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### The Negotiable Transport Document

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*SUBMITTED-21 APRIL 2022*

*ACCEPTED FOR PUBLICATION AT THE LLOYD'S MARITIME AND COMMERCIAL  
LAW QUARTERLY [LMCLQ]*

*(tentatively slotted for publication in November 2022)*

**THE NEGOTIABLE TRANSPORT DOCUMENT\***

**BY**

**Benjamin GEVA\*\***

**Abstract**

*With the emergence of a long-distance land-based trade, along with the expansion of a non-sea based multimodal trade, a demand arose for a negotiable transport document which is not limited to marine transport. A series of international conventions responded to such demand by providing for new types of negotiable transport documents. However, these conventions failed to accord to such documents the features of a document of title and to clarify their negotiable character. The task of overcoming this obstacle is hindered by the fragmentary nature of the law governing the marine bill of lading, which is the classic transport document serving as a document of title. Endeavouring to clarify and rationalise that law and using English law as a basis for the investigation, this article critically discusses the negotiability and legal nature of transferable*

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\* This article builds on and develops the doctrinal analysis of “The Multimodal Electronic Transferrable Transport Record (ETTR): A survey of laws and basic concepts,” a study commissioned (and copyrighted) by the United Nations and submitted by this author to UNCITRAL, Vienna, on 29 October 2021. The full study is available at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works/2867/](https://digitalcommons.osgoode.yorku.ca/scholarly_works/2867/) [Accessed March 17, 2022].

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*transport documents with a view to providing a cohesive, harmonised legal framework to govern them and form the basis for a subsequent adaptation to apply to electronic transport records.*

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### **I. Introduction**

In recent years, a long-distance land-based trade, particularly by rail in Eurasia,<sup>1</sup> along with a non-sea based multimodal trade, emerged and expanded. With it, new forms of paper and electronic transport records surfaced, designed to facilitate transactions and modes of financing using the transport documents as tokens for the goods. Having given rise to issues in relation to both digitisation and the nature of transport records including their negotiability, these developments have caught the attention of UNCITRAL.<sup>2</sup> In turn, the subject of digitisation has not escaped the

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<sup>1</sup> See e.g., C. Putz, “From London to Yiwu in 17 Days: OBOR’s British Connection” (12 April 2017), *The Diplomat*, <https://thediplomat.com/2017/04/from-london-to-yiwu-in-17-days-obors-british-connection/> [Accessed March 17, 2022]. The project may not be devoid of political implications: see: “‘Iron silk road’ threatens to sidetrack Russia” (31 October 2017), *Nikkei Asia*, <https://asia.nikkei.com/Economy/Iron-silk-road-threatens-to-sidetrack-Russia> [Accessed March 17, 2022]. Needless to say, recent geopolitical events only complicated matters for the project even more than for international trade in general.

<sup>2</sup> See e.g., UNCITRAL, *Possible future work regarding railway consignment notes: Proposal by the Government of the People’s Republic of China*, 52nd Sess, U.N. Doc. A/CN.9/998, June 2019; UNCITRAL, *Possible future work on railway consignment notes*, 53rd Sess, U.N. Doc. A/CN.9/1034, May 2020; UNCITRAL, *Report of the United Nations Commission on International Trade Law, Fifty-second session (8-19 July 2019)*, UNCITRAL Official

attention of law reformers<sup>3</sup> and scholars.<sup>4</sup> At the same time, the nature of the newly emerging transport documents—including their negotiability—has remained under the radar in the literature.

This article addresses the nature of tangible transport documents and their negotiability. It purports to shed a new light on English law governing the marine bill of lading (BOL) in a broader context of transport documents in general. Having thus presented a new framework, the article endeavours to use it as a basis for facilitating the provision of solid contents to core concepts introduced and or/used by new international conventions governing transport documents not limited to the marine trade. The goal is to accommodate international legal projects with which a reformed English law will be harmonious. In the process, the article exposes both the fragmented nature and the inadequacy of the present understanding of the law to meet contemporary challenges resulting in incapability of forming a solid basis for new types of documents—and by extension, for functional equivalence by the emerging digital records. The proposed solution, being flexible and relying on parties' autonomy, is a roadmap for further work in the area.

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Record, 74th Sess, Supp No 17, U.N. Doc. A/74/17 (2019) at para.217; and UNCITRAL, *Report of the United Nations Commission on International Trade, Fifty-third session (6-17 July 2020 and 14-18, September 2020)*, UNCITRAL Official Record, 75th Sess, Supp. No. 17, U.N. Doc. A/75/17 (2020) at para.82.

<sup>3</sup> See e.g., UK Law Commission's consultation project seeking "Proposals to allow electronic documents would revolutionise trade" (30 April 2021), *Law Commission*, <https://www.lawcom.gov.uk/proposals-to-allow-electronic-documents-would-revolutionise-trade/> [Accessed March 17, 2022].

<sup>4</sup> See e.g., M. Goldby, "Digitalisation of Shipping and Insurance Documents: Implications for Trade Finance" in *Trade Finance: Technology, Innovation and Documentary Credits* (Oxford: Oxford University Press, 2021), p.197; J.K. Winn, "Will Blockchain Transform Trade Finance?" in *Trade Finance: Technology, Innovation and Documentary Credits* (Oxford: OUP, 2021), p.230; F. Prevost, "Regulation in a digital world" in *2020 ICC Global Survey on Trade Finance* (Paris: ICC Banking Commission, 2020), p.77; Wang Feng, "Blockchain Bills of Lading and Their Future Regulation" (National University of Singapore Centre for Maritime Law, 2021), *National University of Singapore*, <https://law.nus.edu.sg/cml/wp-content/uploads/sites/8/2021/04/CML-WPS-2101.pdf>, pp.22–26 [Accessed March 17, 2022]. Earlier articles are by: Diana Faber, "Electronic Bills of Lading" (1996) *L.M.C.L.Q.* 232; Malcolm Clarke, "Transport Documents: Their Transferability as Documents of Title; Electronic Documents" (2002) *L.M.C.L.Q.* 356.

With respect to bills of exchange, promissory notes and cheques, negotiability means, firstly, the transferability of the instrument together with the right to sue parties liable on it for the sum in which the instrument is denominated. Such transferability is by delivery (plus indorsement when it is payable to order). This feature is referred to as formal or procedural negotiability. Second, negotiability means the power to confer on a qualified transferee who took the instrument in that manner—generally speaking, a bona fide purchaser for value (BFPV)—a better title than that held by the transferor. This is referred to as substantive negotiability.<sup>5</sup> There is no similar uniform approach when it comes to the legal nature, negotiability, or even transferability of documents of title to goods, not to mention other transport documents; namely, receipts issued to consignors/shippers by carriers of goods who undertake to deliver the goods to consignees. At the same time, the use of all such documents in international trade calls for legal harmonisation if not uniformity with broad application to diverse transport documents. This goal becomes elusive considering the deficit in clear principles within and among legal systems, all of which may hinder trade finance.

The article proceeds as follows. In a broader context of classification of transport documents, Part II identifies and discusses a category of transferable transport documents of control to which negotiability may relate. It also addresses options as to the relationship between the holder's claim against the carrier on such a document and the holder's right in the goods held by the carrier. It then points out that to be mostly useful in trade finance a transport document of control ought to be a document capable of according its holder, in relation to the goods, constructive possession, right to claim delivery, as well as property. Part III introduces the marine BOL as the classic document of title and explains the difference between negotiable and non-negotiable BOLs. It further addresses the function of negotiability of BOLs used in trade finance. Part IV provides a nuanced discussion on substantive negotiability and is innovative in arguing for a limited substantive negotiability accorded in the common law to the negotiable BOL. Both Parts III and IV point to some pertinent differences among the laws of a few major jurisdictions. Part V addresses the negotiability under international conventions of transferable transport documents of

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<sup>5</sup> See e.g., B. Geva & S. Peari, *International Negotiable Instruments* (Oxford: Oxford University Press, 2020) pp.6–8.

control, particularly multimodal ones, other than marine BOLs. It highlights the lack of substantive law that governs such documents, a situation that reduces their reliability as collateral in trade finance. Parts III and particularly V highlight that the use of negotiable transport documents in trade finance is in decline in the West but is on the rise in Asia, especially in Chinese-based domestic and foreign trade. In conclusion, Part VI calls for reforming and harmonising the laws applicable to transport documents in the context of establishing a universal modal-neutral BOL or its equivalent. A key point in the argument is the need to apply the law applicable to BOLs to all transferable transport documents of control but not before harmonising, rationalising and reforming the law governing BOLs itself, both in the international and domestic spheres. The successful accomplishment of this task is bound to form a firm basis for functional equivalence rules that will govern electronic transferable transport documents of control.

## **II. Transferable Transport Documents of Control (TTDCs) and the Right to the Goods**

A transport document is a receipt issued by the carrier of goods to the consignor/shipper upon taking possession of them under a contract for their carriage to the consignee. It constitutes a receipt for identified goods (or a specified portion thereof) by the party undertaking responsibility for their carriage. It may also serve as a piece of evidence as to the terms of the contract for carriage as well as to the apparent condition of the goods when received by the carrier.<sup>6</sup> A transport document of which production to the carrier is required in order to receive the possession of the goods is referred to in this article as a transport document of control (TDC).

A transport document of which production to the carrier is neither required nor entitling to receive the possession of the goods from the carrier is not a TDC. Such a document issued by the carrier to the consignor typically remains in the consignor's hands. It is not transferable even to the named consignee and cannot be used as a token for transacting with the goods. Goods to which it relates are to be released only to the named consignee without being required to surrender the

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<sup>6</sup> For a fuller summary see e.g., E. McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn (London: LexisNexis, 2020), pp.990–995, 1013–1021.

transport document that in any event is not in the consignee's hands. While lacking transferability, the use of such a document may save time at both ends of the transaction. Thus, such a document may be issued by the forwarder<sup>7</sup> as soon as it receives the goods, prior to shipment, and used immediately by the shipper to procure an advance from its bank against the goods, until their delivery to the consignee.<sup>8</sup> At the other end of the transaction, the consignee may collect the goods upon their arrival and need not wait for the arrival of the document, which may be delayed. During the voyage of the goods the consignor remains in full control. However, by contract the shipper and carrier may render such documents as TDCs, at least insofar that they may be transferred to the consignee and are to be surrendered to the carrier against the release of the goods.

