, commercial practice, as well as development of the necessary technologies, however it is, regrettably, not specified at any point in the lengthy provisions of the Rotterdam Rules.

On the other hand, the English law currently does not accommodate the use of electronic transport documents. Accordingly, a consignee under an electronic bill of lading may not be entitled to the statutory rights of suit. Under Section 1(5) of the COGSA 1992, the Secretary of State is empowered to extend the application of the Act by making provisions to cover the use of electronic document. The effects of such a regulation should apply to the transactions corresponding to: ‘(a) the issue of a document to which this Act applies; (b) the endorsement, delivery or other transfer of such a document; or (c) the doing of anything else in relation to such a document.’ However, this modification has not been made yet. This means that a cargo owner under an electronic bill of lading cannot sue the carrier by invoking the rights designated for him under the Act.

It is clear that the rules set in the COGSA 1992 are only provided to deal with the transfer of rights and imposition of liabilities on the parties other than the original parties to the contract of carriage. Therefore, it can be said that further legal and practical issues of the electronic transport documents for example to act as a document of title for the purpose of transferring the constructive possession or property in the goods cannot be resolved by the regulations to be made in accordance with the Section 1(5) of the Act.

It seems that the question within our concern which is the transfer of rights and liabilities will be readily solved in case of using an electronic transport record under the Rotterdam Rules by resorting to the provisions governing transfer of

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586 Carver (n 7) 18.101.
rights and imposition of liabilities. However, bill of lading’s capability of being an evidence of a contract of carriage does not mean that it absolutely provides a mechanism for transfer of contractual rights and liabilities to a person other than the original parties to the contract. The main issue is that sometime, the operation of this mechanism is tied to the third function of a bill of lading, namely ‘document of title’ which in common law means the transfer of possession works as transfer of constructive possession of the goods. This will be more important in case of buyer or seller’s insolvency for the purpose of prioritizing the cargo interests.

Moreover, for the purpose of transfer of contractual rights under the COGSA 1992, the transferee of rights is required to be in possession of the document in order to become the holder of that document.\textsuperscript{587} It is clearly not possible to physically hold and therefore possess an electronic transport document or record. In international trade, many jurisdictions require the possession of a paper transport document to determine which party has what statutory rights.\textsuperscript{588} However, it has been discussed that the possession concept is replicated by the exclusive control under the Rules and that this concept seems not to offer much certainty in this regard since the Convention does not specify what is clearly meant by the exclusive control and its transfer feature. Even if the exclusive control is interpreted and applied in the way intended by the drafters of the Convention, the scope of application of the Rules is still narrower than of the COGSA 1992, since the Rules do not apply to the electronic equivalent of the ship’s delivery orders and also do not provide for transfer of rights under the non-negotiable transport documents such as sea waybills.

Generally, the laws on the rights and obligations of the parties to a carriage contract are emerged from custom, practice and case law, which mostly deal with

\textsuperscript{587} Section 5(2)(a) of the COGSA 1992.
\textsuperscript{588} For example, in Australia, the Carriage of Goods by Sea Act 1991 defines ‘contract of carriage’ as ‘a contract of carriage covered by a bill of lading or any similar document of title’. Section 25 of Acts Interpretation Act 1901 defines ‘document’ to include: ‘(a) any paper or other material on with there is writing; (b) any paper or other material on which there are marks, figures ... having a meaning for persons qualified to interpret them; and (c) any article or material form which sounds images or writings are capable of being reproduced with or without the aid of any other article or device.’
the paper-based documents. Therefore, where the Convention is silent about a specific issue, reference to the applicable or national law to govern the use of electronic alternatives will not be a feasible solution. If the Rotterdam Rules are planned to provide a harmonized legal platform for the electronic documents to operate, and these alternatives are going to perform all common and required functions of paper documents, they have to provide for a clear set of rules to operate effectively in practice. This is claimed to be faced with legal and technological difficulties since the infrastructure for such operation is not identified by the Convention and it clearly differs among different jurisdictions.

