UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS, LAW & ART

School of Law

EXPLORING THE SPREAD OF THE LIABILITY ARISING FROM DANGEROUS GOODS UNDER C.I.F. AND F.O.B. CONTRACTS

By

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ABSTRACT

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Both at common law and under the Hague-Visby Rules, the shipper, by reason of the dangerous nature of the goods, may become subject to strict liability for damages or losses caused to the vessel, any other cargo or lives on board. However, this formulation only provides a partial portrait of the allocation of this liability, which is only from the perspective of the law of carriage of goods by sea, since it only attaches this liability to whoever falls within the term “shipper”. The term “shipper” however does not signify any real party or identity under the law of carriage of goods by sea. The question therefore remains as to who is the real party contracting for the carriage of the goods by sea. Perhaps the answer lies within the international sale of goods.

For sale contracts on *shipment terms*, alongside physical obligations in relation to the goods at the loading port, (depending on the sale contract), it is either the seller or the buyer who must make transport arrangements and conclude a contract of carriage for the goods. In the concept of shipment sales, documents are as significant as goods. At the centre of these documents lies bill of lading, whose role it is to evidence a contract of carriage for the agreed destination in the sale contract. When the buyer is not privy to the carriage contract with the carrier, COGSA 1992 Act artificially enables him to become party to that contract. English law, in terms of contract of carriage, is based on principle of mutuality which means that it is not only concerned with the transfer of rights, but also with the imposition of liabilities.

In terms of liability arising from dangerous goods, the transferability issue is not yet a settled matter under English law. This area is not fully explored under English law, given that the buyer has not had actually this liability imposed on him. If transmissible, it is therefore not known whether the law of international sale of goods would correspond to recover the buyer’s loss against the seller. Hence, rather than leaving the liability vaguely on the “shipper”, the complex scheme of international sale of goods law proves the necessity to examine the following question, which is at the centre of this thesis: How does the liability arising from the shipment of dangerous goods spread to the real parties of international trade, namely between the seller and the buyer under c.i.f. and f.o.b. sales? This question can be divided into three sub-questions. Firstly, who is the shipper under c.i.f. and f.o.b. sales and do the courts take a different approach in determining the identity of the shipper particularly for the purpose of allocation of the dangerous goods liability? Secondly, is this liability actually transmissible to the buyer and if so, can the law be justified? Thirdly and finally an aspect, which is frequently missing in other academic studies, would the law of international sale of goods provide any assistance to the buyer for recovery of such loss against the seller? If not, how can this problem be overcome? While examining these questions, not only will the thesis assess how satisfactory English law is currently on these issues, but also it will seek to fill the missing parts addressed in the questions with plausible suggestions both under contractual and non-contractual actions.

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Declaration Of Authorship

I, Ahmet Gelgec, declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

Exploring the Spread of the Liability Arising from Dangerous Goods under C.i.f. and F.o.b. Contracts

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Parts of this work have been used as the basis to create the following publications:
   Gelgec A., "Separation of Actual and Physical Possession on Bills of Lading under English Law" [2017] 4 Il Diritto Marittimo – Quaderni 1.
   Gelgec A., "Who attracts the dangerous goods liability under c.i.f. and f.o.b. contracts?" [2016] 2 Il Diritto Marittimo – Quaderni 29.

Signed: ....

Date: ....

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Ahmet Gelgec

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Abbreviations

All ER	All England Law Reports
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJQ	Civil Justice Quarterly
CLC	International Convention on Civil Liability for Oil Pollution Damage
CLJ	Cambridge Law Journal
CMI	Comité Maritime International
COGSA	Carriage of Goods by Sea Act
EWHC	High Court of England and Wales
ETL	European Transport Law
FOSFA	Federation of Oils Seeds & Fats Associations
GAFTA	The Grain and Feed Trade Association
HNS	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
HR	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (The Hague Rules)
HVR	Brussels Protocol amending the Hague Rules relating to Bills of Lading, 1968 (The Hague-Visby Rules)
IBL	International Business Lawyer
ICCLR	International Company and Commercial Law Review
ICLQ	International Comparative Law Quarterly
IJMCL	International Journal of Marine and Coastal Law
IJOSL	International Journal of Shipping Law
IJSL	The International Journal of Shipping Law
IMDG Code	International Maritime Dangerous Goods Code
IMO	International Maritime Organization
IntML	International Maritime Law
JBL	Journal of Business Law
JIBL	Journal of International Business Law
JIBFL	Journal of International Banking and Financial Law
JIML	Journal of International Maritime Law
JITLP	Journal of International Trade Law and Policy
JMLC	Journal of Maritime Law and Commerce
Ll LR	Lloyd's List Law Reports
Lloyd's Rep	Lloyd's Law Reports

LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
MARPOL	The International Convention for the Prevention of Pollution from Ships
MLR	Maritime Law Review
MSA	Merchant Shipping Act
MSR	Merchant Shipping Regulations
NYPE	New York Product Exchange Time Charter
OJLS	Oxford Journal of Legal Studies
RLR	Restitution Law Review
RR	United Nations Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules 2009)
SOGA	Sale of Goods Act
SOLAS	Convention for the Safety of Life at Sea
STL	Shipping and Trade Law
STLI	Shipping and Transport Lawyer International
Tul Mar LJ	Tulane Maritime Law Journal
TLR	Times Law Reports
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law

GENERAL INTRODUCTION

I. Background and Aim of the Thesis

Dangerous goods that are carried by sea carry with them potential risks of losses and damages to the vessel, other cargoes and lives on board. When the carrier has not been enabled to take necessary precautions against the dangerous nature and character of the goods prior to shipment, the risks of damages and losses will vastly increase. Under English law, there is no exhaustive definition of "dangerous goods" either in legislation or regulations[1]. A number of substances such as explosives and radioactive materials can be classified as dangerous. An example of a classification for these can be found in 1 (2) of the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997 in which dangerous goods are defined by reference to "goods classified in the Blue Book, the IMDG Code[2] or any IMO publication specified below as dangerous carriage by sea…".[3]

However, this is not entirely sufficient to embrace the approach taken under English law in regard to dangerous goods. Goods can be dangerous not only in consequence of their inherent nature but also as a result of surrounding circumstances.[4] For instance, grain, which is normally regarded as innocuous, can create danger, if it overheats. Similarly, although some liquids may not normally pose any danger; their danger may lie in inappropriate packing, which causes leakage and damage to the vessel or other cargo.[5] Thus, in order to make the carrier aware of the nature or the circumstances that may create danger, at common law, the shipper is under an implied duty to warn the carrier of the dangerous nature and character of the goods prior to loading.[6] Therefore in case goods are loaded without a notice given of their dangerous nature and character, the shipper of the goods will be subject to strict liability for damages or losses caused to the vessel, any other cargo or lives on board.[7] In

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[1] But see, the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997, SI 1997/2357.

[2] The International Maritime Dangerous Goods (IMDG) Code. A comprehensive list of dangerous substances and guideline for the safe carriage or shipment of them can be found in the IMDG Code. Chapter VII of the International Convention for the Safety of Life at Sea (SOLAS) 1974 makes mandatorily applicable the IMDG Code for contracting states.

[3] The Merchant Shipping Regulations 1997 give effect to the International Convention for the Safety of Life at Sea (SOLAS) 1974 and its protocol as amended.

[4] *Brass v Maitland* (1856) 119 ER 940; *Ministry of Food v Lamport & Holt* [1952] 2 Lloyd's Rep 371; *the Athanasia Comninos* [1990] 1 Lloyd's Rep 277; *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605. In *Chandris v Isbrandsten-Moller* [1951] 1 KB 240, Devlin J refused to read "other dangerous cargo" restrictively by reference to the *eiusdem generis* rule.

[5] *Brass v Maitland* (1856) 119 ER 940; *Ministry of Food v Lamport & Holt* [1952] 2 Lloyd's Rep 371.

[6] However the shipper is not under such duty where the shipowner knows or ought to reasonably be aware of the nature and character of the goods; *Brass v Maitland* (1856) 119 ER 940; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 K.B. 94; *Great Nothern Railway Co v LEP Transport & Depository Ltd* [1922] 2 K.B. 742; (1922) 11 Ll L Rep. 133. A similar duty may arise under charterparty, even though in most situations there will be express clause in relation to this duty in the charterparty.

[7] *Great Nothern Railway Co v LEP Transport & Depository Ltd* [1922] 2 KB 742; *Micada v Texim* [1968] 2 Lloyd's Rep 742; *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1993] 1 Lloyd's Rep 257 affirmed in [1994] 2 Lloyd's Rep 506; *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605.

addition to this, the concept of the common law duty also extends to cases where there is no physical danger whatsoever. The shipper of the goods can have liability imposed on him for economic losses resulting from "legally" dangerous goods, which lead to legal obstacles and delay to the vessel.[8] For instance, a cargo of rice, which itself was physically innocuous, was held legally dangerous, because the shipper failed to obtain the permission for discharge from the government, thus causing delay to the vessel and to the discharge of other cargoes on board.[9]

When the Hague or the Hague-Visby Rules[10] (the Rules) are applicable to the carriage contract evidenced or contained in the bill of lading, the common law duty is supplanted.[11] However, pursuant to Art IV r 6 of the Rules, when the carrier "has not consented, with knowledge of their nature and character" to "goods of an inflammable, explosive or dangerous nature", the carrier is entitled an indemnity from the shipper of the goods in respect of "all damages and expenses directly or indirectly arising out of or resulting from such shipment".[12] Similar to the common law obligation, the word "dangerous" in Art IV r 6 is given broad interpretation in the sense of physical danger and not restrictedly qualified by only "inflammable, explosive".[13] The carrier is entitled to indemnity even if the goods pose indirect physical damage to the vessel, other cargo or crew on board.[14]

However, this formulation only provides a partial picture of the allocation of this liability, which is only from the perspective of the law of carriage of goods by sea. It would be too simplistic and vague to end the story merely on the liability of the "shipper". The carriage of goods by sea law only attaches this liability to whoever falls within the term "shipper". The shipper is a party that enters into a carriage contract with the carrier under the bills of lading.[15] The term "shipper" however does not signify any real party or identity under the law of carriage of goods by sea. Therefore, who is the real party contracting for the carriage of goods by sea? Perhaps the answer to this question lies within the international sale of goods. Thousands of commercial ships sail daily across seas not for maritime reasons, but in order to carry goods that are purchased and sold internationally under sale contracts. The vast majority of reported cases on international sale of goods under English law appear to prove

[8] *Mitchell Cotts & Co Ltd v Steel Brothers & Co Ltd* [1916] 2 KB 610.
[9] Ibid.
[10] The Hague-Visby Rules have the force of law in England by virtue of Carriage of Goods by Sea Act 1971 (the 1971 Act hereinafter).
[11] *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1993] 1 Lloyd's Rep 257 affirmed in [1994] 2 Lloyd's Rep 506. The Common law duty is superseded to the extent of physically dangerous goods. The common law obligation arising from legally dangerous goods is not supplanted by the Rules. See, *Bunge SA v ADM Do Brasil Ltda and Others (The Darya Radhe)* [2009] EWHC 845; [2009] 2 Lloyd's Rep 175; *Mitchell Cotts & Co Ltd v Steel Brothers & Co Ltd* [1916] 2 KB 610.
[12] See, Art IV r 6 of the Rules. It should be noted that there is no difference between the Hague and the Hague-Visby Rules in terms of wording of this provision.
[13] *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep 337, 341. In the case, it was held that the provision is also applicable to where the goods pose indirect physical loss. Nevertheless, Art IV r 6 is confined to physically dangerous goods and not applicable to legally dangerous goods which may be liable to cause delay or detention; *the Darya Radhe* [2009] EWHC 845; [2009] 2 Lloyd's Rep 175.
[14] *The Giannis NK* [1998] AC 605; [1998] 1 Lloyd's Rep 337.
[15] Art. I (a) of the Rules.

that those contracts are contextually in a direct nexus with marine transportation. Although no rigorous definition has been given, contracts for the international sale of goods can be divided into sub-headings according to the mode and place of delivery of the goods; *ex works* contracts[16], *ex ships* contracts[17] and contracts of sale on *shipment terms*. However, the focus of this thesis is on sale contracts on shipment terms only, since first, the former two do not raise similar legal issues and in practice almost have nothing in common with contracts on shipment terms, and second, an overwhelming majority of contracts for international sale of goods are concluded on shipment terms, namely c.i.f. (cost, insurance and freight) and f.o.b. (free on board) or variations thereof[18].

They are called sale contracts on shipment terms, as the seller's physical obligations in relation to the goods end at the loading port rather than at the arrival port. However, this does not necessarily always mean that the seller's physical obligations end, when he loads the goods as agreed in the sale contract at the port of loading. Under these sales, someone must also make transport arrangements and conclude a contract of carriage for the goods. One cannot state that it is always one particular party's responsibility. Depending on the stipulation in the contract, this could be either the seller or the buyer. Nevertheless, under c.i.f. sales and often f.o.b. sales, due to the development of the international trade, responsibility for making shipping arrangements, which will be discussed in Chapter 2, are often shifted onto the seller rather than the buyer.[19]

However, this is only the half picture of these sales. In the concept of shipment sales, for the performance of the sale contract, documents are as significant as goods. Following fulfillment of physical duties, the seller, depending on the type of sale contract, is also often bound to tender the buyer some documents stipulated for in the contract in order to get paid for the goods.[20] At the centre of these documents lies the bill of lading,[21] which performs some important functions under these sales. First, it is a receipt of the goods containing statements in relation to quantity and quality of the goods. It is also a document of title enabling the holder to obtain constructive possession of the goods and often property in the goods. But most significantly, it also evidences a contract of carriage for the agreed destination in the sale contract. Almost invariably under c.i.f. sales, and often under f.o.b. sales when the buyer has not concluded the carriage contract, the buyer generally is not privy to the carriage contract with the carrier. When this is the case, given the doctrine of privity of contract established under English law,[22] the buyer will not be able to sue or be sued under the carriage contract evidenced in the bill of lading that is concluded on his behalf, however firmly linked with it

[16] Where delivery takes place at the seller's premises.
[17] Where delivery takes place at the buyer's premises.
[18] For variations of these contracts, see, Chapter 2.
[19] S. 32 (2) of the Sale of Goods Act 1979. This will be discussed below in Chapter 2.
[20] Except where the contract is on bare f.o.b. terms. See, Chapter 2.
[21] Indeed the parties may alternatively choose other shipping documents. See, Chapter 3.
[22] *Tweddle & Atkinson* (1861) 1 B & S 393; *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, 616.

he is.[23] The contractual gap between the buyer and the carrier was first filled by a statutory intervention in the form of the Bills of Lading Act 1855 (the 1855 Act). Due to not having up-to-date trading standards and deficiencies in it, it was later repealed by the Carriage of Goods by Sea Act 1992[24] (the 1992 Act).[25] English law in terms of contract of carriage is based on the principle of mutuality, which means that it is not only concerned with the transfer of rights, but also with the imposition of liabilities.[26] This position is also preserved under the 1992 Act, which accordingly not only enables transfer of rights but also liabilities thereunder. Can it be said that the buyer who is not the shipper is immune from liability for dangerous goods? Considering the liability arising from dangerous goods, transferability of this liability is not a settled law as of yet under English law[27] and there are also controversial opinions on the matter among scholars.[28] But, if technically transmissible to the buyer, after incurring this liability, the buyer as an innocent party who has nothing to do with the shipment of such goods, would first seek to reallocate it under the sale contract, given that he would have this liability imposed on him under the carriage contract tendered by the seller. However, this area is not fully explored under English law, given that the buyer has not actually yet had such a liability imposed on him, although the author thinks that it is technically transmissible.[29] It is therefore not known whether the law of international sale of goods would correspond to recover the buyer's loss against his seller, which was incurred under the document, tendered by him.

Indeed, it could arguably be suggested that buyers can purchase liability insurance against such loss. However, it would not be very realistic to expect buyers to buy such insurance, when even the seller/shippers in most situations do not insure themselves against such liability. Moreover, even if such insurance markets are available, considering that liabilities arising from dangerous goods can be disproportionate,[30] they may not be covered by the insurance on an unlimited basis. Even if the policy ideally covers this loss, first, this will not entirely eliminate the necessity for an analysis of this issue, and second, the insurance company as a result of having paid out to the buyer, will likely seek to

[23] *Thompson v Dominy* (1845) 14 M & W 403, 407; 153 ER 532, 534; *Howard v Shepherd* (1850) 9 CB 297, 319; 137 ER 907, 916. See also, *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 853. The transaction of the bills of lading enables the buyer only to have document of title, which gives constructive possession and may also enable him to obtain the title to the goods if intended. See, *Lickbarrow v Mason* (1794) 5 Term Rep 683. See also, *Sewell v Burdick* (1884) 10 App Cas 74.

[24] Repealed by s. 6 (2) of the 1992 Act.

[25] English law, in order to resolve the issue of privity of contract in general contract law, enacted the Contracts (Rights of Third Parties) Act 1999. However the Act expressly is not applicable to contracts of carriage; s. 6 (5) a, 6 (6). The Act also does not affect the liabilities of third parties in general.

[26] *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] AC 205, [31] and [45]. See also, the Law Commission report "Rights of Suit in Respect of Carriage of Goods by Sea" Law Com No 196, Scot Law Com No 130 (the Law Commission Report hereinafter), 3.22.

[27] *Ministry of Food v Lamport & Holt Line* [1952] 2 Lloyd's Rep 371, 382. But see, *the Giannis NK* [1998] AC 605; [1998] 1 Lloyd's Rep. 337.

[28] See below Chapter 3, II.3. Is the dangerous goods liability actually transmissible?

[29] See, generally Chapter 3.

[30] Neither the shipper/seller nor the buyer/transferee of a bill of lading are protected by Convention on Limitation of Liability for Maritime Claims (LLMC) 1976; see Merchant Shipping Act 1995, Schedule 7, art 1(2).

recover from the seller under the doctrine of subrogation on the same grounds that the buyer would seek.[31]

Hence, rather than leaving the liability vaguely on the "shipper", the complex scheme of the law of international trade proves the necessity to examine the question, which is at the centre of this thesis: How does the liability arising from the shipment of dangerous goods spread to the real parties of international trade, namely between the seller and the buyer under c.i.f. and f.o.b. sales? This question can be divided into three sub-questions. Firstly, who is the shipper under c.i.f. and f.o.b. sales and do the courts adopt a different approach in determining the identity of the shipper particularly for the purpose of allocation of the dangerous goods liability? Secondly, is this liability actually transmissible to the buyer and if so, can the law be justified? Thirdly, and finally which is a step frequently missing in other academic studies, would the law of international sale of goods provide any assistance to the buyer for recovery of such loss against the seller? If not, how can this problem be overcome? While examining these questions, not only will the thesis assess how satisfactory the English law currently is on these issues, but also it will seek to fill the missing parts addressed in the questions with plausible suggestions.

The originality of this thesis can be explained in three aspects. Firstly, although this liability arises under the law of carriage of goods by sea, the thesis does not focus on the liability itself, but provides a viewpoint from a different angle, which is frequently missing in the other works, namely the spread of the liability between the seller and the buyer under the law of international sale of goods. Secondly, the novelty not only lies within the analysis of how satisfactory English law is on the matter in the *status quo*, but also in seeking to explore the missing parts in other academic works, which is whether the law of international sale of goods can be of any assistance in the re-allocation of this liability between the buyer and the seller. By doing so, the merits of the thesis not only lie in a comprehensive analysis of the current position of English law on the subject, but also in the way it addresses the issues, including the missing parts by providing plausible suggestions to overcome these problems. Thirdly, the analysis will not be limited to the contractual regime but will also seek to observe the issue and try to provide solutions under the non-contractual mechanisms, where relevant.

Some points also should be noted from the outset. Throughout this thesis it will be assumed that the proper law of contracts of sale and carriage is English law.[32] Therefore, the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) will not be part of this thesis, since the UK has not ratified it.[33] In addition, the CISG does not describe c.i.f. and f.o.b. sales, nor does it make any reference to bills of lading. Neither does it provide much, if any, assistance in

[31] *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1983] 1 Lloyd's Rep 203, 205; where Staughton J opined that the problem before him was in fact between insurance companies. Affirmed in [1986] AC 785; [1986] 2 WLR 902; [1986] 2 All ER 145.

[32] The applicable law will be determined under the Rome I Regulation on the Law Applicable to Contracts, Regulation 593/2008. See, art. 3-4 of the Regulation.

[33] For a detailed discussion on CISG, see, IH Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford 2010).

regard to the issues arising in c.i.f. and f.o.b. sales under English law. Moreover, the commercial parties almost invariably exclude its application under these sales.[34] It would therefore be immaterial to discuss the CISG under this thesis. In addition, Incoterms,[35] which are the product of the International Chamber of Commerce on rules of contractual duties of buyers and sellers for international sales, will be referred to where relevant. It is also worth noting that not a great deal of space is devoted to UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), since it is most unlikely that they will become part of English law. However, they will be mentioned, when necessary. A final point worth noting is a language convention. Since almost all the parties in this thesis are companies, and so have legal personality, they will not be considered as "it". Purely due to conventional English usage in this field, each party will be referred to as "he" or "him".

II. Structure of the Thesis and Methodology

The shipper's dangerous goods liability is a strict one and was established in 19th century. This legal principle is concerned with the allocation of liabilities arising from dangerous goods only between the shipper and the carrier under the carriage contract. Therefore it would only concern these two parties until a new principle emerged by the 1992 Act. On the other hand the 1992 Act is not only concerned with transfer of rights but also imposition of liabilities to third parties under the carriage contract. The Act introduced the principle of mutuality; if a third party is willing to become party to a contract concluded by another and seeks to exercise rights, then he must also take on the burden of the obligations thereunder. Thus, the 1992 Act appears to enable transferability of a strict liability onto a third party. That principle thus brings a third dimension to the two-partite relationship between the shipper and the carrier; the transferee.

Transferability of this liability had never been openly discussed or examined before the courts or by the scholars until 1992 Act came into force and the orthodox policy was preserved accordingly. It would not be wrong to say that English shipping law is not quite open to changes and embraces new policies so readily. Considering the conservative approach taken under shipping law, the 1992 Act introduced a very bold principle that enables transfer of liabilities such as ones arising from dangerous goods. Since the 1992 Act came into force, only three cases has dealt with this matter. Although in none of the cases the liability arising from dangerous goods was actually transferred, it might be arguably said that the courts has technically embraced the principle of mutuality introduced by the 1992 Act enabling transfer. Once transferred, money may turn on this issue and allocation of this liability amongst traders will be an unknown territory under English law. Thus the current status quo

[34] For such an example, see, the standard forms of the Grain and Feed Trade Association (GAFTA) 100, clause 29 (b).
[35] Incoterms 2010 edition, (first issued in 1936).

forces us to look at the main question of the thesis: How does this liability spread to the parties of international trade under c.i.f. and f.o.b. contracts?

To answer this question throughout the thesis, the selected methodology will be doctrinal study, which is concerned with the substantial content of law and with examination of jurisprudence, statutes and literature.[36] Therefore English case law will undoubtedly be the major and the primary source of the thesis along with provisions of the Carriage of Goods by Sea Act (COGSA) 1971 Act, COGSA 1992 Act, Sale of Goods Act 1979 and Civil Liability (Contribution) Act 1978. Throughout this work, those materials will be examined, absorbed, interpreted and processed in order to develop an answer to the main question.

The main question will be divided into three sub-questions. Since c.i.f. and f.o.b. sales are called sale contracts *on shipment terms* and the liability arising from dangerous goods are mostly connected with the shipment period, the practice carried out under these contracts will be a compass of this work and the examination will be conducted respectively from shipment to delivery. Therefore, the first of the three sub-questions, which is "Who is the shipper and who attracts the dangerous goods liability under c.i.f. and f.o.b. sales?" will be conducted in Chapter 2. The English case law will be the main source of this chapter. First, the legal position adopted in the case law will be identified. It should be worth noting at this point that the case law from Commonwealth nations will not be overlooked, where relevant. Once its overall shaped is explained and articulated, the author will try to assert his interpretation on how satisfactory English law is on determining who the shipper is once the liability arises. Therefore this chapter will be evaluative and critical on the approach taken by the English courts.

The second question "Is the liability actually transmissible to the buyer and if so, can the law be justified?" will be conducted in Chapter 3 and 4 respectively. In Chapter 3, the main source will be predominantly the case law and the relevant statute, which is the 1992 Act. The cases from the 1855 Act will be cited where relevant. Although it is not a direct authority, the Law Commission report led the passing of the 1992 Act can be said to be fairly influential on the courts. Therefore, references will be made to it, when necessary. Since this appears to be a controversial question, the views of scholars will not be overlooked but evaluated in order to enhance more plausible suggestions. On the other hand, the common law actions outside the contractual regime will be examined in Chapter 4 to answer the second question. Therefore the case law on those common law actions will be absorbed and evaluated in order to answer this question.

The third and final question "Would the law of international sale of goods provide any assistance to the buyer for recovery of such loss against the seller once the liability is transferred?" will be answered in Chapter 5, 6 and 7 respectively. Chapter 5 will try to find a causal link between

[36] S Halliday, *An Introduction to the Study of Law* (W Green 2012), 5-6. See also, EH Tiller, FB Cross, "What is Legal Doctrine?" [2006] 100 NWLR 517; T Hutchinson, N Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" [2012] 17 DLR 83; RA Posner, "Legal Scholarship Today" [2001] 115 HLR 1314.

the loss inherited by the buyer consequent upon the damage caused by the goods and breach of the seller under the sale contract. Therefore in the course of this, the main sources will be the Sale of Goods Act 1979 along with the case law including ones from the Commonwealth nations where available. Thus the relevant sections of the 1979 Act along with the case law will be absorbed and processed to create a link between the loss of the buyer and breach of the seller in this chapter. In Chapter 6, it will be discussed whether the loss of the buyer would be recoverable from the seller on the principles of the law of damages applicable in sale of goods, in case a causal link is established in Chapter 5. Therefore, once again the case law along with the sections applicable to recovery of damages under the 1979 Act will be the main source of this chapter. The available case law from both international trade and carriage of goods by sea will be crucial to address this question with appropriate solutions. Moreover, in order to produce ideal solutions, references will also be made to case law outside carriage of goods by sea and international sale of goods law involving sea transport, which may be of assistance by way of analogy. In Chapter 7, alternative to the contractual regime in mounting a remedy for the buyer, potential non-contractual actions will be conducted. Therefore Civil Liability (Contribution) Act 1978 and the relevant case law from tort actions will be the main source. Since such action has not been pursued before the courts as of yet, the materials will be interpreted tested and developed in order to produce analogical solutions in this chapter.

Apart from the general introduction and concluding remarks, the thesis is divided into seven chapters. Considering the unique process of shipment sales, the chapters will accordingly be in order, from shipment to delivery of the goods. However, preliminarily, in Chapter 1, in the form of a literature review, a brief descriptive analysis of the liability arising from the shipment of dangerous goods under the law of the carriage of goods by sea will be made in order to provide a further useful insight.

In order to determine who is subject to this liability on shipment, Chapter 2 will address the question of who the shipper is under c.i.f. and f.o.b. sales and whether the courts possess a different approach to determining the identity of the shipper, when considering dangerous goods liability. While doing so, the author will also assert his opinion on how satisfactory English law is on the allocation of the liability, when the real identity of the shipper is unveiled among the seller and the buyer under such sales. It should also be noted that the author has a published article on the subject of this chapter.[37]

In Chapter 3, an evaluation will be conducted as to whether or not the buyer is immune to this liability under English law simply because he is not the shipper. Put differently, the question of whether the liability arising from the dangerous goods is transmissible from the shipper/seller to the

[37] A Gelgec, "Who attracts the dangerous goods liability under c.i.f. and f.o.b. contracts?" [2016] 2 Il Diritto Marittimo – Quaderni 29. For the other published papers of the author, see, A Gelgec, "Clause Paramount and its impact on package limitation figures" [2015] 1 Il Diritto Marittimo – Quaderni 147; A Gelgec, "Separation of Actual and Physical Possession on Bills of Lading under English Law" [2017] 4 Il Diritto Marittimo – Quaderni 1.

buyer/transferee under the carriage contract by means of the 1992 Act will form the main substance of this chapter. If transmissible, the author will also put his viewpoint on whether the law can be justified. Reference will also be made to both how the imposition mechanism under the 1992 Act, particularly in relation to dangerous goods, operates and whether the buyer can be divested of this liability or there could be irreversible dead ends for the buyer when imposed.

Following the examination of transferability of the liability under a contractual regime, in Chapter 4, when there is no contractual nexus between the carrier and the buyer on the other side of the voyage, namely in the delivery stage, it will be examined whether the carrier or other victims affected by the dangerous goods are entitled to sue the buyer/consignee for damages or losses arising from dangerous goods under the common law actions. While doing so, the author will also give his view on the availability of those common law actions in respect of dangerous goods liability in comparison to the contractual liability of the buyer as transferee.

If the buyer who is not the shipper as transferee would incur this liability, it is not known and unexplored whether the international sale of goods law would provide remedy to the buyer for such loss against the seller. In Chapter 5, this unexplored part, which is frequently missing in other academic studies, will be examined to determine whether the sale of goods law would provide any assistance to the buyer for recovery of such loss against the seller. In order to overcome this problem, Chapter 5 will seek to find a causal link between the loss inherited by the buyer consequent upon the damage by the goods and breach of the seller under the sale contract. Overall, this chapter will try to offer some plausible suggestions both under the principles of sale of goods law and by way of analogy.

Following the possibility that the causal link is established between the loss consequent upon the damage caused by the goods and the seller's breach, in Chapter 6, it will be discussed whether the loss of the buyer would be recoverable from the seller on the principles of the law of damages applicable in sale of goods. Given that this issue is also unexplored,[38] by endeavouring to find effective solutions, some feasible suggestions will also be made. The chapter will also seek to draw an analogy with other sale of goods cases involving no sea transport to enhance the suggestions.

In Chapter 7, in order to produce alternative solutions to a contractual regime in mounting a remedy for the buyer, potential non-contractual actions, which may be of assistance, will be examined. To do so, whether the buyer/transferee has a direct claim for the loss inherited from the shipper/seller on a non-contractual basis will be discussed. Accordingly, first, whether under the Civil Liability (Contribution) Act 1978 the buyer can be entitled to recover against the shipper/seller, and second whether the law of torts can be of any assistance, will be analyzed. If so, ultimately such

[38] See, *Borealis AB v Stargas Ltd and Others (The Berge Sisar)* [2001] UKHL 17; [2001] 1 Lloyd's Rep 663. Where the buyer would claim against his seller under the sale contract in respect of the consequential loss that they might be adjudged liable to pay the carrier his loss transferred under the 92 Act resulted from dangerous goods. However since the liability was not transferred to the buyer, the matter remained unresolved.

potential non-contractual remedies will be compared to the potential contractual solutions in order to make suggestions on whichever would be a better solution for buyers.

At the end of this work, in the Concluding Remarks, the author will cumulatively try to rationalize all the discussions from the previous chapters and offer some considered suggestions and views on the main questions of the thesis.

CHAPTER 1
GENERAL FRAMEWORK OF THE LIABILITY ARISING FROM DANGEROUS GOODS UNDER ENGLISH LAW

I. Introduction 11
II. Meaning of Dangerous Goods 11
III. Liability under Common law 13
1. Physically dangerous goods 13
2. The concept of legally dangerous goods 15
IV. Liability under the Hague-Visby Rules 16
V. Fault of the Carrier 18
VI. Conclusion 20

I. Introduction

Before launching a general examination on the subject of this thesis, which is the allocation of the liability arising out of dangerous goods between the seller and the buyer in contracts on shipment terms, it is important to give some insights into the liability itself.

In introducing the liability, it will first be looked into what is meant by "dangerous goods" under English law, including whether such goods are limited to certain contexts or whether there is a more relaxed approach adopted in English law. Following this, the nature of the liability will be examined including under what circumstances the shipper attracts the liability and whether he may be relieved of the liability. A further aspect that will be considered is for what kinds of heads of losses can the shipper become liable and whether he is entitled to limit his liability against the carrier. Following the completion of the insight on the liability itself, the actual spread between the seller and the buyer will be examined in detail in the following chapters.

II. Meaning of Dangerous Goods

When there is a contract of sale on shipment terms, namely c.i.f. and f.o.b. sales involving sea transport, the goods are carried in pursuance of these sale contracts and one of the parties – the seller or the buyer - must contract for carriage of the goods by sea with a third party, the carrier. The parties of a carriage for contract of goods by sea, customarily negotiate and draft all details of the contract and its terms regarding the arrangements for carriage of the goods. Allocation of the parties' responsibilities for risks that the ship and the goods can be exposed to is a significant part of this contract. The description of the goods, therefore, is of paramount importance for the allocation of these risks between the parties to the carriage contract. When the goods that are considered dangerous are the subject of the carriage contract, the parties' responsibilities for risks that the vessel and the goods might be exposed to become more important than ever.

Under English law the shipper of the goods has certain obligations to the carrier, when the subject of the carriage contract is dangerous goods. Both at common law and under the Rules, the shipper may become subject to liability against the carrier, as loss or damage is incurred by the carrier in respect of the dangerous nature or characteristics of the goods. But what is meant by "dangerous goods" under English law? Neither in the Merchant Shipping Act (dangerous goods) 1995[39] nor in the Merchant Shipping Regulations (dangerous goods and marine pollutants) 1997[40] is there a definition of dangerous goods. On the other hand, the International Maritime Dangerous Goods (IMDG) Code which was issued by the International Maritime Organization (IMO) classifies nine groups of dangerous goods in which it prescribes guidelines for the safe carriage of dangerous goods by detailing the necessary measures, like marking, identification, labelling and packing of these goods for each class.[41]

Although classification of inherently dangerous goods by the IMDG Code is of value, the case law appears to show that an exhaustive definition may not be necessary but in contrast, a more flexible approach is preferable since the nature and the characteristics of the goods might be one of the elements posing danger and dangerousness may lie often within situations rather than simply in the goods themselves.[42] Indeed, there are obvious examples of inherently dangerous goods such as chemicals, gases, gasoil products, radioactive materials, explosives and corrosive substances. However, even goods that appear innocent may pose a danger under particular situations and can be considered dangerous.