By reference to carrying out a documentary sale, TDCs may be initially understood to mean documents controlling the disposition of goods. Thus, under article 58 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)<sup>9</sup> (CISG), unless otherwise agreed, the buyer of goods is required to pay their price “when the seller places either the goods or documents controlling their disposition at the buyer's disposal.” The phrase ‘documents controlling the disposition of goods’ was interpreted “as referring to any document ... that entitles the buyer to take possession of the goods or, once in the hands of the buyer, establishes that the seller no longer has the right to control disposition of the goods.”<sup>10</sup> Along with documents

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<sup>7</sup> A freight forwarder is one whose business is to help customers to arrange for the shipment of their goods. See <https://www.cdlogistics.ca/freight-news/differences-between-freight-forwarders-and-shipping-agents/> [Accessed March 17, 2022].

<sup>8</sup> Not being a TDC, it is used in international trade as a means of evidence to prove the shipment of the goods and to establish and meet documentary requirements in payments under letters of credit, but not as collateral. On this point see generally Part III and the concluding paragraphs of Part V.

<sup>9</sup> United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) 1489 U.N.T.S. 3 (entered into force 1 January 1988).

<sup>10</sup> See CISG Advisory Council, “CISG Advisory Council Opinion No. 11: Issues Raised by Documents under the CISG Focusing on the Buyer's Payment Duty” (August 3, 2012), *CISG-AC*,

that may be transferred from one person to another, such as negotiable bills of lading, the list contains documents that are TDCs in a limited way. First, it includes documents that may be transferred by the consignor only to the consignee—such as the non-negotiable (‘straight’) BOL—where the consignee is required to present the document to the carrier against the delivery of the goods but may not transfer the document onward. Second, the list includes documents that in the usual course of events are not to be presented by the original consignee to receive delivery from the carrier. However, during their voyage to the consignee, goods covered by such documents are under the control of the consignor who may replace the consignee by transferring the document to a new consignee and instructing the carrier to deliver the goods to that replacing consignee (instead of to the original one) against the production of the transferred document. The air waybill<sup>11</sup> as well as road and rail consignment notes fall into this category. They become TDCs only once they are transferred by the consignor to the replacing consignee.

The list also includes warehouse receipts and warrants, which are storage rather than transport documents. In another way the definition is too narrow, as it addresses the documents only in the context of the performance of a contract for the sale of goods.<sup>12</sup> Accordingly, a more precise definition could be ‘any transport document that gives the holder rights in relation to the

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*[https://www.cisgac.com/file/repository/CISG\\_Advisory\\_Council\\_Opinion\\_No\\_11.pdf](https://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_11.pdf)* [Accessed March 17, 2022].  
Also available online at: *<http://www.cisgac.com/cisgac-opinion-no11/>* [Accessed March 17, 2022].

<sup>11</sup> For the air waybill see CISG Advisory Council, fn.10 at para.6.6. Such practice is at least unusual for the sea waybill: see fn.10 at paras 8.1–8.3.

<sup>12</sup> In any event, documents that do not control the disposition of the goods were said to include the following, unless there is a practice established between the parties or usage that governs the parties’ contract under CISG art.9, requiring presentation of such a document: sea waybills; dock receipts, quai receipts or mate’s receipts; commercial invoices; insurance policies or certificates; as well as survey reports, certificates of origin, certificates of quality, and sanitary or phytosanitary certificates (the latter being inspection certificates issued by a competent governmental authority to show that a particular shipment has been treated to be free from harmful pests and plant diseases). Together with documents controlling the disposition of goods such goods are nevertheless “documents relating to the goods” which under CISG art.34 the seller may be required to hand over to the buyer “at the time and place and in the form required by the contract”.

goods and requires the carrier to release the goods to the holder against the surrender of the document.’<sup>13</sup>

Issued to the consignor/shipper, a TDC must thus be transferable, either exclusively to the consignee, or also onward, either to one transferee, or from one holder to another in unrestricted succession. Either way, in the terminology used in this article, it is a transferable TDC (TTDC) which gives the holder control of or at least a claim to the goods held by the carrier. Depending on its nature, a TTDC can transfer merely the carrier’s personal obligation to deliver the goods to the holder. Alternatively or in addition, it may transfer constructive possession of the shipped goods, property in them, or both.

It goes without saying that even where a consignor transfers a TTDC capable of transferring property with the intent to pass property to the holder, the property which may be passed is that which the consignor is capable to convey under general property law. Thus, under English law, to pass property to the holder, the consignor must have title, even voidable,<sup>14</sup> to the goods. Alternatively, the consignor must have the authority, even apparent, typically under the law of agency,<sup>15</sup> or, as discussed in the ensuing paragraphs, under specific statutory powers, to convey them.

For his or her part, in the context of the use of TTDCs in the performance of a contract for sale, the holder of a TTDC is exposed to certain risks so that his or her right to the goods in transit

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<sup>13</sup> Generally speaking, the holder is the person to whom the goods are to be delivered who is in possession of the document. For a more precise definition, see fn.92 and surrounding text.

<sup>14</sup> See Sale of Goods Act 1979 (c.54) (SGA) s.23:

“When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller’s defect of title.”

<sup>15</sup> As, for example, under the Factors Act 1889 (c.45) s.2(1).

(namely, the goods in the carrier's hands) may be defeated by an adverse claimant.<sup>16</sup> In English law, according to the type of the TTDC, risk primarily depends on who, between the consignor-seller and TTDC holder, is in constructive possession of the goods held by the carrier. Thus, as long as the *consignor* remains in constructive possession of the goods in transit, and regardless whether property in the goods passed to the TTDC holder, the holder is exposed to the risk that a subsequent buyer from the consignor will defeat the holder under the 'seller in possession' provision of the SGA.<sup>17</sup> The same statutory provision will protect a TTDC holder who bought the goods from the consignor in constructive possession after the former had sold the goods to another person.

The other side of the coin is where holding the TTDC confers on the *holder* constructive possession of the goods in transit. In that case, under English law, the TTDC holder is protected from an adverse claim arising from a subsequent transaction by the consignor.<sup>18</sup> This is true at least where also property in the goods passed to the holder,<sup>19</sup> in which case the new buyer from

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<sup>16</sup> For its part, the carrier might be well advised in such a case to interplead and let the holder and the adverse claimant fight it out. Arguably, on the basis of *Hollins v Fowler* (1875) [1874-80] All E.R. Rep. 118 (H.L.) upon surrendering the goods to the party that ends up losing, the carrier will not escape strict liability to the winner in conversion, even where the carrier acted in good faith, and even if the carrier surrendered the goods to the one who has acquired the right to immediate possession, that is, adverse possession (and who nevertheless lost).

<sup>17</sup> See SGA s.24:

“Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, ... of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.”

Under SGA s.61(1), “delivery” is defined to mean “voluntary transfer of possession from one person to another.”

<sup>18</sup> In fact, also an earlier transaction, as long as it did not involve the transfer of the constructive possession of the goods from the consignor to the (earlier) adverse claimant.

the consignor will not be able to benefit from the ‘seller in possession’ provision of the SGA.<sup>20</sup> At the same time, a TTDC holder in constructive possession of the goods but not ownership may use the ‘buyer in possession’ provision of the SGA<sup>21</sup> to confer ownership of the goods on a qualified purchaser who will prevail over the consignor.<sup>22</sup>

### **III. TTDC Transfer and Negotiation: Negotiable and Non-negotiable Bills of Lading**

As a matter of general principles, negotiability addresses two aspects. In its first and narrow sense, it addresses the form of transfer. From this perspective, negotiability means the transferability of a document that meets certain requirements, from one person to another (that is, from one holder to another), by delivery, and depending on the form of the document, with or without the signature of the transferor, called ‘indorsement.’ Such transfer, called ‘negotiation,’ accords the transferee—the new holder—legal title to the right embodied in the document. This aspect is called *procedural* or *formal negotiability*. Its effect is to ‘lock’ the right accorded by the document in a document

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<sup>19</sup> I suppose that where in conflict, the consignor’s proprietary right in the goods will trump the holder’s possessory right to them.

<sup>20</sup> SGA s.24.

<sup>21</sup> See SGA s.25(1):

“Where a person ... agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, ... of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.”

<sup>22</sup> Between a buyer from the consignor-owner and a buyer from the consignee-possessor the latter will prevail, at least if he or she is first in time.

itself<sup>23</sup> so that transacting with the document is tantamount to transacting with the right.<sup>24</sup> In its second and broader sense, negotiability addresses the potential impact of the transfer by negotiation to confer on a qualified transferee (generally, a BFPV), a better title to the document and the right embodied in it than that of the transferor. This quality of negotiability is called *substantive or material negotiability*.<sup>25</sup>

In principle, negotiability of a TTDC may be either formal or substantive. It can thus mean either mere transferability by negotiation, or transferability by negotiation that may confer a superior title to the right embodied in the document to the transferee. In our context, depending on the TTDC type, it is the personal right to receive the goods, have adverse possession therein, and/or to the property in them.

In English law, negotiability does not play any role in either the protection or exposure of a TTDC holder to a conflicting transaction in the goods in transit. Rather, as discussed at the end of Part II, the holder's protection or exposure depends on who, according to the TTDC type, has constructive possession of the goods. However, substantive negotiability insulates the holder from the carrier's defences against the consignor as well as protects the holder against third-party claims to the *document* (and the rights embodied therein). Where the document confers on the holder

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<sup>23</sup> In this sense, the negotiable instrument (and by extension, the negotiable transport document) is “a documentary intangible” serving as “the physical embodiment of the ... obligation” (McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn, p.579) in which “[t]he ... claim is ‘merged’ into the paper evidencing the claim” (Grant Gilmore, “The Commercial Doctrine of Good Faith Purchase” (1954) 63 Yale L.J. 1057, 1064).

<sup>24</sup> Whether the negotiable instrument falls under what in German jurisprudence is called a *Wertpapier*—defined in art.965 of the Swiss Code of Obligations as “any document in which a right is incorporated in such a way that it cannot be claimed nor transferred to others ... without the document” (*Swiss Code of Obligations: English Translation of the Official Text*, 4th edn (Zurich: Swiss-American Chamber of Commerce, 2003))—is addressed by B. Geva, *The Payment Order of Antiquity and the Middle Ages: A Legal History* (Oxford and Portland, Oregon: Hart Publishing, 2011), p.583, fnn.422–423.