What would be more pleasant to an aggrieved party to a contract of carriage who only has access to the electronic equivalent of the transport document and is severely in need of a time-saving solution to protect his interests than recognition of his right of suit under an electronic document? Combination of accommodating the use of electronic documents while providing their rightful holders the right to sue the carrier could have been one of the very determinative areas in which the Rotterdam Rules would serve as a modern uniform set of rules offering effective solutions. Sadly, this cannot be real.
Part III – General Remarks and Future Issues

1. The need for uniformity

Having analysed the provisions of the Rotterdam Rules and English law on the question of rights and liabilities of the consignees/endorsees, it appears that the English law, even 24 years after its latest legislative updates on the matter, still provides more reliable and operational solutions. This will lead the discussion to a place where one may suggest that the status quo of the English law shall be preserved, since, with all the difficulties, it has been working in a satisfactory way for many years, thus it would not be wise to complicate the current established position of law by adopting a new instrument. However, throughout the entire comparative study of these two systems, one general question has been lying between the lines: is there any need for ‘a’ uniform international maritime convention? And if yes, will the Rotterdam Rules be qualified as ‘the’ one?

1.1. Background

The desire to adopt uniform rules for governing relationships between different parties to a contract of affreightment is not confined to the modern era as it can be traced back to more than a thousand years ago. The tendency towards achieving uniformity of the rules of private maritime law is indebted to its international nature. It is useful to quote Lord Mansfield’s words in Luke v Lyde to indicate the international characteristic of maritime law as he stated ‘the maritime law is not the law of a particular country, but the general law of nations’. Furthermore, almost every aspect of the maritime transport is more inclined towards being international rather than domestic. This is simply because of the fact that all of the players of maritime community are playing on the same

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592 Ibid 887.
stage, i.e. seas and oceans. Moreover, when carriage by sea is employed as the mode of transport, the start and the end of journey, often, is located in two different states, otherwise the parties involved would have preferred another method of transport with less costs, shorter journey and lower risks if it was a domestic carriage. Finally, regardless of the nationality of the vessel, the crew, the shipper or the consignee, all parties share interests in a single international device, which is the agreement or contract of carriage of goods by sea.

1.2. Reasons for uniformity

The flawless explanation for the reason why uniformity matters in international maritime law is Charles S Haight Jr’s unrivalled statement where he expressed: ‘Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community - shipowners, cargo owners, insurers, lenders, furnishers of supplies, salvors - “be of one language and of one speech,” so that rights and obligations may be certain and predictable.’ \(^{593}\) The certainty and predictability of rights and obligations (including liabilities) of the parties on the one hand and the uniformity of rules on the other hand are, in fact, the two sides of the same coin: legislation for international carriage of goods by sea. In other words, they are mutually dependent on and defined by each other.

Undoubtedly, if one seeks commercial predictability and legal certainty, he shall aim for the uniformity of rules. The English maritime regime has never been isolated since parts of its laws which are incorporated into the COGSA 1971 are the result of adoption of uniform international regimes; i.e. The Hague and Hague Visby Rules. If the UK follows a uniform liability regime, it is because there is an international uniform liability regime accepted, almost, worldwide. The fact that the solutions for rights and liabilities of the third parties are independently based on the rules emerged within the English jurisdiction is because the international

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conventions have not addressed them at all, otherwise, these would have also been influenced by a uniform international regime.