This idea that the goods can be dangerous not only because of their inherent nature but because of surrounding circumstances was first put forward first in *Brass v Maitland*[43], where a cargo of chloride of lime was held to be dangerous due to improper packing. Even a cargo of cheese may cause some damage due to insufficient packing when stowed next to chocolate.[44] Similarly, a cargo of tallow can be considered dangerous, when the other cargo on board is contaminated by it leaking[45] or a cargo of groundnut could be considered dangerous due to infestation with insects causing the other

[39] Merchant Shipping Act 1995, s.85 and s.87.
[40] Merchant Shipping Regulations (dangerous goods and marine pollutants) 1997 SI 1997 No 2367. Albeit not complete, reg. 2 (1) defines dangerous goods as "goods classified in the IMDG Code or in any other IMO publication referred to in these Regulations as dangerous for carriage by sea, and any other substance or article that the shipper has reasonable cause to believe might meet the criteria for such classification." It is not considered here the liability of the carrier to third parties. See, The International Convention for the Prevention of Pollution from Ships (MARPOL) 1978 Protocol, Civil Liability Convention (CLC) 1992 given force by Merchant Shipping Act 1995 Part VI, Chapter 3, s. 152. See also, Hazardous and Noxious Substances by Sea Convention (HNS) 1996 and HNS Protocol 2010.
[41] The IMDG Code is mandatorily applied under Chapter VII the International Convention for the Safety of Life at Sea (SOLAS) 1974 by the contracting states. See, Merchant Shipping Act 1995, s.85 and s.87 and Merchant Shipping Regulations (dangerous goods and Marine Pollutants) 1997, reg. 2 (1).
[42] M Mustill, "Carriers' Liabilities and Insrance" in K Gronfors (ed), *Damage from Goods* (Tullbergs Klippan 1978) 69, 77.
[43] *Brass v Maitland* (1856) 6 E&B 470.
[44] *The Thorsa* [1916] P 257.
[45] *The Ministy of Food v Lamport & Holt* [1952] 2 Lloyd's Rep 371.

cargo on board to be dumped at sea.[46] Without posing any physical threat, sometimes the goods can be legally dangerous due to causing detention or delay to the vessel.[47] Even a cargo of fishmeal can be held as dangerous, if it does not receive the necessary treatment so as to decrease its risk of ignition.[48]

In addition to accepting dangerousness in surrounding circumstances as outlined above, the courts have also refused to restrict the meaning of the word "dangerous". In *Chandris v Isbrandtsten-Moller*[49], Devlin J rejected to qualify the meaning of dangerous by the preceding words attached next to it in an express clause.[50] Similarly, in *the Giannis NK,* the word "dangerous" in Art IV r 6 of the Hague Rules was not restricted by the preceding words of "explosive or inflammable" in the provision and it was given a broad meaning to include all the goods that may cause direct or indirect physical danger to other cargo or the vessel which should be considered dangerous.[51] In *the Athanasia Comninos*[52] which probably most closely mirrors the approach taken in English law, Mustill J in discussing whether the cargo of coal was dangerous or not, opined *"We are here concerned, not with the labeling in the abstract of the goods as 'dangerous' or 'safe', but with the distribution of risk for the consequences of a dangerous situation arising during the voyage."*[53]

As outlined above, under English law there is no exhaustive definition or class of dangerous goods and accordingly goods do not need to be inherently dangerous in their nature or character, in order to be considered dangerous. Even the most innocuous goods can become dangerous when posing a danger due to surrounding circumstances. Therefore, traders in c.i.f. and f.o.b. sales should not take it for granted that under English law, liabilities arising from dangerous goods are restricted to those particular types of goods that are recognized as inherently dangerous. They must bear in mind that any type of goods can be considered dangerous due to surrounding elements and may find themselves under liability against the carrier even for goods that appear innocuous.

III. Liability under Common law

1. Physically dangerous goods

The shipper of dangerous goods is under a duty at common law to enable the carrier to take necessary precautions having regard to the nature and characteristics of the goods. This obligation was

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[46] *Effort Shipping v Linden Management (The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep 337.
[47] *Mitchell Cotts & Co v Steel Bros & Co Ltd* [1916] 2 KB 610; *the Domald* [1919] 1 Ll Rep 621.
[48] *General Feeds Inc v Burnham Shipping Corporation (The Amphion)* [1991] 2 Lloyd's Rep 101.
[49] [1951] 1 KB 240.
[50] Ibid.
[51] [1998] 1 Lloyd's Rep 337, 341.
[52] [1990] 1 Lloyd's Rep 277.
[53] Ibid, 282.

first established in *Brass v Maitland*[54] where the cargo of chloride of lime in casks was loaded on board the carrier's vessel. Given the insufficient packing prior to loading, the cargo caused damage to the other cargo on board during transit. Although Crompton J dissented,[55] the majority of the court – Lord Campbell and Wrightman J - held that the shipper's obligation was absolute rather than a fault based one.[56] The majority decision was later followed by Scrutton LJ in *Great Northern Railway Co v LEP Transport & Depository*[57] and in *Bamfield & Goole v Sheffield Transport Co Ltd*[58] in which given the improper packing, the cargo of ferro-silicon carried in casks gave off poisonous gases which caused to the death of the plaintiff's husband. The House of Lords in *the Giannis NK* on the issue of whether the liability was absolute or not, eventually settled the matter and held *obiter* that the shipper's liability was absolute both at common law and under Art. IV r. 6.[59]

Under the duty, the shipper should enable the carrier to take necessary precautions in the carriage of the goods, so that those precautions can be afforded during transit under the contract. If the characteristics and the nature of the goods are well known or should reasonably be known by the carrier, the shipper's duty will be considered as discharged.[60] That is to say, if the carrier is aware or should be aware of the nature and the character of the goods, the shipper will not be under obligation to warn him of nature of the goods.[61] However it should be noted that the carrier cannot be deemed to be an expert chemist or to resort to *"investigation inconsistent with the usual course of commercial business"*.[62]

There might be however sometimes an issue in practice as to whether the carrier's imputed knowledge having regard to the nature and the characteristics of the goods would be sufficient to discharge the shipper's duty. In *the Atlantic Duchess*[63], while ballasting operations at the discharge port, the cargo of butanised crude oil exploded resulting in loss of life and damage to the vessel. The issue was whether any special notice should have been required to provide necessary precautions in the carriage of butanised oil. Crude oil was well known to be dangerous at the time in the trade and it required special precautions for safe carriage during transit. Pearson J decided that the cargo in question did not require any special precaution beyond that required for a usual crude oil, since

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[54] (1856) 6 E&B 470. For early principles see also, *Williams v East India Co* (1802) 3 East 192; 102 ER 571; C Abbott, *Treatise of the Law Relative to Ships and Seamen* (5th edn, 1901) 270.
[55] (1856) 6 E&B 470, 493. He opined that the shipper's liability should not be absolute and accordingly should not be liable for something he does not know. His dissenting judgment found some support in early cases; *Hutchison v Guion* (1858) 5 CB 149; 141 ER 59; *Farrant v Barnes* (1862) 11 CB 553; 142 ER 912.
[56] (1856) 6 E&B 470, 483.
[57] [1922] 2 KB 742.
[58] [1910] 2 KB 94.
[59] [1998] AC 605; [1998] 1 Lloyd's Rep 337. On the detailed analysis of the case see, FD Rose, "Liability for Dangerous Goods *(The Giannis NK)"* [1998] LMCLQ 480. Mustill J in *the Athanasia Comninos* also opined that the previous authorities predominantly supported the absoluteness; [1990] 1 Lloyd's Re 277, 282.
[60] (1856) 6 E&B 470, 487.
[61] This is the case, even if the carrier ships the goods in conjunction with the shipper's instructions; *Shaw Savill & Albion Co Ltd v Electric Reduction Co of Canada Ltd and Imperial Chemical Industries of Australia and New Zealand Ltd (The Mahia)* [1955] 1 Lloyd's Rep 264.
[62] (1856) 6 E&B 470, 487. See also, Cooke 6.54.
[63] *Atlantic Oil Carriers Ltd v British Petroleum Co Ltd (The Atlantic Duchess)* [1957] 2 Lloyd's Rep 55.

butanised crude oil was not more dangerous or prone to explosion than a usual crude oil and did not create risks different in kind.[64] Similarly in *the Athanasia Comninos*[65] where the issue revolved around whether special precautions and accordingly a special notice was required for the carriage of coal. The propensity of coal to emit methane gas was well-known in the trade. Therefore, in order for the carrier to recover against the shipper, the carrier had to prove that the cargo in question had a different nature to a usual cargo of coal in kind and accordingly special precautions, which were beyond those involved in the carriage of usual coal, were necessary. Since the carrier failed to prove this, Mustill J following the decision in *the Atlantic Duchess* rejected the carrier's claim.[66]

In *the Amphion*[67], a cargo of "anti-oxidant treated fishmeal" which is listed in the IMDG Code was shipped. However in fact it had not been properly treated and required more ventilation than anti-oxidant treated fishmeal normally would do. This is because a cargo of fishmeal that does not receive anti-oxidant treatment is more prone to ignition and burning than a treated one. Since the cargo was not given special ventilation during transit, it ignited during discharge. Evans J, following the decision in *the Athanasia Comninos*, held that since the fishmeal was described as "anti-oxidant treated" in the carriage contract, the carrier could not have been expected to afford it special precautions beyond those required in the carriage of anti-oxidant treated fishmeal. Accordingly, the shipowner's claim was allowed.

2. The concept of legally dangerous goods

It was examined above that the shipper is under an implied obligation for goods, which are physically dangerous, either directly or indirectly, under common law. This implied obligation was extended by way of analogy in *Mitchell Cotts v Steel Brothers*[68] to cover cases where there is no physical danger to the vessel or other cargo whatsoever but where the shipment of goods leads to legal obstacles, which may cause economic losses resulting from expenses or delay.

A cargo of rice was shipped on board of *the Kaijo Maru*, which posed no physical danger to the vessel or other cargo on board whatsoever. The destination was Piraeus and the shippers were aware that the cargo would not be discharged without the permission of the British authorities. Since the shipper failed to obtain the permission to unload, the vessel was detained for three weeks. Atkin J held by way of analogy that the shipper's implied obligation extended to cases, in which the goods are not physically dangerous whatsoever but they are liable to cause delay to the vessel;

[64] *The Atlantic Duchess* [1957] 2 Lloyd's Rep 55.
[65] [1990] 1 Lloyd's Re 277.
[66] Ibid, 283-284. See also *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep 506.
[67] [1991] 2 Lloyd's Rep 101.
[68] [1916] 2 KB 610.

> *"I think there is no question that a shipment of goods upon an illegal voyage – i.e., upon a voyage that cannot be performed without the violation of the law of the land of the place to which the goods are to be carried- a shipment of goods which might involve the ship in danger of forfeiture or delay- is precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship".*[69]

By this decision, the shipper, under the obligation should not only enable the carrier to take necessary measures having regard to the nature of the goods but also provide any necessary information in relation to the legal obstacles, which may result from the shipment of the goods causing delay to the vessel. Indeed, as is the case with physically dangerous goods, if the carrier is aware or should have been aware of those obstacles, the shipper's obligation is deemed to be discharged. However the carrier will not be entitled to recover every economic loss or expense resulting from delay, unless that delay is caused by "legal obstacles".[70] Thus, where delay or detention is merely caused by reason of the nature or the character of the goods, the carrier will not be entitled to recovery against the shipper.[71]

IV. Liability under the Hague-Visby Rules

There is an express provision in Art IV r 6 of the Rules on the carriage of dangerous goods: "Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment."[72]

When the Rules apply[73], the common law obligation is superseded only to the extent of physically dangerous goods[74]. Hence, the common law obligation remains intact and still applies to situations where the goods are legally dangerous, even if the contract is governed by the Rules.[75] Unlike the common law obligation, which is a contractual undertaking, once the Rules govern the

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[69] Ibid, 614.

[70] *Bunge Sa v ADM do Brasil Ltda and Others* (*The Darya Radhe)* [2009] EWHC 845; [2009] 2 Lloyd's Rep 175.

[71] *Transoceanica v Shipton* [1923] 1 KB 31. But see also, *Rederi Aktiebolaget Transatlantic v Board of Trade* (1924) 20 Ll L Rep 241.

[72] The Hague Rules also have the identical provision. For the relevant provisions in other conventions which are not applicable in the United Kingdom see, the Hamburg Rules, art 13 and for the United Nations Conventions on Contracts for the International Carriage of Goods Wholly or Partially at Sea (the Rotterdam Rules), art 32.

[73] See, art X of the Hague-Visby Rules and the Carriage of Goods by Sea Act 1971, s 1 (1) and (6).

[74] *The Fiona* [1993] 1 Lloyd's Rep 257, 267-268, affirmed in [1994] 2 Lloyd's Rep 506. The application of the provision is restricted to physically dangerous; *The Darya Radhe* [2009] 2 Lloyd's Rep 175.

[75] *The Fiona* [1993] 1 Lloyd's Rep 257, 267-268.

bills of lading, Art IV r 6 operates as a contractual provision of indemnity.[76] In support of this, in *the Fiona*, the Court of Appeal rejected the notion that the shipper is under any obligation to give notice to the carrier of the nature and characteristics of the goods, which the carrier does not know or cannot reasonably be expected to know.[77]

The ambit of Art IV r 6 was extensively reviewed in *the Giannis NK*[78] by the House of Lord. A cargo of groundnut pellets, which were fumigated following the shipment, were loaded in one hold of *the Giannis NK,* while in other holds wheat pellets were shipped. On arrival to the Dominican Republic to discharge the cargo of groundnut pellets, the vessel was quarantined, because khapra beetle was detected in the cargo. Although the holds were fumigated afterwards, the vessel was ordered by the US Department of Agriculture to return the cargo to its origin or dump it at sea. The carrier chose the latter and dumped the entire cargo at sea, including the wheat pellets in the other holds, although they were in no danger of infestation. Following this, extensive fumigation was carried out to the vessel so as to render her ready for future shipments.

Under the bills of lading, the carrier claimed recovery for his loss and expenses arising out of dangerous goods by reason of infestation in the groundnut pellets from the shipper as per Art IV r 6. The House of Lords held that the word “dangerous” was not restricted by the preceding words “of an inflammable, explosive”. Accordingly “dangerous” was given a broad meaning including goods, which are dangerous to other cargo on board as well as to the vessel even in the indirect sense of being liable to give rise to physical danger to other cargo.[79] In addition, as it is in the common law obligation, the shipper’s liability is considered absolute under the provision and the fact that the shipper or his agent is not aware that the goods are dangerous does not relieve the shipper of liability under the Rules.[80] Therefore, Art IV r 6 is not qualified by Art IV r 3 in which the shipper is discharged of liability in general, when loss or damage is incurred by the carrier resulting or arising from any cause without the act, fault or neglect of the shipper or his agents.[81]

The carrier can claim for “all damages and expenses”, as long as a causal link is established between dangerous goods and the damages and expenses sustained by him, since it is considered that normal rules of remoteness of damages may not apply to the provision.[82] Under Art IV r 6, the carrier can be entitled to claims for loss of or damage to the vessel,[83] for liability to other cargo on board,[84] for loss of life,[85] for cost of decontamination[86] or fumigation,[87] or for loss of time and bunkers[88].

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[76] *The Fiona* [1994] 2 Lloyd’s Rep 506, 518.
[77] Ibid, 512. Indeed, if there is a notice given by the shipper, the carrier can be deemed to have consented to the shipment of particular goods.
[78] [1998] AC 605; [1998] 1 Lloyd’s Rep 337.
[79] [1998] AC 605, 613. On the same view see also, *the Darya Radhe* [2009] 2 Lloyd’s Rep 175.
[80] Ibid.
[81] Ibid.
[82] *The Fiona* [1994] 2 Lloyd’s Rep 506, 522. See also, J Cooke, J Kimball et. al, *Voyage Charters* (4th edn, Informa 2014) 85.448 (hereinafter Cooke); R Aikens, R Lord and MD Bools, *Bills of lading* (2nd edn, Informa 2015), 10.361 (hereinafter Aikens).
[83] *The Fiona* [1994] 2 Lloyd’s Rep 506.

As is the case under the common law obligation, if the goods are loaded with the knowledge of the nature and the characteristics of the goods and the consent of the carrier to the risks attached to the goods, the carrier will not be entitled to claim for damages or expenses from the shipper.[89] There might be however sometimes an issue over whether the carrier can be said to have genuinely consented to shipment of the goods with actual or imputed knowledge, so as to relieve the shipper of liability under the provision. Nevertheless, there is no difference between common law and the provision from this aspect and the carrier cannot be deemed to be an expert chemist or possess the same knowledge as the manufacturer of the goods.[90]

In *the Fiona[91],* due to having methane bubbles, the cargo of fuel oil was found to be different in kind to the usual one in the trade and it was accepted as exceptionally volatile. The shippers did not enable the carrier to take special precautions for its carriage. The Court of Appeal decided that the carrier only consented to the carriage of usual fuel oil. Since the fuel oil in question was different in kind and created more danger than the usual one, it was found that the carrier did not consent to the shipment of the fuel oil in question but only to the usual one in the trade. Similarly, in *the Aconcagua[92]*, a cargo of calcium hypochlorite, which was known to be explosive over 60C, was loaded in a container. The goods shipped in fact had a lower explosive level, which was at 40C, than the usual one would have. It was held that unless he was a specialist carrier, the carrier could not be expected to have the knowledge of the particular goods in question, which was more prone to explosion than the usual calcium hypochlorite.[93] Therefore the carrier's claim was allowed.

V. Fault of the Carrier

The carrier is under a duty "before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy" under Art III r 1 of the Rules.[94] Where he is in breach of this provision, it takes an overriding effect and he is not entitled to rely on Art IV r 6 for liability arising

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[84] *The Giannis NK* [1998] AC 605.
[85] *Northern Shipping v Deutsche Seereederei (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 255; *the Fiona* [1994] 2 Lloyd's Rep 506.
[86] *Sig Bergesen Dy & Co and Others v Mobil Shipping and Transportation Co (The Berge Sund)* [1993] 2 Lloyd's Rep 453; Nonetheless, ordinary cleaning after a voyage may not render the goods dangerous; *Splosna Pilobna of Piran v Agrelak Steamship Co (The Bela Krajina)* [1975] 1 Lloyd's Rep139.
[87] *The Giannis NK* [1998] AC 605.
[88] Ibid.
[89] The carrier will be entitled to dispose of the goods without liability except to general average, if any, under the second paragraph of art IV r 6.
[90] *Compania Sud Americana De Vapores Sa v Sinochem Tianjin Import and Export Corporation (The Aconcagua)* [2010] 1 Lloyd's Rep 101.
[91] [1994] 2 Lloyd's Rep 506.
[92] [2010] 1 Lloyd's Rep 101.
[93] Ibid, [60]-[62].
[94] Art III r 1 (a). See also, art III r 1 (b) and (c).

from dangerous goods against the shipper.[95] In *the Fiona[96],* the cargo of fuel oil was unusually volatile, due to it containing methane bubbles. At the same time, the tanks of the vessel had not been properly cleaned before the shipment and there were residues from the cargo of fuel oil carried previously. On arrival, an explosion occurred causing damage to the vessel and loss of life. MR Diamond QC said that the carrier had not consented to shipment of the fuel oil in question with such knowledge and held that the carrier was in breach of Art III r 1 in terms of exercising due diligence to make the vessel seaworthy before the shipment, given the residues of previous cargo. Accordingly the vessel had not been fit for carriage.[97] Ultimately, the carrier's claim failed on the ground that the dominant cause of the explosion was the carrier's breach of Art III r 1. In approving the judgment of Diamond QC on the overriding effect of Art III r 1, the Court of Appeal further held that unless otherwise stated, the party who is negligent, cannot invoke indemnity clauses on the general rule of construction.[98]

This is the case, even if the carrier's breach is not the dominant but one of the effective causes.[99] In *the Kapitan Sakharov[100]*, undisclosed dangerous goods, which were not known by the carrier before shipment, were shipped in a container on deck. In addition, an inflammable, highly volatile chemical had mistakenly been stowed in an unventilated compartment below deck, which rendered the vessel unseaworthy under Art III r 1, because the goods required strong ventilation. The undisclosed goods stowed on deck ignited during transit and the fire spread to the highly volatile cargo stowed under deck, which eventually led to the entire loss of the vessel. It was held that although the carrier's breach of Art III r 1 was not the dominant cause of the explosion, the carrier was only entitled to claim against the shipper of the undisclosed goods to the extent of the liability arising from the on-deck containers. His claim for the sinking of the vessel and the other containers failed, since these losses were resulted both from the breach of At III r 1 and from the shipment of undeclared goods.

Although there is no direct authority, it appears that the carrier is not entitled to claim from the shipper under Art IV r 6 either, once his breach of Art III r 2 in which he is to properly and carefully load, handle, stow and look after the goods hereunder, is found to be one of the effective

[95] *The Fiona* [1993] 1 Lloyd's Rep 257, 286.
[96] Ibid.
[97] Ibid, 286.
[98] [1994] 2 Lloyd's Rep 506, 522. When the bill of lading is not governed by the Rules, the Common law will take effect and this area is less clear than it is under the Rules. However it is suggested that courts may look into whether the carrier's breach is an intervening act, which break the causal link between the shipper's breach, and the loss arising from dangerous goods; *the Kapitan Sakharov* [2000] 2 Lloyd's Rep 255, 270, 271. Alternatively, at first glance it might be possible to apply apportionment under the Law Reform (Contributory Negligence) Act 1945 in which enables the court to apportion liability between tortfeasor and a person who was partly in fault. The carrier's breach of making the vessel sea worthy or duty of care for the goods may well be classified as fault. Nevertheless, it is not entirely plausible to classify the shipper's breaches of dangerous goods as fault, since it is restricted to fault neither under art IV r 6 nor under the Common law. See, S Girvin, "Shipper's liability for the carriage of dangerous cargoes by sea" [1996[LMCLQ 487, 499; Cooke, 85.462 ff.
[99] [2000] 2 Lloyd's Rep 255.
[100] Ibid.

causes.[101] It is submitted that this is also in line with the general rules of construction that a negligent party cannot invoke indemnity clauses, unless otherwise stated.

VI. Conclusion

Under English law, it appears that the word "dangerous" is not restricted to inherently dangerous goods and dangerousness is conceptually taken into account as the combination of the surrounding circumstances with the nature of the goods. Therefore, the case law predominantly suggests that any goods are potentially capable of being dangerous, unless necessary measures are afforded for carriage. That being the case, traders should draft and share all details regarding necessary arrangements and measures for the safe carriage with the carrier, under the carriage contract.

For damages or expenses arising out of these goods, regardless of whether they arise under the Rules or common law, the shipper comes under strict liability against the carrier, even if he bears no fault at all regarding the shipment. Moreover, the case law appears to show that the shipper may find himself liable for actual total loss of or damage to the vessel, other cargoes on board or even for loss of life. Accordingly, this proves that liabilities arising out of such goods can be disproportionate and substantial. More significantly, the shipper is not statutorily classified within the group of people entitled to limit his liability against the carrier, and shippers in most situations do not purchase insurance for such losses arising out of dangerous goods and even if available, it would not be on an unlimited basis.[102]

Therefore, it would not be wrong to conclude that money highly turns on this issue, and traders – sellers and buyers - of sale contracts on shipment terms should give utmost importance to the allocation of the liability arising out of such goods, given that whoever the shipper will be – either the seller or the buyer – they may attract to substantial liabilities against the carrier under the carriage contract. In the following chapter, in order to determine who is subject to this liability on shipment, the question of who the shipper is under c.i.f. and f.o.b. sales and whether the courts possess a different approach to determining the identity of the shipper, when considering dangerous goods liability will be addressed.

[101] *The Aconcagua* [2010] 1 Lloyd's Rep 1, [337], [374] approved in [2011] 1 Lloyd's Rep 683. See also, *the Fiona* [1993] 1 Lloyd's Rep 257, 288. Nevertheless an excepted peril like an error in the management in the vessel, will not alone prevent the carrier from claiming his loss from the shipper under art IV r 6; *the Aconcagua* [2010] 1 Lloyd's Rep 1, [372]-[373].

[102] Neither in art IV r 5 of the Rules nor in Merchant Shipping Act 1995, Schedule 7, art 1 (2).

CHAPTER 2
IS IT THE SELLER OR THE BUYER WHO BECOMES SUBJECT TO DANGEROUS GOODS LIABILITY AS SHIPPER?

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I. Aim of the Chapter

As outlined in Chapter 1, at common law, the shipper is under an implied duty to inform the carrier of the nature and character of dangerous goods in order to enable him to take necessary precautions for carriage of the goods concerned.[103] In case of nondeclaration and misdeclaration, the carrier will seek redress from the shipper for damages or losses occasioned by the shipment of dangerous goods. Where the Rules are applicable, the common law duty is supplanted.[104] However, similar to the common law duty, under the Rules, the shipper by virtue of Art IV r 6, becomes liable for damages and losses arising from dangerous goods, when the carrier has not consented to the shipment of such goods with knowledge of the nature and character of the goods concerned.[105]

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[103] *Brass v Maitland* (1856) 119 ER 940; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 K.B. 94; *Great Nothern Railway Co v LEP Transport & Depository Ltd* [1922] 2 K.B. 742; (1922) 11 Ll. L. Rep. 133.

[104] *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1993] 1 Lloyd's Rep 257 affirmed in [1994] 2 Lloyd's Rep 506. The Common law duty is superseded to the extent of physically dangerous goods. The Common law obligation arising from legally dangerous goods is not supplanted by the Rules. See, *Bunge SA v ADM Do Brasil Ltda and Others (The Darya Radhe)* [2009] EWHC 845; [2009] 2 Lloyd's Rep 175; *Mitchell Cotts & Co Ltd v Steel Brothers & Co Ltd* [1916] 2 KB 610.

[105] *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep 337.

The liability is allocated on the shipper under both common law and the Rules. However, a question arises at this point is over the identity of the shipper. For the purpose of the allocation of rights and obligations under the carriage contract, the shipper is the party that enters into a carriage contract with the carrier under the bills of lading.[106] Accordingly, the common answer to this question is that the party named as the shipper in the bills of lading becomes subject to this liability. Yet, this still does not appear to unveil the real identity of the shipper. The answer to this question may lie within the sale contract rather than under the contract of carriage for the goods.[107]

When the sale contract is on c.i.f. or f.o.b. terms,[108] one of the parties is required to conclude transport arrangements as a result of stipulation in the sale contract about who is to make the carriage contract for the carriage of the goods.[109] Depending on the terms of the sale contract, which will be discussed below, it could be either the seller or the buyer who concludes the carriage contract and who is named in the bills of lading as the shipper.[110] Nevertheless, this does not necessarily always mean that the bills of lading evidence a contract between the carrier and the named shipper. Sometimes, for instance, the seller can conclude the carriage contract and be named in the bills as the shipper as agent on behalf of the buyer, and accordingly the buyer can be considered the original party as the shipper.[111] In such cases, the seller may not be original shipper at all, and accordingly this may affect the allocation of the liability arising from the shipment of dangerous goods between the seller and the buyer *vis-à-vis* the carrier.

The necessity to identify the original shipper (whether the seller or the buyer) under the bills of lading is hence crucial to determine who is subject to liability for damages and losses arising from the shipment of dangerous goods. Therefore for the purpose of the allocation of the liability resulting from dangerous goods between the seller and the buyer, this chapter will address the question of who the shipper is under c.i.f. and f.o.b. sales and whether the courts follow a different approach in determining the identity of the shipper, when considering dangerous goods liability. While doing so, the author will also assert his opinion about how satisfactory the English law is on the allocation of the liability, when the real identity of the shipper is unveiled among the seller and the buyer under such sales. It should also be noted that when there is no direct contractual nexus with the carrier,

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[106] Art. I (a) of the Rules.

[107] *East West Corp v DKBS 1912* [2003] EWCA Civ 83; [2003] QB 1509, [34].

[108] They are the most common transactions used in commodity sales for well over two centuries. *Ross T Smyth and Co Ltd v TD Bailey, Son and Co* [1940] 3 All ER 60. DM Sassoon, "The Origin od F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" [1967] JBL 32, 32.

[109] This is attributable to the centrality of the sale contract in international trade. See, F Lorenzon, *C.I.F. and F.O.B. contracts* (6th edn, Sweet & Maxwell 2017) 3 (hereinafter Lorenzon).

[110] A classic f.o.b. seller is also under a duty to tender shipping documents (bills of lading), as is under c.i.f. contracts. See, *Concordia Trading BV v Richo International Ltd* [1991] 1 Lloyd's Rep 475. See also, *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36.

[111] *Borealis AB v Stargas Ltd and Others (The Berge Sisar)* [2001] UKHL 17; [2002] AC 205; *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641. See also, *Texas Instruments Ltd v. Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146. For normal position under c.i.f. sales, see, *Domett v Beckford* (1883) 5B & Ald 521; *Customs and Excise Commissioners v Aps Samex* [1983] 1 All ER 1042.

whether the relevant party can be imposed liability for dangerous goods under other mechanisms, such as in tort and implied contract will also be examined.

II. Nature of C.i.f. and F.o.b. Contracts

In the early days of international trade, it was the f.o.b.[112] term that was used first and it was assumed that the c.i.f. term was derived from f.o.b.[113] In those days, there were no regular shipping lines. Basically, the buyer would have chartered a vessel to call at foreign ports. Then the seller, as a mere duty, would have shipped the goods on board for the account of the buyer.[114] As international trade developed, c.i.f. contracts emerged as a popular alternative to f.o.b. contracts. They shifted greater responsibility onto the seller, relegating the carrier's obligation to one of providing cargo space for the goods.[115]

Due to technological advances and commercialization, the obligations of the parties have become more muddled as judicial interpretation has transformed standard terms into flexible instruments.[116] In the early authorities, the f.o.b. buyer was considered the shipper.[117] By the 21st century, the result was that the identity of the shipper was considered flexible and it was difficult to predict from the outset whether the buyer or the seller could be considered as the shipper.[118]

Hence, today, it is not always necessarily the case that the party making the contract of carriage is the party who ships the goods or *vice versa*. For instance, the buyer of the goods could sometimes be considered as the shipper, even though in fact it was the seller who physically shipped the goods.[119] Yet, it is also possible that the seller might be exposed or bound by an implied contract under the bills of lading just because he physically shipped the goods even though he was not the party to the main contract of carriage and was not even named as the shipper in the bills of lading either.[120]

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[112] The very first cases that mentioned f.o.b. terms are *Wackerbarth v Masson* [1812] 2 Camp 270; *Craven & Another v Ryder* [1816] 6 Taunt 433. For the term c.i.f. see *Tregelles v Sewell* [1862] 7 H & N 574; *Ireland v Livingston* [1871] LR 5 HL 395.

[113] For the historical evolution of f.o.b. and c.i.f. sales see generally DM Sassoon, "The Origin od F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" [1967] JBL 32; DM Sassoon, "Application of FOB and CIF Sales in Common Law Countries" [1981] 16 European Transport Law 50.

[114] DM Sassoon, "The Origin od F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" [1967] JBL 32, 33.

[115] *Tregelles v Sewell* [1862] 7 H & N 574; *Ireland v Livingston* [1871] LR 5 HL 395.

[116] Especially f.o.b. contracts; where Devlin J stated in *Pyrene Co Ltd v Scindia Navigation Co* [1954] 2 QB 402, 424; "*The f.o.b. contract has become flexible instrument.*" See also the statement of Roskill LJ in *Concord Petroleum Corp v Gosford Marine Panama SA (The Albazero)* [1975] 3 WLR 491; [1975] 2 Lloyd's Rep 295, 302, although House of Lords reversed the decision, this part of speech was not affected; [1977] AC 774.

[117] *Cowas-Jee v Thompson* [1845] 3 Moore Ind App 422.

[118] *The Athanasia Comninos and Georges Chr. Lemos* [1990] 1 Lloyd's Rep 277, 280; *Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd* [2003] 2 Lloyd's Rep 597, [29]; *East West Corp v DKBS 1912* [2003] QB 1509, [34]; *AP Moller-Maersk A/S v Somiac Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm), [46].

[119] *Pyrene v Scindia* [1954] 2 QB 402.

[120] Ibid.

For the sake of clarity, it is therefore useful to distinguish two types of shippers in this chapter: (1) the wet shipper, the party who physically ships the goods; and (2) the dry shipper, the party who concludes the contract of carriage. Such a distinction can be particularly suitable, where a party (wet shipper) other than the dry shipper may be exposed to liabilities under bills of lading. Also acknowledging two classes of shippers can be of some assistance to highlight the key issue that must be resolved properly in allocating the liability of dangerous goods at shipment between the buyer and the seller.

1. Shipper under c.i.f. contracts

C.i.f. and f.o.b. contracts are the two most commonly used standard forms in the sale of goods. While they share many characteristics, there are important differences,[121] which distinguish one from the other. One such distinction is to whom they allocate the responsibility to make the contract of carriage under the contract of sale.

"C.i.f."[122] stands for "cost, insurance and freight".[123] It is essentially *"…a contract for the sale of goods to be performed by the delivery of documents."*[124] There are some other variants of c.i.f. sales. One of the most common of them is "c & f" (or "CFR")[125] which includes no additional duty to arrange insurance.[126] Hence, it is worth noting from the outset that c & f (or CFR) does not differ in the sense of the duty to make a contract of carriage from normal c.i.f. sales, nor do other variants such as c.i.f.e.,[127] c.i.f.c.,[128] c.i.f.c.i.[129] and c.i.f.f.o.[130]

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[121] See, *the Parchim* [1918] AC 157; *Manbre Saccharin Co v Corn Products Co* [1919] 1 KB 198; *Comptoir d'Achat et de Vente du Boerenbond v Luis de Ridder Limitada (The Julia)* [1949] AC 293; *Kwei Tek Chao v British Traders* [1954] 2 QB 459*; Pyrene v Scindia* [1954] 2 QB 402; *Margarine Union GmbH v Cambay Prince Co Ltd (The Wear Breeze)* [1967] 3 All ER 775; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.

[122] Labeling the contract with c.i.f. alone would not suffice to make it essential c.i.f. contract. The contract under it might be on different terms; *The Julia* [1949] AC 293; *The Parchim* [1918] AC 157. Or where the contract is on c.i.f. terms, this could expose the Courts to strike down the repugnant clauses to c.i.f. terms; *Law and Bonar Ltd v Biritsh American Tobacco Ltd* [1916] 115 LT 612.

[123] *Biddell Brothers v E Clemens Horst Co* [1911] 1 KB 214. The initials were in different order in the earliest authorities that mentioned c.i.f. sales though; *Tregelles v Sewell* [1862] 7 H & N 574; *Ireland v Livingston* [1871] LR 5 HL 395.

[124] *Arnhold Karberg & Co v Blythe, Green, Jourdain & Co* [1916] 1 KB 495, 510. See also *Gardano and Giampieri v Greek Petrolium George Manidakis & Co* [1962] 1 WLR 40; *Tricerri Ltd v Crosfields and Calshop Ltd* [1958] 1 Lloyd's Rep 236; *Congimex Compania Geral SARL v Tradax Export SA* [1983] 1 Lloyd's Rep 250; *Margarine Union GmbH v Cambay Prince Steamship Co* [1967] 2 Lloyd's Rep 315; *Berger & Co Inc v Gill and Duffus SA* [1984] AC 382; *Manbre Saccharine Co v Corn Products Co* [1919] 1 KB 198.

[125] This abbreviation is used by I.C.C. since 1990. See Incoterms 2010 Rules CFR.

[126] *The Pantanassa* [1970] 1 All ER 848, 855.

[127] Cost, insurance, freight and exchange; *National Mutual Life Association of Australasia Ltd v Att-Gen for New Zealand* [1956] AC 369.

[128] Cost, insurance, freight and commission.

[129] Cost, insurance, freight, commission and interest.

[130] Cost, insurance, freight and free out; *Etablissements Soules et Cie v Intertradex SA (The Handy Mariner)* [1991] 1 Lloyd's Rep 378.

