Dematerialized negotiable transport documents: industry and regulatory responses

Prof. Dr. Alexander von Ziegler

Zurich, 14 April 2021
THE STARTING POINT
From Sail to Steam
The Rise of the "Bill of Lading" – The Materialization of the negotiable Transport Document

Exhibiton of «The Voyage of Bill of Lading Before CMI / 1680 – 1897»
Harter Act – Hague Rules

- General Maritime Law / LEX MARITIMA
  
- Harter Act 1893 (USA)

- Hague Rules 1921 (voluntary contractual Text for Bills of Ladings)


- National Laws on Bills of Ladings (Uniform Bill of Lading Act 1909 (USA) / Bill of Lading Act 1855 (UK))

- International Chamber of Commerce: Uniform Customs and Practices for Documentary Credit → first edition 1933
The Containers invade Trade
Hague Visby Rules – Hamburg Rules

- Hague Visby Rules
  - 1968
  - 1979

- Hamburg Rules

- Door-To-Door
  - Inland-Option
  - UNCTAD / ICC Rules
  - FIATA B/L
Trade in the Electronic Environment
Search for the “electronic functional equivalent”

- CMI 1990 Paris Conference
  - Uniform Rules on Sea Waybills
  - Uniform Rules on Electronic Bills of Lading
- UNCITRAL
  - UNCITRAL Model Law on Electronic Commerce 1996
    - June 1996 Report → What is legal model for the “equivalent”?
- ICC
  - eUCP 2019
  - Clause A8 of INCOTERMS 1990 / 2000
The “Functions “ of the Negotiable Transport Document

WHY DO WE NEED TRANSPORT DOCUMENTS?
HOW DO WE USE TRANSPORT DOCUMENTS?
HOW DO WE PROVIDE NEGOTIABILITY?
Raison d’Être for Transport Documents

– in relation to the **contract of carriage** / transportation (the movement of goods from a- b)

– in relation to the **sales contract** (the sale and purchase of goods over a distance, involving transportation of the goods sold or purchased)

– in relation to **trade finance** (the financing of the sale / purchase on the basis of transport documents)

– in relation to **insurance cover** (the establishment of the basis for insurance cover for the goods sold, financed and transported)

– in relation to **administrative proceedings** (the processing of administrative tasks such as customs administration / export / transit / import)
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Simple Sale’s Transaction

Contract of Sale

CIF

Goods

Contract of Carriage

FOB
Simple Sale’s Transaction

Contract of Sale

CIF

Goods

Contract of Carriage

FOB
Simple Sale’s Transaction
Simple Sale’s Transaction

Contract of Sale

CIF

B/L

Contract of Carriage

FOB
Simple Sale’s Transaction

Contract of Sale

B/L

Contract of Carriage

CIF

Goods

S  B

FOB

18
Simple Transaction

Bank B

Letter of Credit

Bank A

S

B/L

CIF

Contract of Sales

Frachtvertrag

B

FOB

Goods
Simple Sale’s Transaction

Bank B

Letter of Credit

Bank A

S

CIF

Contract of Sale

Goods

B

FOB

Contract of Carriage
Simple Sale’s Transaction

Bank B

Letter of Credit

Bank A

S

CIF

Contract of Sale

B

FOB

Contract of Carriage

B/L

Goods
String Sale and Negotiability of the Transport Documents
Functions of a Negotiable Transport Document in Maritime Law

Traditional (paper) Bills of Lading Solutions under the traditional regimes
Key Functions of the Bill of Lading

– Contract of Carriage

– Proof of Quality / Quantity of Cargo loaded on board

– Key to the Cargo / Negotiability/ Transferability
Key Functions of the Bill of Lading

- Contract of Carriage

- Proof of Quality / Quantity of Cargo loaded on board

- Key to the Cargo / Negotiability/ Transferability
  - Key for the Right to Control
  - Key for Requesting Delivery
  - Key for transferring rights to the cargo (→ Negotiability)
# The Bill of Lading in Trade Context

<table>
<thead>
<tr>
<th>Carriage</th>
<th>Sale</th>
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<tbody>
<tr>
<td>Contract / Terms</td>
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<td>Customs etc.</td>
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<td>subrogation claim Cargo Insurer</td>
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<td>«Possession»</td>
<td>Control / Security</td>
<td></td>
</tr>
<tr>
<td>Key for Delivery at Destination</td>
<td>Obtaining full possession</td>
<td>Security</td>
<td></td>
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<td>Negotiability</td>
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<td>On Sale in L/C chain</td>
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## Hague-Visby Rules → the liability issues

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# National Law on Bills of Lading

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Negotiable Transport Documents pursuant to the Rotterdam Rules

Solutions provided by the Rotterdam Rules
New features of the Rotterdam Rules

- **Comprehensive legal regime** for the Contract of Carriage vs. a Liability Regime
- Regime covering the **entire period of custody over the cargo**
- Regime extending to the custody from “**Door to Door**”
- Regime providing all the **key functions** of Negotiable Transport Documents
- Regime based on
  - traditional *lex maritima* principles governing Bills of Ladings
  - national legislations on a harmonized level
  - providing the key interfaces to international trade and trade finance
- Regime providing for **compatibility with existing and future electronic formats** based on the “electronic functional equivalent” principle
## Transport Documents in the Rotterdam Rules

<table>
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<tr>
<th>Carriage</th>
<th>Article in RR</th>
<th>Type of Document</th>
<th>Comments</th>
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<tr>
<td>Contract / Terms</td>
<td>1 (1), 25(4), 27(1), 31(1), 36-42, 54, 56; 66; 79</td>
<td>B/L; SWB</td>
<td></td>
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<td>Proof of Handing-Over to Carrier</td>
<td>36(2)c;</td>
<td>B/L; SWB</td>
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<td>36(2); 36(4); 40</td>
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<td>36(1)</td>
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<td>Conclusive Evidence for bona fide Consignee</td>
<td>41</td>
<td>B/L; “Straight” B/L</td>
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<td>Right of Control</td>
<td>50 – 60</td>
<td>B/L (SWB)</td>
<td></td>
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<tr>
<td>Key of Delivery at Destination</td>
<td>46 – 47</td>
<td>B/L; “Straight” B/L</td>
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<td>Negotiability</td>
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Electronic Negotiable Transport “Document”

Electronic (dematerialized) Negotiable Transport «Document» in the Rotterdam Rules

Chapter 3 Electronic Transport Records
Article 8 Use and effect of electronic transport records

– Subject to the requirements set out in this Convention:

  – (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

  – (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.
Article 9 Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

   (a) The method for the issuance and the transfer of that record to an intended holder;

   (b) An assurance that the negotiable electronic transport record retains its integrity;

   (c) The manner in which the holder is able to demonstrate that it is the holder; and

   (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.
Article 10 Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

   (a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

   (b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

   (c) The negotiable transport document ceases thereafter to have any effect or validity.
Article 10 Replacement of negotiable transport document or negotiable electronic transport record

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

   (a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

   (b) The electronic transport record ceases thereafter to have any effect or validity.
Thank you.

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