The importance of uniformity cannot be denied particularly when the consequences of lack of uniformity are observed. These include more needed litigation since the parties are usually located in different countries and the domicile of those who are involved in providing security and protection measures for the underlying transactions, such as financing banks, insurers or underwriters are usually not limited to one country. Therefore, the number of transactions to be carried out by each of these parties can lead to an increased total number involved in the contract of carriage. Further, each of these transactions may be subject to different domestic or regional rules, which will result in an unconnected chain of commercial activities requiring separate costly and lengthy litigation in case of dispute.\textsuperscript{594}

Furthermore, where there is no uniform set of rules, the parties will not be confident making commercial decisions, since the factor of predictability is absent. They cannot acknowledge their obligations and liabilities where the underlying business is to be made subject to a foreign applicable law. Therefore, in addition to incurring unnecessary costs of litigation, they may encounter various difficulties in order to defend their interests. On the other hand, they may be deprived of their rights in another jurisdiction whereas they could have ascertain them based on the law of the country of their own nationality. All of these unwanted and harsh consequences could be readily solved when the law governing their interrelationships is uniform.

Additionally, the rapid development of technology and its impact on the shipping industry is a reality which cannot be disregarded. There may exists uniformity in the rules to govern the current status of affairs, however, these rules may not be flexible enough to furnish for the problems arising of the use of new technologies. An international level of uniformity to adequately deal with the foreseeable issues

\textsuperscript{594} M F Sturley (n 589) 559.
has to be achieved in order to maintain the effectiveness of status quo. Therefore, returning to the question posted earlier, it can be concluded that the answer is affirmative and there is a need for uniformity of rules in the international carriage of goods by sea.

1.3. The Rotterdam Rules: the uniform regime?

With an affirmative answer given to the first question, it will be asked whether the Rotterdam Rules have the required qualifications in order to be ‘the’ uniform international maritime convention that is expected. In other words, do the Rotterdam Rules offer an acceptable degree of predictability as well as certainty in order to qualify as a uniform instrument to be ‘the only’ international carriage of goods by sea convention? A quick review of the Convention itself suggests that, at least, it is intended to be received in this way. Article 2 of the Rules provides: ‘in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.’ But the question is whether the Rotterdam Rules are capable of promoting uniformity. To answer that, UNCITRAL’s efforts will be assessed from two different angles: a) at the time of drafting and b) after adoption of the Convention.

1.3.1. Recognition of diversity

In the last part of a profound and detailed piece of work on uniformity of international private maritime law, William Tetley QC stated a number of remarks by which it is now possible to assess whether the Rotterdam Rules can be the answer to question of uniformity. He first pointed out that ‘international laws in any form must recognise [the countries’ social] diversity in substance and style or they will fail.’ In fact the UNCITRAL has recognized this diversity while drafting the Rotterdam Rules by inviting delegates from member and non-

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595 Emphasis added on italicized words.
member States with different social and legal backgrounds as well as several IGOs, 597 NGOs 598 and received their views throughout the deliberation sessions for drafting of the Convention.

However, the main question is whether a mere ‘recognition’ has been sufficient for the purpose of achieving uniformity. The diversity in style is even extended to the interpretation of the Rules by different commentators. 599 The problem is that the UNCITRAL, at its first session, determined that the decisions should be reached, as far as possible, by consensus, and in the absence of such a consensus, decisions were to be taken by voting as provided for in the relevant rules of procedure of the General Assembly. 600 Thus, voting was regarded as an exceptional method to be taken place only once on a procedural matter.

The difficulty with reaching consensus among various participants expressing different ideas is a reality. It has been reviewed throughout this study that in several occasions, ‘to do what is right’ 601 had been the victim of reaching a consensus on the relevant matters. Therefore, this recognition of social and legal diversities of the participants has been taken place at the cost of either removal of an essential aspect of carriage of goods by sea in its entirety, such as rights of suit, or avoiding to deal with issues arising out of use of commonly used shipping documents, such as the assumption of liabilities in case of non-negotiable transport documents.


598 UNCITRAL Report of the Secretary-General in thirty-fourth session - Possible future work on transport law A/CN.9/497 paras 2-3; Non-governmental Organizations including International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbours.