To avoid confusion, since this chapter's dominant subject is the allocation of the shipper's dangerous goods liability between the seller and the buyer, it should be emphasized that the present focus is about whose duty it is to conclude the contract of carriage under the c.i.f. contract rather than the parties' entire obligations. This duty falls on the seller rather than the buyer under c.i.f. contracts.[131] There are various essential judicial statements on the definition of c.i.f. sales indicating the seller's duty to conclude the carriage contract.[132]

One of the first most-regularly cited judicial statements on the matter was by Blackburn J in *Ireland v Livingston*;

> *"... and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charterparty, bill of lading, and policy of insurance."*[133]

Where Hamilton J numerically described the duties of the seller in *Biddell Brothers*, the very first two related to shipment and contract of carriage;

> *"A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment"*[134]

In the House of Lords in *Johnson v Taylor Bros* one of the most up-to-date[135] c.i.f. contract definitions was given by Lord Atkinson:

> *"I think, that when a vendor and purchaser of goods situated as they were in this case enter into a c.i.f. contract, such as that entered into in the present case, the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment ... "*[136]

Another House of Lords decision, describes the seller's duty on shipment and contracting for carriage under a c.i.f. contract;

> *"The essential characteristics of this contract have often been described. The seller has to ship or acquire after that shipment the contract goods, as to which if*

[131] The rights and duties arising out of this contract is only transferred from the seller to the buyer by virtue of Carriage of Goods by Sea Act 1992 (the 1992 Act). Generally on this, see, Chapter 3.
[132] For a broader and inclusive definition of c.i.f. contracts see generally Lorenzon, 46 *et seq*. See also, A Lista, *International commercial sales: The sale of goods on shipment terms* (1st edn, Informa 2016) 14 ff (hereinafter Lista).
[133] (1872) LR 5 HL 395, 406.
[134] [1911] 1 KB 214, 220.
[135] *The Gabbiano* [1940] P 166, 174.
[136] [1920] AC 144, 155-156.

unascertained he is generally required to give a notice of appropriation. On or after shipment he has to obtain proper bills of lading and proper policies of insurance."[137]

1.1. Where the seller is both the wet and the dry shipper

From the cases cited above,[138] it is safe to state that in general terms, under c.i.f. contracts, the seller is to make the physical delivery of the goods to the vessel and undertakes to conclude a contract of carriage for the goods.[139] He is almost invariably named as the shipper in the bills of lading and he will be the original party to it.[140] Thus, under c.i.f. sales, it would not be wrong to say that he *prima facie* assumes the roles of both dry and wet shipper.[141] Indeed, there might be antithetical factors indicating that the seller acted as the agent of the buyer in contracting for carriage. This may breach *prima facie* evidence of bills of lading that the contract arises between the carrier and the seller/named shipper.

However, it is very unlikely that the seller in concluding the carriage contract is deemed to act as agent of the buyer under ordinary c.i.f. sales. To start with, in the case of sale afloat, when the seller/named shipper concludes the contract of carriage, he would most likely be in a desperate position to know the identity of a future buyer and accordingly he would not be considered in making the carriage contract as agent of a future buyer.[142]

There could be however other situations. For example, the seller can be aware of the identity of the buyer and the buyer can sometimes be named as consignee in the bill. The inference therefore is that if the property in the goods is held by the buyer/consignee, at the time the carriage contract is concluded, the seller/named shipper can be regarded as the agent of the buyer in making the carriage contract.[143] This inference however is unlikely to be applicable to c.i.f. sales, since the property in most situations passes after shipment, when the documents are tendered against the price under c.i.f.

[137] By Lord Wright in *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 67 Lloyd's Rep 147, 156.

[138] It would be also worth to note that in the current edition of Incoterms Rules (2010), the seller's duty to conclude carriage contract under c.i.f. contracts are defined in parallel with the above authorities. See Incoterms 2010 Rules, CIF A3.

[139] Despite the variations of c.i.f. contracts mentioned above, this duty still remains with the seller.

[140] *Domett v Beckford* (1883) 5 B & Ald 521.

[141] In case that the goods are sold afloat or in string sales, the shipper will have been the initial seller.

[142] GH Treitel, FMB Reynolds, *Carver on bills of lading* (4th edn, Sweet & Maxwell 2017), 4-004 (hereinafter Carver); MG Bridge, *Benjamin's sale of goods* (10th edn, Sweet & Maxwell 2017) 19-092 (hereinafter Benjamin).

[143] *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146. Where the seller is regarded acting as agent for the buyer in concluding the carriage contract, although the bill of lading names the seller as shipper, see, *Borealis AB v Stargas Ltd and Others (The Berge Sisar)* [2002] AC 205, 220; *Enichem Anic SpA and Others v Ampelos Shipping Co Ltd (The Delfini)* [1988] 2 Lloyd's Rep 599, later affirmed in [1990] 1 Lloyd's Rep 252; *Dickenson v Lano* (1860) 2 F&F 188; *Cowas-Jee v Thompson Kebble* (1845) 5 Moore 165; *Anderson v Clark* (1824) 2 Bing 20; *Fragano v Long* (1825) 4 B & C 219.

sales.[144] On the other hand, under c.i.f. sales, the buyer will not be considered as the shipper, merely on the ground that he is named as the consignee in the bill.[145] A supporting authority for this argument can be found in *TICC Ltd v Cosco (UK) Ltd*[146] in which, Rix LJ contended that it would be a very unusual situation under c.i.f. contracts, for a seller to be acting as agent for his buyer/consignee in making the contract of carriage.[147] He further opined that under c.i.f. sales, the ordinary rule is that the seller acts as principal in concluding the contract of carriage.[148] The learned judge in the same case also held that even if the seller had acted as agent for the buyer in concluding the carriage contract, this would not have relieved the seller of undertaking the liabilities of the shipper.[149]

The only conclusion that can be drawn from this is that under c.i.f. contracts it is almost invariably the seller who concludes the carriage contract with the carrier as principal and is named as the shipper under the bills of lading. Thus, it would be very safe to note that where the seller is named as the shipper under bills of lading, it is to be him, under c.i.f. sales who will bear the shipper's dangerous goods liability. Even if it is accepted that the c.i.f. seller acted as agent of the buyer in making the carriage contract, this would be unlikely to prevent him from undertaking liability on the ground of the decision by Rix LJ in *TICC v Cosco Ltd*. It could be nevertheless argued that in such an exceptional situation, both the seller and the buyer would possibly become liable *vis-à-vis* the carrier.[150]

1.2. Where the seller is the wet but not the dry shipper

Albeit highly unlikely today, in certain situations the seller may have shipped the goods but might not be named as the shipper in the bills of lading. In *Hansson v Hamel & Horley Ltd,*[151] even though the c.i.f. seller shipped the goods on board the vessel, the bill of lading designated the buyer as the shipper *"in accordance with a stipulation they had made"*.[152]

In those days, nominating the buyer as the shipper in the bills of lading could serve two purposes.[153] First, it would negate the risk of being deprived of an entitlement right to goods under

[144] Benjamin, 19-099, 19-104. Where the seller/consignor acted as agent for the buyer/consignee in making the contract of carriage, see *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146. This was in fact a CMR case.
[145] *TICC Ltd v Cosco (UK) Ltd* [2001] EWCA Civ 1862; [2002] CLC 347, [17]; *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWHC 538, [62] – [67].
[146] [2002] CLC 347; [2001] EWCA Civ 1862.
[147] *TICC Ltd v Cosco (UK) Ltd* [2002] CLC 347, 349-350.
[148] Ibid. This is also the position where the bank is named in the bill of lading as consignee and the seller as shipper; *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWHC 538; [2011] 2 Lloyd's Rep 190.
[149] Ibid, 150. See also *Perishables Transport Co Ltd v N Spyropoulos (London) Ltd* [1964] 2 Lloyd's Rep 379.
[150] See below, 2.5. Who attracts the dangerous goods liability? See also, *the Athanasia Comninos* [1990] 1 Lloyd's Rep 277.
[151] [1922] 2 AC 36.
[152] Ibid, 43.
[153] Carver, 4-006.

contract by virtue of the complex and problematic scheme of the 1855 Act[154] which required the property in the goods to be passed upon or by the time the bill of lading was transferred by the seller. The buyer might have sought to circumvent this problem by being an original party to the contract of carriage. The second motivation may have been to deprive the seller of the right to redirect the goods, although the effectiveness of this tactic is far from certain,[155] given that Lord Sumner in the case, found that the intention to reserve the *jus disponendi* to the seller was not discomforted by the mere insertion of the buyer's name in the bill.[156] On the other hand, neither does the first reasoning of the buyer appear valid today. The 1855 Act was superseded by Carriage of Goods by Sea Act 1992 (the 1992 Act).[157] The introduction of the 1992 Act has eliminated the requirement for property to pass upon consignment or endorsement in transferring such rights under contract and the 1992 Act transfers rights much easier than its predecessor.[158]

Hansson v Hamel left no doubt that it was the c.i.f. buyer who was regarded the shipper at that time under these circumstances and would be liable for damages arising from dangerous goods. However, it is very unlikely for the buyer to be named as the shipper in the bill under c.i.f. sales, given that there appears no practical reason for this today. In supporting this argument, the author also is not aware of any other case exampling this practice.

However, let us assume that such an exceptional case occurred and the carrier suffered damages due to dangerous goods. Assume also that the carrier sought to put his claim both against the seller and the buyer/shipper. The question is therefore whether such a c.i.f. seller who was not the shipper could be subject to liability for dangerous goods. At common law, the bailor of the goods can be held liable in respect of dangerous goods against the carrier.[159] At first glance, it might be thought that in such a case the seller is the bailor of the goods, since he made the actual delivery of the goods to the carrier. However, this does not appear to be arguable as once the bill names the buyer as the shipper, it will only be considered as a receipt from the buyer and accordingly the buyer would be regarded as the bailor.[160] Another possibility is the one that Rix LJ contended in *TICC v Cosco*; under c.i.f. sales, even if the seller makes the contract of carriage as agent of the buyer, he might still

[154] The 1855 Act is no longer in force. It is superseded by COGSA 1992 Act (the 1992 Act).
[155] Carver, 4-006.
[156] [1922] 2 AC 36, 43. His lordship referred a similar case in which the buyer's name was inserted as the consignee though; *The Kronprinsessan Margareta (The Parana)* [1921] 1 AC 486. See also Sale of Goods Act 1979, s.18 r.5; Carver, 4-006; Benjamin, 19-095.
[157] S. 6 (2) of the 1992 Act.
[158] On this see generally Chapter 3. See also, s. 2 of the 1992 Act.
[159] Benjamin, 18-092, fn 772; Carver, 6-012, fn 89; GH Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344, 353, fn 79. The bailor can also be liable for damages arising out of unsafety or defect of the goods; *Blakemore* (1858) 8 E&B 1035; *Coughlin v Gillison* (1899) 1 QB 145. See also Palmer on Bailment, 636, 1580; NE Palmer and E McKendrick, *Interests in Goods* (2nd edn, LLP 1998), 486 (hereinafter Palmer and McKendrick).
[160] *The Aliakmon* [1986] AC 785, 818. For discussion on the buyer/consignee's liability under bailment, see generally, Chapter 4 III. Bailment Action.

undertake liability along with the buyer.[161] However, the author thinks that this may not be plausible either, unlike in *TICC v Cosco*, since in such a case, the seller himself rejects to be named in the bill as the shipper. As such, the courts may be reluctant to impose the obligation of dangerous goods on the seller, which explicitly falls on the shipper/buyer, unless the seller is at fault so as to cause the damage. In addition, the carrier may seek to claim in tort or there might be an implied contract between the seller and the carrier, once the goods are presented for shipment and accepted by the carrier. Given that these possibilities mostly arise under f.o.b. contracts, they will be discussed below.[162]

1.3. Where the seller is neither the wet nor the dry shipper

Although the c.i.f. seller normally undertakes both to ship the goods and make the carriage contract, this is not always so. C.i.f. sales are commonly traded in string sales. A buyer in one sale hence may be a sub-seller of a subsequent transaction, or *vice versa*. Alternatively, an f.o.b. buyer may sell his goods, which might have already been shipped, on c.i.f. terms to his subsequent buyer who later may become a c.i.f. seller of the same goods as he sells them to his sub-buyer.[163] Or a c.i.f. seller/shipper sells the goods to his buyer, and if this buyer re-sells them again further down the chain, he will subsequently become the intermediate c.i.f. seller who did not personally make the arrangements for the shipment.[164] This type of c.i.f. seller (intermediate) does not breach his contractual responsibilities just because he did not personally ship and contract with the carrier. Since the shipment of the goods and procurement of the carriage contract is performed by the preceding seller,[165] intermediate c.i.f. sellers are thereby regarded as relieved from those obligations under string sales.[166] He, as an intermediate party, neither makes carriage arrangements nor ships the goods himself or through his agents. Therefore, where he is neither a wet nor dry shipper, if a liability arises from the shipment of dangerous goods, the carrier will not be entitled to sue him for damages or losses.

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[161] [2002] CLC 346, 350.
[162] See, 2.1.1. Seller's Position under Bare F.o.b.
[163] *Norsk Bjerningskompagnie A/S v Owners of the Pantanassa (The Pantanassa)* [1970] P 187; *Esteve Trading Corp v Agropec International (The Golden Rio)* [1990] 2 Lloyd's Rep 273; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514.
[164] *Vantol (JH) Ltd v Fairclough Dodd & Jones Ltd* [1955] WLR 642, 646.
[165] *Shipton Anderson & Co v Weston (John) & Co* [1922] 10 Lloyd's Rep 762, 763; *Bowden Bros and Co Ltd v Little* [1907] 4 CLR 1364.
[166] *Biddell Brothers v Clemens Horst (E) Co* [1911] 1 KB 214; *Johnson v Taylor Bros & Co Ltd* [1920] AC 144; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] 1 Lloyd's Rep 462; [2008] UKHL 11. The only duty on his shoulders in relation to this is to tender the bills of lading evidencing the contract of carriage and the shipment of the goods to their buyers; *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515.

2. Shipper under f.o.b. contracts

Unlike c.i.f. contracts,[167] f.o.b. contracts[168] are not defined in rigid terms but conversely have evolved into flexible instruments[169] over time. It was evident in the past that the buyer was considered as the shipper of the goods.[170] However in modern times, f.o.b. contracts have been subjected to changes. These changes have not only affected the distribution of roles between the seller and buyer, but also created various types of f.o.b. contracts. The consideration that the buyer is the shipper under f.o.b. sales may therefore not cover all types of f.o.b. contracts today.

The courts have also kept step with the practical changes and embraced the flexibility[171] of f.o.b. contracts.[172] Just three years after the statement by Devlin J in *Pyrene v Scindia*[173] on the flexibility of f.o.b. contracts, in *NV Handel My J Smits Import-Export v English Exporters Ltd*, it was held that the seller's acceptance to secure shipping space did not prevent the sale contract from being on f.o.b. terms[174] and in another case nor did the seller's payment of freight and insurance change the fact that the contract was on f.o.b. terms.[175] Also Diplock J (later became Lord Diplock) stated that *"there are probably as many exceptions to the rule as there are examples of it"*.[176]

Despite their flexible nature, f.o.b. contracts remain characterized by certain common features identified by the courts. In particular, the seller must put the goods on board and bear all the costs and expenses until the ship's rail. Subsequently, the risk is transferred to the buyer on shipment.[177] However, what makes an f.o.b. sale different from another is the allocation of some duties between

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[167] *Wackerbarth v Masson* (1812) 3 Camp 270; *Craven & Another v Ryder* (1816) 6 Taunt 433. See generally on the point; Sassoon, "The Origin od F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" [1967] JBL 32, 33.

[168] There are other kinds of f.o.b. contracts in Canada and the United States, which may not carry maritime figure at all or may be on destination terms rather than shipment.

[169] *Pyrene v Scindia* [1954] 2 QB 402, 424; *"The f.o.b. contract has become a flexible instrument."*

[170] In *Cowas-Jee v Thompson* (1845) 3 Moore Ind App 422, 429: *"It is proved beyond all doubt, indeed it is not denied, that when goods are sold in London 'free on board' the cost of shipping them falls on the seller, but the buyer is considered as the shipper."* See also, Sassoon, "The Origin od F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" [1967] JBL 32, 33.

[171] For a recent example of an flexible f.o.b. contract, see *Erg Raffinerie Mediterranee SpA v Chevron USA Inc* [2007] EWCA Civ 494; [2007] 2 Lloyd's Rep 542.

[172] F Wooldridge, "The Kinds of F.O.B. Contracts" [1973] Law and International Trade Recht und Internationaler Handel Festschrift fur Clive M Schmitthoff zum 70 Geburtstag 388 ;See also LCB Gower, "F.O.B. Contracts" [1956] 19 MLR 417; P Devlin, "The Relation between commercial law and commercial practice" [1951] 14 MLR 249.

[173] [1954] 2 QB 402.

[174] [1957] 1 Lloyd's Rep 517, 521.

[175] *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240. Also the House of Lords decided in parallel with those decisions in the sense that there was no invariable rule that it was the buyer who would secure any export licence; *AV Pound & Co Inc v M W Hard & Co Inc* [1956] AC 588.

[176] *Ian Stach Ltd v baker Bosely Ltd* [1958] Lloyd's Rep 127, 132, 137 and 139. For the recognition of the various types of f.o.b. contracts in Australia Supreme Court see *McKay Massey Harris Proprietary Ltd v Imperial Chemical Industries of Australia & New Zealand Ltd and United Stevedoring Proprietary Ltd (The Mahia No 2)* [1960] 1 Lloyd's Rep 191.

[177] *Stock v Inglis* (1884) 12 QBD 564, 573, affirmed by House of Lords (1885) 10 App Cas 263; *J Raymond Wilson & Co Ltd v N Scratchard Ltd* [1944] 77 Lloyd's Rep 373, 374. For a detailed examination of f.o.b. contracts see generally Lorenzon, 247 *et seq*.

the seller and the buyer, particularly the duty to nominate the vessel and conclude the contract of carriage.

The first comprehensive categorisation of f.o.b. contracts, which was later endorsed by both the Court of Appeal[178] and the House of Lords,[179] can be found in *Pyrene v Scindia*.[180] Devlin J stated that there were three main types of f.o.b. contracts. These contracts were distinguished based upon whether the buyer or the seller nominated the vessel and concluded the carriage contract. The three main f.o.b. contracts are to be named hereinafter as "bare", "classic" and "fob with additional services"[181]. Since this categorisation is not just a matter of labelling and the contracting party for contract of carriage may vary one from another, it is therefore followed below in order to ascertain who attracts the shipper's dangerous goods liability between the seller and buyer under each type.

2.1. Bare f.o.b.

Although it is the third type of f.o.b. contracts described in *Pyrene*, it is the oldest used in practice.[182] When compared to other types, bare f.o.b. contracts impose the least number of duties on the seller.[183] They provide the easiest basis on which to illustrate the distinction between the wet and the dry shipper under English law. In them, the buyer nominates the vessel,[184] and he or his agent as the dry shipper makes the arrangements for the carriage of the goods. The only duty of the seller as wet shipper is to put the goods on board the nominated vessel and hand the mate receipt to the buyer or his forwarding agent. Under a bare f.o.b. sale, the seller is not responsible for procuring bills of lading from the carrier or paying the freight.[185] Thus, he never holds the bill, nor becomes party to

[178] *The El Amria and The El Minia* [1982] 2 Lloyd's Rep 28.
[179] *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462. This does not mean that this classification is exhaustive though. The f.o.b. contracts are still open to be evolved.
[180] In *Wimble v Rosenberg & Sons* [1913] 3 KB 743 only the "classic" f.o.b. was described as it is the buyer's duty to nominate the vessel, and the seller is to put the goods on board for account of the buyer. For another classic f.o.b. definition see *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475.
[181] Terminology on the point may vary from a commentator to another; In Lorenzon, they are labelled as "bare", "classic" and "with additional carriage services". In CM Schmitthoff, *The law and practice of international trade* (12th edn, Sweet & Maxwell 2012), (hereinafter Schmitthoff), the types are referred to as "simple", "strict" or " classic" and "additional services" in it. In C Debattista, *Bills of lading in export trade* (3rd edn, Tottel 2008), (hereinafter Debattista) they are named as "straight", "classic" and "extended"; or where they are called as "real", "unreal" and "extended" in Lebhun J., "Practising CIF and FOB today" [1981] 1 ETL 24. See alos, Lista, 23 ff. See also, Lista, 23.
[182] Wooldridge, "The Kinds of F.O.B. Contracts", 391.
[183] This type (bare) was interestingly described as "classic" in *The Al Hofuf* [1981] 1 Lloyd's Rep 81, 84. See also *Saffron v Societe Miniere Cafrika* [1958] 32 ALJR 286, Aust HC.
[184] *Wackerbarth v Mason* (1812) 3 Camp 270; 170 ER 1378; *Armitage v Insole* (1850) 14 QB 728; 117 ER 280; *Sutherland v Allhusen* (1866) 14 LT 666; *Cohen & Co v OCkerby & Co Ltd* (1917) 24 CLR 288; *Brand (HO) & Co v Morris (HN) & Co Ltd* [1917] 2 KB 784; *Maine Shipping Co v Sutcliffe & Co* (1917) 87 LJKB 382; *Burch & Co Ltd v Corry & Co* [1920] NZLR 69; *Cunningham v Monro* (1922) 28 Comm 42.
[185] *Green v Sichel* (1860) 7 CB (NS) 747.

it.[186] The buyer or his agents obtains the bills of lading in the buyer's name from the carrier. In the classification by Devlin J in *Pyrene*, the learned judge described this type in the following way;

> *"Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance this method may be the most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate's receipt and handing it to the forwarding agent to enable him to obtain the bill of lading."*[187]

The bare f.o.b. was also defined by Donaldson J, in *The El Amria and The El Minia*;*"The third is where the seller puts the goods on board, takes a mate's receipt and gives this to the buyer or his agent who then takes a bill of lading. In this latter type the buyer is a party to the contract of carriage ab initio."*[188] The House of Lords in *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* however laid to rest the matter and bare f.o.b.[189] was described in parallel with the previous cases; *"... (c) cases where the buyer arranges and nominates the ship, and the seller ships but the buyer is named in the bill as consignor..."*[190]

The consensus hence is that under bare f.o.b. the buyer is named as the shipper in the bills of lading and is the original party to the relevant contract of carriage. There is no doubt that the buyer as the dry shipper could be liable to the carrier for damages caused by a shipment of dangerous goods, since he is considered the shipper under a bare f.o.b. contract. However, the question that arises at this point is whether the carrier is entitled to sue the seller along with the buyer/shipper for damages arising from dangerous goods under this type.

2.1.1. Seller's position under bare f.o.b.

Unlike the buyer, the seller's position is more complex under bare f.o.b. sales. He is not party to the contract of carriage concluded between the buyer and carrier, nor can he be privy to the rights and responsibilities assigned by its terms. Yet, as the wet shipper, the seller may be bound by the

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[186] See Rix J's statement in *Sunrise Maritime Inc v Uvisco Ltd (The Hector)* [1998] 2 Lloyd's Rep 287, 299.
[187] [1954] 2 QB 402, 424.
[188] [1982] 2 Lloyd's Rep 28, 32.
[189] Indeed the courts were not the only sources for the definitions of f.o.b. contracts. Several organisations and institutions offered detailed definitions on f.o.b. contracts. See By the Joint Committee representing the Chamber of Commerce of the United States, the National Council of American Importers, and the National Foreign Trade Council in the United States 'Revised American Foreign Trade Definitions - 1941' ;and by the British Association of Chambers of Commerce in the United Kingdom 'F.O.B. Vessel'(1971). By the Institute of Export, the suggested f.o.b. contract would indicate an f.o.b. contract where the seller puts the goods on board and the buyer nominates the ship and secures the shipping space, namely bare f.o.b; 'Proposed Definition of the Term F.O.B.'(1951) 14 Export 211, [19]. Also in the Incoterms 2010 Rules, under the proposed f.o.b. contract, it is the buyer's duty to make a contract of carriage and the seller's is to deliver the goods on board the vessel nominated by the buyer; Incoterms 2010 Rules FOB A3 and A4.
[190] [2008] 1 Lloyd's Rep 462; [2008] UKHL 11, [34].

terms of a separate implied contract between himself and the carrier premised upon the same bill of lading.

In *Pyrene,* the seller sold a fire tender on bare f.o.b. terms. The buyer/dry shipper concluded the carriage contract with the carrier through their agents. The seller/wet shipper was under a duty to ship the goods. When the fire tender was lifted by the vessel's tackle, it was dropped and damaged before passing the ship's rail as a result of the admitted negligence of the vessel.[191] The bill of lading had not been issued when the fire tender was damaged and when produced, it did not even evidence the shipment of the damaged tender. Since the seller was not party to the carriage contract between the buyer and the carrier, he tried to sue the carrier in tort for the actual value of the tender (£966). Conversely, the carrier sought a protection from the limitation figures of the Hague Rules, which was £200.[192] Nonetheless, the problem with the carrier seeking limitation under the Hague Rules was that the Rules would only govern the contract of carriage concluded between him and the buyer. Therefore, the issue was whether the seller was subject to the contract of carriage concluded between the buyer and carrier and whether he was bound by its limitation terms pursuant to the Hague Rules. Eventually, Devlin J held that despite the fact that the buyer was considered the shipper of the goods, the seller however participated in the contract made between the buyer and carrier and accordingly the carrier was entitled to limit his liability to £200.

The learned judge first considered the applicability of the agency principle[193] to the case on the basis that the buyer might have contracted with the carrier as well as on behalf of the seller as an undisclosed principal but he explained his decision on "wider principle" grounds instead;

> *"If it were intended that he should be a party to the whole of the contract his position would be that of an undisclosed principal and the ordinary law of agency would apply. But that is obviously not intended; he could not, for example, be sued for the freight. This is the sort of situation that is covered by the wider principle; the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes."*[194]

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[191] For an interesting case in the similar facts see also *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 Lloyd's Rep 200.

[192] According to the British Maritime Law Association's Agreement of August 1 1950. This limit is not applicable currently under the Hague-Visby Rules.

[193] With due respect, Professor Treitel mistakenly indicated in his article that the case was held on the grounds of the agency principle. GH Treitel, "Exemption Clauses and Third Parties" [1955] 18 MLR 172, 176. See also FE Dowrick, "A Jus Quaestium Tertio by Way of Contract in English Law" [1956] 19 MLR 374.

[194] [1954] 2 QB 402, 426. The learned judge had two underlying reasons for reaching this conclusion. He contended that the seller would be in breach of the sale contract without any *"redress against the ship",* if the vessel left the port without loading his goods. Additionally he also reasoned that the seller would be able to sue for conversion, if the carrier handled the cargo. These conclusions were heavily criticised by some learned commentators. See Carver, 4-019; P Todd, *Cases and materials on international trade law* (Sweet & Maxwell 2003), 543. First, if the vessel left the port without loading his goods the seller would not be in breach of the sale contract. Instead the buyer would be in breach for failure to nominate an effective vessel; see, *Glencore*

Nevertheless, Devlin J's reasoning on "wider principle" grounds is not applicable today, since participation in a contract by a third party was laid to rest by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd,*[195] specifically by Viscount Simonds on the basis of the doctrine of privity under English law. The learned judge criticised the potential leak of the doctrine of privity created by *Pyrene* alongside some other cases[196] and put cement on a potential participation in a contract by a third party. Devlin J's decision was also criticized in other cases. At the Court of Appeal, Mustill J was also reluctant to accept the first *ratio decidendi* of Devlin J in *Pyrene* namely the "wider principle" and accordingly the learned judge opined *"whether the first ground [wider principle] of decision in Pyrene v Scindia can now be regarded as good law"*[197]. It is therefore safe to say that the first *ratio decidendi* of Devlin J namely a *jus quaesitum tertio* is no longer applicable under English law.

Devlin J however had an alternative *ratio decidendi* to reach the same decision. He inferred an implied contract between the seller and carrier from the conduct of the parties where the seller *"by delivering the goods alongside ... implicitly invited the shipowner to load and the shipowner implicitly accepted that invitation"*[198]. Therefore the questions that arise are whether this second ground namely the "implied contract" is alive, and if so, whether the seller can attract dangerous goods liability thereunder.

2.1.2. The implied contract

There is no difficulty in arguing that for dangerous goods liability, the carrier has *locus standi* against the buyer since he is considered as the shipper under bare f.o.b. contracts. The difficulty lies down in term of where the carrier would wish to sue the seller who normally has no contractual nexus for such liability along with the buyer/shipper.[199] In order to see whether the bare f.o.b. seller could be held liable for dangerous goods, a number of questions need to be answered one by one. The first

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Energy UK Ltd v Transworld Oil Ltd [2010] EWHC 141 (Comm). Second, the carrier would be well positioned to invoke a defence against the conversion on the ground that he obtained the consent of the seller prior to loading his goods.

[195] [1962] AC 446, 471.

[196] *Adler v Dickson* [1955] 1 QB 158; [1954] 3 WLR 696; [1954] 3 All ER 397 (CA). See also *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd* [1924] AC 522; [1924] 40 TLR 464 (HL).

[197] *The Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep 321, 331. Emphasis added.

[198] Ibid, 426.

[199] In such a case, the seller is not be considered as the bailor of the goods, just because he has made the actual delivery of the goods to the carrier. As the bill names the buyer as the shipper under bare f.o.b. sales, it will only be considered as receipt from the buyer and accordingly the buyer would be regarded the bailor. Thus, he will not be subject to liability under bailment; *The Aliakmon* [1986] AC 785, 818. See also, fn. 57.

question is whether this type of implied contract[200] survives in the light of subsequent common law cases.

a) Is it alive?

Since its inception, the doctrine of privity of contract has been the subject of much debate in English law.[201] The decisions had been split as to whether a third party could enforce a contract[202] or not[203] until the issue was conclusively settled by the House of Lords in several cases in favour of privity of contract.[204] Devlin J in *Pyrene,* by his second *ratio decidendi*, must have sought to circumvent the potential interference of the doctrine of privity of contract to his "wider principle" by an implied contract;

> *"If this conclusion is wrong, there is an alternative way by which, on the facts of this case, the same result would be achieved. By delivering the goods alongside the seller impliedly invited the shipowner to load them, and the shipowner by lifting the goods impliedly accepted that invitation. The implied contract so created…"*[205]

While the first part of the reasoning (wider principle) was overruled in *the Midland Silicones*, the second part appears to have survived. In *the Midland Silicones*, Viscount Simmons did not entirely overrule Devlin J's decision and explained it on the implication of a contract, which was the second reasoning of Devlin J. His express words are evident to prove this; *"Devlin J.'s decision ... can be supported only upon the facts of the case, which may well have justified the implication of a contract between the parties."*[206] It can be inferred from this passage that the House of Lords did not want to disregard *the Pyrene* case entirely but expressed its survival on the implied contract. Nor did Mustill J, in *the Kapetan Markos*, overrule the implied contract of Devlin. The learned judge only explicitly referred to the "wider principle" thus; *"I doubt with all respect to a very learned judge whether the first ground [wider principle] of decision in Pyrene v Scindia can now be regarded as good law"*[207]. If the words of Mustill J were read meticulously, it would be tacitly inferred that the second ground

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[200] It should be stated from the outset that the Contract (Right of Third Parties) Act 1999 would not provide any assistance to the carrier, since it does not apply to contracts for the carriage of goods by sea and only gives rights to third parties; Sec. 6 (5).

[201] On the point see generally HG Beale, *Chitty on contracts* (32nd edn, Sweet & Maxwell 2015), Chapter 18, (hereinafter Chitty); E Peel, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015), Chapter 14 (hereinafter Peel).

[202] *Dutton v Poole* (1677) 2 Lev 210; *Martyn v Hind* (1776) 2 Cowp 437; *Marchington v Vernon* (1787) 1 B & P 101; *Smith & Snipes Hall Farm LD v River Douglas Catchment Board* [1949] 2 KB 500; *Drive Yourself Hire Co (London) LD v Strutt* [1954] 1 QB 158; *Adler v Dickson* [1955] 1 QB 158.

[203] *Bourne v Mason* (1668) 1 Ventris 6; *Crow v Rogers* (1726) 1 Stra 592; *Price v Easton* (1883) 4 B & Ad.

[204] *Tweddle v Atkinson* (1861) 1 B & S 393; *The Midland Silicones* [1962] AC 446; *Beswick v Beswick* [1968] AC 58; affirmed in [1966] Ch 538; reversed by HL [1965] 2 All ER 858.

[205] [1954] 2 QB 424, 426. For similar views of Devlin J, see *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1041.

[206] [1962] AC 446, 471.

[207] *The Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep 321, 331. Emphasis added.

"implied contract" could be regarded as good law, since the express criticism was only on the "wider principle".

In light of these authorities, the implied contract of Devlin J can be regarded as alive today. However, on which grounds can this implied contract be supported? Devlin J was not the first to imply a contract; there were indeed earlier cases.[208] Most notably, in *Brand v Liverpool, Brazil & River Plate Steam Navigation Co*[209] a contract was implied between a consignee and the carrier. Devlin J's contract was deemed analogous to the *Brand v Liverpool* contract despite the fact that the former was concluded between the seller and the carrier.[210] The contract in *Brand v Liverpool* was implied on the grounds that the consignee surrendered the bill of lading and paid the freight, whilst the carrier in return delivered the goods against the bill of lading.[211] On the other hand, the contract in *Pyrene*, was implied when the seller offered his goods to the carrier and the goods were accepted for loading by the carrier.[212] The relevance of these two implied contracts in respect of liability arising from dangerous goods will be discussed below.[213]

b) Formation of the implied contract

Devlin J did not explain the underlying reasons of his implied contract, save for the way of offer and acceptance of the parties. However, in order for a contract to arise, the ordinary contractual requirements are offer, acceptance, contractual intention and consideration.[214]

(i) Offer, acceptance and intention

As Devlin J stated, the implied contract between the seller and carrier arose by the conduct of the parties, namely the delivery of the goods to the carrier by the seller (offer) and the loading of such goods on board by the carrier (acceptance).[215] It is no doubt possible under English law for a contract

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[208] *Cock v Taylor* (1811) 13 East 399; 104 ER 424; *Sanders v Vanzeller* (1843) 4 QB 260; *Stindt v Roberts* (1848) 17 LJ QB 166; *Yound v Moeller* (1855) 5 E & B 755; *Allen v Coltart* (1883) 11 QBD 782; *White & Co v Furness, Withy & Co Ltd* [1895] AC 40.
[209] [1924] 1 KB 575.
[210] Carver, 415.
[211] For the limitations of the *Brand v Liverpool* type contract see *The Owners of Cargo Iately Laden on Board the Ship Aramis v Aramis Maritime Corp (The Aramis)* [1989] 1 Lloyd's Rep 213; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep 311. See also *The Aliakmon* [1986] 2 WLR 902.
[212] Indeed there are other types of implied contract created between the f.o.b. seller and the carrier at the loading operation, which tacitly survives until to date. See *President of India v Metcalfe Shipping Company (The Dunelmia)* [1969] 2 Lloyd's Rep 476, 480. This is considered below in the heading of Classic F.o.b.
[213] See, 2.1.3. Bare f.o.b. seller's liability under implied contract.
[214] *The Aramis* [1989] 1 Lloyd's Rep 213, 224 per Bingham LJ. On the point see generally Chitty, Chapter 2; Peel, Chapter 2, 3 and 4.
[215] [1954] 2 QB 402, 426.

to be formed as a result of parties' conducts,[216] where they would amount to offer and acceptance.[217] These are not, however, sufficient to infer a contract. In addition to these, a contract can only be implied, only if contractual intention can be found.

The seller's intention is to be protected against non-payment by the buyer and accordingly he may want to retain the right of disposal, even though he is not named as the shipper in the bill.[218] In the case of non-payment, the seller would be willing to re-sell his goods to another party. In such a situation, a bare f.o.b. seller would be in an unsecure position, since the bill names the buyer as the shipper. From the perspective of the carrier, by being party to the contract with the seller contained or evidenced in the bill of lading, he would want to be protected by the provisions of the Hague-Visby Rules, such as Art III r 1 or package limitation figures of the Rules, instead of being sued in tort on an unlimited basis, as was the case in *Pyrene*.