<sup>25</sup> See text around fn.5.

constructive possession and the power to transfer property in the goods, substantive negotiability protects the holder from adverse claims to the goods asserted by claimants who would have prevailed as to the document (and hence the goods) had it not been negotiable. More generally, the qualified holder of a negotiable TTDC defeats adverse claims that can be raised only through owning the right to the document. As indicated, depending on the type of the TTDC, such claims may be to the mere delivery, possession, and/or property of the goods. Prevailing as to the document, the qualified holder defeats the pertinent adverse claims.<sup>26</sup>

A TTDC of which a transfer may convey constructive possession and facilitate the passage (or creation) of a property right in the goods represented by it is a document of title.<sup>27</sup> Under the common law, the classic document of title to goods, in fact the only one,<sup>28</sup> is the BOL issued<sup>29</sup> by

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<sup>26</sup> It is thus incorrect to say, as stated by Raphael Brunner, *Electronic Transport Documents and Shipping Practice Not Yet a Married Couple* (Zurich: University of Zurich, 25 April 2007), p.40, that “[o]nly a document of title may be negotiable.” I understand this to mean that negotiability is limited only to TTDC conveying constructive possession and facilitating the passage of property (which, as discussed immediately below, is a document of title).

<sup>27</sup> See e.g., Ontario Personal Property Security Act 1990 (Canada) s.1(1) which defines “document of title” to mean:

“[A]ny writing that purports to be issued by or addressed to a bailee and purports to cover such goods in the bailee’s possession as are identified or fungible portions of an identified mass, and that in the ordinary course of business is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers”.

For a comprehensive analysis of the document of title see e.g., M. Bridge & K. Low, *The Law of Personal Property* 3rd edn (London: Sweet & Maxwell, 2021) at paras 5.028–5.047.

<sup>28</sup> McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn, p.992.

<sup>29</sup> It is frequently issued in several (usually three) originals, a situation reflecting the period in which they were dispatched by mail and in which mailing was insecure. For some elaboration, see e.g., L. Railas, *The Rise of the Lex Electronica and the International Sale of Goods: Facilitating Electronic Transactions Involving Documentary Credit Operations* (Helsinki: University of Helsinki, 2004), pp.240, 242, which is accessible online at <https://helda.helsinki.fi/bitstream/handle/10138/224327/THERISEO.pdf?sequence=1> [Accessed March 17, 2022].

a sea carrier.<sup>30</sup> When it is addressed to the order of a named person or to bearer, and sometimes only where it is marked ‘negotiable’, the BOL is negotiable. Otherwise, and sometimes when it is marked so, it is non-negotiable. A negotiable BOL made out to order is transferrable by delivery and indorsement, whether special or in blank. A negotiable BOL made out to bearer is transferable by delivery alone. There is no unanimity as to whether a BOL made out to order without saying to order of whom is to be considered as made out to the shipper’s order (so as to require the shipper’s indorsement for a transfer) or to bearer (so as to be transferable by delivery alone). The holder of a negotiable document is either the one to whose order the document is made or indorsed, who is in its possession, or its bearer. The indorsement in blank of a document made out to order renders it a bearer document, except that the holder may convert a blank indorsement to a special one, thereby restoring the document to an order one.

At the same time, under the common law, the non-negotiable (‘straight’) BOL is transferable only from the consignor to the consignee. As discussed below, in some other jurisdictions the non-negotiable (‘straight’) BOL may also be transferred in succession, albeit not by negotiation.

The bill of exchange, cheque, and promissory note are model negotiable instruments. Each is mandated by statute to consist of a terse unconditional order or promise<sup>31</sup> so as to be “a courier without luggage.”<sup>32</sup> The issuance of each such an instrument is tantamount, at least in form,<sup>33</sup> “to

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<sup>30</sup> For a short history of the bill of lading, as of its medieval origins, see Chapter 1 of R. Aikens et al., *Bills of Lading*, 3rd edn (London: Routledge, 2020). For an earlier account which also addresses warehouse receipts, see e.g., William Britton, “Negotiable Documents of Title” (1954) 5 Hasting L.J. 103, 104–105.

<sup>31</sup> See e.g., Bills of Exchange Act 1882 (c.61) (BEA) ss.3(1), 83(1), respectively.

<sup>32</sup> *Overton v Tyler* (1846) 3 Pa. 346 at 347.

<sup>33</sup> In fact, regarding position vis-à-vis a holder not in due course, the position is much more nuanced. See especially Benjamin Geva, “Equities as to Liability on Bills and Notes: Rights of a Holder Not in Due Course” (1980) 5 Canadian Business L.J. 53.

an independent contract within the wider contract in pursuance of which it was executed and not dependent as regards its enforcement on due performance of the latter.”<sup>34</sup> Conversely, neither mercantile usage nor custom or statute mandate a strict terse form for the BOL.<sup>35</sup> Unlike the bill of exchange and the promissory note, the BOL is inherently linked to the contract of carriage and evidences rather than suspends<sup>36</sup> its terms. Nevertheless, while the carrier’s undertaking thereunder has no shade of autonomy,<sup>37</sup> even between the carrier and consignor,<sup>38</sup> the BOL usually reflects the entire agreement.<sup>39</sup> Nor is an indorser thereon liable to the BOL holder<sup>40</sup> who, in turn, does not benefit from any presumption as to taking for value and in good faith.<sup>41</sup> These features does not preclude the BOL from being ‘negotiable’ in one way or another.

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<sup>34</sup> *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 K.B. 585 (C.A.) at 591.

<sup>35</sup> Though R. Aikens et al., *Bills of Lading* may have gone too far in stating at p.19 that “[l]ike an elephant, a bill of lading is generally easier to recognise than to define.”

<sup>36</sup> Which is the presumption for the bill of exchange, cheque and promissory note: *Re Charge Card Services Ltd* [1988] 3 All E.R. 702 CA (Civ Div) at 707, per Sir Nicolas Brown-Wilkinson V.C.

<sup>37</sup> For the link between the bill of lading and the consideration, that is, the underlying transaction, see e.g., Luis Cova Arria, “Legal Obstacles to the Implementation of the Electronic Bill of Lading in Civil Law Countries” (1997) *European Transport Law* 709, 709. See also Martine Remond-Gouilloud, *Droit Maritime*, 2nd edn (Paris: Pedone, 1993), p.356. For a more hesitant position to the same effect, see René Rodière, *Traité Général de Droit Maritime, Affrètements & Transports* (Paris: Dalloz, 1968), tome II, p.109.

<sup>38</sup> More so between the carrier and a remote holder-BFPV. See text at fn.106.

<sup>39</sup> *Leduc v Ward* (1888) 20 Q.B., (1888) 20 Q.B.D. 475, 479–480, per Lord Esher M.R. See generally G. Treitel & F.M.B. Reynolds, *Carver on Bills of Lading*, 4th edn (London: Sweet & Maxwell, 2017), pp.97–102.

<sup>40</sup> For the indorser’s liability, see BEA s.55(2).

<sup>41</sup> For such presumptions, see BEA.

In the common law, *Lickbarrow v Mason* (1787)<sup>42</sup> stands for the nature of the BOL as a document of title that in its negotiable form may pass both constructive possession of and property in the goods in transit. According to Ashhurst J.,<sup>43</sup> “as between the vendor [i.e., the shipper] and third persons [e.g., a holder], the delivery of a BOL is a delivery of the goods themselves.” Similarly, in *Barber v Meyerstein* (1866),<sup>44</sup> addressing the situation “in which goods which are at sea being transmitted from one country to another [so that] you cannot deliver actual possession of them,” the BOL was “considered to be a symbol of the goods, [so that] its delivery [was deemed] to be a delivery of the goods.” Stated otherwise, the BOL 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.”<sup>45</sup>

As well in *Lickbarrow v Mason* (1787), Grose J. thought that as a matter of law “as between the vendor and the assignee of the vendee, the bill of lading transfers the property” in the goods.<sup>46</sup> Buller J. appears to be of the same opinion.<sup>47</sup> In a subsequent proceeding in the case,<sup>48</sup> he was reported to speak of “the universal doctrine of Westminster-Hall” under which “by a bill of lading, and by the assignment of it, the legal property does pass.”<sup>49</sup>

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<sup>42</sup> *Lickbarrow v Mason* (1787) 2 T.R. 63; 100 E.R. 35.

<sup>43</sup> *Lickbarrow v Mason* (1787) 2 T.R. 63 at 71; 100 E.R. 35 at 39, per Ashhurst J.

<sup>44</sup> [1861-73] All E.R. Rep. Ext. 1810 (H.L.) at 1825.

<sup>45</sup> *Sanders Bros v Maclean & Co* (1883) 11 Q.B.D. 327 at 341, per Bowen L.J.

<sup>46</sup> *Lickbarrow v Mason* (1787) 2 T.R. 63 at 76; 100 E.R. 35 at 42.

<sup>47</sup> *Lickbarrow v Mason* (1787) 2 T.R. 63 at 73, 75; 100 E.R. 35 at 40–41.

<sup>48</sup> *Lickbarrow v Mason (in Error)* Dom Proc. 1793, reproduced in *Newsom v Thornton* (1805) 6 East 17 at 22; 102 E.R. 1189 at 1192.

<sup>49</sup> *Newsom v Thornton* (1805) 6 East 17 at 26; 102 E.R. 1189 at 1192.

Subsequently in *Sewell v Burdick* (1884),<sup>50</sup> recognizing that “where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession,”<sup>51</sup> the House of Lords held that whether the effect of the delivery of a BOL is to transfer property to the holder depends on the intention of the parties.<sup>52</sup> More recently, in *The Future Express* (1992),<sup>53</sup> Judge Diamond QC went further, considering it “a fundamental feature of English law that the transfer of a bill of lading does not pass constructive possession of goods to the transferee unless it is the intention of the parties to the transfer that this should occur.”<sup>54</sup> However, this statement is considered limited to the unusual facts of that case.<sup>55</sup> Otherwise, the consensus is that “[t]he bill of lading constitutes an acknowledgement by the carrier that the goods will be held by whoever is the current holder of the bill of lading.”<sup>56</sup> This is along the lines of the universal understanding that under normal

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<sup>50</sup> [1881–5] All E.R. Rep. 223 (H.L.).

<sup>51</sup> *Sewell v Burdick* (1884) [1881–5] All E.R. Rep. (H.L.) 223 at 236.

<sup>52</sup> This is also true for the passage of title from the consignor/seller to the consignee/buyer, which is a matter to be determined according to rules under sale of goods legislation rather than the transfer of the BOL. See McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn, p.992. In fact, the view that it is the intent of the parties which determines the transfer of the “property” in the goods goes back to Buller J.’s own judgement in *Hibbert v Carter* (1787) 1 T.R. 745; 99 E.R. 1355 (K.B.).