599 For instance, the debate between Francesco Berlingieri and Anthony Diamond QC on certain topics is suggested to be because the former is guided by his civil law background while the latter’s insights are based on litigious nature of common law. Anthony Rogers and Jason Chuah and Martin Dockray, Cases and Materials on the Carriage of Goods by Sea (4th edn, Routledge 2016) 497: ‘The civilian approach tends to be less prescriptive in legislation drafting enjoining judicial and arbitration tribunals to take a more teleological or purposive reading of the wording. On the other hand, the common law system places much emphasis on precision and explicit clarity in legislative drafting.’

600 Note by the Secretariat: UNCITRAL rules of procedure and methods of work A/CN.9/653 paras 9-12; A/CN.9/697, p 3.

601 W Tetley QC (n 596) 824: ‘the adoption of international law requires objectivity to do what is right.’
1.3.2. Promoting through accession kit

Another point of reference to Tetley’s criteria is where he stated that the law-making bodies ‘once having accepted responsibility, cannot refuse to lead.’ He continued it is not enough to ‘make suggestions to conduct surveys, send out questionnaires and to prepare drafts with alternatives’.602 This is suggested as the only requirement from the standards set by Tetley that has been satisfied by the UNCITRAL. Apart from holding and participating in several events to promote the Rotterdam Rules from the immediate years603 after the signing ceremony until recently,604 the most recent attempt of the UNCITRAL has been to provide assistance for the states in adopting the Convention. In its 48th session during June to July 2015, the Secretariat of UNCITRAL expressed that it planned to prepare and distribute an accession toolkit in respect of the Rotterdam Rules in order to assist states intending to ratify the Convention.605

The details of the kit has been planned to be presented at the Commission’s 49th session in June to July 2016, however until the latest stages of writing this thesis, it has not been provided by the UNCITRAL on their website in order to be accessed and examined further. Also, it has been expressed by the Secretariat of UNCITRAL that ‘it continues to promote recently adopted treaties in order to encourage their signature and adoption by States with a view to facilitating their early entry into force and, when already in force, to consolidate their status as globally accepted standard.’606 The Rotterdam Rules is also included in the list of these instruments, thus it is made clear that the UNCITRAL, at least, has the intention to take further steps in terms of taking responsibility for what it has produced. However, it is only a matter of time to observe how successful their

602 Tetley QC (n 596) 824.
603 The list and details of the events can be accessed via UNCITRAL’s website at http://www.uncitral.org/uncitral/uncitral_texts/transport_goods/2008rotterdam_rules/online_resources.html.
604 Participation in the Asian Experts Group Meeting to promote ratification in the region, hosted by RCAP and Comité Maritime International in Singapore on 22 April 2015; Also in the 7th Asian Maritime Law Conference (Singapore, 23-24 April 2015).
605 UNCITRAL Note by the Secretary-General in forty-eighth session - Planned and possible future work A/CN.9/841 para 20.
606 UNCITRAL Note by the Secretary-General in forty-eighth session - Technical cooperation and assistance A/CN.9/837 para 16.
attempts will be to achieve the ultimate goals of the Convention, including promotion of international uniformity.

1.4. Conclusion

So far, the journey of evolution of international maritime rules towards the destination of uniformity has never had an ending. This is because of the diversity of social, economic and legal backgrounds as well as the potential conflict of interests of those who are involved in the decision making process of achieving uniformity. The necessity to reach that goal is obvious, as it is a reality both in practical and theoretical senses. However, lessons have to be learned from the failure of previous attempts made in not only the maritime sector, but also in all of the laws with international commercial character. Complete uniformity can never be reached, as there is no perfect law, and there will never be one. But this should not debar the law-makers from maximizing their efforts to achieve that goal.