(ii) Consideration

Apart from offer, acceptance and intention, there must also be consideration moving from one party to another to form a contract. In bare f.o.b. cases, the consideration moving from the seller could be the delivery of his goods to the carrier's vessel. On the other hand, it might be difficult to identify the consideration moving from the carrier to the seller in such cases. However, to form a contract between the seller and the carrier, the carrier's consideration does not have to move towards the seller. It could also be towards a third party.[219] Under a bare f.o.b. contract, the carrier is already under a duty to deliver the goods to the buyer, given the carriage contract between him and the buyer. However, under common law, the very same consideration arising under a contract can be a consideration of another contract as well. To put it differently, the existence of a duty to deliver the goods owed to the buyer does not prevent the same delivery from being a consideration of the carrier for the bare f.o.b. seller's promise.[220]

c) Terms of implied contract

In the light of general contractual requirements to form a contract, when goods are presented for shipment and accepted by the carrier, it may not be easy to explain implication of a contract, in the rigid structure of the law of contract but the courts namely in *the Midland Silicones* along with *the*

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[216] *Hart v Mills* (1846) 15 LJ Ex 200; *Steven v Bromley & Son* [1919] 2 KB 722; *Greenmast Shipping Co SA v Jean Lion et Cie SA (the Saronikos)* [1986] 2 Lloyd's Rep 277; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 [2003] EMLR 35.

[217] See generally on the point Chitty, Chapter 2.

[218] *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36. See, the 1979 Act, s. 18 r.5. The seller may retain the title, even if the bill of lading is to order of consignee; see, *The Kronprinsessan Margareta (The Parana)* [1921] 1 AC 486.

[219] *Scotson v Pegg* (1861) 6 H & N 295. Approved by the Privy Council in *the Eurymedon* [1975] AC 154.

[220] Ibid.

Kapetan Markos, appear to have pragmatically accepted the existence of such an implied contract so as to satisfy commercial expectations.[221]

A question that arises at this point is what are the terms of such a contract? In *Pyrene*, Devlin J opined that "*[t]he implied contract so created must incorporate the shipowner's usual terms…"*[222]. Evidently, this raises the question as to what constitutes the "usual terms" that should be incorporated.[223] These include those *"they enter into upon… which they know or expect the bill of lading to contain."*[224] Since the Rules almost invariably govern the bills of lading, by way of a "paramount clause" [225] incorporated into the bills of lading, the Rules which were also considered *"usual in the trade"*[226] by Devlin J in *Pyrene* can be said to satisfy the usual terms *"which they know or expect the bill of lading to contain".* The implied contract in *Pyrene* was on the same terms as the contract between the buyer and carrier under the bills of lading in respect of the Hague Rules.[227] In *Pyrene*, the carrier was entitled to trigger the package limitation provisions of the Rules against the seller. Therefore, on these grounds, it would not be wrong to conclude that the Rules may govern the implied contract once incorporated.

2.1.3. Bare f.o.b. seller's liability under implied contract

So far, in general terms, it is safe to contend that the implied contract between the seller and carrier is alive[228] and incorporates the usual terms by reference to the main carriage contract between the buyer and carrier.[229] However, it is not entirely clear whether the bare f.o.b. seller could attract the dangerous goods liability under the implied contract, since it is attached to the shipper/the buyer in the case of bare f.o.b. contracts.[230]

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[221] There are few number of cases drilling the rigid structure of the law of contract. See *The Satanita* [1895] P 248; *Clarke v Dunraven* [1897] AC 59; *The Eurymedon* [1975] AC 154. See also *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [§979] 1 WLR 401.

[222] [1954] 2 QB 402, 426.

[223] For an accurate criticism on a different type of an implied contract see Carver, 414-415. See also *Elder Dempster* [1924] AC 522.

[224] [1954] 2 QB 402, 419.

[225] Provided that the Rules are incorporated by paramount clause in the bills of lading. If there is no paramount clause in the bills of lading or if there is but Art X of the Rules cannot be triggered, the Rules will not apply to the contract between the buyer/shipper and the carrier by virtue of Carriage of Goods by Sea Act 1971 (the 1971 Act). On this the author has published an article, see, Gelgec, "Clause Paramount and its impact on package limitation figures" [2015] 1 Il Diritto Marittimo – Quaderni 147. If the implied contract is not subject to Hague or Hague-Visby Rules, it would not be plausible to say that it may also be capable to contain the implied term arising out of Common law the duty to inform the carrier of dangerous content of his goods since he would not be regarded "shipper".

[226] [1954] 2 QB 402, 426.

[227] Chitty, 190; Carver, 314.

[228] This is also the view of Professor Treitel and Professor Debattista and Professor Lorenzon see respectively GH Treitel, "Bills of lading and implied contracts" [1989] LMCLQ 162, 171; Debattista, 10; Lorenzon, 10.052.

[229] Chitty, 190; Carver, 314.

[230] However, the bare f.o.b. seller would not be liable for freight; *Pyrene v Scindia* [1954] 2 QB 402, 426. The carriage is for reward of payment of freight. Although the named shipper normally is under a duty to pay the freight (*Domett v Beckford* (1833) 5B & Ad 521), unlike the liability of dangerous goods, this duty will not

Firstly, it must be said that an implied contract not only confers rights to the parties but also imposes liabilities thereunder.[231] In *Pyrene*, the seller was entitled to sue under the implied contract in which the Hague Rules were applicable. It would thus be correct to say that the seller could also be sued under such an implied contract and be bound by the provisions of the Hague-Visby Rules where applicable. Secondly, in order for the bare f.o.b. seller to be held liable for dangerous goods under the Rules,[232] he must fall within the meaning of the term "shipper" of Art IV r 6, since it imposes the liability on *"the shipper of such goods…"*[233]. A question arises immediately at this point: Can the bare f.o.b. seller be considered as the shipper within the meaning of the Rules? Indeed, under bare f.o.b. sales, it is the buyer who is considered the shipper as the contracting party to the main contract, whilst the seller as wet shipper is regarded as the consignor. The term "shipper" however, is not referred to rigidly in the Rules. The "shipper" is mentioned in Art 1(a) in which it prescribes the *"'carrier' … who enters into a contract of carriage with a shipper."* On the other hand, in Art III r 3 by the use of "shipper", the reference must have been made to the consignor who ships his goods, not to the contracting party; *"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:…".*[234] Therefore, the shipper under the Rules can be interpreted both as wet shipper as per Art III r 3 and dry shipper as per Art I(a) depending on the circumstances.

It is thought by the author that the bare f.o.b. seller may fall within the meaning of the "shipper" under Art IV r 6 for several reasons. Firstly, once it is accepted that the Rules are applicable to the implied contract, it is not easy to accommodate its terms with its parties under the strict interpretation of the Rules. Therefore, there would be no harm to apply some verbal manipulation to give proper effect to the Rules thereunder. On this ground, the bare f.o.b. seller can be said to have satisfied the term "shipper" within Art 1(a), since he enters into a carriage contract – albeit implied - with the carrier. Secondly, it has already been said that he no doubt also falls within "the shipper" in Art III r 3 as the consignor who ships the goods. Furthermore, the Rules are only applicable either between the shipper and the carrier or between the holder of the bill of lading and the carrier.[235] That is to say, in order to apply the Rules to the implied contract, the seller should be considered either the shipper or the holder thereunder. It would not logically stand accurate to consider the bare f.o.b. seller

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necessarily be implied from the shipment or the issue of the bill to his name. It is possible that this duty may fall on a party other than the named shipper in the bill, since the carrier may have had other contractual relations with others such as charterers which may affect the position; see, *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641, 643. The Rotterdam Rules adopt an approach for the position of the bare f.o.b. seller in art 1(9) that documentary shipper is a person accepting to be named as the shipper alongside the original shipper and he becomes subject to the obligations and the liabilities imposed on the shipper; art 33.

[231] *Tweddle v Atkinson* (1861) 1 B & S, 398.

[232] In respect of dangerous goods liability, there is no material difference between the Hague and Hague-Visby Rules under Art. IV r.6.

[233] See, Art. IV r.6 of the Hague or Hague-Visby Rules.

[234] R Aikens, R Lord and MD Bools, *Bills of lading* (2nd edn, Informa 2015) 7.82 (hereinafter Aikens); S Baughen, "The legal status of the non-contracting shipper" [2000] 1 IJOSL 21, 21.

[235] See, Art. I (a) and (b) of the Rules.

as the holder of the bill of lading under the contract implied on shipment, since he never holds the bill.[236] Therefore, once the Rules are employed to govern the implied contract, the author suggests that the bare f.o.b. seller as both wet shipper as per Art III r 3 and dry shipper - albeit under implied contract - may fall within the meaning of the "shipper" in Art IV r 6 with some allowance for verbal manipulation.

However, the courts may be reluctant to apply this provision to the bare f.o.b. seller, since it is the buyer/shipper who expressly undertakes the obligation under the contract. But since Art IV r 6 is an indemnity clause and more significantly the shipper does not owe any sort of duty to warn the carrier of the dangerous nature of the goods thereunder,[237] the courts may show some readiness to apply it under the implied contract, particularly where the seller's fault causes the damage or loss. As mentioned above, the contract is implied in order to satisfy the commercial expectations, particularly the carrier's expectations in limiting his liability against the seller. If the buyer/shipper is not within the reach or his assets are not enough to cover his loss, in order not to deny the carrier's right to redress his loss, the courts may show some willingness to allow his claim against the seller under the implied contract, provided that his fault has caused the damage or loss. Particularly, this would be more arguable if the bill of lading contained a "Merchant" clause imposing liabilities to various parties including the consignor.[238]

On the other hand even if the bare f.o.b. seller can be said to have satisfied the meaning of the shipper in the Rules, one may still contrarily argue that the bare f.o.b. seller is not subject to the liability arising from dangerous goods. In *the Athanasia Comninos*, Mustill J *obiter* held that where the contract is implied between the consignee and the carrier, the consignee would only be subject to the rights and liabilities, which *"concern the carriage and delivery of the goods and the payment therefor"*[239] under this contract. According to his decision, the liability of the consignee will not be extended to embrace the liability in relation to dangerous goods under the implied contract, given that it is directly related to shipment of the goods.

However this decision may not directly have a direct impact on the implied contract created in *Pyrene*. First of all, unlike in *Pyrene*, the relationship cited by Mustill J in *the Athanasia Comninos* is between the consignee and the carrier at the other side of the voyage, namely at the delivery stage, when the carrier delivers the goods against the bill presented for taking delivery of the goods along with payment of freight and other charges. That is to say, the implied contract created between them is

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[236] Unless the bill of lading is later transferred to him further down in a chain sale. But this is not relevant with the subject.

[237] The rule is not framed as a duty to warn the carrier of nature of the goods, but it is a rule that indemnifies the carrier, when he has not consented the shipment with the knowledge of nature and character of the goods. See, *the Fiona* [1994] 2 Lloyd's Rep 506, 512, 518, 521. See also, *Total Transport Corp v Arcadia Petroleum Ltd (The Eurus)* [1996] CLC 1084, 1098.

[238] Examples of such clause can be found in some bill of lading forms such as Combiconbill, "K" Line bill, Conlinebill, P&O Nedlloyd Bill.

[239] [1990] 1 *Lloyd's Rep* 277.

derived from the implied contract commonly known as a "*Brand v Liverpool* contract" which is explained entirely on the different analysis of offer, acceptance and intention.[240] *The Pyrene* type contract, however, is created between the seller/wet shipper and the carrier on different grounds as explained above.[241] Most significantly, as stated by Mustill J, his reasoning covers only the position of the consignee; *"There is to my mind no reason to assume ... that the parties intended the consignee to be made subject to a retrospective liability for acts with which he had nothing to do."*[242] His reasoning therefore appears to prove that his *obiter* decision is only applicable to the implied contract arising at delivery stage, which has expressly nothing to do with the shipment part of the voyage and the parties of the implied contract created therein.

In contrast to the consignee, however, the bare f.o.b. seller as wet shipper may indeed have something to do with the goods prior to shipment. He as wet shipper at least is under an obligation to deliver the goods over the ship's rail.[243] In the case of bare f.o.b. sales, where the buyer only concludes a carriage contract through his agent, it is not uncommon that given the parties agreement in the contract, the seller would fulfil some duties directly in relation to physical shipment of the goods like packing, stowing or stuffing them to be seaworthy in transit. For instance, when goods which are expressly classified as dangerous in the IMDG Code are shipped, a copy of a dangerous goods note containing all necessary information required by the IMDG Code like UN Number of the goods, the Proper Shipping Name (PSN), or a declaration stating that the goods are properly packed, marked and labelled should be provided to the carrier by the shipper. Sometimes under f.o.b. sales, the seller may handle these duties on behalf of the buyer/shipper. Even if there is no such stipulation in the contract with regard to the shipment, the f.o.b. seller is under a duty to ship the goods carefully and skilfully.[244] Thus, it would be difficult to argue that Mustill J's reasoning on the position of the consignee/buyer is applicable to the seller/wet shipper.

Moreover, a supportive contra-inference can be interpreted from Mustill J's words. The learned judge opined that the consignee would only be subject to the rights and liabilities under the implied contract, which only *"concern the carriage and delivery of the goods..."*[245] If a consignee under an implied contract created at the delivery stage assumes responsibility for the carriage and "delivery" of the goods, according to the reasoning of Mustill J, it can also be suggested that a

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[240] For *Brand v Liverpool* type contract see, generally Benjamin, 18-181 *et seq*.
[241] The editors of Benjamin also suggest that *the Pyrene* type implied contract is different from *Brand v Liverpool* type; Benjamin, 18-187.
[242] [1990] 1 *Lloyd's Rep* 277, 281.
[243] *Stock v Inglis* (1883-84) 12 QBD 564, 573; affirmed by the House of Lords (1884-85) 10 App Cas 263; *J Raymond Wilson & Co Ltd v N Scratchard Ltd* [1943/44] 77 Ll L Rep 373, 374.
[244] *A Hamson & Son (London) Ltd v S Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep 553, 554; *George Wills & Sons Ltd v Thomas Brown & Sons* (1922) 12 Ll LR; *Sime Darby & Co Ltd v Everitt & Co* (1923) 14 Ll LR 120. See also s. 29 (6) of the 1979 Act. See also Incoterms 2010 FOB A9. Where the goods should be also in a merchantable state at the time of shipment to endure the voyage, see also, *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 WLR 862; [1961] 1 Lloyd's Rep 47. Reversed on different grounds in the Court of Appeal [1961] 2 Lloyd's Rep 326.
[245] [1990] 1 *Lloyd's Rep* 277.

consignor – the bare f.o.b. seller - under the implied contract created at the shipment stage may assume responsibilities which concern the carriage and "shipment" of the goods that - it is suggested - clearly includes shipment of dangerous goods.

2.1.4. Bare f.o.b. seller's liability in tort

Regardless of whether the carrier's claim under the implied contract is valid or not, he might be able to sue the bare f.o.b. seller in tort. In *the Orjula,*[246] the supplier supplied drums of hydrochloric acid to the seller/shipper for shipment. The supplier stuffed the drums into the containers provided by the carrier[247] and the seller/shipper shipped them. Due to defective packing and staging, the drums of acid leaked and caused damaged to the vessel and the containers. The carrier made claims for cleaning up the vessel, decontamination and re-stuffing of the containers, along with the cost of transhipment to the destination. The carrier sued both the shipper/seller in contract and the supplier of the goods who stuffed them negligently in the containers in tort. It was held by Mance J that the defendants owed a duty of care for the damage to the containers and the vessel. Accordingly, the carrier would be entitled to claim in tort against the supplier for the alleged negligence in the stowage of the containers for cleaning up the vessel.[248] Mance J also opined that the losses for decontamination and re-stuffing of the containers could be claimed either on the basis of loss consequential upon physical damage or as loss incurred in mitigation. However for the cost of transhipment, the learned judge rejected the claim on the ground that it was purely economic.

Indeed, it was the supplier, not the bare f.o.b. seller, who became liable in tort against the carrier. However, as was the case with the supplier in *the Orjula,* given the physical nexus of the seller with the goods prior to shipment, the seller may owe a duty of care to the carrier, and accordingly, his negligent act may have caused or triggered the damage or loss arising from shipment of dangerous goods. Regardless of the type, under all f.o.b. sales, the seller is under a duty to make safe delivery of the goods over the ship's rail.[249] He is also under a duty to ship them skilfully and carefully.[250] As mentioned before, f.o.b. sales are flexible instruments. It is not uncommon for the parties to agree on express stipulations as to how the goods should be delivered by the seller in respect of packing, stowing or stacking on board. Due to the mechanics of the contract, the seller as wet shipper would handle those duties better than the buyer/dry shipper who may only have engaged his

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[246] *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395, 403. See also, A Tettenborn, "Tort Liability and environmental responsibility" [1996] LMCLQ 8.
[247] The Bareboat charterers.
[248] *The Orjula* [1995] 2 Lloyd's Rep 395, 403. For a supportive speech for a claim in tort for dangerous goods, see, *the Fiona* [1994] 2 Lloyd's Rep 506, 521-522 (per Lord Hoffmann). For where the shipper owed duty of care against the charterer in tort, see, *Virgo Steamship Co SA v Skaarup Shipping Corp (the Kapetan Georgis)* [1988] 1 Lloyd's Rep 352.
[249] *Stock v Inglis* (1883-84) 12 QBD 564, 573; affirmed by the House of Lords (1884-85) 10 App Cas 263; *J Raymond Wilson & Co Ltd v N Scratchard Ltd* [1943/44] 77 Ll L Rep 373, 374.
[250] See, fn. 243.

forwarding agent at the port of shipment to book space and to procure the bill. While the bare f.o.b. seller may have fulfilled any of those duties prior to shipment to provide safe shipment on board, provided that his negligent acts – for instance, the declaration note required by the IMDG Code states that the goods are properly packed, but the seller has not done so - have caused the damage or loss resulting from dangerous goods, the author opines that there is no reason why the seller should not be subject to liability arising from the dangerous goods in tort negligence, as was the case in *the Orjula.*[251] However, it is worth noting that such a claim in tort could be disadvantageous for the carrier. Unlike in a contractual claim, he may not be able to recover losses which are purely economic and are not linked to any claim for physical damage, like liability for legally dangerous goods[252] or cost of transhipment as was the case in *the Orjula*. Therefore, his claims against the seller can be limited to physical damage or loss consequential upon physical damage.

2.1.5. Conclusion on the bare f.o.b. seller's liability

In respect of implied contract, it appears to be arguable that the seller technically can be subject to the liability arising from dangerous goods. However, the courts may feel reluctant to hold him liable for such a liability, since it is expressly the buyer as the shipper under bare f.o.b. who undertakes the obligation in relation to the shipment of dangerous goods. That was probably why Mustill J in *the Athanasia Comninos* refused to render the consignee who had nothing to do with them prior to shipment, liable under the implied contract created at the delivery stage. However, in case of a *"Pyrene* type" implied contract established in the shipment stage, the courts may perhaps show some readiness to imply this contract and hold the seller liable, particularly when he is at fault or negligent in some of his duties in relation to the shipment which may cause or trigger damage or loss resulting from dangerous goods.

On this ground, the author opines that while the buyer/shipper is strictly liable under the contract – whether he is at fault or not -, the seller, when the damage arises from his act or fault, as the source of damage, should also be held liable under the implied contract. This also seems more plausible, if the buyer/shipper is not worth suing, for instance, he may be insolvent or may not have valuable assets within reach. However, under the implied contract, the carrier may not be able to claim his loss arising from legally dangerous goods, since Art IV r 6 is not applicable to those goods, which only causes delay or detention.[253] Moreover, even if such a contract is not implied, the seller can be still subject to liability for dangerous goods in tort when his negligent actions caused the

[251] This analogy is also applicable to any seller/wet shipper who does not have contractual nexus with the carrier.
[252] In *Mitchell Cotts & Co Ltd v Steel Brothers & Co Ltd* [1916] 2 KB 610 where the shipper was liable for purely economic loss of the carrier resulting from the detention of the vessel.
[253] *Bunge Sa v ADM Do Brasil (The Darya Radhe)* [2009] EWHC 845 (Comm); [2009] 2 Lloyd's Rep 175; *the Giannis NK* [1994] 2 Lloyd's Rep 171; [1996] 1 Lloyd's Rep 577.

damage. But, as is the case in the implied contract, the carrier may not be able to claim purely economic losses, which cannot be linked to any physical damage.[254]

2.2. Classic f.o.b.

Despite the fact that the sale contract before Devlin J was in bare f.o.b. terms, he also classified three main varieties of f.o.b. contracts in *Pyrene.* Under his definition of classic f.o.b., the seller shoulders a heavier legal burden when compared to bare f.o.b. sales.

Devlin J, with reference to *Wimble, Sons & Co Ltd v Rosenberg & Sons,*[255] defined a classic f.o.b. contract as one in which the buyer nominates the vessel and the seller puts the goods on board for the account of the buyer and obtains bills of lading.[256] This differs from bare f.o.b. where the seller procures bills of lading; and he becomes *"directly party to the contract of carriage at least until he takes out the bill of lading in the buyer's name."*[257] According to Devlin J, in a classic f.o.b., it is assumed that the seller arranges some carriage contract with the carrier and is party to this contract as principal "at least until" the bill of lading names the buyer as the shipper.[258] When the bill names the buyer as shipper, the seller is assumed to discontinue being party to this antecedent contract,[259] and accordingly it will be the buyer who is privy to the contract contained in or evidenced by the bills of lading.

However, the position of the seller and the buyer under a classic f.o.b. contract is not inflexible.[260] In *The El Amria and The El Minia*, the Court of Appeal approved the classification of Devlin J in line with the commercial practice. It was also recognized in the case that the classic f.o.b. seller could be named in the bill of lading and accordingly be the shipper as principal instead of buyer.[261] In addition to this, in *Saffron v Soc Miniere Cafrika*, the classic f.o.b. was described as follows; *"in what has been called the 'classic' type of f.o.b. contract it is the duty of the seller both to*

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[254] *The Orjula* [1995] 2 Lloyd's Rep 395.
[255] It was the first case that defined the classic f.o.b. sales; [1913] 3 KB 743.
[256] [1954] 2 QB 402, 424.
[257] Ibid.
[258] However this does not mean that the seller can be subject to liability as being party that antecedent contract, where damages arise from dangerous goods before the bill is issued. It was held by Devlin J in *Pyrene v Scindia* that it was material that whether the issue of bill was envisaged and not whether the bill was actually issued. Thus when damages occur after the shipment operations start but before the issue of the bill, that problem will be covered by the bill of lading as if it was issued before the damage has occurred. See, *Pyrene v Scindia* [1954] 2 QB 402, 419.
[259] The learned judge however explained neither how this antecedent contract between the seller and carrier was converted to the bill of lading contract between the buyer and carrier, nor the terms of this antecedent contract. See Carver, 158-159. See also *Leduc & Co v Ward* (1888) LR 20 QBD 475; *Owners of Cargo Lately Laden on Board the Ardennes v Owners of the Ardennes (The Ardennes)* [1951] 1 KB 55.
[260] As per McNair J contended in *NV Handel My J Smits Import-Export v English Exporters (London) Ltd* [1957] 1 Lloyd's Rep 517, 521 that there is nothing inconsistent for the seller to secure shipping space under f.o.b. contract.
[261] [1982] 2 Lloyd's Rep 28, 32.

put the goods on board and to procure a bill of lading."[262] Furthermore Evans J in *Concordia Trading BV v Richo International Ltd* stated on the classic f.o.b. that:

> *"In the normal case, although the goods have been shipped on a vessel nominated by the buyer, the seller for his own protection will have reserved the right of disposing of the goods, as unpaid seller, and the bill of lading will require delivery to him or to his order."*[263]

These cases appear to show that in classic f.o.b. cases, it is often the seller who makes arrangements for the carriage contract.[264] There is, however, available judicial support on a different view that under a classic f.o.b. contract, it is the buyer who makes arrangements for shipment. In *Ian Stach Ltd v Baker Bosley Ltd,* Diplock J (later became Lord) unlike the above definitions, stated that under a classic f.o.b. it is the buyer's duty to nominate the vessel and to make the arrangements for the carriage.[265] Devlin's definition does not necessarily invalidate Diplock J's view, or *vice versa*. The two different judicial definitions only attest to the flexible nature of f.o.b. contracts. They are both applicable in commercial practice. Thus, it appears that there is no invariable rule under classic f.o.b. sales, and accordingly either of the parties could conclude the contract of carriage and be named as the shipper depending on the facts.

2.2.1. Modern classic f.o.b.

Devlin J's definition of classic f.o.b. in *Pyrene* may not be entirely reflective of commercial practice. The seller may not always be in a position to reserve space for the goods. Moreover, the buyer might have chartered a vessel due to various reasons or might have reserved space in advance. On the other hand, even in such cases where it is the buyer who makes arrangements for shipment, the seller could be willing to take out the bills of lading in his own name, given that he may have an interest in the performance of the contract of carriage. By doing so, he would retain control over the goods and protect himself against non-payment of the goods from the buyer.[266] In case of non-payment, he could seek to redirect the goods to another buyer.[267] Due to such reasons, under classic f.o.b., the seller is not necessarily obliged to take out the bill of lading in the buyer's name.[268]

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[262] [1958] 100 CLR 231, 241.

[263] [1991] 1 Lloyd's Rep 475, 478-479.

[264] For examples of this type see *Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784 and *Lusograin Comercio Internacional De Cereas Ltd V Bunge AG* [1986] 2 Lloyd's Rep 654.

[265] [1958] 2 QB 130, 139. A "special freight agreement" between the f.o.b. buyer and the carrier was not considered as a carriage contract in *Evergreen v Aldgate Warehouse* [2003] 2 Lloyd's Rep 597.

[266] Such security problems of the seller were also highlighted even in *Cowas-Jee v Thompson Kebble* (1845) 5 Moore 165.

[267] *Mitchell v Ede* (1840) 1 Ad & El 888.

[268] Benjamin, 20-006.

Conversely, the seller will not breach the sale contract, simply because he asks the carrier to issue a bill of lading in which his own name is put as the shipper.[269]

This type namely where the buyer reserves space in advance or charters the vessel and the seller is named as the shipper in the bills of lading is called the "fourth" type of f.o.b. contract by some commentators.[270] However this type is to be called the "modern" classic f.o.b. contract here, since it was considered within classic f.o.b. by the House of Lords in *Scottish & Newcastle v Othon Ghalanos*[271]. While endorsing Devlin J's definition of the classic f.o.b. contract, the House of Lords in *Scottish v Newcastle* also modernized the definition to make it compatible with commercial practice by describing it as *"cases where the buyer arranges and nominates the ship but the seller ships and takes the bill of lading in his own name as consignor…"*.[272] In such cases, the buyer often charters the vessel, but it is the seller who is named as the shipper under the bill of lading when the goods are shipped on board.[273] As was illustrated in *Scottish & Newcastle,* there are examples in both ways where the seller acts as agent[274] or principal[275] by doing so.

The description of such a complex contractual scheme can be found in the statement by Lord Denning in *the Dunelmia* where the learned judge described four different contracts concluded under international sales. In the case, under a classic f.o.b. contract, which was assumed as the first contract, the buyer had made the arrangements for carriage and had a charterparty with the carrier.[276] The charterparty was the only contract (second) assumed by Lord Denning in which the buyer was the original party with the carrier. Although there was no express contractual agreement between the seller and carrier, Lord Denning considered a (third) contract concluded between the seller and the carrier in the bill of lading; *"The third contract is the bill of lading of July 11, 1961. The Master signed a bill of lading which was on a printed form of the sellers…"*[277].[278] Accordingly, the fourth

[269] *Browne v Hare* (1853) 3 H & N 484; (1859) 4 H & N 822.
[270] Benjamin, 20-071; Carver, 4-025.
[271] [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.
[272] [2008] UKHL 11, [34]. In this case, the contract could be assumed as a classic f.o.b. contract. While the buyers selected the shipping line and agreed to pay the freight, the seller was left to choose the vessel and make contract of carriage. Although it was not stated in the report that whoever was named in the bills of lading (seaway bills) as the shipper, it was assumed that it was the seller who acted as the agent of the buyer in making the carriage contract. See [2008] UKHL 11, [45].
[273] *KSAS Seateam & Co v Iraq National Oil Co (The Sevonia Team)* [1983] 2 Lloyd's Rep 640; *the Dunelmia* [1969] 2 Lloyd's Rep 476; *Pacific Molasses Co and United Molasses Trading Co v Entre Rios Compania Naviera SA (The San Nicholas)* [1976] 1 Lloyd's Rep 8; *the Athanasia Comninos* [1990] 1 Lloyd's Rep 277; *the Seven Pioneer* [2001] 2 Lloyd's Rep 57 (High Court of New Zealand); *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWHC 944.
[274] *The MSC Amsterdam* [2007] EWHC 944.
[275] *The Sevonia Team* [1983] 2 Lloyd's Rep 640.
[276] The sale contract was classified as the first contract by Lord Denning. See [1969] 1 QB 289, 303.
[277] [1970] 1 QB 289, 304. For more detailed and supportive analysis on this ground, see generally S Baughen, "The legal status of the non-contracting shipper" [2000] 1 IJOSL 21.
[278] More than one carriage contract could be in existence together at the same time with regard to the same shipment. See *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641.

contract was the one established by the endorsement and delivery of the bill of lading in which the buyer became party later by such transfer from the seller.[279]

Such (third) contracts were mostly assumed to be between the classic f.o.b. seller/named shipper and the carrier by the courts where the facts of the cases fit, even if there was no express contractual arrangement between them. Where the sale contract was under classic f.o.b. terms, such as in cases like *the Sevonia Team*[280] and *the San Nicholas,*[281] even though the buyers had chartered the vessel and the sellers had no express contractual dealings with the carrier, it was the sellers who were named as the shipper and accordingly considered as the original party to the carriage contract under the bills of lading.[282] The courts appear to have never justified in clear words this implied contract under modern classic f.o.b. except for Lord Denning in *the Dunelmia*, but it can be said that interestingly it has been tacitly applied since then.[283]

2.2.2. Another implied contract

At first glance, it may be thought that this type of implied contract and Devlin J's implied contract are regarded as the same. However, they are slightly different even though their existence can be explained on the same grounds set out above, namely the seller's delivery of the goods and the carrier's acceptance to carry them.[284]

Under the modern classic f.o.b., the seller's intention to become party to the carriage contract is more visible than under the bare f.o.b., since he is the one who is named as the shipper in the bills of lading. Furthermore unlike the implied contract from *Pyrene,* the implied contract under the modern f.o.b. contract is not a collateral one. The *Pyrene* type contract is one of the two contracts existing under the bills of lading terms, where the bare f.o.b. seller is only party to an implied

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[279] [1970] 1 QB 289, 304. Yet it was held in the case that the bill of lading would be considered as a receipt in the hand of the buyer where he has chartered the vessel from the same carrier that issued the bill of lading.
[280] [1983] 2 Lloyd's Rep 640
[281] [1976] 1 Lloyd's Rep 8. The existence of such implied contract is also observed in Aikens, 7.78.
[282] Where the fixture note between the shipper and charterer was superseded by the issue of bill of lading between the shipper and shipowner, see *Chew Hong Edible Oils Ltd v Scindia Steam Navigation Co Ltd (The Jalamohan)* [1988] 1 Lloyd's Rep 443.
[283] Such implied contract could be most ideally justified in the cases where the buyer has no contractual relationship with the carrier but only sub-charterparty with the head charterer. In such cases, the only contract that the buyer would be party with the carrier is the contract contained in or evidenced by the bills of lading in which the seller is named as the shipper. Here given that the buyer makes the carriage arrangements by sub-charter, accordingly the seller is not required to make any. That example would charmingly suit the implied contract assumed by Lord Denning in *the Dunelmia*. For a good example of an f.o.b. contract with a complex charterparty relationship between the parties see *R Pagnan & Fratelli v NGJ Schourlen NV (The Filipinas I)* [1973] 1 Lloyd's Rep 349.
[284] See, 2.1.2. The implied contract.

collateral contract, while the *Dunelmia* type is the only contract under the bills of lading where the seller (as agent or principal) is party to the main carriage contract with the carrier.[285]

It can also be said that the presence of such an implied contract under classic f.o.b. sales can be tacitly inferred from the House of Lords' decision in *Scottish & Newcastle,* where it was held that *"… cases where the buyer arranges and nominates the ship but the seller ships and takes the bill of lading in his own name as consignor… in cases (a) [classic f.o.b.]… the seller may be either the only party to the bill of lading or acting as agent for the buyers as a (more or less undisclosed principal)…"*[286] The question arises at this point; under such classic f.o.b., where the seller makes no contractual arrangements, in what sense can the seller act as agent or principal under the bills of lading?[287] The only logical explanation for this question would be the acceptance of an implied contract between the seller and carrier, when the seller is named as the shipper, as Lord Denning expressly assumed in *the Dunelmia*.[288] Otherwise there would be no contract for the seller to act as principal or agent.

2.2.3. Conclusion on classic f.o.b. sales

It would not be wrong to say that under classic f.o.b., there are two different applications in practice, namely the old and modern one. It depends on the facts whether it is the seller or the buyer who makes the carriage contract and becomes the shipper under the bills of lading. If there is no reserved space or chartered vessel by the buyer, the seller could conclude a carriage contract between himself and the carrier and ask the carrier to issue a bill of lading naming either himself or the buyer. If it were the buyer named in the bill as the shipper, the buyer would be regarded as the original party to the carriage contract and accordingly the seller as the wet shipper would not be subject to any liability under the main contract.[289] On the other hand, under the modern type, where the buyer reserved space in advance or chartered a vessel, and the seller was named in the bill as the shipper, it would be the seller becoming party to the carriage contract either as principal or agent of the buyer

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[285] Professor Debattista classifies this (modern classic f.o.b.) as bare f.o.b. (in the words of learned author, it is straight f.o.b.) in Debattista, 10. With great respect, it is nevertheless difficult to consider this type as bare f.o.b. after the decision of *Scottish & Newcastle v Othon Ghalanos*. It is somehow the seller under this type either as principal or agent becomes the party to the carriage contract and is named as the shipper in the bills of lading. Unlike this type, in the bare f.o.b., the seller assumes only one duty, namely delivery of the goods on board the vessel. He is neither named in the bill nor becomes party to original carriage contract under it.

[286] [2008] UKHL 11, [34]. Emphasis added.

[287] Where both the f.o.b. sellers and buyers were named in the bill as the shippers, see *AP Moller-Maersk v Sonaec Villas Cen Sad Fadoul & Ors (The Maersk Line)* [2010] EWHC 355, [2012] 1 CLC 798.

[288] Such implied contract could be restricted on the basis of *the Aramis* [1989] 1 Lloyd's Rep 213 and *the Gudermes* [1993] 1 Lloyd's Rep 311. However these cases' restrictions are mostly related to the conduct of the buyer and carrier on discharge, not the seller and carrier on loading.

[289] However, likewise the bare f.o.b. seller, he as the wet shipper can be subject to liability under the implied contract or in tort. See, 2.1.3. Bare f.o.b. seller's liability under implied contract and 2.1.4. Bare f.o.b. seller's liability in tort.

depending on the facts. The question of who would be subject to the liabilities of the shipper including the one arising from dangerous goods under such a contract will be examined below.[290]

2.3. F.o.b. contract with additional duties

As is the case in all f.o.b. contracts, here the seller/wet shipper (or through his agents) is under a duty to deliver the goods over the ship's rail. The seller as both wet and dry shipper, when compared to other types, undertakes the maximum amount of duties towards the buyer under this type of f.o.b. contract. Unlike in bare and classic f.o.b. contracts where it is the buyer who nominates the vessel, the seller under this type of f.o.b., undertakes to fulfil the duties,[291] namely of both nominating the vessel and concluding the carriage contract.[292] As McNair J contended in *Handel v English Exporters* unless otherwise stated, it is the buyers' duty to nominate the vessel.[293] However, the same judge also held that there is nothing to prevent allocation of this responsibility to the seller.[294] Having said this, such shifting of both duties does not prevent a sale contract from being under f.o.b. terms as contended by Diplock J in *Ian Stach Ltd v Baker Bosley*;

> *"…it may be a matter of doubt as to whose was to be the responsibility for finding shipping space and for determining shipping port and shipping date. Prima facie, under an f.o.b. contract that is the duty and responsibility of the buyer; but there are probably as many exceptions to the rule as there are examples of it.*"[295]

As was the case with other f.o.b. contract types, the first judicial recognition of this type was made in *Pyrene* by Devlin J; *"Sometimes the seller is asked to make the necessary arrangements; and the contract may then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a c.i.f. contract."*[296] The position of the seller under this type is also

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[290] See below, 2.4. Who attracts the shipper's liability under f.o.b. contracts and 2.5. Who attracts the dangerous goods liability?