<sup>53</sup> [1992] 2 Lloyd’s Rep. 79 (Q.B.) at 95–96, reversed on other grounds in [1993] 2 Lloyd’s Rep. 542 (C.A.).

<sup>54</sup> See McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn, p.60, fn.138.

<sup>55</sup> In the facts of the case, having sold and delivered the goods to another, the seller negotiated the BOL to the holder and thus could not be taken as intending to transfer the possession of the goods.

<sup>56</sup> See e.g., McKendrick, *Goode and McKendrick on Commercial Law*, 6th edn, p.992. See also Treitel & Reynolds, *Carver on Bills of Lading*, 4th edn, p.317.

circumstances the transfer of the possession to the goods is the typical or presumed intention of parties to the transfer of a BOL.<sup>57</sup>

Accordingly, the BOL is “a negotiable receipt for the cargo.” Under its contract “the shipowners are obliged to deliver cargo only against presentation [by the holder] of a bill of lading.”<sup>58</sup> However, at common law, this obligation is enforceable only by the consignor. Thus, it was held in *Thompson v Dominy* (1845)<sup>59</sup> that “there is nothing to shew that a bill of lading is transferable under any custom of merchants. It transfers no more than the property in the goods; it does not transfer the contract.” The argument that a BOL “possesses all the properties of a bill of exchange” so as to give the transferee/holder the right to sue in his or her name on the BOL was said to “lead to absurdity.”<sup>60</sup> Accordingly, the transferee/holder may not sue the carrier on the BOL; rather, where the carrier declines to surrender the goods to the transferee/holder upon presentment, the latter may bring against the former an action in conversion.<sup>61</sup>

Accordingly, under the common law, while being accorded the right to possess the goods, the holder of a BOL may sue on the BOL neither the shipper nor the carrier. This astonishing result appears to me inconsistent with the impact of negotiability to merge a claim to a written obligation on negotiable paper into a claim to the piece of paper that embodies it, so that the transfer of the

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<sup>57</sup> Railas, *The Rise of the Lex Electronica and the International Sale of Goods: Facilitating Electronic Transactions Involving Documentary Credit Operations* (2004), p.242. For the bill of lading as a “legal surrogate for the physical delivery of the goods,” see Brunner, *Electronic Transport Documents and Shipping Practice Not Yet a Married Couple*, p.38, citing John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, 1st edn (Cape Town: Juta, 1999), §14–3.3.

<sup>58</sup> *Kuwait Petroleum Corp v I&D Oil Carriers Ltd (The Houda)* [1994] 2 Lloyd’s Rep. 541 at 556, per Millett L.J.

<sup>59</sup> 14 M. & W. 403 at 407; 153 E.R. 532 at 534, per Parke B.

<sup>60</sup> *Thompson v Dominy* (1845) 14 M. & W. 403 at 408; 153 E.R. 534 at 534, per Alderson B.

<sup>61</sup> For a comprehensive discussion of more recent case law, see Paul Todd, “The Bill of Lading and Delivery: The Common Law Actions” (2006) Lloyd’s Maritime and Commercial Law Quarterly 539, 540–552.

paper, being a chattel, transfers with it the right to enforce the obligation.<sup>62</sup> Indeed, even accepting that the BOL does not “possess ... all the properties of a bill of exchange,”<sup>63</sup> the conclusion in *Thompson v Dominy* (1845)<sup>64</sup> that under the “custom of merchants” a BOL “transfers no more than the property in the goods [but] not ... the contract”<sup>65</sup> is, to say the least, problematic. This is so if only to the extent that this conclusion means that the transfer of the BOL does not pass the right to enforce the obligation on it. Of course, no “custom of merchants” to that end had been proven in this and earlier cases. Alternatively, if reference to “custom of merchants” was to the ‘law merchant’<sup>66</sup> which is more likely the case, it has to be recalled that under the modern view the ‘law merchant’ effectively consists of rules and principles adapting the common law to apply to instruments and documents used by merchants, and is not an independent source of law.<sup>67</sup> This is even echoed in the landmark case of *Lickbarrow v Mason* (1787), where Ashhurst J. stated that while the custom of merchants establishes indorsability—namely, the transferability of a BOL by indorsement—“the effect of that indorsement is a question of law.”<sup>68</sup> However, since this was an action in trover, Grose J. limited the inquiry to “a mere question of law,” specifically, “whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property.”<sup>69</sup>

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<sup>62</sup> See fn.5. For this analysis I am particularly obliged to Aharon Barak, “The Nature of the Negotiable Instrument” (1983) 18 Israel L. Rev. 49.

<sup>63</sup> See text following fn.59. For the major differences, see text between fnn.31–41.

<sup>64</sup> See fn.59.

<sup>65</sup> See text following fn.59.

<sup>66</sup> See e.g., *Chat and Edgar Case* (1663) 1 Keble 636; 83 E.R. 1156.

<sup>67</sup> See fn.5 at pp.50–52. For further detail, see J.S. Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge: Cambridge University Press, 1995), pp.137–150.

<sup>68</sup> See fn.42 at 2 T.R. 63 at 71; 100 E.R. 35 at 39.

<sup>69</sup> See fn.42 at 2 T.R. 63 at 76; 100 E.R. 35 at 42.

The holder's cause of action on the BOL was not beyond the court's power to recognise and yet it did not address the point as its determination was not necessary for the resolution of the case.

If the holder's lack of a cause of action on the BOL has truly been a matter of global mercantile understanding reflected in the "custom of merchants" or 'law merchant', one would have expected a similar rule elsewhere. However, in both France and Germany—two major Continental jurisdictions—as under the common law, the transfer of the bill of lading is tantamount to the transfer of the possession of the goods it covers.<sup>70</sup> Yet, in both countries, the holder has a standing to enforce the carrier's obligation on the BOL.<sup>71</sup>

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<sup>70</sup> For the position in France see e.g., Rodière, *Traité Général de Droit Maritime, Affrètements & Transports* (1968), stating at p.108 that "*livrer le connaissement, c'est livrer la chose*" (i.e., "delivery of the bill of lading is the delivery of the thing [goods]"). See also K. Adyel, "L'importance des Fonctions du Connaissement Dans Les Operations de Commerce International Par Mer" (Village de la Justice, 2010), *Village de la Justice*, <https://www.village-justice.com/articles/importance-fonctions-connaissance,12616.html> [Accessed March 17, 2022]. Reflecting this principle in Germany is § 524 in *Handelsgesetzbuch* (HGB), which is Germany's Commercial Code. For an English translation, visit [https://www.gesetze-im-internet.de/englisch\\_hgb/englisch\\_hgb.pdf](https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.pdf) [Accessed March 17, 2022].

<sup>71</sup> In Germany, see HGB at fn.70, §§ 519–521. In France, "a bill of lading is not a document of title (*titre de propriété*), because the rights which are transferred with it are of credit (*titre de créance*) but not of ownership." Stated otherwise, "[u]nder French law, a bill of lading gives its holder the right to claim delivery of the cargo described in such a document just as a bill of exchange gives its holder the right to demand a sum of money." See Arria, "Legal Obstacles to the Implementation of the Electronic Bill of Lading in Civil Law Countries" (1997) *European Transport Law* 709, 710, in the footsteps of Remond-Gouilloud, *Droit Maritime* (1993), p.356. See also Rodière, *Traité Général de Droit Maritime, Affrètements & Transports* (1968), p.109 as well as Railas, *The Rise of the Lex Electronica and the International Sale of Goods: Facilitating Electronic Transactions Involving Documentary Credit Operations* (2004), pp.242–44 emphasising the difference and linking full negotiability to the 'credit document' character of the bill of lading. But cf. Adyel, "L'importance des Fonctions du Connaissement Dans Les Operations de Commerce International Par Mer" (2010), arguing that under French law the BOL has the same features as a document of title under English law.

In England, Parliament swiftly reversed the absurd result of *Thompson v Dominy* (1845)<sup>72</sup> and allowed a direct action by the holder-BFPV to enforce the carrier's obligation on the BOL.<sup>73</sup> This was an unusual exercise of legislative power not to codify a "custom of merchants,"<sup>74</sup> but rather to fix a mistakenly created gap in it. In the final analysis, the logic of *Lickbarrow v Mason* (1787)<sup>75</sup> in resorting to negotiability should have led to a conclusion under which the negotiation of the BOL confers on the holder not only the right to possess the goods, but also the right to enforce the carrier's obligations on it. However, having chosen the legislative route, Parliament may have blocked courts from according on their own full negotiability to other, including newly emerging, transport documents.

National legislation elsewhere frequently addresses the BOL as part of a broader category of documents of title. Such is the case in the United States, where UCC § 1-201(b)(16) lists also other documents, including the warehouse receipt. In fact, "any ... document" that "purport[s] to be issued by or addressed to a bailee and purport[s] to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass," is a document of title as long as such document "in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers."

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<sup>72</sup> See fn.59.

<sup>73</sup> First by the Bills of Lading Act 1855 (c.111), recently superseded by the Carriage of Goods by Sea Act 1992 (c.50). See e.g., Carol Proctor, *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document in Financing International Sale Contracts* (Pretoria: University of South Africa, 1996), pp.67-70, accessible online at: <https://www.worldcat.org/title/legal-role-of-the-bill-of-lading-sea-waybill-and-multimodal-transport-document-in-financing-international-sales-contracts/oclc/122291880> [Accessed March 17, 2022]. For a full analysis of the superseding legislation, see e.g., Robert Bradgate & Fidelma White, "The Carriage of Goods by Sea Act 1992" (1993) 56 Mod. L. Rev. 188.

<sup>74</sup> As e.g., the BEA.

<sup>75</sup> See fn.42.

Under UCC § 7-104(a):

“A document of title is negotiable if by its terms the goods are to be delivered<sup>76</sup> to bearer or to the order of a named person.”

Under UCC § 7-501(a), the negotiable document is transferable by delivery<sup>77</sup> plus, where it is made out or properly indorsed to a named person, by the indorsement<sup>78</sup> of that person.<sup>79</sup>

The prevailing global understanding of the non-negotiable (‘straight’) BOL is that it may be transferred only once, to the named consignee identified in the bill from its inception, who takes it by delivery alone, without being indorsed, and who must produce it to obtain delivery of the goods.<sup>80</sup> Deviating from it, the UCC accommodates continuous transferability to different people

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<sup>76</sup> Under § 1-201(b)(15) of the Uniform Commercial Code (UCC) (United States), with respect to a document of title, ‘Delivery’ is defined to mean “voluntary transfer of possession.”