Aiming for uniformity is, merely, the journey. One has to be prepared and equipped to reach the destination. The Rotterdam Rules, although lengthy, detailed and ambitious, are not adequately developed to put an end to the unsatisfactory current status of uniformity. This has been proved by analysing the Rules and their slight possibility of success as far as the rights and liabilities of the consignees and endorsees have been concerned. Therefore, it is concluded that Rotterdam Rule, finding their way to the graveyard of failed international instruments, neither are capable of being a uniform international maritime convention, nor have the characteristics of being the ‘only’ international maritime convention in force.

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Conclusion

This study started with a quote from Edmund Burke reading as ‘bad laws are the worst sort of tyranny.’ Having considered the deficiencies of the Rotterdam Rules, it is now possible to refer to the Convention as an example of bad law. It is true that there is no perfect law, and it is also acknowledged that to have the perfect law is impossible; however, an acceptable level of certainty is what is expected by most of the traders and all those involved in the carriage of goods by sea business. The Rotterdam Rules, failing to achieve this level of certainty or clarity is, regrettably, an out of use convention before it even gains the force of law. In fact, this can be recognized as one of the main reasons that the Convention has not attracted enough signatories after eight years from its adoption.

In the previous Chapters of this thesis, several aspects of the Rotterdam Rules with respect to the question of rights of the consignees and endorsees, whether they act in their own capacity or as the holder or the controlling party have been analysed. These were comprised of the right of suit, the right to claim delivery of the goods and the right of control. All of these items have been compared to their corresponding rules under the English law in order to find whether they are capable of paving the way for the Convention to reach its objectives. In cases where there was no correlative provision provided under the English law, it was attempted to extract the most similar concept from the rules of common law as well as the existing UK statues. Both similarities and differences between the two sets of rules have been discussed and their advantages and disadvantages have been pointed out. As a result of this comparison, the potential impacts of the Rotterdam Rules in case of ratification by the UK have also been investigated.

It has been attempted to examine and analyse various aspects of the rights and liabilities of the consignees and endorsees under the English law, and where it was deemed necessary, solutions as to how to deal with the existing difficulties in finding the basis of the rights as well as interpretation of the rules regarding both rights and the liabilities have been provided. The result of the first chapter has
been to establish a conceptual foundation for further discussions over the Rotterdam Rules. In this way, the task of comparison of the two systems has been facilitated. Therefore, in the second chapter, the rights and liabilities of the parties within our concern under the Rotterdam Rules have been extracted, and moreover, the related provisions have been critically evaluated in terms of concept, language and structure.

Furthermore, in each subject, the deficiencies and ambiguity of the Rules were investigated and possible solutions for the consignees and endorsees in order to protect their interests in a more suitable way have been presented. This has been carried out in forms of providing legal and practical advices, suggesting contextual and structural amendments to the Convention, revising and redrafting certain parts of the Rules, presenting and innovating an extra set of provisions in form of an additional protocol to the Convention, and also finding a more appropriate and functional approach for interpretation of the Rules. It has to be recalled that the difficulties were not limited to the Rotterdam Rules and in some sections, the rules of English law have also been identified to be suffering from unclarity or in certain occasions, such as the electronic documents, lack adequate regulations thus resulting in legal gaps and uncertainty. Thus, the chapter on the Rotterdam Rules have tried to firstly, make the rules digestible and comprehensible; and secondly, to illustrate the problems the Convention will bring with its enforcement to the world of commerce and trade.

The rights of suit and different approaches adopted on how to deal with this question has been examined under a number of jurisdictions with different legal systems in order to clarify why it is crucial that any new set of international uniform rules must include specific provisions on this particular subject. Further, it was demonstrated how deletion of the entire chapter on rights of suit from the Convention had been unreasonable, unjustifiable and examined as the most effortless way to encounter the problem while it had been recognized by the UNCITRAL Working Group as a subject with practical importance and needed
uniform solutions. In addition to the potential disputes arising out of conflict of laws on the rights of suit because of lack of a uniform solution, the possibility of liability gap has also been diagnosed as a result of such disparity of laws.