[291] These additional duties of the seller under this type are not exhaustive. The seller could also prepay the freight and insure the goods for the account of the buyer. See *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240.

[292] The underlying reasons of this type may vary. In terms of international sales, the buyer could possibly be abroad to do these duties and accordingly he might have had no commercial practice or business link at the place of loading. Or even if he had so, he might have no knowledge on the type of vessel, on which the goods are required to carry properly. And the seller might have been in a better position to nominate the suitable vessel and make the shipping arrangements for the goods that he sells. Additionally the required shipping space could be small, and thereby the seller rather than the buyer could easily reserve the required space, as was the case in *DH Bain v Field & Co Fruit Merchants Ltd* (1920) 3 Ll LR 26. Or the seller might have booked the shipping space well before the shipment of the goods; See *Scandinavian Trading Co A/B v Zodiac Petroleum SA (The Al Hofuf)* [1981] 1 Lloyd's Rep 81. All aside, the buyer might just have requested the seller to do so. Given the above reasons, these duties nevertheless could be shifted from the buyer to the seller under this type.

[293] [1957] 1 Lloyd's Rep 517, 519.

[294] Ibid. In the case, the seller's undertaking was not considered as an absolute obligation but qualified.

[295] [1958] 2 QB 130, 138.

[296] [1954] 2 QB 402, 424. In *the El Amria and El Minia* [1982] 2 Lloyd's Rep 28, the sale contract was classified as f.o.b. with additional duties. In the case, this type was also accepted as the variant of classic f.o.b. by Donaldson J; [1982] 2 Lloyd's Rep 28, 32. This was mostly because the duties of the seller are nearly

recognized in the statement of Lord Mance from *Scottish & Newcastle v Othon Ghalanos* in the House of Lords; *"(b) cases [f.o.b. with additional duties] where the seller arranges shipment and takes the bill in his own name as consignor…"*[297]

Given that all the required shipping arrangements including being named in the bill of lading as the shipper are made by the seller under this type, this type of f.o.b. may resemble c.i.f. contracts in many aspects.[298] However, unlike c.i.f. contracts, the seller does not invariably perform them as principal. He may act either as principal or agent of the buyer both in making the carriage contract and being named in the bill of lading as the shipper, as stated by Lord Mance in *Scottish v Newcastle* in the House of Lords.[299] Therefore, it might be crucial to determine who is the principal for the purpose of imposing liabilities of the shipper including the one arising from dangerous goods.

2.4. Who attracts the shipper's liability under f.o.b. contracts

It has been examined so far that under f.o.b. contracts whether it is the buyer or the seller who concludes the carriage contract with the carrier and is named in the bill of lading as the shipper. Under bare f.o.b. and classic f.o.b. sales when the buyer is named in the bill of lading, it is evident that the buyer is considered as the original party as the shipper. On the other hand, the seller can also be named as the shipper in the bill under both classic and f.o.b. with additional duties.[300]

However, it does not necessarily follow that the bill evidences a contract between the carrier and the named shipper. Sometimes, under f.o.b. sales, the contract evidenced in the bill of lading can be between the carrier and the buyer, other than the seller/named shipper.[301] This may lead to the conclusion that the seller/named shipper may have concluded the carriage contract as agent of the buyer.[302] It is also evident from the decision by the House of Lords in *Scottish & Newcastle* that when the seller takes out the bill of lading in his own name, he could be doing so either as principal or agent

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identical except that here the seller nominates the ship and is named in the bill of lading as the shipper. For instance, Even though classic f.o.b. contract was first described in *Wibmle v Rosenberg* [1913] 3 KB 743, the f.o.b. contract in the case was mostly recalled as this type (f.o.b. with additional duties). It was the seller who chose the vessel and made the carriage contract, paid the freight. It was not however entirely evident that whether the seller was acting principal doing so and considered as the shipper.

[297] [2008] UKHL 11, [34]. Emphasis added.

[298] However it is worth noting that the difference is that under f.o.b. with additional duties, the buyer undertakes to pay the freight and insurance if any, since the invoice for these services are separate from the sale contract's invoice. Unlike c.i.f. contracts, here it would be the buyer who bears the risk of fluctuation in the freight rates even if it were prepaid by the seller. See *The Parchim* [1918] AC 157, 163-164. The differences between f.o.b. and c.i.f. contracts were also considered in *Scottish & Newcastle v Othon Ghalanos* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.

[299] [2008] UKHL 11, [34].

[300] *Browne v Hare* (1853) 3 H & N 484; (1859) 4 H & N 822.

[301] *The Berge Sisar* [2001] UKHL 17; [2002] AC 205, [19].

[302] *East West Corp v DKBS 1912 AF A/S* [2003] EWCA Civ 83; [2003] QB 1509, [34]; *the Delfini* [1988] 2 Lloyd's Rep 599, 605, affirmed in the Court of Appeal [1990] 1 Lloyd's Rep 252; *Dickenson v Lano* (1860) 2 F&F 188; *Cowas-Jee v Thompson Kebble* (1845) 5 Moore 165; *Anderson v Clark* (1824) 2 Bing 20; *Fragano v Long* (1825) 4 B & C 219.

of the buyer.[303]At this point, the question arises as to who would be subject to the liabilities of the shipper including the one arising from dangerous goods under such f.o.b. sales? The answer to this question may depend upon whether the seller made the carriage contract as agent of the buyer or as principal.

A solution to the tension between the seller and the buyer in such cases may not be apparent from the bill of lading but may depend on an examination of the sale contract between the seller and the buyer along with the intention of the parties.[304] To ascertain whether an f.o.b. seller designated in the bill of lading as the shipper is the original party requires an examination of whether he has any commercial interest in being an original party to the carriage contract after shipment.[305] If the seller were thus willing to retain the right of disposal and title in the goods after shipment for security against the non-payment from the buyer, it would strongly follow that he would have an interest in being an original party to the carriage contract.[306] Put differently, if the property has not passed to the buyer on shipment – often in consequence of non-payment from the buyer -, the seller named in the bill as the shipper is *prima facie* regarded as the principal party to the carriage contract.[307] It can therefore be inferred that the crucial point is whether the seller has any interest in being the original party to the carriage contract on shipment. It therefore follows that if the property passes at a time after shipment, then it is safe to contend that the seller preserves his interest in the performance of the contract and accordingly acts as principal. The way that the bill of lading is issued may be of some assistance in resolving whether the seller concluded the carriage contract as agent of the buyer or principal.

2.4.1. Where the bill is issued to order of the seller

Where the bill has been issued to the order of the seller, it may not be difficult to ascertain whether the seller has an interest and is a principal party to the carriage contract under the bill. Pursuant to s. 19 (2) of the Sale of Goods Act 1979, the presumption is that the seller retains the right of disposal once the bill of lading is issued to his order.[308] It is also the position of the case law that the seller *prima facie* retains the property in the goods as the bill is made out to his order.[309] The seller

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[303] [2008] UKHL 11, [34].
[304] *East West Corp v DKBS 1912* [2003] EWCA Civ 83; [2003] QB 1509, [35]; *Cho Yang v Coral* [1997] 2 Lloyd's Rep 641, 643.
[305] [2008] UKHL 11, [15], [17], [37], [44]-[47].
[306] Benjamin, 20-009.
[307] *Evergreen v Aldgate* [2003] EWHC 667; [2003] 2 Lloyd's Rep 597, 604.
[308] This section is undoubtedly applicable to f.o.b. contracts. See *Mitsui & Co Ltd and Another v Flota Mercante Grancolombiana Sa, The Cuidad de Pasto, The Cuidad de Nevia (The Cuidad de Pasto)* [1989] 1 All ER 951, 956, 959, 960.
[309] *Jenkyns v Brown* (1849) 14 QB 496; *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60. Indeed, this inference can be rebuttable; see *the Albazero* [1977] AC 774.

will retain his interest both in the goods and in bills of lading and thereby as the named shipper; will be assumed to be an original party to the carriage contract.[310]

2.4.2. Where the bill is issued to order of a party other than the seller or the buyer

Where the bill of lading names the seller as the shipper but it is issued to the order of a party other than the seller or buyer the considerations can be different. In *Evergreen v Aldgate,*[311] the goods were sold on classic f.o.b. terms. Although the buyer had a special freight agreement with the carrier, the manufacturer of the seller was named as the shipper in the bills of lading.[312] One of the bills was made to the order of a bank since the payment was through a letter of credit, whilst the second bill was "to the order"[313] without indicating any name next to it. The payment under the second bill was cash against documents. The issue was whether the seller's manufacturer or the buyer was the shipper of the goods. It was held that the seller's manufacturer was the true shipper of two bills since the seller retained the right of disposal over the goods until the payment.[314] No doubt the seller had retained his interest in the performance of the contract, given that the payments were through letter of credit[315] and cash against documents[316].

A supporting authority can be found in *East West Corp*[317] in which the facts of the case were similar to *Evergreen*. The bills of lading were taken out in the name of the seller and made out to the order of the banks. It was held that the sellers named in the bill, as the shipper did not act as the agents of the banks, simply on the ground that the bill was issued to the order of the banks. Conversely, it

[310] In *the MSC Amsterdam* [2007] EWHC 944, the sale contract was in f.o.b. terms, and the buyer made the shipping arrangements. However it was the seller who was named as the shipper in the bill and the bill was "to order" of the seller. Even though the seller retained the bill of lading until the payment, it was held that not the seller, but the buyer was interestingly the "real shipper". With great respect, the buyer should not have been regarded the shipper. There was nothing to suggest otherwise from the presumption that the seller was the true shipper when the bill was the seller's order. He had reasonable interest in the goods since the goods were not paid and accordingly he only endorsed the bill after payment. And more significantly, the bill was "to order" of the seller. Therefore the only logical explanation is that the buyer became party to the contract under the bill by the endorsement not by the way being original party. For a supportive view on the point see, Carver, 4-029.
[311] [2003] EWHC 667; [2003] 2 Lloyd's Rep 597.
[312] Since it was because of the local regulations that mandatorily required the manufacturers to be named in the bills as the shipper rather than the seller, whether the seller was named, as the shipper in the bill was immaterial. The bill of lading may also have named an agent for either the seller or the buyer or both. In *the Maersk Line*, the bill was taken out in the name of the company acting as the agent of the buyer and the seller. However, although the evidence before the court was limited, it was held that the seller was considered the original party, since the seller was not paid by the buyer and accordingly he might have interest in being the party to carriage contract; see, *AP Moller- Maersk A/S v Sonaec Villas Cen Sad Fadoul (The Maersk Line)* [2010] EWHC 355 (Comm); [2010] 2 All ER 1159 (Comm). For where the agent acted both on behalf of the buyer and seller, see, *the Tromp* [1921] P 337.
[313] It equals to the shipper's order.
[314] [2003] 2 Lloyd's Rep 597, [33], [40].
[315] See, *The Cuidad de Pasto* [1989] 1 All ER 951.
[316] See, *The Miramichi* (1915) P 71.
[317] [2003] EWCA Civ 83, [65].

was found that the banks were acting as the agents of the sellers in order to clear the payments, and so the sellers were held as the true shippers. In brief, the mere fact that the bills are made out to the order of a party other than the buyer or the seller does not necessarily mean that the sellers did not conclude the carriage contract as principals. In such cases, the seller/named shipper is *prima facie* considered as the original party to the carriage contract.

2.4.3. Where the bill is issued to order of the buyer

In the last of the situations, where the bill is made out to the order of the buyer, but names the seller as the shipper, there is some authority on the view that *"where there is a named consignee it may be inferred that the contracting party is the consignee not the shipper."*[318] However, this view is unlikely to be sustainable in unqualified form.

It is worth noting from the outset that unlike for the seller's right of disposal under s. 19 (2) when the bill is issued to the order of the seller, there is no supportive section in the 1979 Act indicating that the buyer retains a right of disposal, once the bill is issued to his order. Additionally, the case law appears to indicate the opposite. In a Privy Council case, it was held that the title in the goods did not pass until a certain point after shipment, namely the moment of payment, despite the fact that the bill was issued to the order of the buyer.[319] Thus, the mere fact that the bill of lading is made out to the order of buyer does not alter the fact that the seller can still retain his interest in being party to the bill of lading. To put it differently, making the goods deliverable to the order of the buyer does not automatically pass the property to the buyer from the seller on shipment. The seller could have an interest in the performance of the carriage contract even after shipment, even though the bill is made out to the buyer's order. In such cases, in unqualified form, there is no reason to suggest otherwise from the fact that the seller is the shipper as principal rather than agent of the buyer.

However, in *East West Corp*, Lord Mance contended that the seller/named shipper could be regarded as agent of the buyer who is named as consignee in the bill of lading.[320] However, the learned judge supported this inference only on the grounds of Brandon J's categorization of the shipper's position in *the Albazero*[321]. Brandon J in *the Albazero*, identified three different categories of shippers.[322] In the first category, the shipper was regarded as agent of the consignee in making the carriage contract, where the property passed before or on shipment. In the second, the shipper was

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[318] *The Berge Sisar* [2001] UKHL 11; [2002] AC 205, 220. See also, *Cho Yang Shipping Co Ltd v Coral (UK) Ltd* [1997] 2 Lloyd's Rep 641, 643.

[319] *The Kronprinsessan Margareta (The Parana*) [1921] 1 AC 486. There is also considerable supportive authority albeit obiter dicta. See *Arnold Karberg & Co v Blythe Green Jourdain & Co* [1915] 2 KB 379; *the Julia* [1949] AC 293; *the Lycaon* [1983] 2 Lloyd's Rep 548.

[320] [2003] QB 1509, 1533.

[321] [1975] 3 WLR 491. This categorization was made in relation to the bailment terms. In the House of Lords, this categorization was affirmed by all members of the House including Lord Diplock; [1977] AC 774, 842.

[322] Only the first two are relevant here.

regarded as principal where the property did not pass until after shipment.[323] This categorization was also followed by the House of Lords in *Scottish v Newcastle* later in order to determine the original party of the carriage contract.[324]

What can be inferred from Lord Mance's reference to Brandon J's categorization is that issuing a bill of lading to the order of the buyer does not itself suffice to indicate that the seller acts as agent of the buyer in being named in the bill of lading as the shipper. Such a view could only be supported in qualified form where the seller has no interest in the performance of the carriage contract, namely if the property passes before or upon shipment.[325]

In *Scottish & Newcastle,* it was held that the seller had no interest in the performance of the carriage contract.[326] The bill of lading named the buyer as consignee[327] and it was to be sent to the buyers directly after shipment with the payment due 90 days from arrival.[328] Upon these facts, the House of Lords held that since the seller secured the price from the buyers, the property passed on shipment and as a result of this, the seller had no interest in the bill of lading, and accordingly the sellers were not held to be the original party to the carriage contract but the agent of the buyer. In a very recent case of *the Magellan Spirit,*[329] the approach taken in general to determine the original party by the courts was followed. In the case, where the sale contract was on f.o.b. terms, the contract of carriage was found to be between the buyer named as consignee and the carrier, only on the basis that the seller named as shipper had no interest in the carriage contract since the property in the goods passed on shipment. Therefore, the view that the seller/named shipper acts as agent of the buyer, when the bill of lading is made out to the order of the buyer can be supported only on the ground that the seller does not have any interest in being a principal party to the carriage contract on shipment.

What can be concluded from the above is that under English law it may not be easy to find an inflexible rule to ascertain whether the f.o.b. seller/named shipper acts as the principal or the agent of the buyer in being named as the shipper in the carriage contract, since it mostly depends on the terms of the sale contract and their intentions.[330] As long as the seller has an interest in being party to the carriage contract on shipment, then it is plausible to regard him as the original party to the carriage contract. It would follow that the seller/named shipper and not the buyer is subject to dangerous goods liability against the carrier. On the other hand, where the property passes on shipment as a result of

[323] [1975] 3 WLR 491, 501.
[324] [2008] UKHL 11, [42].
[325] However the property in the context of c.i.f. and f.o.b. sales is highly unlikely to pass before shipment. *Carlos Federspiel v Twigg* [1957] 1 Lloyd's Rep 240. An opposite example can be given from the context of carriage of goods by road where the property passed before shipment; *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146.
[326] [2008] UKHL 11, [15], [17], [37].
[327] It was a non-negotiable bill of lading which omits "to order" next to the name of the consignee. It was also not evident that whether the seller or buyer was named in the bill as the shipper.
[328] Ibid, [37].
[329] *Magellan Spirit Aps v Vitol Sa (The Magellan Spirit)* [2016] EWHC 454, [38].
[330] *East West Corp v DKBS* [2003] EWCA Civ 83, [35].

security of payment, the seller will likely be regarded as having no interest, and accordingly the buyer as the principal will attract dangerous goods liability as the shipper.

2.5. Who attracts the dangerous goods liability?

It has been shown that as a result of the approach taken by the courts, the buyer can be regarded as principal, when the seller/named shipper has no interest in being party to the carriage contract on shipment. It would normally follow that the seller/named shipper as agent of the buyer should not be responsible for liabilities, which are imposed on the buyer/principal shipper. However, considering the liabilities arising from dangerous goods, this may not always be the case under English law, and the general approach taken by the courts in determining principal may have been set aside and accordingly the seller as principal may find himself under liability.

In *the Athanasia Comninos,*[331] the seller sold coal to the buyer under a sale contract on f.o.b. terms. Even though it was the buyer who made all the carriage arrangements and sub-chartered the vessel from the time charterers, it was the seller who was named in the bills of lading as the shipper. On the other hand, the buyer was named as the consignee in the bill. The cargo of coal caused damage to the vessel and the carrier sued both the buyers and seller under the carriage contract for his loss resulting from the shipment of coal. The issue was whether it was the seller or the buyer who should have dangerous goods liability imposed on him as the shipper. The defendant sellers' argument was that they the sellers were only named as the shipper in the bill of lading as agent of the buyers. Mustill J rejected this argument and held that the sellers were principals even though the property passed on shipment. His justification was that the buyers did not need to be party to another contract under the bills of lading, since they already had a contract of carriage in the form of a charterparty.[332]

Mustill J ultimately held that the seller was considered the original party and thereby he should attract the dangerous goods liability, if any.[333] He also found that the seller would not have been able to be relieved of the liability arising from dangerous goods, even if he had acted as the agent of the buyer[334];

> *"As regards Devco [sellers], there is in my view no room for doubt. They were shippers of the goods, and were named as such in the bill of lading, without qualification. It was argued on their behalf that it was in fact C.E.G.B. who were*

[331] [1990] 1 Lloyd's Rep 277.
[332] Ibid, 280-281.
[333] The seller/shipper was not held liable given that the carrier could not prove that he was in breach of his duty towards him. [1990] 1 Lloyd's Rep 277, 280.
[334] Under English law, sometimes both agent and principal can be subject to same liability under the contract. See *Teheran-Europe Co v Belton* [1968] 2 QB 53 and *TICC v COSCO* [2002] CLC 346. See also in general, Chitty, 31-085; P Watts, *Bowstead and Reynolds on agency* (21st edn, Sweet & Maxwell 2017), Art. 98, 9-004 ff. Especially where the bills of lading contain "Merchant Clause" in which the agents are also classified as the merchants.

the participants in the contract of carriage. To my mind the position of C.E.G.B. has no bearing on the potential liability of Devco. To show that C.E.G.B. were principals would not relieve Devco from liability, but would entail that both parties were principals vis a vis the plaintiffs."[335]

2.5.1. Is the law ideal?

It is possible to argue convincingly against the decision of Mustill J that the seller should have been held as agent of the buyer rather than principal as to the general approach discussed previously. First, it should be noted that on the basis of the House of Lords' decision in *Scottish & Newcastle* the sale contract in *the Athanasia Comninos* clearly falls within the modern classic f.o.b. definition rather than bare f.o.b. contracts, since it was the buyer who made the shipping arrangements but the seller was named in the bill as the shipper.[336]

Under classic f.o.b. sales where the seller is named as shipper, as discussed above, the approach taken by the courts is that he should not be considered the principal, where he has no interest in the performance of the carriage contract on shipment. In *the Athanasia Comninos*, the property passed on shipment and accordingly the seller may not be said to have had any interest in being an original party to the carriage contract. However, Mustill J held that the seller was the principal, although he interestingly indicated *vice versa;* "*Under many forms of f.o.b. contract it can be inferred that the property of the goods passes on shipment, that the entire carriage is performed on behalf of the buyer as owner of the goods, and that the seller participates in the contract primarily (if not exclusively) as agent for the buyer."*[337]

His decision appears to be contradicting his speech and the authorities cited above on the point to determine the principal party of the carriage contract. The learned judge justified his decision on the basis that the buyer already had a contract of carriage and did not need another.[338] Indeed, the buyer had a contract of carriage in the form of a charterparty but this contract as he stated, was with the time charterers of the vessel,[339] not with the shipowner/carrier who in fact had sued for the damages. Therefore, unlike the learned judge's suggestion, the bills of lading would not be mere receipts in the hands of buyers but a contract of carriage, since the buyers did not have any contractual

[335] [1990] 1 Lloyd's Rep 277, 280. Emphasis added.

[336] The Contract between the carrier/shipowner and the seller can only be explained on the grounds of implied contract of Lord Denning from *the Dunelmia* in which the learned judge explicitly accepted the existence of implied contract between the f.o.b. seller/named shipper and carrier in the form of bills of lading, where the buyer had charterparty with the carrier. See, *the Dunelmia* [1969] 1 QB 289, 304.

[337] Ibid, 280.

[338] [1990] 1 Lloyd's rep 277, 281.

[339] Ibid, 277.

privity with the shipowners.[340] As such in contrast to his view, the buyer would need the contract contained in the bill of lading.

Although the facts of the case appear to prove that the seller should have been regarded as agent on the ground of other authorities discussed above, in considering the question of who should be imposed the liability arising from dangerous goods among the seller and the buyer, the author thinks that the general approach taken by the courts should be set aside and Mustill J's decision should be followed and preferred. Accordingly the seller as both wet and dry shipper should assume responsibility.[341]

Under c.i.f. and many f.o.b. sales,[342] the seller is under a duty to conclude the carriage contract evidenced in the bill of lading on behalf of the buyer on usual terms[343] in the specific trade concerned by providing all necessary precautions for safe carriage of the goods[344] and conferring substantial continuous protective rights throughout the voyage[345].[346] Under f.o.b. contracts, as examined above, the seller may take out the bill either in his own or the buyer's name. When the seller is named as the shipper with his consent and choice, then it would follow that the seller as dry shipper accepts to undertake all the necessary arrangements and obligations under the carriage contract in relation to shipment arrangements of the goods, including enabling the carrier to take all necessary precautions having regard to the nature and character of the dangerous goods, even if he acts as agent of the buyer. Also, as wet shipper, loading responsibilities are mostly allocated to the

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[340] See *The Dunelmia* [1969] 1 QB 289.

[341] An opposite view can be found in a dangerous cargo case from Canada. See; *Union Industrielle et Maritime v Petrosul International (The Roseline)* [1987] 1 Lloyd's Rep 18. In this case the sale contract was on f.o.b. terms and the bill of lading was issued to the order of the buyer. The cargo of sulphur somehow damaged the vessel. The issue was revolving around whether the seller/named shipper or the buyer/named consignee was the original party to the carriage contract under the bill of lading. It was held by the court that the buyer was the true shipper since the bill of lading was made out to his order and accordingly the seller had no interest in being the original party to it. With due respect, the fact that the bill is to the order of the buyer does not itself suffice to support that the buyer is the true shipper. Had issuing a bill to the order of the buyer been sufficient alone, there would have been no logical reason to have two party (shipper and consignee) in the bills of lading. Such a case is highly unlikely to apply under English law. That is most likely why this case was not embraced but criticized on the above grounds in the House of Lords where Lord Goff stated; *"There is doubt whether a similar conclusion [The Roseline] would be reached in English law."* See *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1, 5. Emphasis added. Lord Goff refused to follow this case by referring to an unreported case from 1979 which was later reported; *The Athanasia Comninos* [1990] 1 Lloyd's Rep 277. See below. See also, Carver, 4-025.

[342] This is not the case where the buyer concludes the carriage contract under bare f.o.b. and sometimes under classic f.o.b. sales. See, 2.1. Bare f.o.b. and 2.2. Classic f.o.b. See also, Benjamin, 18-289.

[343] *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress)* [1996] 2 Lloyd's Rep 319; *Tsakiroglou & Co v Noblee Thorl GmbH* [1961] 2 All ER 179; [1962] AC 93; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* (1940) 68 Ll L Rep 75; *TW Ranson Ltd v Manufacture d'Engrais et de Produits Industriels Antwerp* (1922) 13 Ll L Rep 205; *Burstall & Co v Grimsdale and Sons* (1906) Com Cas 280.

[344] *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146; *Gatoil International Inc v Tradax Petroleum Ltd (the Rio Sun)* [1985] 1 Lloyd's Rep 350; *Thomas Young and Sons Ltd v Hobson and Partners* (1949) 65 TLR 365; *BC Fruit Market Ltd v The National Fruit Co* (1921) 59 DLR 87.

[345] *Hansson v Hamel and Horley* [1922] 2 AC 36.

[346] By virtue of S. 32 (2) of the 1979 Act. For detailed analysis on s. 32 (2), see, F Lorenzon, "When is a CIF seller's carriage contract is unreasonable?" [2007] 13 JIML 241.

seller rather than the buyer. For instance, when the goods classified as dangerous in the IMDG Code are shipped, his duty does not end as soon as he puts the goods over the ship's rail. The seller as the named shipper not only is bound to provide a dangerous goods transport document containing all the necessary safety information required by the Code, but also undertakes to see that the goods are properly packed, marked and labelled. For instance, even if there is no express term in relation to shipment in the sale contract, the seller is bound to deliver the goods properly packed to withstand a normal voyage.[347] Before the goods are placed on board, he should also see to it that the costs in regards to customs prior to loading and harbour dues are cleared.[348]

This appears to prove that when the seller is both the wet and dry shipper, he becomes the leading actor of the shipment who has a direct nexus with the goods both physical and contractual. It would also follow that his knowledge in regards to the goods is superior to anyone else, including the buyer of the goods. Since this obligation under the contract requires enabling the carrier to take all necessary precautions against the dangerous nature and character of the goods prior to shipment, it would not be wrong to say that this duty is directly related to the physical and contractual actions of the shipper. It should also follow that as both wet and dry shipper, the seller when named as the shipper in the bill, can be said to undertake to fulfil this duty both physically and contractually against the carrier, even if he acts as agent for the buyer. Therefore, just because the property has passed on shipment, why should the buyer/consignee – unless he takes part or instigates it on or before shipment - as undisclosed principal who is likely abroad somewhere else from the loading port is unlikely to see the bill until endorsement and delivery and neither ships nor sees the goods, become liable for damages and losses resulting from the acts or faults of the seller who is both the wet and dry shipper?

Put differently, why should the seller/named shipper as the source of the defect be enabled to escape the liability resulting from his actions, just because he has lost his interest in being party to the contract on shipment in consequence of the passage of property? Given that the obligation of dangerous goods arises impliedly or expressly from the contract, and not from the proprietary interest of the shipper in the goods, it is ultimately submitted by the author that even if the facts show that the seller acts as agent for the buyer, the decision of Mustill J imposing the liability of dangerous goods onto the seller/named shipper rather than the buyer should be followed and preferred on the grounds discussed above.

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[347] *A Hamson & Son (London) Ltd v S Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep 553, 554; *George Wills & Sons Ltd v Thomas Brown & Sons* (1922) 12 Ll LR; *Sime Darby & Co Ltd v Everitt & Co* (1923) 14 Ll LR 120. See also s. 29 (6) of the 1979 Act. Where the goods should be also in a merchantable state at the time of shipment to endure the voyage, see also, *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 WLR 862; [1961] 1 Lloyd's Rep 47. Reversed on different grounds in the Court of Appeal [1961] 2 Lloyd's Rep 326.

[348] *Port of Brisbane Authority v Santos Ltd* [1988] 1 Qd R 645. Indeed, under f.o.b. sales, such responsibilities can be allocated onto the buyer as well; *Attorney-General v Walford (Leopold) Ltd* (1923) 14 Ll LR 359. See also, Incoterms 2010 FOB A 6 and B 6.

III. Conclusion

This chapter concentrated on the question: Is it the seller or the buyer as the shipper who attracts the liability arising from dangerous goods under f.o.b. and c.i.f. sales and is the law ideal under English law? Although the examination shows that it is not entirely possible to find a single rule under c.i.f. and f.o.b. contracts, in most situations, this liability is more associated with the seller than the buyer.

To start with c.i.f. sales, there is no difficulty in generalising that it is almost invariably the seller as both wet and dry shipper who is subject to this liability *vis-à-vis* the carrier. Even if he is regarded as agent of the buyer in making the carriage contract, which would be a very exceptional case under c.i.f. sales, this will not relieve him of liability against the carrier.

Unlike in c.i.f. sales, it is very difficult to generalise a single result under f.o.b. contracts. Under bare and classic f.o.b. sales where the buyer concludes the contract and is named as the shipper in the bill, there is no doubt that the buyer becomes subject to liability under the contract. However, this may not be the end of the story under these sales. The non-contracting seller can be party to a separate implied contract with the carrier. Indeed, the courts may feel reluctant to impose dangerous goods liability on the seller under this contract but the author suggests that the seller should not be enabled to escape from the liability, particularly where his actions are the source of damages and losses and the buyer is not worth suing. In such cases, the courts should show some readiness to hold him liable under the implied contract. At any rate, even if the carrier does not appear to have fully grasped the potential tort claims for damages arising from dangerous goods under English law, the case law shows that the non-contracting seller can have this liability imposed on him where he is the source of the fault or negligence. Carriers should be encouraged and should not be denied redress against the seller in tort, when necessary.

Under both classic and "with additional duties" f.o.b. contracts, where the seller makes the carriage contract and is named as the shipper in the bill, it has been shown that when the seller has no interest in being party to the carriage contract on shipment, the courts appear to have taken an approach that the seller may have been named as the shipper in the contract as agent of the buyer, and accordingly, the bill of lading can be said to have evidenced a contract only between the buyer and the carrier. However, considering the liability arising from dangerous goods, this approach may have been justifiably set aside and the courts would appear to be inclined to hold the seller/named shipper liable as principal rather than the buyer, even if the facts of the case prove otherwise. In respect of liability for dangerous goods, as examined above, the author ultimately offers that the general approach in determining the principal party to a carriage contract should be set aside and the law making the seller/named shipper who is the source of the defect liable should be preferred and followed. In the next chapter, an evaluation will be conducted as to whether or not the buyer is immune to this liability under English law simply because he is not the shipper. Put differently, the question of whether the

liability arising from the dangerous goods is transmissible from the shipper/seller to the buyer/transferee under the carriage contract by means of the 1992 Act will form the main substance of Chapter 3.

CHAPTER 3

TRANSFER OF THE LIABILITY FROM THE SELLER TO THE BUYER

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I. Aim of the Chapter

In Chapter 2, it was shown that in all c.i.f. sales and variations thereon, almost invariably the contract of carriage is concluded by the seller and the liability arising from dangerous goods is accordingly imposed on him. It is also often the case that under f.o.b. sales - except in bare f.o.b. and some classic type f.o.b. sales - the seller not the buyer is named as the shipper in the contract of carriage and attracts the liability as the shipper of the goods thereunder.[349] At first glance, it would be natural to suppose that the buyer who is not the shipper of the goods would not be liable for such goods, since he is not party to that carriage contract. However it would also be too vague and simplistic to assume that that alone provides the complete picture in international sale of goods.

As examined in Chapter 2, when parties contract on *shipment terms,* the sale contract is not the only agreement that traders become party to. One of the parties under the sale contract must also conclude a contract of carriage, which forms a crucial part of the functioning of c.i.f. and f.o.b. sales. Under c.i.f. and f.o.b. sales, alongside performing his physical obligations, when the seller performs his duty to make a reasonable carriage contract on behalf of the buyer[350] and tender it to the buyer, he becomes entitled to payment from the buyer. Thereafter, the seller is unlikely to harbour any interest in keeping the carriage contract. The risk in the goods remains with the buyer while the goods are in

[349] *Pyrene & Co. v Scindia Navigation Co* [1954] 2 QB 402; *Wimble v Rosenberg & Sons* [1913] 3 KB 743; *The El Amria and The El Minia* [1982] 2 Lloyd's Rep 28; *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475; *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.

[350] The Sale of Goods Act 1979 (the 1979 Act hereinafter), s. 32 (2).

transit.[351] All the practical interest in being party to that carriage contract therefore lies with the buyers after that moment. Similarly, carriers may be willing to have contractual rights against the buyer/cargo owners. This picture evidently proves that carriage contracts are concluded in pursuance of sale contracts and accordingly this creates a tri-partite relationship between the seller, the buyer and the carrier in the process of international sale of goods on shipment terms.

It would not be wrong to state that these two areas of law are firmly linked with each other. However, given the doctrine of privity of contract established under English law,[352] the buyer will not be able to sue or be sued under the carriage contract that is concluded on his behalf, however firmly linked with it he is.[353] The contractual gap between the buyer and the carrier was first bridged statutorily by the 1855 Act, which was repealed by the 1992 Act,[354] because it did not meet up-to-date trading conditions and had deficiencies in it.[355] It has already shown that it is the seller as the shipper who justifiably attracts the liability against the carrier in most situations. The spread of this liability from the seller/shipper to the buyer does not appear to be possible under the sale contract. However, the 1992 Act artificially makes it possible for the buyer to become party to the carriage contract, and English law in terms of the contract of carriage, is based on the principle of mutuality which is not only concerned with transfer of rights, but also with imposition of the liabilities.[356] This position is also preserved under the 1992 Act, which accordingly not only enables transfer of rights but also liabilities thereunder from the seller/shipper to the buyer/transferee. That is to say, the only platform

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[351] *The Julia* [1949] AC 293; *Pyrene v Scindia* [1954] 2 QB 402; *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462. This is also the case for the buyer, to whom the goods are sold afloat in string sales before arrival. For the allocation of the risk between the seller and the buyer under Incoterms 2010 Rules, see Incoterms 2010 Rules CIF, CFR and FOB A5, B5.

[352] *Tweddle & Atkinson* (1861) 1 B & S 393; *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605, 616.

[353] *Thompson v Dominy* (1845) 14 M & W 403, 407; 153 ER 532, 534; *Howard v Shepherd* (1850) 9 CB 297, 319; 137 ER 907, 916. See also, *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 853. The transaction of the bills of lading enables the buyer only to have document of title, which gives constructive possession and may also enable him to obtain the title to the goods if intended. See, *Lickbarrow v Mason* (1794) 5 Term Rep 683. See also, *Sewell v Burdick* (1884) 10 App Cas 74.