<sup>77</sup> For delivery without indorsement and the right to compel indorsement, see UCC § 7-506. Under UCC § 1-201(b)(15), ‘delivery’ means “voluntary transfer of possession.”

<sup>78</sup> Under UCC § 7-505, unlike in the case of negotiable instrument, an indorser of a document of title is not a guarantor for other parties.

<sup>79</sup> See also UCC § 7-501(d), under which:

“The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods.”

As well, see UCC § 7-501 (c), providing that negotiation works only for a negotiable document of title.

<sup>80</sup> See *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)*, [2003] EWCA Civ 556, [2004] Q.B. 702, affirmed in [2005] UKHL 11; [2005] 2 A.C. 423, following the earlier decision of the Singapore Court of Appeal in *Peer Voss v APL Co Pte Ltd*, [2002] 2 Lloyd’s Rep. 707.

in succession other than by negotiation of both negotiable and non-negotiable documents of title,<sup>81</sup> including BOLs.<sup>82</sup> Under UCC § 7-504(a), such transfer requires the transfer of the document to the transferee, which is an obvious requirement for a TDC, without which delivery of the goods cannot be claimed from the carrier. Furthermore, under UCC § 7-504(b), in the case of a transfer other than by negotiation, the transferee's protection from claims of enumerated third parties<sup>83</sup> requires the receipt by the carrier of notice of the transfer.

Similarly, under art.250(2) of the Maritime Code of Spain,<sup>84</sup> nominative BOLs, namely those which are issued neither to the bearer nor to the order, are transferable "through assignment according to the regulations governing the assignment of non-endorsable credits."

As for rights acquired in the absence of a due negotiation<sup>85</sup>, under UCC § 7-504(a):

"A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated acquires the title and rights that its transferor had or had actual authority to convey."<sup>86</sup>

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<sup>81</sup> UCC § 7-104.

<sup>82</sup> "Document of title" is broadly defined in UCC § 1-201(b)(16) to include, among others, the bill of lading and the warehouse receipt.

<sup>83</sup> Such as transferor's creditors, buyers and lessees from the transferor in the ordinary course of business and the bailee dealing in good faith with the transferor.

<sup>84</sup> Law 14/2014 of 24 July 2014 on Maritime Navigation (Spain).

<sup>85</sup> Under UCC § 7-501(5):

"A document is duly negotiated if it is negotiated ... to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation."

Universally, and not only under UCC art.7, whether or not it is transferable other than to the consignee, a non-negotiable BOL is not transferable by negotiation. Its transferability is thus incapable of conferring on the transferee a better title than that of the transferor. Whether the negotiation of a negotiable BOL is capable of conferring a superior title on the transferee is discussed in Part IV.

The transferability by negotiation facilitates the use of the BOL as a trade finance tool.<sup>87</sup> Thus, in a documentary sale, the parties may use the documentary collection method for payment. The seller may draw a draft (bill of exchange) on the buyer for the price of the goods transported to the buyer. The seller may send the draft together with the BOL (and other shipping documents) through the seller's bank to the buyer's bank. Depending on whether the draft is a sight or time draft, the buyer's bank will surrender the BOL (and other shipping documents) to the buyer against the buyer's payment or acceptance. To bridge the gap between the delivery of the goods to the carrier and receipt of payment for them, the seller may discount the draft with the seller's bank. The seller's bank may rely on the BOL as collateral securing the seller's reimbursement obligation on the seller's indorsement to that bank. Whether the seller's indorsement to the seller's bank is with recourse or without recourse, the BOL in the hands of the draft holder will also secure the buyer's obligation on the acceptance of the draft.

At the other end of the sale transaction, whether or not the seller discounted the draft with the seller's bank, the BOL (together with the other shipping documents) will not be delivered to the buyer until the buyer pays or accepts the draft. For its part, the buyer's bank may advance funds to the buyer in which case it will rely on the BOL and through it on the goods themselves as collateral securing the buyer's reimbursement obligation. Furthermore, the buyer's bank will

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<sup>86</sup> In the case of a non-negotiable document of title, certain defences are cut off by notice to the bailee. See UCC § 7-504(b).

<sup>87</sup> For the recognition of the BOL as an instrument of credit, see Norman Miller, "Bills of Lading and Factors in Nineteenth Century English Overseas Trade" (1957) 24 U Chicago L. Rev. 256 at 267–281.

release the BOL to the buyer on trust terms. Under a ‘trust receipt’ accordingly issued, the buyer is a trustee and its bank is the beneficiary, who remains in constructive possession of the BOL and through it of the goods it represents, even after the buyer obtains the goods from the carrier against the presentation of the BOL. Thereby the buyer’s bank purports to obtain a proprietary claim to the proceeds realised from the subsequent sale of the goods by the buyer.<sup>88</sup> Banks involved in trade finance also prefer the BOL to be substantively negotiable, so as to confer on them a superior title. This option, which is not universally fully available, is discussed in the following Part.

For decades this mode of finance has been in sharp decline in the West.<sup>89</sup> At present, TTDCs—whether or not they are documents of title such a BOLs—are used to prove the transfer by negotiation of control of the goods. They are also frequently used in international trade as means of evidence for the shipment of the goods, as well as to establish and meet documentary requirements in payments under letters of credit. At the same time, the use of TTDCs purporting to function as documents of title in trade finance is on the rise in the Chinese-based domestic and foreign trade and elsewhere in East and South Asia.<sup>90</sup>

#### **IV. Title Accorded by Negotiation – The Extent of Negotiability**

Substantive negotiability involves the power of a transferor of an instrument or document to accord to a qualified transferee—generally speaking, a BFPV—a superior title, or more specifically, a

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<sup>88</sup> For an early-modern comprehensive discussion on the various ways in which a bill of lading can serve as a collateral, see e.g., Frederick Thulin, “Bill of Lading as Collateral Security under Federal Laws” (1918) 16 Mich. L. Rev. 402 at 403–404. See also Britton, “Negotiable Documents of Title” (1954) 5 Hasting L.J. 103, 106–112.

<sup>89</sup> See e.g., Boris Kozolchyk, “Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective” (1992) 23 J. Mar. L. & Comm. 161, 161–162.

<sup>90</sup> The concluding paragraphs of this Part (as of fn.87) heavily rely on information provided to the author by bankers connected to the ICC (International Chamber of Commerce) from various countries. Emails are in the author’s hands.

better title than that of the transferor, free of third parties' adverse claims (namely, equities of ownership) and prior parties' defences (namely, equities of liability).<sup>91</sup>

I argue that one can distinguish among three degrees of substantive negotiability. To begin with, where negotiability is limited, for the qualified transferee to gain a superior title, the transferor must have been in lawful possession. Next, where negotiability is full, the transferor ought to be a holder, even if in unlawful possession. Finally, where the negotiability is complete, the transferor could be any possessor, not necessarily in lawful possession and not even a holder. For his or her part, 'holder' is the bearer of an instrument or document made out to bearer (or indorsed in blank) or the person in possession of an instrument or document made out or indorsed to him or her.<sup>92</sup>

In this framework, as developed in the law of negotiable instruments, a person to whom the instrument or document was either issued or indorsed, subject to separately agreed-upon restrictions (e.g., for safekeeping only), is a holder in lawful possession. He or she may confer on a qualified transferee who is unaware of the restrictions a superior title free of such restrictions.<sup>93</sup> For his or her part, a thief of a bearer instrument or document is a holder—albeit in unlawful possession—who can accord a superior title under full (but not limited) negotiability.<sup>94</sup> At the same time, under English law, a thief of an instrument either made out or indorsed to another person is not even a holder.<sup>95</sup> In the absence of complete negotiability under English law, this thief cannot accord title to his or her transferee.

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<sup>91</sup> See text around fn.25.

<sup>92</sup> cf. BEA s.2, defining (in relation to bills of exchange, cheques and promissory notes) 'holder' to mean "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof."

<sup>93</sup> See e.g., *London Joint Stock Bank v Simmons* [1892] A.C. 201 (H.L.).

<sup>94</sup> See e.g., *Miller v Race* (1758) 1 Burr. 452; 97 E.R. 397.

For negotiable payment instruments, common law settled on full negotiability. Complete negotiability was specifically rejected.<sup>96</sup> Legislation in both the UK<sup>97</sup> and the USA<sup>98</sup> has adopted this position, even if subject to specific exceptions, which substantially vary between these two countries.<sup>99</sup> Conversely, the civil law position, reflected in international conventions governing negotiable payment instruments, recognises complete negotiability. Thereunder, and contrary to the position in the UK and the USA, one who takes under a forged indorsement may become a “lawful holder” so as obtain title to the stolen negotiable payment instrument.<sup>100</sup>

An overwhelming majority of—if not all—jurisdictions recognise some measure of substantive negotiability, namely, the good title of the transferee-holder to whom the BOL was negotiated by a previous lawful holder with the intent of passing title.<sup>101</sup> It is, however, often

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<sup>95</sup> Other than the payee, a holder must take the instrument by ‘negotiation’ which, in the case of an instrument payable to order, requires the indorsement of the previous holder. See BEA s.31.

<sup>96</sup> *Mead v Young* (1790) 4 T.R. 28; 100 E.R. 876.

<sup>97</sup> BEA s.24.

<sup>98</sup> UCC § 3-403.

<sup>99</sup> For an extensive discussion, see Benjamin Geva, *Bank Collections and Payment Transactions: Comparative Study of Legal Aspects* (Oxford: Oxford University Press, 2001), pp.465–487, 501–514.

<sup>100</sup> Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) 143 L.N.T.S. 257, Annex I, art.16; Convention Providing a Uniform Law for Cheques (Geneva, 1931) 143 L.N.T.S. 355, Annex I, arts 19, 21.

<sup>101</sup> I read this between the lines of Railas, *The Rise of the Lex Electronica and the International Sale of Goods: Facilitating Electronic Transactions Involving Documentary Credit Operations* (2004), p.243.

stated<sup>102</sup> that the negotiability of the BOL under English law goes merely to the form of transfer, rather than to confer on the transferee-holder acquiring the BOL in good faith and for value a better title than that of the transferring holder.<sup>103</sup> This is certainly true inasmuch as “documents of title to goods never have the currency of money.”<sup>104</sup> However, this position overlooks limited negotiability; that is, the ability of a good faith purchaser for value to acquire under some circumstances, as a matter of law, a better title than that of the transferor.