As a result of comparing the status of the English law on rights of suit with the draft provisions of the Rotterdam Rules and recognizing the absence of corresponding provisions under the Convention, it was concluded that although the UK COGSA 1992 is a precise and reliable piece of legislation, there are not many equivalent statues in other jurisdictions around the globe. With this in mind, the question is how the Convention can guarantee international uniformity of carriage rules, as alleged in its Preamble, when it evidently abandons the existing difficulties of the maritime law. It is, therefore, submitted that the signs of potential conflict of laws are so vivid that the lustreless light of the Rotterdam Rules cannot offer uniformity or certainty while they themselves are suffering from the darkness of incompleteness.

Moreover, the Rotterdam Rules provisions on delivery of goods have been identified to be unnecessarily complicated, ambitious and, to some extent, controversial. The views of several interested organizations have been given in order to support this argument. The summary of their suggestions regarding the chapter of the Convention on delivery of the goods was to simply ‘avoid’ the Rotterdam Rules. In fact, it was claimed that the rationale of providing many of the detailed rules in the Convention had been very difficult to understand, since not only these provisions are found to be incapable of providing solutions to the existing problems, but also they might create a path for further disputes, as they are so deviated from the long-established principles of carriage of goods by sea that their functionality has become very doubted.

The truth is that the world of trade and commerce needs certainty, a goal which commercial lawyers and law-makers around the globe have been attempting to achieve for centuries. A perfect degree of certainty can never be guaranteed since there are circumstances beyond the control of the rules and even human.
However, an acceptable level of certainty is what is expected by most of the traders and all those involved in the businesses of buying, selling and carrying the goods. This reasonable level of certainty can be assured only, and only, if the risks are reduced to the least possible. Unfortunately, the Rotterdam Rules with their current provisions on delivery of the goods cannot guarantee that level of acceptable and expected certainty; neither commercially nor legally. There are many visible and noticeable gaps in the rules that make them too easy to be exploited. This will produce anything but certainty.

On the positive side, it has been found out that the ratification of the Rotterdam Rules might be helpful to the position of English law on the concept of right of control, since the Convention firstly, facilitates the use of transport documents by giving the force of law to the rights of control, and secondly, the provisions of the Convention make it clearer ‘when’ the shipper or the consignee/transferee/endorsee can give instructions to the carrier while the goods are being carried on board the ship. Also, the Rotterdam Rules might be beneficial to the status of English law on the use of electronic documents, for when there is no transport document issued at all, the rights of control can still be exercised. Therefore, this may encourage the law-makers of the UK to accelerate the process of legislation for the use of electronic transport documents in order to fill the gaps existing in the current carriage of goods by sea statute.

However, similar to other topics covered by the Rotterdam Rules, it has been argued and illustrated that the rules governing the rights of control are also not immune from unsatisfactory drafting, lack of clear definitions, problematic structure, imbalance of regulations and more importantly, the complexity. This is why it has been suggested that these rules must be re-examined in order to be revised and redrafted to address the discussed difficulties. The result has been given to the effect that, with respect to the right of control, the Convention although attempting to provide legislation for one of the most important features
of carriage of goods by sea, must not be ratified by the UK until receipt of further amendments.

Another aspect of the two systems which were examined by way of comparison was the mechanisms they provided for the transfer of rights and imposition/assumption of liabilities of the consignees and endorsees. It has been demonstrated that although they both share the same purpose, the rights that are made subject to their mechanisms are of different nature. Apart from that, the devices provided under the English law have been decided to be more comprehensive, precise and reliable for the third parties who wishes to ascertain their rights or to acknowledge what their rights are, since whenever the statutory provisions of the English law are incapable of preforming such transfer, the alternative devices provided by the common law are of avail. In terms of the liabilities, it has been pointed out that principle of mutuality is the common ground of the both systems, however, the vague, ambiguous and unrestricted provisions of the Rotterdam Rules may not offer certainty, while on the other hand, the COGSA 1992 gives a clearer picture of how, when and what liabilities are to be imposed on the parties who have interests in the contract of carriage but not original parties to that.