[354] Repealed by s. 6 (2) of the 1992 Act. Although, this is outside the scope of this thesis, for the defects and created solutions under the 1855 Act see generally; *Sewell v Burdick* (1884) 10 App Cas 74; *the San Nicholas* [1976] 1 Lloyd's Rep 8; *the Sevonia Team* [1983] 2 Lloyd's Rep 640; *the Delfini* [1990] 1 Lloyd's Rep 252; *the Aramis* [1989] 1 Lloyd's Rep 213; *Brand v Liverpool, Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 KB 575; *Cremer v General Carriers (The Dona Mari)* [1974] 1 WLR 341; *the Aliakmon* [1986] AC 785; *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2)* [1990] 2 Lloyd's Rep 395; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep 311; *the Albazero* [1977] AC 774; *Margarine Union v Cambay Prince SS Co (The Wear Breeze)* [1967] 2 Lloyd's Rep 219; [1969] 1 QB 219; *Compania Continental del Peru SA v Evelpis Shipping Corporation (The Agia Skepi)* [1992] 2 Lloyd's Rep 467.

[355] English law, in order to resolve the issue of privity of contract in general contract law, enacted the Contracts (Rights of Third Parties) Act 1999. However the Act expressly is not applicable to contracts of carriage; s. 6 (5) a, 6 (6). The Act also does not affect the liabilities of third parties in general.

[356] *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17; [2002] AC 205, [31] and [45]. See also, the Law Commission report "Rights of Suit in Respect of Carriage of Goods by Sea" Law Com No 196, Scot Law Com No 130 (the Law Commission report hereinafter), 3.22.

that may possibly transfer liabilities arising under the carriage contract from the seller to the buyer is the 1992 Act.

This picture therefore makes it necessary to examine the statutory mechanism of the 1992 Act in order to see whether the liability can spread from the seller to the buyer. This examination, which includes the carrier, would be incomplete, if the tri-partite relationship in respect of the potential transfer of the liability from the seller to the buyer under the 1992 Act were overlooked. Otherwise, it would not be possible to see whether the buyer inherits this liability from the seller, since there is no other mechanism providing such proximity in-between the parties. Therefore, the practical question, hence, which will form the main substance of this chapter, is whether the liability arising from the dangerous goods is transmissible from the shipper/seller to the buyer/transferee under the carriage contract by means of the 1992 Act and, if so, whether the proposition can be justified. Considering the liability arising from dangerous goods, transferability of this liability is not a settled law as yet under English law[357] and there are also conflicting opinions on the matter among scholars.[358] If it is possible, reference will also be made to both how the imposition mechanism under the 1992 Act, particularly in relation to dangerous goods, operates and whether the buyer can be divested of this liability or there could be irreversible dead ends for the buyer when imposed. In the end, a comment will be made on whether the regime of the 1992 Act creates an imbalance between the buyer/transferee and the carrier in respect of this liability.

It is also worth noting that as discussed in Chapter 2, the seller's potential liability arising from dangerous goods under tort actions will not be technically possible to spread the seller to the buyer under the 1992 Act, since it only deals with the imposition of contractual liabilities. A discussion of the potential common law actions outside the contract against the buyer with regard to dangerous goods will be conducted in Chapter 4.

II. Contractual Transfer of the Liability

1. Carriage of Goods by Sea Act 1992

Unlike in the 1855 Act, liabilities are not automatically imposed at the same time as rights are acquired under the 1992 Act.[359] The 1992 Act consists of 6 sections and applies to a broad range of shipping documents; namely, sea waybills, delivery orders and bills of lading.[360] However, since the

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[357] *Ministry of Food v Lamport & Holt Line* [1952] 2 Lloyd's Rep 371, 382. But see, *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep. 337.
[358] See below, 3. Is the dangerous goods liability actually transmissible?
[359] See s. 2 and s. 3 of the 92 Act.
[360] The 1855 Act would only apply to shipped bills of lading. It was not entirely evident whether the Act would have applied also to the received for shipment bills. There were also contradictory views of the Courts on whether the received bills are document of title. See, *the Marlborough Hill* [1921] AC 444 and *Diamond Alkali Export Corp v Fl Bourgeois* [1921] 3 KB 443. Apparently the 1855 Act did not apply straight bills of lading

focus of this chapter is only on the transfer of dangerous goods liability from the seller to buyer, only sections relevant to that will be examined hereunder.[361] Although, the only section in relation to imposition of contractual liabilities is s.3, it expressly imposes those liabilities to "the person in whom rights are vested by virtue of" s.2.[362] This explicitly makes s.2 a preliminary condition of the imposition of liabilities under the Act. Therefore, before examining whether this liability is transmissible from the seller to the buyer under s.3, s.2 will be preliminarily examined to see under what conditions the buyer can be the person "in whom rights are vested".

2. The buyer "in whom rights are vested"

S. 1 (1) of the 1992 Act states the shipping documents that the Act applies to which are any bill of lading, any sea waybill and any ship's delivery order.[363] Bills of lading predominantly take the central role of the required documents under f.o.b. and c.i.f. contracts. Sea waybills and delivery orders are important but secondary to bills of lading, if they are stipulated as acceptable documents in the sale contract. Even though these documents are exhaustively listed in the 1992 Act, it is no doubt more generous than its predecessor in this sense. The majority of the shipping documents used under c.i.f. and f.o.b. sales are thus covered by the 1992 Act, although there are still some documents, which may fall outside the scope of the Act such as mate's receipts[364] and merchant delivery orders[365]. For any document outside the listed ones by the Act, the 1992 Act will not provide any assistance.[366] Thus, a buyer holding a merchant delivery order will not fall within the application of the Act, and

either. See, the Law Commission Report, 5.8, 5.10. But see also, *the Rafaela S* [2005] 2 AC 423. Although, the bill of lading is not defined in the Act, it is not entirely clear a multimodal transport document covering non-sea element can be regarded bill of lading. See, Carver, 8-080; Aikens, 11.41; Debattista, 2.47. See also, D Faber "The Problems Arising from Multimodal Transport" [1996] LMCLQ 503, 515.

[361] The entire analysis of the 1992 Act is outside the scope of this chapter. For detailed analysis of the 1992 act with its predecessor see generally; J Beatson and JJ Cooper, "Rights of Suit in Respect of Carriage of Goods by Sea" [1991] LMCLQ 196; FMB Reynolds, "The Carriage of Goods by Sea Act 1992" [1993] LMCLQ 436; N Curwen, "The Problems of Transferring Carriage Rights: an equitable solution" [1992] JBL 245; T Howard, "The Carriage of Goods by Sea Act 1992" [1993] 24 JMLC 181; G Humphreys and A Higgs, "An Overview of the Implications of the Carriage of Goods by Sea Act 1992" [1993] JBL 61; R Bradgate and F White, "The Carriage of Goods by Sea Act 1992" [1993] 56 MLR 188; B Reynolds, "Further Thoughts on the Carriage of Goods by Sea Act 1992 (UK)" [1994] 25 JMLC 143; C Ferris, "The Carriage of Goods by Sea Act 1992" [1992] ICCLR 432; J Bassindale, " Title to Sue under Bills of Lading: the Carriage of Goods by Sea Act 1992" [1992] JIBL 414; B Davenport, "Reform to Bill of Lading Law – Some Implications for Banks" [1992] JIBFL 305. For detailed analysis of the 1992 Act by the House of Lords see, *the Berge Sisar* [2001] UKHL 17, [28].

[362] See, S. 3 (1).

[363] In respect of "electronic bills of lading", s. 1(5) of the 1992 Act evidently shows that in the absence of legislative change, the Act does not normally apply to such bills of lading, given that it is not easy to apply the concepts like "delivery", "endorsement" or "possession". However for electronic seaway bills and delivery orders, the very same problem may not arise, since they normally would not require delivery of document to transfer of contractual rights under the 1992 Act. See, Benjamin, 18-247, 18-251. See also, *Glencore International AG v MSC Mediterranean Shipping Co* [2017] EWCA Civ 365; [2017] 2 Lloyd's Rep 186.

[364] For an example of use of mate receipt see, *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439.

[365] Ship's delivery order is prescribed in s. 1 (4).

[366] For those documents, the common law actions such as *Brand v Liverpool* contract will be available though.

accordingly will potentially not be open to attract liabilities under the 1992 Act, even if s.3 is triggered.

As stated before, by virtue of s. 3 (1), imposition of this liability depends preliminarily upon whether the buyer acquired rights under these documents. That is to say, unless rights are transferred as to s. 2 to the buyer, he would not have this liability imposed, since he would not become the person "in whom rights are vested", even if such a buyer somehow triggers s. 3 (1) in the manner that makes him subject to dangerous goods liability.

2.1. The buyer holding bills of lading

The first of the three listed documents in s. 1 (1) a is "any bills of lading".[367] Although there is no complete definition[368] of bills of lading in the Act, it cannot be a document "incapable of transfer either by endorsement or, as a bearer bill, by delivery without indorsement" for the purpose of the Act.[369] Thus, non-transferable bills such as straight bills of lading fall outside this restrictive definition.[370] On the other hand, received bills of lading are regarded as bills of lading in the statutory sense.[371]

S. 2 (1) a prescribes statutory assignment of contractual rights; "the lawful holder of a bill of lading … shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract."[372] As for s. 2 (1) a, to become assignee, the buyer should thus become a "lawful holder". However, there is no explanation in this section on what the lawful holder is. Interpretations are provided by the Act in s. 5. (2);

> "… (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
> (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill;
> (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction

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[367] S.1 (1) a.
[368] It was discussed in the Law Commission report that a complete definition could have been counter-productive; see Law Commission Report para 2.50.
[369] S.1 (2) a.
[370] Although straight bills fall within the sea waybill definition of the Act, which will be discussed below, straight bills are considered as bills of lading for the purpose of Hague & Hague-Visby Rules. See, *the Rafaela S* [2005] 1 Lloyd's Rep 347.
[371] S.1 (2) b. See also, the Law Commission report, para 2.48.
[372] That assignment covers the rights existed even before being lawful holder; *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, 218. See also, Sir Bernard Eder et. al *Scrutton on charterparties and bills of lading* (23rd edn, Sweet & Maxwell, 2015), 3-013 (hereinafter Scrutton).

been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith."

Sub-section (a) defines consignee in possession of an order bill[373]. Sub-paragraph (b) covers both endorsee and bearer in possession, whilst (c) cites a particular class of holders of a spent bill of lading[374] who would normally have fallen within (a) or (b). All these sub-paragraphs (a, b, and c) starts with "a person with possession of the bill". Thus the inference is that to be "holder" within the statutory sense, the holder must also have the possession of the bill.

2.1.1. Relationship between holder and possession

In the first of the situations, which is defined in (a), there is no difficulty to ascertain the holder of a bill of lading. Once the bill of lading is transferred to the buyer who is named as consignee in the bill, he will become the lawful holder within the meaning of the Act.[375] He will not be regarded to be in possession of the bill until the moment of obtaining the bill.[376]

Unlike sub-section (a), merely obtaining possession of the bill may not be sufficient to be regarded as the holder as per s. 5 (2) b. A person becomes holder of the bill under sub-section (b) "as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill".[377] There are two groups of holders under this sub-section. The first group encompasses bills "made out to order". A can be a holder, only if the bill is endorsed to A and that bill is delivered to him. Alternatively, that order bill may have been endorsed in blank[378] in which case further endorsement is not necessarily required. Mere delivery would be enough to be

[373] It is to be assumed as consignee of an order bill. Otherwise it would not fall within the category of "any bills of lading". Instead it would have been categorized under sea waybills. See also, Aikens, 8.47.

[374] S. 5 (2) c also covers the particular situations in which the goods become total loss. See below, and *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399; [2006] 1 All ER 367, [71].

[375] This is the case even if the buyer receives the bill from parties other than the original party to the bill; *UCO Bank v Golden Shore* [2005] 2 SLR 735; affirmed in [2005] SGCA 42 (Singapore). *East West Corp v DKBS 1912 & AKTS Svendgborg* [2003] EWCA Civ 83; [2003] QB 1509. The consignee was the lawful holder for the purpose of the Act, despite the fact that consignee was acting as the agent of the shipper.

[376] *Gulf Interstate Oil Corporation LLC and the Coral Oil Co Ltd v Ant Trade and Transport Ltd of Malta (The Giovanna)* [1999] 1 Lloyd's Rep 867. Rix J however held that endorsee or consignee could be holder from the moment of the endorser or shipper's disengagement from the bill. So once the endorser or shipper gives the bill to an independent courier for dispatch, the consignee or endorsee may be considered in possession of the bill. There is a rightful criticism over this view. Where the shipper or endorser is in a position to cancel delivery despite disengagement from the bill, it is difficult to construe that the consignee or endorsee will be in possession of the bills. See N Gaskell, R Asariotis and Y Baatz, *Bills of Lading: Law and Contracts* (LLP 2000), 4.22 (hereinafter Gaskell).

[377] Indeed, passing of property is not an element of requirement to transfer rights of suit under the new Act; *East West Corp v DKBS 1912* [2003] EWCA Civ 83; *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The Pace)* [2010] 1 Lloyd's Rep 183.

[378] As was the case in *the Aramis* [1989] 1 Lloyd's Rep 213.

holder of the bill. In the second group, the bill could also be a bearer bill, and endorsement is not required, as is the case with order bills endorsed in blank. A becomes a holder, once the bill is transferred to him.

However, mere physical custody of the bill may not be sufficient to consider the possessor as the holder for the purpose of the Act. In *the Aegean Sea,*[379] A sold the goods to B who in turn sold to C, which was the associate company of B. The bill of lading was made out to the order of A. A, instead of endorsing the bill to B's order, mistakenly endorsed it to C and delivered it to B who later forwarded the bill to C. However, C did not accept the bill and returned it to A for re-endorsement.[380] Thomas J held that C did not become the holder under s. 5 (2) b, since C did not have the possession of the bill "as a result of completion of an endorsement by delivery". The first reasoning given by Thomas J was that there was no acceptance of delivery of the bill on the part of C. This proves that requisite intent should not only be on the part of A, but C should also have requisite intent to be the holder of the bill.[381]

The second reasoning, which was the error in endorsement, impliedly suggests that chain of endorsement should match chain of sale contracts. In the case, the sale chain was in a row of A-B-C, while the endorsement was lacking B. However, endorsement of the bill should have mirrored the chain of sales, which was A-B-C respectively. That is to say, it should have been endorsed by A to B instead of directly to C. A question that arises at this point is whether C would be imposed liability under the 1992 Act, once s. 3 (1) was triggered, if he had accepted such delivery of the bill. The mirroring between chain of sale and endorsement suggests that he would not. This is because such acceptance would not be enough on its own to make C the holder within the meaning of the Act, given the non-fulfilment of "as a result of the completion of an endorsement by delivery".[382]

Some examples may be of assistance to examine s. 5 (2) b accurately. Assume that a chain of sale is A-B-C in a row. A endorses the bill to the order of B, but B only delivers the bill to C without further endorsement.[383] C accepts the delivery of the bill and somehow triggers s. 3 (1). Would C be subject to liability? The answer would be the same as in the previous example; no liability would be imposed on C albeit existence of requisite intent to be the holder, given the lack of "completion of an endorsement by delivery". The bill should have been endorsed to him either in blank or to his order.

Another significant question may arise at this point. Suppose that there is a chain of sale A-B-C in a row. Without delivering it to B, A directly delivers a bearer bill or a bill, which was endorsed in

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[379] [1998] CLC 1090; [1998] 2 Lloyd's Rep 39.
[380] No re-endorsement was necessary by C since it has never become entitled to be holder under the Act. [1998] 2 Lloyd's Rep 39, 61. Re-indorsement is necessary only where a previous holder is redelivered the bill by a subsequent lawful holder. Otherwise he will not be holder for the purpose of the Act. See, *East West Corp v DKBS* [2003] QB 1509, [19].
[381] Ibid, 59-60.
[382] Ibid.
[383] For a case like this, see, *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2)* [1990] 2 Lloyd's Rep 395.

blank to C. C accepts the bill and somehow triggers s. 3 (1). Would C have liability imposed under s. 3 (1) in this scenario? The editors of *Carver on Bills of Lading* suggest that in the case of a bearer bill, it is not necessarily required that B should deliver the bill to C in order to fulfil s. 5 (2) b. Accordingly A's direct delivery to C might suffice.[384] The inference is that since delivery of a bearer bill would suffice to make C the holder notwithstanding a further endorsement, A can deliver such a bill directly to C by omitting B.

Such a suggestion may not be bulletproof. Although there is no requirement of endorsement in the case of bearer bills, B may have had valid grounds to keep the bill against C. It is not uncommon under c.i.f. and f.o.b. sales that the seller wishes to retain the bill of lading until payment. In the example, B could be a sub-seller while C in return could become his buyer. C may not have paid against the goods to B. Accordingly, B would most likely wish to retain symbolic possession of the goods through the bill for security against C and by way of keeping the bill would also want to keep the title to the goods until payment.[385] In such a case, A's direct delivery to C might cause the loss of B's rights against C. Therefore, without proof of any agency relationship between A and B or requisite consent of B for delivery from A to C, A's direct delivery to C may not suffice to make C the holder as per s. 5 (2) b. Accordingly, without being the party "in whom rights are vested", it is unlikely that C would have liability under s. 3 imposed on him.

Returning to the first reasoning of Thomas J in *the Aegean Sea*, even if there is a complete and accurate endorsement, acceptance of the bill into physical custody may not be sufficient to be holder, given that there could be a lack of requisite intent on the part of the transferee/buyer to become holder. Accordingly, the buyer may not be regarded as holder within the meaning of the Act from the moment of acceptance of physical custody of the bill.

In *the Erin Schulte,*[386] the bills of lading endorsed to the name of a bank were delivered to it pursuant to a letter of credit.[387] Although the bills were primarily rejected by the bank due to some discrepancies, they were eventually held in the custody of the bank until further settlement. Following the settlement, the bank paid out pursuant to the letter of credit. The issue revolved around whether the bank had title to sue and it was significant whether it became lawful holder at the time of initial tender or after the settlement.[388] In the Court of Appeal, it was held that mere physical custody of the bill was not sufficient to become holder pursuant to the Act. Because the bank, due to discrepancies,

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[384] Carver, 5-022. In the case of consignee, it is immaterial whether the bill is delivered by original party or anyone else. See, *Standard Chartered Bank v Dorchester LNG Ltd (The Erin Schulte)* [2014] EWCA Civ 1382, [16]. See also, Aikens, 8.43 and *UCO Bank v Golden Shore* [2005] 2 SLR 735, affirmed [2005] SGCA 42 [Singapore].

[385] *Scottish v Newcastle* [2008] UKHL 11, [20].

[386] *The Erin Schulte* [2014] EWCA Civ 1382. For the detailed analysis of the case both for the first instance and the Court of Appeal, see P Todd, "Bank As Holder Under Carriage of Goods by Sea Act 1992" [2013] LMCLQ 275 and P Todd "Bank As Holder Under Carriage of Goods by Sea Act 1992" [2015] LMCLQ 155.

[387] See also, a Singaporean case where it was held that the element of fraud can affect the validity of any indorsement; *the Dolphina* [2011] SGHC 273; [2012] 1 Lloyd's Rep 304.

[388] The issue in relation to s. 2 (2) a is discussed below, see 2.1.3. Position of spent bills of lading.

at the time of initial tender, just held the bills in physical custody and for the purpose of the Act the endorser was the holder until the moment of settlement, the bank can only be said to have had requisite intent to be holder, following the settlement.[389]

The Erin Schulte may appear to qualify the concept of "acceptance" of bills of lading. At first glance, it might be seen that it complicates being holder under the Act. However, the case should be welcomed on the ground that a party cannot be forced to accept transfer of rights against his will.[390] *The Erin Schulte* proves that there might be a gap between the moment of having physical custody of the bill and the moment of requisite intention given which could be crucial to determine whether the rights are transferred as per s. 2. This gap could be crucial to determine whether the buyer could be imposed liability as per s. 3 (1). Assume that A delivered B an order or a bearer bill. As was the case in *the Erin Schulte*, due to some discrepancies, that bill was retained by B but B did not have any requisite intent to become holder. B, before becoming lawful holder as to s. 2, but during physical custody of the bill, somehow may have triggered s. 3 for dangerous goods liability. Would B be subject to liability under the 1992 Act? He would not have any liability imposed on him under s. 3 (1), since he would not be regarded as the person "in whom rights are vested" as per s. 2 at the moment that s. 3 was triggered. It was still A who was the lawful holder for the sake of the 1992 Act, due to lack of requisite intent on the part of B.

2.1.2. Separation of actual and physical possession

It is not uncommon in international trade for one party to hold the bill for another, particularly considering the complex transaction schemes involving multiple parties. For example, freight forwarders may often claim delivery of the goods from the carrier on behalf of buyers or insurers may obtain the bill of lading from the buyer to settle their claims. However, not every physical possessor of bills will always be considered as a holder under the Act.[391] Therefore, the question of whether the physical possessor of the bill or the buyer is the holder for the purpose of the Act could be vitally significant to ascertain whether the buyer can have liability imposed under s. 3 (1), while somebody else holds the bill of lading.

The first determining factor is the way the bill of lading is issued or endorsed. In *the Aliakmon*[392] which was a case under the 1855 Act, although the bill of lading named the buyer as consignee and it was in the physical custody of the buyer, no rights of suit were transferred to the buyer under the 1855 Act. This was because the buyer was held as agent of the seller in holding the bill due to further agreement between them.

[389] [2014] EWCA Civ 1382, [52].
[390] [2014] EWCA Civ 1382, [17].
[391] The Author has published a paper on this matter. See, A Gelgec "Separation of Actual and Physical Possesion on Bills of Lading under English Law" [2017] 4 Il Diritto Marittimo – Quaderni 1.
[392] [1986] AC 785.

The position can be different under the 1992 Act. In one subsequent House of Lords case, it was found that the buyer in *the Aliakmon* would have had rights of suit under the 1992 Act.[393] Some support for this can be found in *East West Corp*[394]. In this case the issue revolved around whether the seller/shipper had rights of suit under the 1992 Act. The bills were issued to the order of the consignee bank, which was regarded as the agent of the sellers for holding the bills. However, at the Court of Appeal, which approved the judgment at the first instance, it was held that the rights of suit under the bill of lading contract were transferred to the consignee bank, even though the bank held the bills as agent for the seller. Therefore the shipper/seller was held to have been divested of contractual rights pursuant to s. 2 (1).[395]

Unlike in the 1855 Act, it is therefore safe to assume that named consignee/buyer, even though holding the bill as agent for another party, would likely acquire rights of suit under the 1992 Act. It is submitted that the position is likely to be likely the same where the buyer is not a consignee but an endorsee. Therefore, since he would be regarded as holder under s. 2 (1), where the bill of lading is consigned or endorsed to the order of his own name, holding the bill as agent of another party would be unlikely to prevent the buyer from being subject to liability once s. 3 (1) is triggered.

The position however could be more complex where the bill of lading is a bearer one or endorsed in blank but held by someone else. This position was left untouched by the Court of Appeal in *East West Corp*.[396] The editors of *Carver on Bills of Lading* suggest in the case of a bearer bill or a bill endorsed in blank that it is the buyer who is the holder for the purpose of the Act, if the agent holding the bill acts in a purely ministerial capacity.[397] If not, it would be the agent who could be the holder for the purpose of the Act. However the position is less clear where the bearer bill or a bill endorsed in blank is handed over to an independent contractor of the buyer.[398] The editors further suggest that physical possession and actual possession can be divorced where the bill of lading is endorsed in blank or it is a bearer bill since in the Act, there is no definition of possession.[399] This argument was rejected by Mance J in *East West Corp* at the Court of Appeal.[400] However, Mance J's decision was on a bill that was directly consigned to the order of an agent. Indeed, actual and physical possession of the bill that is consigned or endorsed to the name of an agent would be unlikely to be divorced. However, it is submitted by the author that in the case of a bearer bill or a bill indorsed in blank the argument of the editors of *Carver* may survive in the light of a recent authority on this. In

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[393] *White v Jones* [1995] 2 AC 207, 265. See also, Benjamin, 18-144 and Carver 5-023.
[394] *East West Corp v DKBS* [2003] QB 1509.
[395] At the first instance, Thomas J in holding that indicated the underlying reason of this decision was the simplification of the transferring contractual rights by the 1992 Act. See, [2002] 2 Lloyd's Rep 182, [22]; the case was approved at the Court of Appeal; *East West Corp v DKBS* [2003] QB 1509. In the Law Commission's Report, which led the passing of this Act, such simplification was also suggested. See, paras 2.24-2.27.
[396] [2003] EWCA Civ 83, [16].
[397] Carver, 5-027
[398] Carver, 5-027. See also, Benjamin, 18-145.
[399] Carver, 5-027.
[400] *East West Corp* [2003] EWCA Civ 83.

the Erin Schulte, the bank retained the bill and it was the endorser not the bank who was the holder within the meaning of the Act until the moment of settlement, since the latter was not holding the bill with the intent of being holder within the meaning of the Act. That is to say, although it was the bank who had the physical possession of the bill, it was the endorser who had actual possession for the purpose of the 1992 Act.

In *the Erin Schulte*, at the first instance, Teare J observed that delivery "*is a bilateral act not a unilateral act*".[401] Also, the Court of Appeal gave importance to the requisite intent of both parties. Therefore, it is submitted that the transferor's requisite intent is as significant as the transferee's to ascertain who the actual holder is. As such, it does not appear to be easy to ascertain from the outset whether the holder for the purpose of the Act is the buyer or independent contractors who hold the bill in such cases.[402] In *the Ythan*, the facts are complex but relevant parts are as follows. The holder bank after the sinking of the vessel, delivered the bearer bills to the insurance brokers of the buyers. The bills were in the physical custody of the brokers to settle the claim of the buyers under the bills. Aikens J held that the brokers were holding the bills on behalf of the buyers and it was the buyer, not the brokers, who would be the holder for the purpose of the Act.[403] Although the insurers were independent contractors in the case, they had the physical possession of the bill only in order to settle the claim of the buyers. Under these circumstances, it can sometimes be difficult to find requisite intent on the part of independent contractors to become holders within the meaning of the Act, especially where personal endorsement is lacking. Therefore, both *the Ythan* and *the Erin Schulte* prove that separation of actual and physical possession appears to be possible under the 1992 Act. Accordingly, the buyers can be regarded as the holder for the purpose of the Act, even if somebody else has physical possession of the bills of lading.

A practical issue may arise at this point. It is not uncommon in trade practice for the buyer to hand over the bill to freight forwarders to claim delivery. Assume that the freight forwarder somehow triggers s. 3 (1) while claiming delivery on behalf of the buyer. Would the buyer have liability imposed on him under the Act? The answer to this question depends upon whether it is the freight forwarder or the buyer who is considered the holder for the purpose of the Act. Indeed, this assumption can be rebuttable depending on the facts of each case but where the freight forwarder holds a bill which is a bearer one or endorsed in blank, it would be *prima facie* difficult to find requisite intent on the part of the forwarder to become holder, while his only duty is to claim the delivery of the goods on behalf of the buyer. That is to say, the buyer can be regarded as holder under s. 2 (1) and accordingly have liability imposed as per s. 3 (1).

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[401] [2013] 2 Lloyd's Rep 388, 34.
[402] See *the Aramis* [1989] 1 Lloyd's Rep 213.
[403] *The Ythan* [2006] 1 Lloyd's Rep 457; [2005] EWHC 2399 (Comm).Eventually the buyers were not held the holder due to other reasons. See, 2.1.3. Position of spent bills of lading.

Would the position be different, if the bill was endorsed to the name of the forwarder? In the light of *East West Corp,* it would be likely as the freight forwarder who could be exposed to liability as per s. 3 (1), even if he acted as the agent of the buyer, since it would be him who became the holder for the Act.[404] However, the position is more evident where the bill is endorsed to the buyer's name but delivered to his agent forwarder.[405] It is therefore submitted that it would be the buyer who would attract the liability under s. 3 (1), since he would most likely preserve his position as the holder for the purpose of the Act.

2.1.3. Position of spent bills of lading

The 1992 Act enables transfer of rights of suit under spent bills pursuant to s. 2 (2) a where the possession of it;

> "no longer gives a right (as against the carrier) to possession of the goods to which the bill relates;
>
> "by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill;"[406]

The question of what is a spent bill can be answered in two contexts. The first prescribes the bills of lading as document of title, which gives constructive possession of the goods to its holder.[407] When it becomes spent, it ceases to operate as document of title. The second concerns only continuity of contractual rights of action. The 1992 Act only addresses the latter; transfer of contractual rights when the bill is spent. The most obvious example of a spent bill is the delivery of the goods against surrender of the bill of lading to a party entitled to it. S. 2 (2) a prescribes an exceptional situation to become the lawful holder of a spent bill. For instance, it is not uncommon in practice, especially in oil trade, that in string sales the ultimate buyer may not have obtained the bill of lading before arrival of the vessel carrying his goods.[408] In this case, the buyer may claim his goods from the carrier against production of an indemnity letter.[409] Once the buyer obtains the bills well after taking delivery of the

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[404] However the buyer would likely become liable alongside the agent. Albeit not strong, there might be some support. In *East West Corp*, at the first instance, Thomas J observed that even if the agent acquire rights of suit under the Act, those rights could be exercised by the principal too. [2002] EWHC 83; [2002] 2 Lloyd's Rep 182, 193. Carver also suggests the same, 5-023. In the current edition of Aikens, there is some support to this idea too. See Aikens, 8.40. Therefore, if the buyer exercises those rights under the Act alongside his agent, he would fall within s. 2 (1) and accordingly may fall within s. 3 too.

[405] See, Aikens, 8.40.

[406] Since s. 2 (2) a prescribes the exception, the rights of suit under spent bill is still transferred by s. 2 (1) rather than s. 2 (2) a.

[407] *Lickbarrow v Mason* (1787) 2 TR 63; (1793) 126 ER 511.

[408] See, *A/S Hansens-Tangens Rederi III v Total Transport Corp (The Sagona)* [1984] 1 Lloyd's Rep 194; *Mobil Shipping and Transportation Co v Shell Eastern Petroleum Ltd (The Mobil Courage)* [1987] 2 Lloyd's Rep 655.

[409] It is worth to note that the position of spent bills is a controversial matter under common Law. The case law predominantly shows that bills of lading become spent, as the goods are delivered to the person entitled to,

goods, the bills will have already been spent and normally give no rights to possession of the goods against the carrier. However, s. 2 (2) a enables such a buyer to obtain contractual rights against the carrier under the spent bill.

Although s. 2 (2) a deals with the exception when a party becomes the lawful holder of a spent bill, s. 5 (2) c interprets spent bill holder as; "a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;" The issue with this part is whether the buyer of a spent bill holder is potentially exposed to liability under s. 3 (1). Therefore, it is important to examine the scope of s. 5 (2) c, before analyzing the operation of s. 2 (2) a.

a) The scope of s. 5 (2) c

S. 5 (2) c expands the meaning of lawful holder to spent bill holders who would have been regarded holders either under sub-sections (a) or (b), if they had obtained the bills at a time when possession of the bill would have given the right to possession of the goods to which the bill related. However s. 5 (2) c does not only cover the typical situation described above, where the goods are delivered without production of the bill to someone entitled who later obtained the bill. The scope of this sub-section is broader than this.

In *the Ythan*, the goods were lost at sea just after the start of the voyage. The court sought to determine whether the loss of goods rendered the bill spent pursuant to s. 5 (2) c. Aikens J answered this question in the affirmative and indicated that there could not be any contractual rights under the bills of lading regarding goods that did not exist. In holding that, Aikens J referred to the Law Commissions report on the 1992 Act which provided some direct assistance in relation to the scope of the sub-section; "*The words "possession of the bill no longer gives a right ... to possession of the goods" cover, inter alia, the case where delivery of the goods has been made and also the case where*

notwithstanding production of the bill to the carrier. See, *Barber v Meyerstein* (1870) LR 4 HL 317, 330; *The Delfini* [1990] 1 Lloyd's Rep 252, 269. The bills which were marked as "accomplished" by the carrier were also held as spent for the purpose of the Act. See *The David Agmashenebeli* [2002] EWHC 104; [2003] 1 Lloyd's Rep 92; [2002] 2 All ER 806, [204]. There are also counter arguments on the issue indicating that the bill of lading will not be spent until the goods are delivered against the production of the bill to the person entitled to. Under the 1992 Act, although in *East West Corp* at first instance, it was firstly held in favor of the former view, recently in the Court of Appeal, Diamond QC's view from *the Future Express* is freshened again by Moor-Bick LJ in *the Erin Schulte*. The issue is still open to argue on either way. See, Diamond QC's decision at first instance in *the Future Express* [1992] 2 Lloyd's Rep 79, 96, 100. The case was affirmed on other grounds [1993] 2 Lloyd's Rep 542. See also, *the Delfini* at first instance [1988] 2 Lloyd's Rep 599. See, *East West Corp* [2002] 2 Lloyd's Rep 182, [35], [41]. See, discussions also at the Court of Appeal [2003] QB 1509, [19]. See also, *The Erin Schulte* [2014] EWCA Civ 1382, [53]. See also, *the Ythan* [2006] 1 Lloyd's Rep 457, [67], [71].

the goods are destroyed."[410] Therefore, for the purpose of the Act, pursuant to s. 5 (2) c, a spent bill also covers situations where the possession of the bill would give no contractual rights to possession for goods that are lost.

In *the Ythan*, the buyers nevertheless were not held as the holder of the bill as per s. 5 (2) c. The cargo of "Mettalic HBI Fines" was sold on f.o.b. terms but exploded during the course of the voyage due to the dangerous content of the cargo. The payment was under an irrevocable letter of credit. Before the explosion, "to order" bills indicating the sellers as the shipper were endorsed in blank by the buyer to the seller's bank. After the explosion occurred, the bills were held by the bank until the payment was made by the buyer. Following the payment, the buyer instructed the bank to deliver the bills to the buyer's insurance brokers so that they could settle the claim from the carrier's P & I Club. The carrier claimed damages arising out of the dangerous cargo from the buyers on the ground that they triggered s. 3 (1). However preliminary issue before the court was whether the buyer would fall within s. 5 (2) b or c, since the buyer should have been the person "in whom rights are vested" and liability imposed under the Act.

As said above, Aikens J held that the bills covering the goods that were lost were regarded as spent for the purpose of the Act. The case, therefore, fell within s. 5 (2) c. First of all, the learned judge preliminarily found that "transaction" in s. 5 (2) c only refers to the physical process, namely transfer of the bill.[411] He further introduced a qualification to s. 5 (2) c and indicated that the transaction of the bill from the bank to the buyer's insurers would not have occurred in the "*normal course of trading*". [412] In holding this, the learned judge opined that if the goods had not been lost, the bill would have stayed at the bank, it would not have been transferred to the broker, and accordingly the buyer would not have become the holder pursuant to s. 5 (2) b. On this ground, Aikens J eventually decided that the buyer was not the holder pursuant to s. 5 (2) c given the requirement of "*normal course of trading*", even though he said that their insurers were holding the bills on behalf of the buyers.

With due respect, the requirement of "*normal course of trading*"[413] may cause some problematic results for both commercial practice and law. It is difficult to understand why such a transaction would not be regarded as normal in trade practice. Under c.i.f. contracts, insurance contracts are an inseparable part of them. Under c & f and f.o.b. contracts, although there is normally no insurance contract sold, the buyer either himself or through his agent may conclude his own

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[410] *The Ythan* [2005] EWHC 2399, [67]. See also, the Law Commission Report, 64-65. Aikens J also benefited from the speech of Lord Hobhouse in *the Berge Sisar* where his Lordship held that the Act deals with only the contractual rights; [2005] EWHC 2399. [70].
[411] *The Ythan* [2005] EWHC 2399, [66].
[412] Ibid, [80].
[413] Such requirement is criticized by the learned commentators; Carver, 5-021; Benjamin, 18-144. See also, S Baughen "Sue and be Sued? Dangerous Cargo and the Claimant's Dilemma" [2006] 5(4) STLI 14; F Reynolds QC, "Bills of Lading and Voyage Charters" in R Thomas (ed), *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009), 210, 211.

insurance contract, as was the case in *the Ythan*. Although such explosions or accidents are not expected to happen in normal course of trade, transactions against such risks should have been held to be normal in the course of trading, since allocating such insurable risks is done frequently in practice. If such courses were not regarded as normal in trade, that would be a denial of the commercial reality and practice. Furthermore, if such a qualification is correct, any transaction could fall outside the "normal course of trading", since what is normal in trade can be mutable from one practice to another. For example, any transaction occurring after loss of goods would indeed differ from what would normally occur, if the goods were not lost. Accordingly, they may not be regarded in the normal course of trading. Hence, if that is the case, s. 5 (2) c would unlikely apply to cases where the goods are lost. However, legislators clearly envisaged such transactions and enabled holders of a spent bill to become holders even in the case of loss of goods.