To begin with, even in the less usual case in which the contract for carriage contains terms not included in the BOL,<sup>105</sup> as against a holder-BFPV, the carrier may not raise defences not stemming from terms included in the BOL.<sup>106</sup> This is unlike an obligor under an assigned debt who may raise against an assignee all defences available to the obligor under the contract giving rise to the debt.<sup>107</sup>

As for protection from adverse claims, Lord Campbell C.J. stated in *Gurney v Behrend* (1854)<sup>108</sup> that:

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<sup>102</sup> See e.g., Proctor, *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document in Financing International Sale Contracts* (1996), p.71 and McKendrick, *Goode and McKendrick on Commercial Law* (2020), p.994 and the sources each cites.

<sup>103</sup> For these two components of negotiability (albeit focusing on debt instruments, i.e., bills of exchange, cheques, and promissory notes) see the text around fn.5.

<sup>104</sup> M.G. Bridge, *The Sale of Goods*, 4th edn (Oxford: Oxford University Press, 2019), para.5.47.

<sup>105</sup> For the usual case to the contrary, see the text around fnn.37–39.

<sup>106</sup> See e.g., *George Kallis (Manufacturers) Ltd v Success Insurance Ltd* [1985] 2 Lloyd’s Rep. 8 at 11; *Partenreederei M/S “Heidberg” v Grosvenor Grain & Feed Co Ltd (the Heidberg)* [1994] 2 Lloyd’s Rep. 287, 310. See generally: Treitel & Reynolds, *Carver on Bills of Lading* (2017), pp.102–105.

<sup>107</sup> See e.g., *The Government of Newfoundland v The Newfoundland Railway Company* (1888) 13 App. Cas. 199 (PC).

<sup>108</sup> *Gurney v Behrend* (1854) 3 Ellis & Blackburn’s Q.B. Rep. 624; 118 E.R. 1275.

“Ever since the great case of *Lickbarrow v Mason*<sup>109</sup> ... the law has been considered to be that the bona fide transferee, for value, of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop in transitu, as against the purchaser.”<sup>110</sup>

However, *Gurney v Behrend* did not go as far as to understand *Lickbarrow v Mason* as endowing the BOL with the full features of negotiability. Rather it held that:<sup>111</sup>

“A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a bona fide transferee for valuable consideration,<sup>112</sup> without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority,<sup>113</sup> a subsequent bona fide transferee for value cannot make title under it, as against the shipper of the goods.”

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<sup>109</sup> *Lickbarrow v Mason* (1787) 2 T.R. 63; 100 E.R. 35.

<sup>110</sup> *Gurney v Behrend* (1854) 3 Ellis & Blackburn’s Q.B. Rep. 624 at 638–639; 118 E.R. 1275 at 1280–1281.

<sup>111</sup> *Gurney v Behrend* (1854) 3 Ellis & Blackburn’s Q.B. Rep. 624 at 633–634; 118 E.R. 1275 at 1279.

<sup>112</sup> Certainly, in the absence of an indorsement signature, this must be taken to apply only to bills of exchange or promissory notes either payable to bearer or indorsed in blank.

<sup>113</sup> However, as discussed below, ‘authority’ is inherently apparent for a transferor in lawful possession.

Opponents of the substantive negotiability of the BOL seize on the requirement that the BOL be “put into circulation by the authority of the shipper or consignee.”<sup>114</sup> Thus, they explain *Gurney v Behrend* on grounds other than negotiability. For example, McKendrick suggests the transferee’s better title on the basis “of some exception to the *nemo dat* rule, e.g., estoppel” rather than something inherent in the nature of the negotiable documents of title.<sup>115</sup>

However, in *Gurney v Behrend*, the Court was specifically concerned only with whether the BOL came “into the possession of the [holder] ... with the authority of the [shipper].”<sup>116</sup> Effectively, I argue, the key for deciding in favour of the holder was the holder’s mere lawful possession of the BOL, received from an intermediary, to whom the shipper had delivered the bill, with the apparent authority to transfer. Notwithstanding McKendrick, apparent authority is arguably inherent in lawfully possessing a negotiable BOL by an eligible internal,<sup>117</sup> as long as the BOL is silent as to any restriction on the holder’s power to negotiate it, and is not fact-driven so as to be considered in each case on its own.<sup>118</sup> As such it reflects limited negotiability. Moreover, in the facts of *Gurney v Behrend*, there is no convincing basis for making a distinction between the first and second delivery; the lawful possession of a BOL suffices to convey apparent authority and hence the power to convey a superior title. Finally, even if historically transferability by negotiation has not produced automatically substantive negotiation,<sup>119</sup> it is obvious that the

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<sup>114</sup> See text around fn.110.

<sup>115</sup> McKendrick, *Goode and McKendrick on Commercial Law* (2020), p.994 fn.73.

<sup>116</sup> *Gurney v Behrend* (1854) 3 Ellis & Blackburn’s Q.B. Rep. 624 at 634; 118 E.R. 1275 at 1280.

<sup>117</sup> Which is not necessarily the case for merely having the authority to deliver orders to a warehouse: *Farquharson Brothers v King* [1902] A.C. 325.

<sup>118</sup> When the actual possessor is not a person reasonably expected to act on behalf of the transferor, the taker from him or her may be taken not to act in good faith so as not to gain protection as a BFPV.

<sup>119</sup> The bumpy road from transferability by negotiation to material negotiability is addressed in Geva, *The Payment Order of Antiquity* (2011), pp. 582–584.

protection given to the BFPV in *Lickbarrow v Mason*<sup>120</sup> was perceived as the result of the negotiation. This is not to mention the “absolute title ... freed from [an] equitable right” of the holder of the BOL taken by negotiation in *Lickbarrow v Mason*. This is linguistically a reminiscent of the freedom from "equities of the bill", "equities that attach to the bill itself", "equities affecting it", or equities "with which the bill is incumbered" of a holder who takes by negotiation a negotiable bill of exchange or promissory note.<sup>121</sup>

Under limited negotiability, not having authorised the transfer to a thief, a dispossessed ex-holder of a BOL may recover not only from the thief but also from a subsequent holder who took the document by negotiation from a thief (or someone deriving title from the thief) in good faith and for value. While logically such state of law is not inevitable, limited negotiability can be understood once it is recalled that in English law, full negotiability emerged as an explanation to the currency quality of the banknote as a monetary object. Whether the expansion of full negotiability to other payment instruments was mindless or thoughtful is beside the point. Suffice it to say that the application of full negotiability also to BOLs would have been a step removed and thus not inevitable.

It is noteworthy that for a transport document to be endowed with limited negotiability it must be transferable by negotiation. As explained in Part II, a railway consignment note or receipt is a TDC only in a limited sense. Its lawful holding does not indicate apparent authority. Hence, it was correctly held that, on its own, the transfer of such a document cannot convey a superior title to a BFPV.<sup>122</sup>

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<sup>120</sup> *Lickbarrow v Mason* (1787) 2 T.R. 63; 100 E.R. 35.

<sup>121</sup> For a summary, discussion and these interchangeable expressions see: *In Re Overend, Gurney, & Co* (1868) L.R. 6 Eq. 344 at 359–361; Note, “Equities Attaching to Overdue Bills of Exchange” (1870) 49 L.T. 122.

<sup>122</sup> *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] A.C. 287 (not following *Commonwealth Trust Ltd v Akotey* [1926] A.C. 72 (P.C.)).

Limited negotiability is not confined to BOLs. Rather, it facilitates a fresh view on the common law treatment of the purchaser in possession of a certificate of a registered share, who took it, for value and in good faith, bearing a blank indorsement by the registered shareholder. Thus, in *Colonial Bank v Cady* (1890),<sup>123</sup> the BFPV in possession of a registered share certificate indorsed in blank, who derived title from the original registered shareholder, was protected from adverse claims. Such an adverse claim could not successfully be asserted by an earlier buyer from the owner who had not taken possession of the certificate. Alternatively, an adverse claim could not successfully be asserted by the owner where the buyer (to be protected) purchased the share certificate from the owner's agent who had lawful possession but had sold the share certificate in breach of authority.<sup>124</sup> Conversely, when the BFPV in possession of a share certificate indorsed in blank derived title from a thief, the purchaser would not have been protected against the dispossessed earlier holder (including the original registered owner).

True, protection accorded to the BFPV of a 'documentary intangible,' in this context either a BOL or share certificate indorsed in blank, as well as a BOL made out to bearer, is limited to one who takes it from a lawful possessor. As such it is in line with the protection given under the apparent authority principle. It is also in line with protection given to a BFPV of goods from a non-owner in lawful possession, as provided by the statutory rules applicable to the sale of goods. However, protection accorded by limited negotiability is not precluded by protection accorded by statutory rules under sales law<sup>125</sup> and apparent authority. Nor is it of identical scope. Usually, even if not always, it is broader.

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<sup>123</sup> *Colonial Bank v Cady* (1890) 15 A.C. 267 (H.L.), dealing with acquisition from brokers to whom executors of a deceased shareholder surrendered share certificates indorsed in blank.

<sup>124</sup> As in *Fuller v Glyn, Mills, Currie & Co* [1914] 2 K.B. 168 (K.B.D.), specifically applying *Colonial Bank v Cady* (1890) 15 A.C. 267 (H.L.).

<sup>125</sup> Namely, protection accorded by limited negotiability falls into the category of "rules of the common law" that are not "inconsistent with the provisions of this Act" so as to "apply contracts for the sale of goods" under SGA s.62(2).

First, only a BFPV by *negotiation* of a ‘documentary intangible’ qualifies. Second, on the other hand, compared to the beneficiary under sale of goods and apparent authority rules, the BFPV-holder of a ‘documentary intangible’ is protected under broader circumstances. Indeed, statutory provisions protect both beneficiaries<sup>126</sup> when buying from a seller remaining in possession of goods,<sup>127</sup> a would be buyer taking possession of goods,<sup>128</sup> as well as from an agent exceeding authority to dispose of the goods.<sup>129</sup> Both are also protected upon buying from somebody with a voidable title that has not yet been voided.<sup>130</sup> However, only the BFPV of a ‘documentary intangible’ and not the beneficiary under the sale of goods and apparent authority rules is also protected upon taking by negotiation from any lawful holder—even, for example, when the adverse claimant neither intended to pass property,<sup>131</sup> nor presented the transferor as authorised to carry out the transfer.