Further, it has been illustrated that the application of Rotterdam Rules will leave a number of pivotal questions unanswered particularly in terms of the shipper’s rights and liabilities status after transfer to and assumption by the holder/transferee respectively. These issues which are submitted to have practical and legal consequences, are to a large extent resolved under the English law and it is regrettable that sixteen years later, the methods used in COGSA 1992 which is discernibly a targeted, effective and also legally valuable piece of legislation, are not at least echoed in the Rotterdam Rules. Although the attempt made by the Rotterdam Rules to codify the transfer of rights to and assumption of liabilities by the third parties for the first time among the international maritime conventions deserves to be valued, however, it is unforeseeable whether any country with a
well-established and detailed body of rules such as the UK COGSA 1992 would be willing to adopt the incomplete, guideline-shaped and restricted system of the Rotterdam Rules which is neither accommodating to commercial realities, nor enough self-evident to avoid further litigation.

The final point of comparison and assessment of the two regimes was the harmonization and modernization of the carriage rules. The main focus of this section was on the attempts of the laws to facilitate the use of electronic documents. Therefore, one of the key objectives of the Rotterdam Rules has been analysed with respect to the issues emerging along with the growth of technology in the modern era. It has been examined that the English law, under COGSA 1992, does not yet provide for the use of electronic transport documents and subsequently, in case of ratification of the Rules, a legal gap will emerge as to how to deal with the issues that are addressed by the COGSA 1992 but not the Rotterdam Rules and vice versa. The conflict of laws will be inevitable and the party, who seeks for compensation for his losses, will remain unsatisfied. Therefore, it has been asserted that, at least, with respect to the question of rights of the endorsees/consignees the Rotterdam Rules have frustrated the hopes for gaining a body of harmonized rules that also fills in the legal gaps of commercial needs in the modern era. Another objective of the Convention which is failed to be achieved resulting in non-efficiency of the Rules.

In the last part of the thesis, a more general question was attempted to be answered, which was whether there was any need for the legal and commercial community of international carriage of goods by sea to have a uniform set of rules, and also whether Rotterdam Rules could be the only international uniform regime on the maritime law. While the answer to the first question has been affirmative, it has been claimed that the Rotterdam Rules, although lengthy, detailed and ambitious, are not adequately developed to put an end to the unsatisfactory current lack of uniformity.
Eight years have been passed since the adoption of the Convention and there is no sign of hope for its worldwide ratification. It is doubtful whether it ever gains the attention of major shipping and leading trading countries since eight years can be considered as a reasonable period of time for the governments’ consulting bodies to express their opinions on signing or ratifying the Convention. The fact is that the laws are expected to provide solutions to the existing and potential difficulties without delivering new gaps or deficiencies. The English maritime regime is so responsive, flexible and perceptive that even in the modern era of carriage of goods by sea; it can offer certainty and predictability by accommodating itself to the exigencies of trade and communication. The possibility of dispute or problems with interpretation can never be excluded; however, it is suggested as long as a piece of legislation maintains a fair balance of rights and liabilities between the parties, it shall be considered as a good law. It is submitted that English law rules on the question of rights and liabilities of the consignees/endorsees in the context of international carriage of goods by sea are undoubtedly described as good laws.

The future of international maritime law is more blurry than it has ever been. The clouds of technology are overcasting the face of sky of law. Evolving smart systems might even bring an end to the essence of legislation. With every single incident being monitored, recorded and reported in real-time, it appears that there is no need to employ the traditional legal concepts of ‘reasonable efforts’, ‘due diligence’, ‘good faith’ and so forth. This is obviously no good news for a maritime lawyer, however, it is all a matter of time; thus, we shall wait to discover.
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