In terms of law, the operation of "normal course of trading" is also problematic under the 1992 Act as well. First of all, nothing in the 1992 Act indicates that such qualification is required to become holder, nor is there any comment or recommendation on this in the Law Commission report. If s. 5 (2) c is qualified by this requirement, the operation of transfer of rights may cause some problems. The contractual rights under the 1992 Act are only transferred, the do not vanish. S. 2 (5) clearly illustrates that transfer of rights operates only by way of divestment. In *the Ythan*, first it was the bank that was holder for the purpose of the Act. However, once it lost pledge over the bills upon payment from the buyer, the bank delivered the bill to the buyer's brokers. Accordingly, Aikens J held that the bank was no longer the lawful holder from the moment of delivery of the bill to the brokers.[414] Therefore, contractual rights should have transferred from the bank to another party, since the bank was held as divested of his rights and pursuant to s. 2 (5), divestment only operates by transfer of rights to a new holder. However, the buyer was not held as holder due to the requirement of normal course of trading. The buyer's insurers would not have been the holder either, because they retained the bill as agent of the buyer as Aikens J found.[415] Therefore, due to the requirement of normal course of trading, no party was regarded as holder for the purpose of the Act in the case, although technically there should have been someone pursuant to s. 2 (5).[416] Therefore, on the grounds discussed above, it is ultimately on the issue submitted that such a requirement should not be welcomed for square application of s. 5 (2) c on spent bills.[417]

b) The scope of s. 2 (2) a

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[414] *The Ythan* [2005] EWHC 2399, [77].
[415] Ibid, [80].
[416] See, Baughen "Sue and be Sued? Dangerous Cargo and the Claimant's Dilemma" [2006] 5(4) STLI 14.
[417] Aikens J in current edition of his book says that if the transaction would have happened before the goods were lost, the buyer would have become holder pursuant to s. 5 (2) b, although in the judgment he said the exact opposite. See respectively, Aikens, 8.53, *the Ythan* [2005] EWHC 2399, [80].

As said above, the Act normally does not transfer contractual rights under spent bills save for exceptions stipulated under s. 2 (2); "(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill."[418]

When looking into the literal meaning of the sub-section, it was already said above that "transaction" amounts to a physical process, which is the transfer of the bill.[419] On the other hand, "in pursuance of" provides a causal link between "transaction" and "contractual and other arrangements"[420].[421] Moreover, according to the wording, to become a holder, those "contractual or other arrangements" for transfer of the bill must have been concluded, before the bill becomes spent.[422] Put differently, if those arrangements for transfer of the bill are finalised after the bill becomes spent, s. 2 (2) a will not apply.[423]

In *the Ythan*, Aikens J further held *obiter* that even if the buyer had fallen within s. 5 (2) c, he would not have had rights of suit pursuant to s. 2 (2) a. In holding that, the learned judged looked for the "*reason or cause*" of the transfer of the bills from the bank to the buyer's insurance brokers due to the fact that there must be a link ("in pursuance of") between transfer and contractual or other arrangements.[424] He applied "*the immediate reason and proximate cause*" test to find the reason for the transaction, and accordingly found that the "*ex gratia*" payment regarding the loss of the cargo was the immediate reason and proximate cause of the transfer.[425] The proposed or actual compromise agreement for this payment was completed well after the loss of the goods. Therefore, the learned judge held *obiter* that the buyer would not have fallen within s. 2 (2) a either, since transfer of the bill was made in pursuance of an agreement that was completed well after the bill became spent for the purpose of the Act.[426]

However, recently in *the Erin Schulte*, Aikens J's narrow test was not followed by the court of Appeal. The facts of the case were cited above but there is no harm in repeating the relevant facts. A quantity of gasoil was sold which was on board *Erin Schulte*. Since the payment was under the letter

[418] S. 2 (2) b is not directly related to subject of this chapter.
[419] Although Aikens J held this decision on "transaction" from s. 5 (2) c, this should also cover "transaction" from s. 2 (2) a.
[420] There is no definition of "contractual or other arrangements in the Act. But the editors of Carver however suggests that "transaction" can even occur in pursuance of a gift; Carver 5-067.
[421] *The Ythan* [2005] EWHC 2399; *the Pace* [2010] 1 Lloyd's Rep 183.
[422] The transaction has to be "called for" by the "contractual or other arrangements"; *the David Agmashenebeli* [2002] EWHC 104; [2003] 1 Lloyd's Rep 92, 118. But for a broader view where it was held that s. 2 (2) does not require a prior contractual entitlement see; *the Pace* [2010] 1 Lloyd's Rep 183, [48].
[423] It would unlikely cover the situations where the transfer of the bill was made in pursuance of the "contractual and other arrangements" which were essentially varied and regarded as new contract after the bill of lading becomes spent for the purpose of the Act even though their original versions were made before; *the David Agmashenebeli* [2002] EWHC 104; [2003] 1 Lloyd's Rep 92; [2002] 2 All ER 806, [206].
[424] *The Ythan* [2005] EWHC 2399, [84].
[425] This test was followed later by Teare J in *the Pace*, although he indicated that s. 2 (2) a should not be confined to cases only where there is particular contractual entitlement; *the Pace* [2010] 1 Lloyd's Rep 183, [48].
[426] Ibid, [84], [85].

of credit, the seller presented the documents to the confirming bank. The bank did not honour the letter of credit due to discrepancies but did not return the bill either. In fact, the bank retained it. Before the further settlement of the issue between the seller and bank, the goods were delivered to the buyer pursuant to the instruction of the seller. The bank was held holder of the bill not at the time of acceptance of the physical custody of it but upon this further settlement, which was made long after the delivery of the goods.[427] The bank sued the carrier for misdelivery of the goods. As such, the issue revolved around whether the bank had rights of suit under the 1992 Act by virtue of s. 2 (2) a.

At first instance, Teare J applied a different test, which was broader than Aikens J's. The test was the*"real and effective cause"* of the transaction and accordingly he found that the relevant "contractual or other arrangement" which was the cause of the transfer of the bill was the letter of credit, not the further settlement between the seller and bank.[428] This decision was upheld at the Court of Appeal but on much wider grounds. Moore-Bick LJ, did not think that *"real and effective cause"* provided any assistance on the matter and accordingly rejected its application. Instead, the learned judge preferred *"...simply to identify the arrangement, if any, pursuant to which the transfer was made."*[429]

In *the Ythan*, the buyer was sued by the carrier and the issue was whether the buyer could be held liable under the 1992 Act, whilst in *the Erin Schulte* it was the carrier who was sued by the bank. Perhaps Aikens J applied this narrow test to avoid the buyer's dangerous goods liability[430] but it is submitted that s. 2 (2) a should not be applied by unveiling underlying reasons to trigger it. The author opines that the test should not vary on whether the holder is to sue or to be sued. Furthermore, nothing in the Act or the Law Commission report indicates that s. 2 (2) a should apply more restrictedly to cases where the potential lawful holder can subsequently have liability imposed on him under the 1992 Act than where it would be him suing the carrier.

It is submitted that this broader approach is preferable to the narrow test of Aikens J in *the Ythan*.[431] Teare J in *the Pace* indicated that the underlying policy of s. 2 (2) a is to avoid trafficking in bills of lading after the bill becomes spent.[432] However the test in *the Ythan* does not provide any way

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[427] This is discussed above. See, 2.1.2. Separation of actual and physical possession.
[428] [2013] 2 Lloyd's Rep 338, [68], [68], [74].
[429] [2014] EWCA Civ 1382, [56]; [2015] 1 Lloyd's Rep 97, [56]. Moor-Bick J indicated that the bill did not become spent where the goods are delivered to the party entitled to without production of bill of lading, although neither party wanted to depart from this concession in the case. Although at first glance this argument would assist the holders of the bills to become holder without proving to fall within s.2 (2) a. However this argument on spent bill would reduce the effect of s. 2 (2) since the bill will not become spent except for the fact that the goods are only delivered against production of the bill to the party entitled to. With due respect, within the purpose of s. 2 (2) which is to avoid trafficking of the bills of lading, the bill of lading should become spent for the purpose of the Act when the goods are delivered to the party entitled to.
[430] See, Carver, 5-025.
[431] This narrow test was criticized by several learned commentators, see; Baughen "Sue and be Sued? Dangerous Cargo and the Claimant's Dilemma" [2006] 5(4) STLI 14; Todd "Bank As Holder Under Carriage of Goods by Sea Act 1992" [2013] LMCLQ 275 and Todd "Bank As Holder Under Carriage of Goods by Sea Act 1992" [2015] LMCLQ 155.
[432] *The Pace* [2010] 1 Lloyd's Rep 183, [48]. See also, the Law Commission report, 2.43.

to prevent of trafficking in bills but on the contrary restricts the rights of action of spent bill holders provided by the Act. Secondly, it is thought that "other arrangements" were wisely attached next to "any contractual or" in s. 2 (2) a in order to interpret broadly the reason for the transfer of the bill. On this grounds, *the Erin Schulte* provides a standard and fair application of s. 2 (2) a. In any case, Aikens J's decision was only *obiter* on the test of *"immediate reason and proximate cause"*. That is to say, his narrow test is therefore unlikely to stand in the light of the Court of Appeal's decision on wider test for s. 2 (2) a which was part of the *ratio* in the judgment.

A practical question arises at this point; following the judgment in *the Erin Schulte*, would the buyers in *the Ythan* have been transferred rights, and accordingly would they have been held potentially liable for the dangerous goods? In the light of the wider test of *the Erin Schulte*, the buyer in *the Ythan* would have been held the lawful holder in pursuant to s. 2 (2) a. This is because the compromise agreement (open cargo cover) between the buyer and underwriters which was completed well before the loss of the goods, would likely have been held as the arrangement which affected the transaction as to the wider test of *the Erin Schulte*.[433] Accordingly, they would potentially have had liability imposed on them, if they had triggered s. 3 (1). Following the wider test of *the Erin Schulte,* the buyer who is the spent bill holder should be more vulnerable, once he triggers the liability as per s. 3 (1) and the narrow test of *the Ythan* may not lend a helping hand to buyers to avoid liability.

2.1.4. "lawful" holder

S. 2 (1) prescribes that a person can only be a "lawful" holder in order to acquire rights of suit under the contract of carriage. As per s. 5 (2), a holder becomes a "lawful" holder, only "wherever he has become the holder of the bill in good faith."[434] Despite the fact that lawful is only depicted in being good faith, there is no further definition of good faith given in the Act.[435] Nor is there any definition given in the Law Commission report, except for the examples of who cannot become a lawful holder as a result of some actions such as theft, fraud and violence.[436]

There is limited interpretation by case law on the requirement of "good faith" to become a lawful holder; its only examination being in *the Aegean Sea*[437]. Thomas J in the case did not consider that the broad concept of good faith would be the correct interpretation for the purpose of the Act.

[433] In *the Ythan*, Aikens J had anticipated that wider test too; *"Whilst I accept that it could be argued that the compromise agreement between Primetrade and underwriters and the transfer of the bills to Marsh arose out of the open cargo cover that existed before the cargo was lost, in my view the immediate reason and proximate cause of the transfer of the bills to Marsh was the actual or proposed compromise agreement itself.",* [2005] 2 CLC 911, [85]. See also, the current edition of his book where he accepts and embraces the wider approach of *the Erin Schulte*, Aikens, 8.85.

[434] This is also consistent with the approach taken under the Sale of Goods Act 1979, s. 61 (3); "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly…"

[435] But see the Sale of Goods Act 1979 s. 62 (2) in which it states "a thing is deemed to be done in good faith … when it is done honestly, whether it be done negligently or not."

[436] The Law Commission report, 2.21.

[437] [1998] 2 Lloyd's Rep 39.

Conversely, he opined that "good faith" simply signifies honest conduct not a broader concept.[438] The relevant time to evaluate conduct of the party is at the time of becoming holder. After that moment, any subsequent conduct of the holder, whether it is honest or not, will not alter his position under the Act.[439] Although, "good faith" may not appear to be an important requirement, in terms of allocation and shifting back of the dangerous goods liability to intermediate holders, it may play a significant role. This is examined below.[440]

2.2. Sea waybills

As is the case in bills of lading, when sea waybills are used, transfer of rights is the preliminary condition to impose liabilities on the buyer as per s. 3. Sea waybills may often be used instead of bills of lading under c.i.f. or f.o.b. sales - commonly in bulk trades -, when the buyer has no intention to re-sell the goods during transit. Unlike bills of lading, it only names a party as consignee omitting "to order" or something indicating similar.[441] Pursuant to s. 1 (3), a sea waybill is a document "which is not a bill of lading", but which is considered, both a receipt of the goods and evidence of the contract[442].[443] That is to say, it is not negotiable like order or bearer bills.[444]

Pursuant to s. 2 (1) b, rights of suit are transferred to the buyer "to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract".[445] Unlike for bills of lading, the concept of "holder" plays no part in determining the transfer of rights under sea waybills. The buyer is transferred rights of suit, as soon as the sea waybill is issued.[446] The buyer therefore does not necessarily obtain the sea waybill from the shipper in order to have rights of suit. Accordingly, the named buyer as consignee in the sea waybill is entitled to delivery of the goods only upon proof of identity.[447] On the other hand, although straight bills are regarded as a bill of

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[438] It does not cover broader concept like "the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned". See [1998] CLC 1090; [1998] 2 Lloyd's Rep 39, 60.

[439] Aikens, 8.59.

[440] See, 5. Cessation of the liability.

[441] For an example of this, see the Maersk Line "Non-negotiable sea waybill". Alternatively, it may expressly state "not to order". For examples, see, COMBICONWAYBILL and LINEWAYBILL. Consignee does not have to be named in the bill. It could be identified by description as well as naming. S. 5 (3).

[442] S. 1 (3) a.

[443] S. 1 (1) b. before the 1992 Act, the 1855 Act would unlikely have applied to sea waybills. However the doctrine of the implied contract (*Brand v Liverpool contract*) would be open to receiver if any.

[444] It lacks of "to order" or similar words indicating transferability of the documents. See, *the Chitral* [2000] 1 Lloyd's Rep 529, where instead of "to order" in the consignee box, there was "if order state notify party" and any notify party was not named. Therefore the bill was held as sea waybill.

[445] S. 2 (1) b.

[446] Unlike the bills of lading, as to s. 2 (5), the shipper of sea waybill is not divested of rights of suit. Both shipper and consignee will have rights of suit against the carrier.

[447] Delivery is to be made upon acceptable proof of identity. See, The Law Commission report, 5.7. Nevertheless although straight bills are treated as sea waybills for the purpose of the Act, there is some dicta indicating that they should be produced to obtain the delivery at common law; *the Rafaela S* [2005] 2 AC 423.

lading or a similar document title under the Hague-Visby Rules,[448] since they are "incapable of transfer… by indorsement", they are considered as sea waybills for the purpose of the 1992 Act[449].[450] However, in contrast to their position under the 1992 Act, they may require to be presented for delivery of the goods under the common law.[451] This may give rise to some difficulties in terms of satisfying the conditions required by s. 3 (1) to impose liability, which will be discussed below.[452]

Unlike the rights of the shipper of bills of lading, the rights of the sea waybill shipper are preserved pursuant to s. 2 (5) including his right to redirect the goods under a new contract of carriage, where the rights have been transferred to the buyer/consignee under s. 2 (1) b.[453] Preservation of the right to redirect the goods of the original party may also give rise to difficulties in terms of divestment of the liability which will be discussed below as well.[454]

2.3. Delivery orders

The third and last type of documents that the Act applies to is delivery orders.[455] Where the seller ships the goods in bulk and, for the entire goods, only obtains one bill of lading from the carrier, and then sells them partially to several buyers, he does not tender the bill of lading to the buyers but delivery orders entitling them to delivery of a relevant parcel of the goods from the carrier.[456]

Delivery orders are defined in the Act as "... an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person."[457] The

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[448] *The Rafaela S* [2005] 2 AC 423, [20], [26], [46], [79].
[449] The Law Commission report, 5.7. However in *the Rafaela S* it was held that straight bills are regarded as "bill or lading or similar document of title" for the purpose of the Hague-Visby Rules and the COGSA 1971; [2005] 2 AC 423, [22] and [50] (HL).
[450] However unless otherwise stated in the contract, the shipper retains his right to redirect to the goods under sea waybills. Therefore he may instruct the carrier to deliver a party rather than the named consignee. See the Law Commission Report, para. 5.13, 5.25. See also, *AP Moller- Maersk A/S v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All ER 1159 (Comm). From that moment the initial consignee lost his rights of suit as to s. 2 (5) b, since the subsequent consignee is transferred rights of suit under the Act. Exception of this rule is straight bills held by the consignee. Although straight bills are treated as sea waybills under the 1992 Act, the buyers, in most of the situations would want to hold the straight bills in order to obtain delivery of the goods from the carrier. Once the buyer has the possession of the straight bills, the shipper loses his rights to redirect the goods. See, Scrutton, 3-024.
[451] *The Rafaela S* [2005] 2 AC 423, [20], [45].
[452] See, 4. Imposition of the liability.
[453] *AP Moller-Maersk A/S (trading as Maersk Line) v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All ER 1159. See also, the Law Commission report, 5.23.
[454] See, 5. Cessation of the liability.
[455] S. 1 (4).
[456] *Colin & Shields v Weddel & Co Ltd* [1952] 2 Lloyd's Rep 9, 19; *Margarine Union GmbH* [1967] 2 Lloyd's Rep 315, 322; *Siat di dal Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470, 493. Delivery orders' covered by the 1992 Act is consistent with trade practice, since under c.i.f. sales, delivery orders are acceptable documents if the sale contract explicitly stipulates so. Merchant delivery orders were held as not acceptable. See *the Julia* [1949] AC 293. See also, *Cremer v General Carriers SA (The Dona Mari)* [1974] 1 WLR 341.
[457] S. 1 (4) b. It is negatively defined by s. 1 (4) in which states it is neither bill of lading nor sea waybill. For a detailed definition, which is consistent with the common law definition of delivery orders, See also, the Law Commission report, para. 5.26.

definition evidently leaves merchant orders, which are issued by the bill of lading holder outside the Act,[458] since undertaking must be given only by the carrier.[459] Similar to sea waybills, the rights are transferred to the named person in the order, as soon as it is issued by the carrier as per s. 2 (1) c.[460] The buyer acquires the rights only in relation to the goods that the order relates to.[461] The party identified in the order is *prima facie* entitled to delivery upon proof of identity.[462] Similar to sea waybills, rights of the shipper or holders of the bills of lading will be preserved by s. 2 (5), when rights are transferred to the person identified in the delivery order. It is also possible that pursuant to s. 5 (3), the person identified in the order to whom delivery is to be made can be changed after the issue of the order. These may give rise to difficulties in terms of imposition and divestment of the liability, which will be discussed below.[463]

3. Is the dangerous goods liability actually transmissible?

Before examining how the mechanism of s. 3 (1) operates to impose liabilities onto the transferee/buyer, the most significant question is whether the wording of s. 3 (1) - "subject to the same liabilities under that contract as if he had been a party to that contract"[464] - is wide enough to embrace transfer of the dangerous goods liability to the buyer/transferee. Although the matter has not been decisively settled under English law as of yet, it is thought by the author that the liability is transmissible from the seller/shipper to the buyer/transferee. It is also noteworthy that there is no unanimity among the learned commentators on the matter.[465]

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[458] See, the Law Commission report, 5.30. Tort actions or doctrine of implied contract *(Brand v Liverpool contract)* are still open to buyer of merchant delivery orders.

[459] Or it should be attorned to by the carrier. Difficulties may arise in relation to the identity of the carrier. The Act does not define who the carrier is. Where the bill of lading is shipowner's bill (in which the shipowner is the carrier), the undertaking has to be given by the shipowner. The charterer's undertaking will not suffice. See, *the Rewia* [1991] 2 Lloyd's Rep 69 and *the Ines* [1995] 2 Lloyd's Rep 144. On the other hand, if the bill of lading is charterer's bill (the charterer is regarded as the carrier), it is plausible to argue that the undertaking given by either charterer or shipowner will suffice since the shipowner can be regarded as non-contractual carrier under the bailment relationship. See, *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715. The editors of Benjamin and Carver suggest that too. See, Benjamin, 18-223 and Carver, 5-092. In contrast, see, Gaskell, 4.73.

[460] Likewise sea waybills, the identification by description will suffice. See s. 5 (3).

[461] S. 2 (3) b. See also, 5 (4).

[462] This rule is subject to s. 2 (3) a by which rights "shall be so vested subject to the terms of the order." By virtue of s. 5 (3), Delivery orders can be made out "to order" or "bearer" and when they are issued in that way, the terms of the order may prescribe that the carrier will deliver the goods only against production of the order. If that is the case, the rights can only be acquired, as is the case in bills of lading, when the person identified in the order has possession of the order. See, Benjamin, 18-217.

[463] See, 5. Cessation of the liability.

[464] S. 3 (1) of the 1992 Act.

[465] For those who favour the liability is transmissible under the Act see, Scrutton, 3-035, 14-097; Aikens, 8.97, 10.365; J Cooke, J Kimball et. al, *Voyage Charters* (4th edn, Informa 2014) 18.100, (hereinafter Cooke). Despite their argument on restricted application of s. 3 (1), see also Carver, 5-109; Benjamin, 18-175. See also, F Reynolds "The Carriage of Goods by Sea Act 1992 Put to the Test – the Berge Sisar" [1999] LMCLQ 161. For

3.1. Case law and the influence of the Law Commission report

To start with the case law under the 1855 Act, there was no case decided on actual transfer of the dangerous goods liability to the transferee, neither was there a case indicating *vice versa*.[466] This result could be regarded as normal, because the first case establishing the strict liability of the shipper in relation to dangerous goods was reported in 1856, which was after the enactment of the 1855 Act.[467] That is to say, it was technically impossible for legislators of the 1855 Act to anticipate the transfer of this liability, well before the establishment of such liability. Therefore, the silence of the case law on the matter can be considered reasonable. However, although there is no authority on actual transfer, in the House of Lords (*the Giannis NK*) it was held *obiter* that all the shipper's liabilities, including for the shipment of dangerous goods, was transmissible under the 1855 Act.[468] Albeit *obiter*, given the lack of direct authority on the point indicating otherwise, it is submitted that this affirmation by the House of Lords renders it a predominant authority on the matter.

One may argue that this decision should not be followed under the 1992 Act, since the 1855 Act was superseded by it. However, if the law remained unchanged, the courts would likely follow the authorities held under the 1855 Act. For instance, in *the Berge Sisar* (a 1992 Act case), both the Court of Appeal and the House of Lords affirmatively relied on a case heard in 1862 on the matter of divestment of incurred liabilities under the 1855 Act.[469] Therefore, given that the relevant law is preserved under the 1992 Act, there is no harm in relying on an authority decided under the 1855 Act.

Both under the 1855 and 1992 Acts, the relevant wording is the same and the transferee becomes "subject to the same liabilities".[470] In fact, in the Law Commission report, which led to the passing of the new Act without any amendments, following detailed consideration on the arguments for and against subjecting the transferee to the liability of dangerous goods, it was eventually suggested that transfer of pre-shipment liabilities including dangerous goods should be transferred by the Act;

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the opposite view see, W Tetley, *Marine Cargo Claims* (4th edn, Cowansville 2007), 460 (hereinafter Tetley); Gaskell, 137-139; MG Bridge, *The International Sale of Goods* (3rd edn, Oxford 2013), 8.36 (hereinafter Bridge); S Baughen and N Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3; S Baughen "Obligations of the Shipper to the Carrier" [2008] JIML 555; S Baughen, "Charterparty Bills of Lading Cargo Interests Liabilities to the Shipowner" in R. Thomas (ed), The Evolving Law and Pratice of Voyage Charterparties (Informa 2009), 243-246, (hereinafter Baughen Charterparty Bills of Lading); GH Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344.

[466] *Ministry of Food v Lamport & Holt Line Ltd* [1952] 2 Lloyd's Rep 371, 382. Where the judge indicated that it was never decided under the 1855 Act that whether all liabilities of the original party including pre-shipment ones was transferred under the Act.

[467] *Brass v Maitland* (1856) 6 E & B 470.

[468] *The Giannis NK* [1998] 1 Lloyd's 337, 343, 344, 349.

[469] *Smurthwaite v Wilkins* (1862) 11 CB (NS) 842. It was decided on outdated policy of the 1855 Act in which the rights and liabilities would be transferred together, while the position is divorced under the 1992 Act. Discussed in detail below. See, 5. Cessation of the liability.

[470] The 1855 Act, s. 1 and the 1992 Act, s. 3 (1).

"*It was also suggested to us that special provision should be made so that the consignee or indorsee should never be liable in respect of loss or damage caused by the shipper's breach of warranty in respect of the shipment of dangerous cargo. This is said to be a particularly unfair example of a retrospective liability in respect of something for which the consignee/indorsee is not responsible. However, we have decided against such a special provision. We do not think that liability in respect of dangerous goods is necessarily more unfair than liability in respect of a range of other matters over which the holder of the bill of lading has no control and for which he is not responsible, as for instance liability for loadport demurrage and dead freight. Also, it may be unfair to exempt the indorsee from dangerous goods' liability in those cases where he may have been the prime mover behind the shipment. Furthermore, it is unfair that the carrier should be denied redress against the indorsee of the bill of lading who seeks to take the benefit of the contract of carriage without the corresponding burdens.*"[471]

That being the case, the policy of the new Act evidently favours the transfer of dangerous goods liability. That is to say, the Law Commission reports' policy does not contradict the *obiter* of *the Giannis NK,* but strengthens the position of the case as the relevant authority. [472]

On the other hand, one may argue that the Law Commission report may not be influential on the courts to decide in favour of their recommendation. It is believed by the author that their suggestions cannot be overlooked, since the report led the passing of the 1992 Act with no amendments. The report itself is not only a perfect aid to apply and interpret the Act accurately, but also establishes the new policy of the Act. The case law also appears to support this argument. As of yet, all the cases, which referred to the Report, not only called it an aid to apply the Act accurately, but also affirmatively followed its recommendations.[473]

More significantly, considering the transfer of dangerous goods liability, the impact of the report can be clearly seen from the cases relevant to the matter. Since the 1992 Act came into force, only three cases (*the Berge Sisar, the Aegean Sea and the Ythan*) have dealt with the question whether dangerous goods liability is transmissible under the Act.[474] In none of these cases was this liability

[471] The Law Commission report, 3.22. For all discussion on the point see also, 3.15 – 3.22

[472] *The Giannis NK* was reported in 1998, which was well after the enactment of the 1992 Act. That is to say, the House of Lords were well aware of this. They might have opined *vice versa* but in fact opined in the line of the policy of the 1992 Act.

[473] *The Berge Sisar* [1998] QB 863, 877, 879, 880, 882, 883 (CA); [2001] UKHL 17, [28], [39] (HL). In *the Ythan*, Aikens J called the Report in the aid to determine the scope of s. 5 2 (c). The learned judge explicitly followed the recommendations of the Report and held accordingly; [2005] EWHC 2399; [2006] 1 All ER 367, [67]-[71]. See above, 2.1.3. Also for the influence of other similar reports on the Courts see, *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85; *Pepper v Hart* [1993] 1 All ER 42.

[474] *The Aegean Sea* [1998] 2 Lloyd's Rep 39; *the Berge Sisar* [2001] UKHL 17; *the Ythan* [2005] EWHC 2399; [2006] 1 All ER 367. Aikens J who was the judge in *the Ythan*, in the current edition of his own book, he explicitly indicated that in *the Ythan* he considered this liability is transferred under the Act. See Aikens, 8.97, fn 134.

actually transferred to the transferee/buyer. However, this was because the conditions of s. 3 (1) were not satisfied in each case. However, in all those cases, it was held or at least assumed that this liability is transmissible under s. 3 (1).[475] Particularly in *the Berge Sisar,* where the Act was reviewed in its entirety, the House of Lords when considering the scope of s. 3 (1), explicitly opined that this liability is transmissible;

> *"The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are."*[476]

The 1992 Act has roughly been in force for a quarter of a century. The transferability of this liability was even assumed at the highest level of authority, the House of Lords. Yet not even one case has dealt with this matter closely which indicates that this liability should not be transferred under the 1992 Act. Conversely, all the relevant cases affirmed the transferability as recommended in the report. Given the lack of a counter-authority on the matter indicating otherwise, it is therefore safe to assume, with unanimous approval favouring the transfer in the case law, including the House of Lords decisions in *the Giannis NK* and *the Berge Sisar* along with *the Ythan* and *the Aegean Sea,* that the predominant authority under English law suggests that this liability is transmissible.

3.2. Transferability of the liability under the Hague/Hague-Visby Rules

There are also counter-arguments that the wording in s. 3 (1) only entails that the transferee becomes subject to some liabilities of the shipper but not the ones explicitly attached to "the shipper". The argument is that s. 3 (1) may not prescribe that the transferee becomes subject to liability, as if he had been the original party to the contract, but rather as if he had concluded that contract as an additional party who only becomes subject to liabilities not explicitly attached to the shipper.[477]

In *the Aegean Sea*, it was held *obiter* by Thomas J that the term "shipper" both in Art III r 5 and Art IV r 3 under the Rules meant solely the shipper, not on whom liabilities are imposed.[478] Additionally, in the 20th edition of *Scrutton,* it was argued that "the shipper" in Art III r 5 could only

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[475] *The Aegean Sea* [1998] 2 Lloyd's Rep 39; *the Berge Sisar* [2001] UKHL 17; *the Ythan* [2005] EWHC 2399; [2006] 1 All ER 367.

[476] [2001] UKHL 17, [33]. Since Lord Hobhouse does not specifically mention the common law implied duty or the Hague/ Hague-Visby liability, it is submitted that both liabilities can be transferred under the Act. In *Fowler v Knoop* (1878) 4 QBD 299, the consignee was held liable for delays at discharge as a result of an breach of an implied duty of the shipper. That is to say, the liabilities resulted from the Common law implied duties which are imposed on the shipper can be transferred under the 92 Act too. Baughen also thinks that the common law obligation is transferred. See, Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 11.

[477] Baughen Charterpary Bills of Lading, 11.65.

[478] See, *the Aegean Sea* [1998] 2 Lloyd's Rep 39, 69. See also, *the Filikos* [1983] 1 Lloyd's Rep 9.

be deemed to apply solely to the shipper, not any other third party, and hence any "shipper" appearing in the Rules should be interpreted in this way.[479] Accordingly in relying on those grounds, some learned commentators argued that only the dangerous goods liability arising from the common law[480] is transmissible, while under the Rules,[481] under Art IV r 6, this liability is not transmissible, since it is only attached to the "shipper".[482] In contrast, it was also argued by some commentators that the liability under Art. IV r 6 is transmissible under the Act.[483] It is submitted that the author favours the latter view on the grounds explained below.

As against subjecting the liability under Art IV r 6 to the transferee, while Baughen seeks to interpret the wording of s. 3 (1) with complexity so as to restrict the scope of the section,[484] Gaskell states that the Commission may not have had Art IV r 6 in mind, when recommending for transfer of the dangerous goods liability.[485] These views are not held by the author as there is no need to restrictedly interpret the spirit of s. 3 (1) to see the real scope of the section. As stated in the previous heading, following the meticulous considerations of the arguments for and against subjecting the transferee to the liability of dangerous goods, the Law Commission report can be said to have expressly intended that this liability is transmissible, whether it arises from the common law or under the Rules.[486] Nothing in the report indicates that there is a difference between the common law and the Rules, in terms of the transferability of liability to the transferee. Not even a single discussion was conducted on this.

Considering the argument of Gaskell, the Commission was indeed well aware of the problems in relation to the Rules as a whole. This is evident from the part of the report, in which the problem caused by Art III r 4 of the Rules was expressly discussed.[487] Additionally, s. (5) 5 of the 1992 Act provides an express policy so as not to prejudice application of the Rules by the operation of the 1992 Act.[488] It would therefore be implausible to argue that the Commission, with its legal experts in this area, and which discussed *in extensio* transfer of such liability, may have overlooked the fact that the

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[479] S Boyd, S Burrows and D. Foxton, *Scrutton on Charterparties and Bills of Lading* (20th edn, Sweet & Maxwell 1996), 434, 453. However in the current edition (23rd edition), this view is dropped and explicitly stated that s. 3 (1) transfer the liabilities incurred under Art IV r 6. See, Scrutton, 14.097.

[480] Where the Hague or the Hague-Visby Rules do not apply or where applicable, the common law obligation is still applicable for the liability arising from legally dangerous goods. See, *the Giannis NK* [1998] 1 Lloyd's Rep 337.

[481] There is no material difference at all between the Hague and the Hague-Visby Rules in terms of Art IV r 6.

[482] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 9-10; Baughen "Obligations of the Shipper to the Carrier" [2008] JIML 555, 558; Baughen in Charterpary Bills of Lading, 11.66; Gaskell, 4.51 – 4.55. See also, Bridge, 8.36.

[483] D Mildon and D Scorey, "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94. Some learned commentators including the editors of Scrutton also supports this view; Aikens 10.365; Cooke 18.100; Scrutton, 14.097.

[484] Baughen Charterpary Bills of Lading, 11.65.

[485] Gaskell, 4.54.

[486] The Law Commission report, 29-34.

[487] The Law Commission report, 35-38.

[488] S. 5 (5); "The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971."

liability arises under Art IV r 6 as well. Therefore, it is safe to assume that the Commission intended both liability to be be transferred under s. 3 (1).

If the proposition by Baughen that the transferee becomes subject only to liabilities that are not expressly attached to "the shipper" is correct, then this would mean that the dangerous goods liability arising from the common law cannot be imposed on the buyer/transferee either, since it is trite law that the common law liability solely attaches to "the shipper", and not anybody else.[489] The fact that it arises impliedly does not alter the other fact that it solely attaches to the shipper itself. However, Baughen interestingly suggests that while the common law liability is transmissible, the liability under Art IV r 6 is solely imposed onto the shipper.[490]

It is also submitted by the author that the arguments on Art III r 5[491] and Art IV r 3[492] that s. 3 (1) should not apply to those provisions does not necessarily generate a similar result for Art IV r 6. Unlike with Art III r 5 and Art IV r 3, the author is not aware that there is any direct or indirect authority indicating that s. 3 (1) cannot apply to Art IV r 6. On the other hand, each provision prescribes different obligations with different wordings. Therefore, it is also difficult to see why those arguments and judgments on the other provisions should be applicable to Art IV r 6.