Third, the qualified holder of the negotiable document of title need not necessarily be a buyer, as under SGA rules, but could also be a secured party.<sup>132</sup> Fourth, negotiability is the best, if not the only, explanation to the confinement of the carrier’s obligation to the holder-BFPV strictly to the terms contained in the BOL to the exclusion of anything else that might have been agreed

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<sup>126</sup> McKendrick, *Goode and McKendrick on Commercial Law* (2020), pp.325–326. Under these provisions, goods must be delivered and documents of title transferred: McKendrick, p.511.

<sup>127</sup> SGA s.25(1); Factors Act 1889 (c.45) s.8.

<sup>128</sup> SGA s.25(2); Factors Act 1889 (c.45) s.9.

<sup>129</sup> Factors Act 1889 (c.45) s.2(1).

<sup>130</sup> SGA s.23, albeit covering the document of title holder only implicitly.

<sup>131</sup> See text around fn.119.

<sup>132</sup> Which is also the case in connection with agent with authority to dispose of the goods. Factors Act 1889 s.2(1) as distinguished from SGA ss.25(1) and (2).

between the carrier and the consignor.<sup>133</sup> Fifth, for its part, the expansion of negotiability to bills of exchange and promissory notes beyond the ‘currency’ reasoning, particularly as applied to banknotes, or more generally to negotiable instruments payable to bearer, was not an independent process. Rather, it coincided and was intertwined with the evolving law providing protection for a BFPV of goods in the circumstances set out above.<sup>134</sup> Since the objective was enhancing the flow of commerce,<sup>135</sup> I am inclined to speculate that skipping documents of title was accidental.

There are two principal advantages for viewing the BFPV of a negotiable BOL as protected under negotiability, albeit limited. First, it opens the door to considering whether negotiability should not be extended, at least to full negotiability. Second, it brings the BFPV’s protection to be governed in England by the same doctrine as in all other legal systems, which facilitates harmonization—if not a search for uniformity—an important theme in international trade.

In the final analysis, maintaining the status quo of protection limited to sales law and apparent authority, opting for limited negotiability, or adopting full (or even complete) negotiability is a matter for a policy decision. Under the status quo, a document of title is no more than a representative of goods. Accordingly, dealing with it ought not to produce results different from those emerging with dealing with the goods. On the other hand, using documents of title in trade finance may enhance benefits if some degree of negotiability is accorded.

In any event, in some other legal systems, the effect of negotiation of negotiable BOLs is not confined to limited negotiability as under the common law. Among civil law jurisdictions, the position of the holder of a negotiable BOL acquiring it in good faith and without gross

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<sup>133</sup> See fn.106 and the text around it.

<sup>134</sup> Geva, *The Payment Order of Antiquity* (2011), pp.554–567.

<sup>135</sup> See fn.134.

negligence<sup>136</sup> from (or through) a thief, varies.<sup>137</sup> For example, the Maritime Codes of Norway<sup>138</sup> and Spain<sup>139</sup> protect such a purchaser so as to confer upon the BOL complete negotiability. Many if not most statutes elsewhere are silent on this point.

In the United States, the key to the acquisition of a superior title is ‘due negotiation’ of a negotiable document of title. Under UCC § 7-501(a)(5):

“A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder<sup>140</sup> that purchases it in good faith, without notice of any defense against or claim to

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<sup>136</sup> Being the general civilian formula for the acquisition of the status corresponding to that of a holder in due course of a negotiable monetary debt instrument under Anglo-American law. See e.g., art.16(2) of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) 143 L.N.T.S. 257, Annex I, accessible at: <https://www.jus.uio.no/lm/bills.of.exchange.and.promissory.notes.convention.1930/doc.html#54> [Accessed March 17, 2022].

<sup>137</sup> See Railas, *The Rise of the Lex Electronica and the International Sale of Goods: Facilitating Electronic Transactions Involving Documentary Credit Operations* (2004), p.243.

<sup>138</sup> The Norwegian Maritime Code 1994 (Norway) s.306, accessible at [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_isn=88374&p\\_lang=en](https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=88374&p_lang=en) [Accessed March 17, 2022]. Under s.306(2): “A person who in good faith has acquired an order or bearer bill of lading is not obliged to surrender it to the person who lost it.”

<sup>139</sup> Law 14/2014 of 24 July 2014 on Maritime Navigation (Spain), accessible at <https://www.boe.es/buscar/act.php?id=BOE-A-2014-7877> [Accessed March 17, 2022], providing at art.254 that:

“When a person is dispossessed for any reason of a bill of lading, whether it is a bill of lading, or an endorsable bill of lading, the new holder who would have acquired it inter vivos according to the document circulation law will not be obliged to return it if you acquired it in good faith and without serious fault. The rights and actions of the legitimate owner against those responsible for acts of illegitimate dispossession will be safe.”

<sup>140</sup> Under the relevant part of UCC § 1-201(b)(21), ‘holder’ of a tangible document of title is defined to mean:

it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.”

In turn, under UCC § 7-501(a)(1), a document made out to order “is negotiated by the named person's indorsement and delivery.” In the footsteps of the common law, negotiation and hence due negotiation of a document made out to order, must thus be made through the indorsement of a holder, not necessarily in lawful possession, and yet a holder. As in connection with negotiable instruments, the civilian complete negotiability is thus rejected. Unlike the common law governing bills of lading, negotiability is thus full and not limited.

Under UCC § 7-502(a), a holder to which a negotiable document of title has been duly negotiated acquires thereby:

“(1) title to the document;

(2) title to the goods;

(3) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(4) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document *free of any defense or claim by the issuer* except those arising under the terms of the document or under this article. ...”. (Emphasis added.)

Under UCC § 7-502(b):

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“... (B) the person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession.”

“ ... title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

(1) the due negotiation or any prior due negotiation constituted a *breach of duty*;

(2) any person has been deprived of possession of a negotiable tangible document ... by *misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion*; or

(3) a previous sale or other transfer of the goods or document has been made to a third person.”

(Emphasis added.)

Both freedom from the issuer’s defences, and from third party claims, are thus available to the acquirer by due negotiation.

Rights acquired by due negotiation are stated in UCC § 7-502(a) and (b) to be subject to UCC § 7-503, addressing rights preceded the issuance of the document. The principle is that:

“ ... the title of a purchaser by due negotiation prevails over almost any interest in the goods which existed prior to the procurement of the document of title *if the possession of the goods by the person obtaining the document derived from any action by the prior claimant which introduced the goods into the stream of commerce or carried them along that stream.*”<sup>141</sup>

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<sup>141</sup> Official Comment to UCC § 7-503. Emphasis added.

For example, unless estoppel is involved, a purchaser by due negotiation will not defeat an owner from whom the shipper (or predecessor in title) stole the goods.<sup>142</sup>

## V. TTDCs under International Conventions and Other Instruments

International conventions governing the carriage of good by a unimodal means of transportation hardly address transferability, let alone negotiability. Thus, the consignment note under the United Nations Convention on International Carriage of Goods by Road (CMR),<sup>143</sup> the COTIF/CIM Uniform Rules concerning the Contract of International Carriage of Goods by Rail (“CIM Rules”)<sup>144</sup> and the SMGS Convention,<sup>145</sup> as well as the CIM/SMGS Consignment Note Manual,<sup>146</sup> are TDCs in a limited way.<sup>147</sup> The same is true of the air

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<sup>142</sup> See fn.141.

<sup>143</sup> Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 1956) 399 U.N.T.S. 189 (entered into force 2 July 1961). Available online from the University of Oslo Faculty of Law website: <https://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html> [Accessed March 17, 2022].

<sup>144</sup> Various relevant documents are indexed and accessible at: [https://int.search.tb.ask.com/web?st=sb&ptb=4401AC9C-2A24-4B3D-8A31-DD291C18209B&n=78492b35&ind=2018061109&p2=%5eCWZ%5exdm017%5eTTAB02%5eca&si=EAlaIQobChMIiIGRjvJM2wIVSKsBCh3OdwE9EAEYASAAEgLVfD\\_BwE&q=COTIF%2FCIM+Uniform+Rules+concerning+the+Contract+of+International+Carriage+of+Goods+by+Rail](https://int.search.tb.ask.com/web?st=sb&ptb=4401AC9C-2A24-4B3D-8A31-DD291C18209B&n=78492b35&ind=2018061109&p2=%5eCWZ%5exdm017%5eTTAB02%5eca&si=EAlaIQobChMIiIGRjvJM2wIVSKsBCh3OdwE9EAEYASAAEgLVfD_BwE&q=COTIF%2FCIM+Uniform+Rules+concerning+the+Contract+of+International+Carriage+of+Goods+by+Rail) [Accessed March 17, 2022].

<sup>145</sup> Various relevant documents are accessible online at: <https://www.cit-rail.org/en/rail-transport-law/smgs-smgs/> [Accessed March 17, 2022].

<sup>146</sup> Accessible online e.g., through: [https://int.search.tb.ask.com/web?st=sb&ptb=4401AC9C-2A24-4B3D-8A31-DD291C18209B&n=78492b35&ind=2018061109&p2=%5eCWZ%5exdm017%5eTTAB02%5eca&si=EAlaIQobChMIiIGRjvJM2wIVSKsBCh3OdwE9EAEYASAAEgLVfD\\_BwE&q=CIM%2FSMGS+Consignment+Note+Manual](https://int.search.tb.ask.com/web?st=sb&ptb=4401AC9C-2A24-4B3D-8A31-DD291C18209B&n=78492b35&ind=2018061109&p2=%5eCWZ%5exdm017%5eTTAB02%5eca&si=EAlaIQobChMIiIGRjvJM2wIVSKsBCh3OdwE9EAEYASAAEgLVfD_BwE&q=CIM%2FSMGS+Consignment+Note+Manual) [Accessed March 17, 2022].

waybill under the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention).<sup>148</sup> All are not transferable by negotiation and thus are not negotiable.<sup>149</sup>

The Hague-Visby Rules<sup>150</sup> governing the carriage of goods by sea define in art.1(b) “Contract of carriage” as applying “only to contracts of carriage covered by a [BOL] or any similar document of title” which “regulates the relations between a carrier and a holder ...”. By reference to the nature of the marine BOL<sup>151</sup> and a few provisions alluding to it,<sup>152</sup> negotiability is assumed to exist and yet is not expressly addressed.

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<sup>147</sup> For the consignment note, see e.g., S. Baytan, “Turkey: The Content and Functions of The Consignment Note Under The CMR” (Mondaq, 2012), *Mondaq*, <https://www.mondaq.com/turkey/rail-road-cycling/170492/the-content-and-functions-of-the-consignment-note-under-the-cmr> [Accessed March 17, 2022]. See also the SMGS Agreement art.26(1), under which upon the arrival of the goods to the destination both the consignment note and the goods are to be given by the carrier to the consignee.

<sup>148</sup> Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) (Montreal, 28 May 1999) 2242 U.N.T.S. 309 (entered into force 4 November 2003). Available online at: <https://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/> [Accessed March 17, 2022].

<sup>149</sup> For the limited nature of them as TDCs, see the text following fn.10.

<sup>150</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924, as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 23 February 1968 (Hague-Visby Rules) 1412 U.N.T.S. (entered into force 23 June 1977). Available online: <https://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html> [Accessed March 17, 2022].

<sup>151</sup> For the BOL as the classic document of title to goods under the common law, see the text around fn.27.

<sup>152</sup> See e.g., art.III(4) (description of goods on a bill of lading is binding towards a third-party transferee acting in good faith) and art.VI (bill of lading contrasted with “a receipt which shall be a non-negotiable document and shall be marked as such”).

The 2000 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)<sup>153</sup> is an exception. In art.1(6), it defines “Transport document” to mean “a document which evidences a contract of carriage and the taking over or loading of goods by a carrier, made out in the form of a [BOL] or consignment note or of any other document used in trade.” CMNI art.13 characterises the BOL as a document of title that may be “issued in the name of the consignee, to order or to bearer,” and which must be presented in order to obtain the goods. It is transferable “to a third party, including the consignee” who, upon taking it “in good faith in reliance on the description of the goods therein,” benefits from an irrebuttable presumption as to the accuracy of information included in the document. There is no definition for a “consignment note or of any other document used in trade.”

Unlike international conventions governing the carriage of goods by a unimodal means of transportation, conventions and other international instruments governing multimodal means of carriage of goods address negotiability extensively and yet incompletely. Three principal examples will be addressed.<sup>154</sup>

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<sup>153</sup> Adopted by the Diplomatic Conference Organized Jointly by the Central Commission for the Navigation of the Rhine (CCNR), the Danube Commission and UNECE, held in Budapest from 25 September to 3 October 2000 (entered into force 1 April 2005). Accessible online at: [https://www.ccr-zkr.org/files/conventions/cmni\\_en.pdf](https://www.ccr-zkr.org/files/conventions/cmni_en.pdf) [Accessed March 17, 2022].

<sup>154</sup> See also e.g., the negotiable FIATA Multimodal Transport Bill of Lading (FBL), issued (alongside the FWB: non-negotiable FIATA Multimodal Transport Waybill) and used by members of FIATA—translated from French to English, the International Federation of Freight Forwarders Associations—a NGO representing freight forwarders worldwide. See generally: M. Ardelt, “What is a FIATA Bill of Lading?” (Forto, 14 December 2017), *Forto Blog*, <https://forto.com/en/blog/fiata-bill-of-lading/> [Accessed March 17, 2022].

First, the 1980 UNCTAD (United Nations Conference on Trade and Development) Multimodal Convention<sup>155</sup> defines "Multimodal transport<sup>156</sup> document" in art.1 as "a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract." Under art.5(1), upon taking the goods, the MTO "shall issue a multimodal transport document which, at the option of the consignor, shall be in either negotiable or non-negotiable form." Articles 6 and 7 address the form and transferability of negotiable and non-negotiable transport documents. Under art 6(2), goods are to be released by the MTO only "against surrender of the negotiable multimodal transport document duly endorsed where necessary." Under art.7(2), having issued a non-negotiable multimodal transport document, the MTO "shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing." This means that, during transit, the consignor remains in control of the goods so that a non-negotiable multimodal transport document is not even a TDC. Under art.10(b), the contents of a "multimodal transport document ... issued in negotiable form and ... transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein" is conclusive against the MTO.

Second, the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents<sup>157</sup> apply under Rule 1 only upon their incorporation by the parties into their contract of

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<sup>155</sup> United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980), U.N. Doc. TD/MT/CONF/16 (not in force), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-E-1&chapter=11&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en) [Accessed March 17, 2022].

<sup>156</sup> Requiring under art.1(1) "the carriage of goods by at least two different modes of transport," excluding "[t]he operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract."

<sup>157</sup> TRADE/WP.4/INF.117/Corr.1, TD/B/FAL/INF.117/Corr.1. Accessible at: [https://unctad.org/system/files/official-document/tradewp4inf.117\\_corr.1\\_en.pdf](https://unctad.org/system/files/official-document/tradewp4inf.117_corr.1_en.pdf) [Accessed March 17, 2022]. For a discussion, see McKendrick, *Goode and McKendrick on Commercial Law* (2020), p.1212.

carriage, albeit “irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport.” Under art.2.6, a multimodal transport document (MT document) may be issued either in a negotiable or non-negotiable format, as further elaborated in art.4.3.

Third, the 2008 Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules (RR),<sup>158</sup> “is ambitious in scope, covering not only carriage of goods by sea but also, within limits, other modes of transport where used in conjunction with carriage by sea.”<sup>159</sup> Having defined “Negotiable transport document” in RR art.1(15), art.57(1) goes on to mandate transferability by negotiation—that is, by delivery—plus an indorsement signature where delivery is to be made out to the order of a specified person.

In principle, the delivery of the goods may be claimed from the carrier by the holder and made against the surrender of the document to the holder of a negotiable document.<sup>160</sup> In other cases, the entitlement is that of the consignee.<sup>161</sup> When a non-negotiable transport document that indicates that it shall be surrendered in order to obtain delivery of the goods has been issued, the surrender of the document by the consignee is required.<sup>162</sup> This suggests the possibility of a non-negotiable transport document that does not require surrender upon the delivery of the goods. Such

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<sup>158</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (Rotterdam Rules), CITRALOR, 63rd Sess, Annex, U.N. Doc. A/RES/63/122, [https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam\\_rules](https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules) [Accessed March 17, 2022].

<sup>159</sup> McKendrick, *Goode and McKendrick on Commercial Law* (2020), p.1213.

<sup>160</sup> RR, art.47, which nevertheless envisages a situation in which “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”.

<sup>161</sup> RR art.45. See also art.1(11): “‘Consignee’ means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.”

<sup>162</sup> RR art.46. See also arts 51(2), 54(2).

a transport document is obviously not a TDC.<sup>163</sup> Query as to the implications, if any, under the Rotterdam Rules of any statement on a non-negotiable transport document according to which it is transferable other than by negotiation. Under RR art.1(10), “holding” is linked to the possession of a negotiable document.

In principle, under RR art.41(b), a transport document is prima facie evidence of the carrier’s receipt of the goods as stated in the contract particulars. Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

“(i) A negotiable transport document ... that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;”

As well, under RR art.41(c),

“Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of [specified] contract particulars included in a non-negotiable transport document”<sup>164</sup>

Effectively, it is only the transferee of a negotiable document that has an unqualified right to rely on the information contained in the document. Typically, such a transferee is a holder to whom the document or record was transferred.

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<sup>163</sup> This is reinforced by art.4.3(d) of the UNCTAD/ICC Rules for Multimodal Transport Documents, providing that:

“[W]hen the *MT document* has been issued in a non-negotiable form, [delivery to the goods] to the person named as consignee in the document [is to be made] upon proof of his identity” (emphasis in original).

<sup>164</sup> Such particular are primarily by reference to RR art.36, addressing information provided by the shipper and carrier.

As well, RR art.25(1)(c), provides that goods may be carried on the deck of a ship only under specified circumstances. One such case is where “[t]he carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.” However, under RR art.25(4), the carrier may not invoke this provision “against a third party that has acquired a negotiable transport document ... in good faith, unless the contract particulars state that the goods may be carried on deck.”

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By way of summary, international conventions addressing unimodal means of transportation are quite sparse in addressing the negotiability or even transferability of TDCs. Other than in maritime and river trade, transport documents thereunder are not even TDCs. For their part, overall, conventions addressing multimodal transportation accord negotiability to TTDCs governed by them if so desired by the parties. They also provide the holder with the right to claim the delivery of the goods from the carrier. Nonetheless, they do not specify the type, contents or extent of negotiability. They also do not address the nature of such TTDCs as documents of title.

As pointed out at the conclusion of Part III, to have the maximum potential for use in trade finance, a transport document ought to be not only negotiable to one degree or another. Rather, it also ought to have the capacity to be a document of title capable of conferring on its holder a personal claim against the carrier, constructive possession, and property in the goods. What is thus needed to complete the extensive and helpful work of UNCITRAL is a versatile modal-neutral transport document whose nature, between a mere receipt and document of title, may be adapted by the parties as they wish in each given case. As UNCITRAL work demonstrates, a demand for the use of a transport document with such features in international trade—which may not exist in

the West—certainly exists in Chinese-based domestic and foreign trade and elsewhere in South and East Asia.<sup>165</sup>

## VI. Conclusion

In recent years, with the emergence of a long-distance land-based trade, particularly by rail in Eurasia, along with the expansion of a non-sea based multimodal trade, a demand arose for a TTDC which is not limited to marine transport. A series of international conventions partly responded to such demand by providing for new types of negotiable transport documents. However, these conventions failed to clarify the full meaning of negotiability thereunder. As well, they failed to explicitly accord to such documents the features of a document of title. This undermines their use in trade finance.

The task of overcoming this obstacle is hindered by the fragmentary nature of the law governing TTDCs. Thus, while negotiability of the marine BOL is generally recognised, its content is neither uniform nor always clear, even at the common law. As well, the nature of the ‘straight’ BOL is not uniform. For transport documents other than the marine BOL, even negotiability, and sometimes their nature as control documents, is either lacking or uncertain. Moreover, for all transport documents, even the marine BOL in some civil law jurisdictions, there may be a question as to their nature as tokens for a property right in the goods.

With land-based trade over rail being extended from China to the UK, courts in the UK may encounter documents of control other than the marine BOL purporting to be negotiable and operate as documents of title; that is, capable of passing the right to enforce the carrier delivery obligation, as well as constructive possession with or without property. Furthermore, substantive uniform laws ought to be established to accommodate international trade throughout the world. The clarification of principles towards the emergence of a versatile modal-neutral transport document, fully adaptable to the needs of contracting parties and governed by clear principles of

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<sup>165</sup> Principal documents are cited in fn.2.

law in both international and domestic spheres, has been undertaken in this article. It is necessary first step towards harmonization, not to speak of the crafting of uniform laws, which at a later stage could be extended to cover electronic TTDCs.

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