It is true that the term "shipper" in Art III r 5, Art IV r 3 and Art IV r 6 should mean solely the shipper. However, the problem occurs once "the shipper" is replaced by "the transferee". Art III r 5 deals with the shipper's guarantee in relation to statements on marks, number, quantity and weight in the bills of lading. These statements will be conclusive evidence against the carrier, once the bill is transferred to a third party by virtue of Art III r 4. That is to say, if the term "shipper" in Art III r 5 is replaced by the transferee, the same party would be both liable under Art III r 5 for these statements against the carrier and also entitled to rely on them against the carrier.[493] Moreover, the last sentence of Art III r 5 evidently proves that Art III r 5 should apply solely to the shipper*; "The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."* The fact that Art IV r 6 lacks an equivalent statement to the final sentence of Art III r 5 appears to prove that there is no technical obstacle to transfer this

[489] *Brass v Maitland* (1856) 6 E & B 470.
[490] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 9-10; Baughen "Obligations of the Shipper to the Carrier" [2008] JIML 555, 558; Baughen Charterparty Bills of Lading, 11.64.
[491] "The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."
[492] "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants."
[493] Mildon and Scorey "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94, 97.

liability thereunder.[494] It is also worth noting that the argument on “the shipper” in Art III r 5 so as to read “the shipper” in Art IV r 6 in a similar way originally advocated in the 20th edition of *Scrutton on Charterparties*[495] was abandoned in the last edition (23rd) of the work where it was also expressly submitted by the editors that s. 3 (1) transfers the dangerous goods liability under Art IV r 6.[496]

On the other hand, considering the argument on Art IV r 3, the same re-phrasing for Art IV r 3 may not make sense for the similar reasons already explained for Art III r 5. Art IV r 3 regulates that the shipper will not be responsible for loss or damage sustained by the carrier if this loss or damage does not arise out of the act, neglect or fault of the shipper. If the term “shipper” in Art IV r 3 were open to replacement by “the transferee”, it is unlikely that s. 3 (1) would impose liability on a third party, unless the shipper acted negligently. However, this was rejected by Thomas J in *the Aegean Sea* in holding that the shipper in Art IV r 3 means solely the shipper and not a third party whom the liabilities are imposed on by s. 3 (1).[497] Yet again, it is unlikely that the argument on Art IV r 3 would have an impact on Art IV r 6. Also, had Thomas J intended to rule against Art IV r 6, he would have done so. However, he rejected to comment on it in the way he did for the other provisions. When looking into Art IV r 6, neither is there a final sentence equivalent to the one in Art III r 5, which indicates that, the liability cannot be transferred, nor is there an illogical result, as is the case for Art IV r 3 once re-phrased. When the term “shipper” is replaced by “the transferee”, nothing in the rule renders the reading illogical or incapable of being transferred to the transferee;

> *“Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innoculous by the carrier without compensation and [the transferee] shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment”.*[498]

It is also to be remembered that the Rules do not define the terms “consignee”, “holder” or “transferee”. The Rules do not directly deal with allocation of rights or liabilities to third parties either. As Devlin J opined in *Chandris v Isbrandsten Moller*, the Rules are not a complete code and are only meant to cover certain topics.[499] There is no doubt that transfer of rights and liabilities is

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[494] Although Gaskell argues affirmatively this, he concludes opposite on the matter; Gaskell, 15.52 and 4.56. See also, Baughen and Campbell “Apportionment of Risk and The Carriage of Dangerous Cargo” [2001] 1 IntML 3, 8.

[495] Scrutton (20th edition), 453.

[496] Scrutton, 14.097.

[497] *The Aegean Sea* [1998] 2 Lloyd’s Rep 39, 69-70. Even if s. 3 (1) had applied to Art IV r 3, this would unlikely have had any impact on Art IV r 6, since in *the Giannis NK*, the House of Lords held that Art IV r 3 did not qualify the strict liability of Art IV r 6; [1998] 1 Lloyd’s Rep 337, 343.

[498] Emphasis added.

[499] *Chandris v Isbrandsten-Moller* [1951] 1 KB 240, 247. Unlike the Hague or Hague-Visby Rules, the Rotterdam Rules include a provision directly on transfer of liabilities and by virtue of Art 58 (2), the holder of a transferable shipping document can become subject to liabilities “to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document”. This clearly envisages contractual

outside its scope, since it only governs the contextual contractual relationship between the parties under the contract.

On the other hand, under English law, due to the doctrine of privity of contract, prior to the 1855 Act, the buyer/endorsee could not sue the carrier under the bill given that mere transfer of the bill of lading did not transfer the contract under it.[500] This was overcome by creating an artificial contract by statute first by the 1855 Act and then the 1992 Act, which fills this gap of the law and transfers rights and liabilities. That is to say, neither the Rules nor the 1992 Act occupies one another's field. This can be confirmed by s. 5 (5) of the 1992 Act which states; "*The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.*"

A good example of this is the last sentence of Art III r 5, which was discussed above. Nothing in the 1992 Act overrides this last sentence and affects the operation of the provision.[501] However, there is no such sentence or wording in Art IV r 6, which may call for the aid of s. 5 (5), once s. 3 (1) applies to Art IV r 6 to transfer the liability. Why would the application of the 1992 Act be restricted on this by the Rules, while the Rules do not have anything to say on this matter? Therefore, it is submitted by the author that s. 3 (1) does indeed transfer the liability under Art IV r 6, given that the operation of the provision is not prejudiced by the 1992 Act.

Furthermore, Baughen and Campbell also argue by way of analogy that the term "shipper" in Art IV r 6 may not be read as "holder" or "transferee", given the need for some degree of manipulation.[502] They rely on *the Miramar*[503] where the House of Lords refused to manipulate the wording of a clause from the charterparty indicating that the "charterer" needed to pay demurrage, which was incorporated in the bill of lading so as to make the bill of lading holder liable.[504]

It is submitted by the author that the decision in *the Miramar* on the incorporation of charterparty clauses to the bills of lading contract may not apply to the issue in question successfully. Firstly, as Thomas J opined in *the Aegean Sea,* it is not easy to see how the analogy of charterparty cases can apply as they are between a shipowner and a charterer to bills of lading cases.[505] While a charterparty is a contract that governs the relationship between the shipowner and the charterer for the hire of a vessel, a bill of lading once the cargo is loaded, is not only a receipt of the goods but also

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liabilities. However the Rotterdam Rules do not apply to non-negotiable shipping documents like seaway bills or delivery orders which are not considered "transport document" within Art 1(14). On the other hand similar to the 1992 Act, it is a precondition that the holder must exercise his contractual rights, in order to impose liabilities onto him under Art 58 (2). See also, Art 57.

[500] *Thomson v Dominy* (1845) 14 M & V 403; 153 ER 532.

[501] Mildon and Scorey "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94, 97.

[502] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3.

[503] [1984] 2 Lloyd's Rep 129.

[504] Ibid, 10.

[505] Thomas J evidently opined that it is difficult to see that the analogy of charterparty cases can apply to the bill of lading cases, see; *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 65.

prima facie evidence of the contract of carriage, which governs the relationship between the carrier and the shipper. While the latter is a transferable document, which becomes the contract of carriage between the carrier and holder once transferred, the former is not. The shipowners and charterers, depending on their bargaining strengths are free to negotiate terms of the charterparty without interference from statute, so they may agree on additional clauses to suit their own interests. On the other hand, unlike in charterparty, the parties to a bill of lading have a rather restricted freedom to negotiate their own terms, since it is mostly governed by international conventions, and it is these, which may define parties' obligations and rights. That is to say, in brief, they are different contracts between different parties, which likely involve different obligations and rights. Therefore, it is not immediately apparent to the author why an analogy with charterparty cases should apply to bill of lading cases.

Secondly, in *the Miramar*[506] the shipowner sought to invoke an incorporated clause to recover demurrage under the charterparty from the bill of lading holder. Although it was held that the charterparty demurrage clause was incorporated into the bill, the problem revolved around whether "the charterer" in the clause should be replaced by "the holder". This analogy may not be feasible on the ground that the issue in question is not related to incorporation of a clause from one contract to another. The 1992 Act does not operate by incorporating terms from one contract to another. In fact, the Act artificially enables the holder to become party to a bill of lading contract. Moreover, under the Act, the issue is not the substitution of a "holder" for a party such as a "charterer" from a contract of a different kind, but the replacement of parties arising under the same contract, namely "the shipper" with "the holder" or "the transferee". Furthermore, even if such manipulation is needed, support can be found in the Rules with Art I (b) expressly stating; *"regulates the relations between ... a carrier and a holder ...",* once the bill is transferred to a holder. Therefore, the Rules themselves provide some verbal manipulation to read the shipper as holder or transferee. Moreover, if that analogy of *the Miramar* is correct, then the 1992 Act would fail to give effect to the recommendations of the Commission in relation to the transfer of this liability. It is also worth noting that the author is not aware of any case in which *the Miramar* was considered so as to apply as Baughen suggested. Therefore, on the grounds explained above, this analogy should not be made.

Besides all this, neither in *the Aegean Sea*, nor in *the Ythan* or in *the Berge Sisar*, were any of the arguments against subjecting the holder or the transferee to the dangerous goods liability put forward or discussed. In *the Berge Sisar*, the carrier made the claim from the holder for the liability arising out of dangerous goods under Art IV r 6.[507] No argument against the replacement of the shipper by the transferee or the holder was advanced in the case. Further to that, although the claim was made under Art IV r 6, none of the judges in the House of Lords queried on this issue but expressly assumed that the dangerous goods liability is transmissible under Art IV r 6. In any case,

[506] [1984] 2 Lloyd's Rep 129.
[507] [2001] UKHL/17; [2001] 1 Lloyd's Rep 663, 667.

arguably, the transfer would be made easier with an express term like the "Merchant" clause which imposes liabilities including dangerous goods onto multiple parties, including the shipper, the holder, consignee and many others.[508] Many bill of lading forms[509] contain such a clause, which would render the imposition of this liability on the buyer/transferee easier.

3.3. Justification of the transfer to the buyer

One of the other arguments against subjecting the transferee to the liability is that transferring dangerous goods liability under s. 3 (1) is against the policy identified in *Brass v Maitland*[510].[511] In *Brass v Maitland*, Lord Campbell imposed strict liability for shipment of dangerous goods to the shipper, because his Lordship opined that the shipper had better means of knowledge in relation to the nature and character of the goods than the carrier. Baughen and Campbell argue that this underlying reason does not apply between the carrier and third party, and accordingly the liability should not be transferred onto him.[512]

The author thinks this argument may not be of any direct assistance in preventing transfer of this liability under the 1992 Act. The policy established by Lord Campbell in *Brass v Maitland* covers the apportionment of the liability, only between the shipper and the carrier, and the liability falls on the shipper rather the carrier even if the shipper has no knowledge of the dangerous characteristics of the goods to be shipped. That is to say, the rationale behind the policy in *Brass v Maitland* aims for the utmost protection of the carrier against only the shipper, for cases in which there was only there a two-party relationship between the carrier and the shipper. His Lordship gave no opinion on the imposition of the liability to the buyer/transferee or any other third party since there was no such dispute regarding the transfer of this liability. It is therefore argued that the policy in *Brass v Maitland* should not be extended to a matter that is not directly relevant to it.

On the other hand, the 1992 Act creates its own policy in relation to imposition of liabilities to transferees, which it is submitted by the author, does not weaken the policy in *Brass v Maitland* but strengthens the core aim hereunder. Firstly, the carrier's position is not weakened by the 1992 Act, since under s. 3 (3), the shipper's liabilities will not be extinguished by the time the transferee becomes liable as per s. 3 (1). Secondly, in addition to the shipper, the 1992 Act subjects this liability to an additional party once s. 3 (1) is triggered. Therefore, it is not thought that the policy of the 1992

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[508] Gaskell, 4.52; Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3.

[509] Examples of such clause can be found in some bill of lading forms such as Combiconbill, "K" Line bill, Conlinebill, P&O Nedlloyd Bill.

[510] (1856) 6 E&B 470; 119 ER 940.

[511] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 7; Baughen, Charterpary Bills of Lading, 11.63.

[512] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 7; Baughen, Charterpary Bills of Lading, 11.63.

Act contradicts the policy in *Brass v Maitland,* since like in *Brass v Maitland,* the policy of 1992 Act aims at the utmost protection of the carrier at all times, not only against the shipper but also the transferee. Even if it is accepted that these two policies contradict each other, it is still difficult to see why a policy from 1856 should overrule an up-to-date policy that is compatible with modern trade practice. This argument can also be supported by the words of Lord Goff commenting on the 1992 Act in the House of Lords; *"…[the 1992 Act] will move our law in this area from the middle of the 19th century to well into the 21st"*.[513]

The author also thinks that the policy of the 1992 Act should not be restricted by the policy of *Brass v Maitland,* given that the former expressly widens the contractual nexus between the relevant parties of carriage. Once s. 3 (1) is triggered, in terms of the imposition of liabilities, the 1992 Act creates a tri-partite relationship between the carrier, the shipper and the transferee. The new policy of the 1992 Act requires us to approach such a tri-partite relationship from a different perspective. By making the carrier entitled to sue both the shipper/seller and the transferee/buyer for the same liability, it is submitted that the policy impliedly suggests one thing; the rationale behind the principle that the carrier should be protected at all times is that under this tri-partite relationship, the carrier is the most innocent and remote party to the goods which are the source of the damage or loss to the carrier.

The author thinks that this is arguably true from the context of sale of goods law; the buyer as the transferee may have a more proximate connection and interest to the goods, which may justify his potential liability under this tri-partite relationship. It is trite law that it is the shipper as the original party who drafts all the details in relation to carriage arrangements of the goods and enables the carrier to take all necessary precautions to carry the goods safely. By virtue of s. 32 (2) of the Sale of Goods Act 1979 (the 1979 Act), under c.i.f. and many f.o.b. contracts,[514] the seller is under a duty to make or procure a contract of carriage on behalf of the buyer. S. 32 (2) expressly indicates that the seller concludes this contract "on behalf of the buyer",[515] whether he concludes it as principal shipper or agent of the buyer. That is to say, once the seller/shipper – even as the original party - drafts all the details and makes all necessary arrangements to enable the carrier to take necessary precautions to carry the goods, he makes all these for the benefit of the buyer/transferee on behalf of him under s. 32(2). Indeed, this explains that the contract of carriage is a contract for the benefit of a third party, namely the buyer. At this point, a question immediately arises; why would a beneficiary party be able to be relieved of his obligations, once he seeks to enforce that contract which is evidently concluded on his behalf? The policy of the 1992 Act is grounded on the principle of mutuality.[516] It was

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[513] Hansard, 04/02/1992, Carriage of Goods by Sea Bill 234 (Official Report). Emphasis added.
[514] Exception is bare and some classic f.o.b. contracts. See, *Pyrene v Scindia* [1954] 2 QB 402; *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] UKHL 11.
[515] S. 32 (2) of the 1979 Act.
[516] See the speech of Lord Hobhouse in *the Berge Sisar* [2001] UKHL 17; [2002] 2 AC 205, [31] and [45].

expressly stated in the Law Commission report that a party who is willing to exercise this contract should not escape from its corresponding liabilities;

> *"it is unfair that the carrier should be denied redress against the indorsee of the bill of lading who seeks to take the benefit of the contract of carriage without the corresponding burdens."*[517]

More support can be found in s. 32 (1) of the 1979 Act in which it prescribes that delivery of the goods to the carrier is *prima facie* deemed to be delivery to the buyer.[518] Moreover, by virtue of s. 45 (1) of the 1979 Act, when delivered to the carrier, goods are deemed to be in the course of transit for the purpose of transmission to the buyer. That is to say, the carrier obtains and carries the goods not only on behalf of the buyer but also for the benefit of the buyer. All these appear to prove that the buyer can be regarded as the prime reason behind the shipment. Apart from the contractual nexus of the buyer to the goods, the buyer may also have non-contractual proximity to the goods, which may strengthen his interest in the goods. For instance, once a transferable bill of lading is tendered to the buyer, he becomes the holder of a document of title, which entitles him to constructive possession of the goods.[519] With the document of title, the buyer not only holds something that represents the goods but also puts the goods symbolically at the disposal of the buyer.[520] From that moment, the carrier is deemed to carry the goods on behalf of the buyer and he is obliged to deliver the goods only to the buyer as the holder of the document of title. In addition, the buyer can sometimes be regarded as the bailor of the goods[521] or he may obtain the title to the goods and become the owner during transit. The question is, once the buyer wants to exercise the contract, why would he be enabled to escape from the liability that is caused by the goods in which the buyer may have constructive possession or title to the goods and the carrier is not only obliged to deliver only to him but also to owe him a duty of care for the goods?[522] It is therefore submitted by the author that all this discussed above appears to prove that in this tri-partite relationship, the buyer as the transferee who can be considered as the prime reason behind the shipment has not only a stronger contractual nexus with the goods than the carrier, but also may have a non-contractual connection which arguably justifies the policy of the 1992 Act of subjecting the buyer as an additional party to the dangerous goods liability alongside the

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[517] The Law Commission Report, 3.22.

[518] *Dunlop v Lambert* (1839) 6 Cl & F 600. This position can be rebuttable. See, *Scottish v Newcastle* [2008] UKHL 11, [9] – [20].

[519] *Lickbarrow v Mason* (1794) 5 TR 683; *Barber v Meyerstein* (1870) LR 4 HL 317; *Sanders v Maclean* (1883) 11 QBD 327.

[520] *Barber v Meyerstein* (1870) LR 4 HL 317, 322; *Sewell v Burdick* (1884) 13 QBD 159, 171.

[521] See, *The Albazero* [1977] AC 774; *the Berge Sisar* [2001] UKHL 17; *East West Corp* [2003] QB 1509. See also below, Chapter 4, III. Bailment Action.

[522] The carrier owes a duty of care to the owner of the goods or party with an immediate right of possession at the time of breach; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [39].

seller/shipper, once the buyer as the transferee is willing to exercise his rights under the carriage contract.

The imposition of the liability to the buyer/transferee can also be supported by way of analogy on the grounds of another tri-partite relationship; between shipowners, charterers and cargo interests. Depending on the charterparty terms, as a result of complying with the charterer's orders or requests, the shipowners may sign bills of lading in the form as requested by the charterer. Once the bill is issued or is transferred to the person[523] entitled to it, it becomes a carriage contract between the shipowner and the transferee. As a result of complying with the orders of the charterer to sign the bill as requested, the shipowners may find themselves under liability against the person to whom the bill is transferred. Although the reason for the fault may often lie with the charterer's orders and the shipowner may not be personally at fault against the cargo interests, the shipowner may not be relieved of the liability against the cargo interests, given the contractual relationship between him and the cargo interests.[524] It is submitted that a similar relationship exists between the carrier, the shipper/seller and the transferee/buyer. Although the buyer as transferee is not personally at fault for liability arising from shipment of dangerous goods, as the result of becoming party concluded by the shipper/seller who is in fact at fault, the buyer may have this liability imposed on him against the carrier, provided that he seeks to exercise the carriage contract as per s. 3 (1).

Baughen and Campbell also argue that this liability should not be transferred to a "third party" who had nothing to do with the goods prior to loading.[525] However, this argument may not be watertight. Firstly, the Law Commission expressly opined that all liabilities including pre-shipment ones, which the transferees are unlikely to have something to do with before loading, are transmissible under s. 3 (1).[526] At first glance, this may seem unfair. However the Act also provides that the transferee can obtain rights against the carrier in relation to breaches committed even before the transfer of the bill.[527]

In supporting their argument, Baughen and Campbell opine that the end buyer as the transferee may not have any opportunity to ascertain the nature or characteristics of the goods prior to shipment.[528] By this argument, they must be referring to the lack of physical nexus between the buyer and the goods, since they expressly indicate ascertainment of "the true nature of the cargo" prior to

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[523] Other than the charterer.

[524] Indeed the shipowner may have a claim against the charterer under express or implied indemnity; *Kruger & Co Ltd v Moel Tryvan Ship Company Ltd* [1907] AC 272; *Dawson Line Ltd v Aktiengesellschaft "Adler" Fuer Chemische Industrie of Berlin* [1932] 1 KB 433; (1931) 41 Ll L Rep 75; *Larrinaga Steamship Co Ltd v The King* [1945] AC 246, 253; *Royal Greek Government v Minister of Transport (The Ann Stathatos)* (1949) Ll L Rep 228; *Naviera Mogor SA v Societe Metallurgique de Normandie (The Nogar Marin)* [1987] 1 Lloyd's Rep 456; *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon)* [1994] 2 Lloyd's Rep 227.

[525] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 7; Baughen, Charterpary Bills of Lading, 11.63.

[526] The Law Commission Report, 3.20-3.22.

[527] *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, 218. See, Scrutton 3-013.

[528] See, fn. 458.

loading.[529] However, this may be the case, even where the buyer is the shipper, the original party to contract of carriage. Under some f.o.b. sales, the seller not only agrees to ship the goods but may also draft all the necessary contractual arrangements and conclude the contract of carriage as agent of the buyer.[530] When this is the case, despite being the original party to the carriage contract, the buyer would still be unlikely to have the opportunity to ascertain the nature of the goods prior to loading. If the argument of Baughen and Campbell is correct, then in the above f.o.b. sales examples, the buyer, where he becomes an original party to the carriage contract as the shipper, should not become liable on the ground that the buyer as a third party had no means to ascertain the true nature or character of the goods prior to loading. However, as opposed to their argument, the buyer as the shipper is not regarded as a third party, given the contractual relationship between the carrier and him, but becomes liable against the carrier irrespective of whether he had the opportunity to inspect the goods prior to loading.

Similarly, the transferee buyer who is practically in the same position – who had nothing to do with the goods prior to loading - as the buyer/original party in the examples above, is not technically considered a third party, once he has had, pursuant to s. 2 (1) of the 1992 Act "transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract". The sole difference between the two buyers above is that while in the former he becomes party to the carriage contract through his seller, in the latter he becomes party via s. 2(1) of the 1992 Act. Indeed, it might be argued that the buyer in the former prefers to be the principal party, which strongly supports that he should indeed be liable against the carrier. However, the buyer in the latter scenario has the advantage in terms of attracting the liability when compared to the buyer in the former scenario. In the former, the buyer as the original party in any case becomes liable against the carrier and cannot deny liability even if he is not personally at fault. However, in the latter, the buyer does not automatically attract the liability but may escape from it, unless he seeks to enforce the contract and triggers one of the conditions under s. 3 (1). That being the case, where the buyer in the former cannot be regarded as a third party just on the ground that he has no physical nexus with the goods, the buyer in the latter should not be considered as a third party either on the grounds explained above.

3.4. Conclusion on the transfer of the liability onto the buyer

Taking into consideration the discussion above, the author strongly believes that both the liability under Art IV r 6 and the liability arising under the common law are transmissible from the seller/shipper to the transferee/buyer under the 1992 Act. Indicating otherwise would amount not only to the failure of the Law Commission, which expressly envisaged transferability of this liability, but

[529] Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3, 7; Baughen, Charterpary Bills of Lading, 11.63.

[530] *Pyrene v Scindia* [1954] 2 QB 402; *Scottish & Newcastle Int Ltd v Othon Ghalanos Ltd* [2008] UKHL 11.

would also go against the policy of the Act. In respect of the contract of carriage, since 1855, English law has been based on the principle of mutuality; if a third party is willing to become party to a contract concluded by another party and seeks to exercise rights, then he must also take on the burden of the obligations thereunder. With the 1992 Act, the policy has been strengthened and expressly provides no exception to transferable liabilities including liabilities for dangerous goods. Although the matter in question has not yet been settled under English law, the current case law also appears to have embraced this policy and opined in favour of transferability of this liability. A similar trend can be seen among scholars. The editors of *Scrutton* who were initially strongly against the transfer, today expressly favour the view that the liability is transmissible.[531]

Indeed one may argue that it would be fairer, if the carrier only looked for compensation to the shipper/seller who is "naturally" liable. But "naturality" may not be the correct concept with which to approach this relationship. Otherwise, the buyer would not be able to exercise rights under that contract either, since he is not "naturally" but artificially party to it. Furthermore, the Act does not "naturally" make the transferee/buyer liable, unless he enforces contractual rights. In addition, no one can guarantee that in practice suing only the shipper will always provide ideal outcome. Considering dangerous goods, liabilities can be disproportionate, so the shipper for instance, may not have any or sufficient assets within reach. One must not forget that rights of third parties are a matter of commercial necessity. Under c.i.f. and f.o.b. sales, carriage contracts are sub-parts of them and parties are entitled to flexibility to draft any terms including allocation of risks of carriage contract. On the other hand, liabilities of third parties are a matter of policy. Considering particularly dangerous goods, by giving a right to redress against the buyer/transferee, the policy of the Act clearly aims to protect carriers by reducing the risk of insolvency. As discussed above, in respect of the imposition of liabilities, the Act creates a tri-partite relationship and thereunder protects the carrier as the most innocent party against the shipper/seller along with that additional party – the buyer - who is the prime reason behind the shipment as those goods are ultimately carried for his benefit.

4. Imposition of the liability

It has been shown so above that whether s. 3 (1) is wide enough to embrace liabilities arising from dangerous goods. Hereunder, the ambit of s. 3 (1) will be examined so as to see how the mechanism of the section operates to impose particularly the liability arising from dangerous goods to the buyer/transferee. It is also noteworthy that unless otherwise specifically stated, everything said on the liability of the lawful holder of bills of lading will apply *mutatis mutandis* to sea waybills and delivery orders too.

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[531] Scrutton (20th edition), 453 and see Scrutton, 14.097.

Before examining the section, two preliminary issues must be addressed. First, it is trite law that where the shipper is the charterer, the bill of lading is not a contract but a receipt in the hands of the shipper.[532] The only contract between the shipper/charterer and the shipowner is therefore the charterparty itself. It is also evident that the 1992 Act does not intend to transfer rights and liabilities under the charterparty.[533] Therefore, a question arises at this point as to how the buyer/transferee could have liability imposed on him under the bill of lading that does not evidence or contain a contract? Before the 1992 Act, the issue was settled by "springing a contract"[534] when the bill was transferred. The Commission clearly did not want to change this position and the law remained unchanged.[535] Hence, between the shipowner and the transferee, the Act transfers rights and liabilities under the bill of lading, which becomes a "sprang up" contract of carriage in the hands of the transferee.[536]

The second issue revolves around the question of what happens when the bill is transferred to the charterer? The bill of lading yet again becomes a mere receipt in the hands of the charterer and the charterparty governs the relationship between the shipowner and the charterer/transferee.[537] Suppose that the charterer/transferee somehow triggered s. 3 (1) and the charterparty contained an exemption of liability clause in relation to shipment of dangerous goods. *Prima facie*, their relationship will be governed by the charterparty, and accordingly the charterer will not become subject to the liability under s. 3 (1). However, this position may vary depending on the purpose of contracting under the charterparty. The *prima facie* rule is grounded on the assumption that the buyer/charterer chartered the vessel for the purpose of taking delivery under it.[538] If the charterer did not conclude the charterparty for the purpose of receiving the goods and if there is no nexus between this charterparty and the reason for the transfer of the bill to the charterer, then the relationship between the charterer/transferee can be governed by the bill of lading instead, where it becomes "a separate contract … independent of a charterparty."[539] When this is the case, the bill of lading as contract of carriage can become operative and the liability under s. 3 (1) can be imposed on him.[540]

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[532] *Rodocanachi v Milburn* (1886) 18 QBD 67; *President of India v Metcalfe Shipping Co Ltd (The Dunelmia)* [1970] 1 QB 289.
[533] The Law Commission Report, 2.52, 2.54. See also, *the Albazero* [1977] AC 774.
[534] *Hain S.S. Co. v Tate & Lyle* (1936) 41 Com Cas 350, 356; *Rudolph A Oetker v IFA Internationale Frachtagentur AG (the Almak)* [1985] 1 Lloyd's Rep 557, 560; *the Arctic Trader* [1996] 2 Lloyd's Rep 449, 455.
[535] The Law Commission Report, 2.54.
[536] The wording of s. 3 (1) can also be of some assistance; "same liabilities … as if he had been a party to that contract". That is to say, the transferee would have been imposed the liabilities, if the bill had been originally issued to him. See, Mildon and Scorey "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94, 101.
[537] *The Dunelmia* [1970] 1 QB 289. Indeed, the charterer and the shipowner may expressly agree on otherwise; *Rodocanachi v Milburn* (1886) 18 QBD 67, 75, 78.
[538] *The Dunelmia* [1970] 1 QB 289.
[539] Ibid, 306. For the same view, see also, Benjamin, 18-079; Reynolds QC, Bills of Lading and Voyage Charters, 201, 204-205.
[540] For such examples, see *Gullischen v Stewart Bros* (1884) 13 QBD 317; *Calcutta SS Co Ltd v Andrew Weir Co* [1910] 1 KB 759.

4.1. Conditions of s.3

It has already been said that acquiring rights under the Act does not automatically impose liabilities. The underlying policy is that liabilities of the contract can only be imposed on the parties that wish to enforce their rights.[541] S. 3 prescribes certain actions which should be fulfilled to impose liabilities to the transferees alongside the original shippers:[542]

> "(a) takes or demands delivery from the carrier of any of the goods to which the document relates;
>
> (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or
>
> (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods…"[543]

The ambit of the section was examined in detail by case law, particularly by the House of Lords in *the Berge Sisar*, which will be of assistance to see how each paragraph should be interpreted.[544]

4.1.1. Taking or demanding delivery

By taking or demanding delivery, the buyer could become subject to the same liability arising from dangerous goods as the original party under the carriage contract. Even though paragraph (c) cites similar actions ("took or demanded delivery"), as (a) does, it expands situations to where the buyer could attract the liability even before acquiring rights provided that those rights should be vested in him later via s. 2 (2) a.[545] However, actions of delivery and demand are not defined by the Act.

Since those actions can make the buyer subject to liabilities, it was held that both actions should involve a choice by way of election, which should illustrate a positive step to enforce contractual rights.[546] Hence, where the buyer cooperates with berthing facilities to discharge the

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[541] Mutuality of contractual relationship; See the speech of Lord Hobhouse from *the Berge Sisar* [2001] UKHL 17; [2002] 2 AC 205, [31] and [45].

[542] That is to say, transfer of liabilities to another party does not extinguish the original party's liabilities. Albeit not statutorily, this was already position under English law even before the 1992 Act came into force; See, *the Giannis NK* [1998] 1 Lloyd's Rep 337, 343, 344.

[543] S. 3 (1).

[544] *The Aegean Sea* [1998] 2 Lloyd's Rep 39.; *the Berge Sisar* [2001] UKHL 17; *the Ythan* [2005] EWHC 2399 (Comm); [2006] 1 Lloyd's Rep 457; *P&O Nedlloyd v Arab Metals Co* [2006] EWHC 2433; *Fortis Bank v Indian Overseas Bank* [2011] 2 Lloyd's Rep 190.

[545] Sub-section (c) mostly covers typical cases where the arrival of the bills of lading is late and delivery is against letter of indemnity. See, *the Delfini* [1990] 1 Lloyd's Rep 252 and *the Berge Sisar* [2001] UKHL 17; [2002] 2 AC 205.

[546] Those three sub-sections are substantially reviewed per Lord Hobhouse in *the Berge Sisar* [2001] UKHL 17, [32]-[36].

goods, this act will not be held as taking delivery of the goods.[547] Conducts of the buyer should involve an element of relative finality or unequivocal affirmation.[548] Taking delivery of "any of the goods to which document relates"[549] may normally render the buyer liable as per s. 3 (1).[550] However, given that the goods can be rejected depending on test results, taking routine samples to test the quality of the goods is not regarded as involving any finality or unequivocal conduct to take full possession of the goods and accordingly it is not considered as delivery action under s. 3 (1).[551]

At the earliest, delivery action can start at the time of discharge process. If the goods are left in the warehouse to the order of the carrier, delivery can only occur once the buyer obtain his goods from the warehouse, not at the time of discharge. In such cases, discharge will not trigger s. 3.[552] Delivery for the purpose of the Act, requires voluntary action from the buyer/transferee to obtain possession of the goods.[553] Thus, where the salved goods are taken by the buyer on the order of the local government, there will be no delivery for the purpose of s. 3, since the buyer can be said to have taken the goods involuntarily.[554] Both paragraphs (a) and (c) require that delivery should be "from the carrier".[555] Taking delivery from independent salvors therefore, even if done voluntarily, would not make the buyer liable as per s. 3.[556]

The buyers may seek to circumvent s. 3 (1) c by not obtaining bills of lading ever in order to avoid the liability by taking actual delivery of the goods against the letter of indemnity. When this is

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[547] Ibid, [36].

[548] *The Berge Sisar* [2001] UKHL 17, [41].

[549] "Any of the goods" may cover different situations. Delivery may occur partially. Or it may be left unfinished due to strike at the port. Or there might be problems on the delivery machines after delivery started. Or the buyer after commencement of the delivery, notices that the goods are contaminated and may reject them. These situations are not exhausted but since they involve element of finality to take the full possession of the goods, such cases will likely trigger the liability under s. 3 (1) a "taking delivery" or at least there will be undoubtedly "demand". See, *the Berge Sisar* [2001] UKHL 17, 209. Thomas J's obiter view in *the Aegean Sea* is that the delivered goods must be "commercially as the same goods" too. See [1998] 2 Lloyd's Rep 39, 63. However it is submitted even if the goods' value is reduced to the certain point, delivery of the goods should trigger s. 3 provided that the goods are identifiable as the same goods and not essentially perished to the extent that it can be used or tradable in the market. Thus, the goods which have been fundamentally changed where their identity is destroyed like lemons squashed into lemon juice, they will not be considered as "commercially as the same goods". On this view, see Aikens, 8.57. See also, *Asfar v Blundell* [1896] 1 QB 123; *the Caspian Sea* [1980] 1 WLR 48.

[550] The Act evidently states under s. 3 (2) that the buyer of delivery order will liable only to the extent of the goods to which the order relates.

[551] *The Berge Sisar* [2001] UKHL 17, [38].

[552] *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep 81; *Port Jackson Stevedoring Pty v Salmond and Spraggon Pty (The New York Star)* [1981] 1 WLR 138.

[553] *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 62, 63; *the Berge Sisar* [2001] UKHL 17, [32].

[554] *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 62, 63.

[555] Problems may arise on the identity of the carrier when delivery or demand is made. Where the shipowner is the carrier, there will unlikely be any problem. However where there is charterer's bill, the carrier is regarded as the charterer under the bills of lading. When delivery is made by the shipowner, it is plausible to say that the shipowner should also be regarded as the carrier alongside the charterer since the carriage contract is performed on his vessel. The shipowner should be considered agent or the sub-bailee of the charterer for the sake of delivery. See Carver, 5-098 and Benjamin, 18-169. See also, Aikens, 8.100.

[556] *The Aegean Sea* [1998] 2 Lloyd's Rep, 39, 62, 63. However if the delivery is made under a varied contract under the bills of lading which requires delivery at different place or stage, such delivery would satisfy s. 3 (1). See *the Aegean Sea* [1998] 2 Lloyd's Rep 39, 62.

the case, the buyer would not become the lawful holder as per s. 2 (2) a, and accordingly would not become liable under s. 3 (1) c either. However, this method may not be watertight, since where the carrier delivers the goods against a letter of indemnity, depending upon its wording,[557] the carrier may have a claim under that letter against the buyer for the loss caused by the dangerous nature of the goods.[558]

It should be noted at this point that the nature of delivery orders may give rise to difficulties in terms of the imposition of liabilities when delivery occurs. It was said above that the party identified in the order can be changed after the issue of the order by virtue of s. 5 (3). When the order is made out "to order" of B1 or "bearer", B2 may acquire rights under s. 2 (1) c by way of substitution. Accordingly, the carrier may not be aware of such a substitution. Unlike in the case of bills of lading and sea waybills, the carrier may not receive any notice when those rights are transferred to B2 and may have delivered the goods to B1 instead of B2. When this is the case, the carrier will not be able to claim against B1, even if s. 3 (1) is triggered due to delivery, since the rights formerly acquired by B1 will be regarded as extinguished under s. 2 (5) b. It is therefore suggested to the carriers that they should insist on production of the order before delivery, when they issue "to order" or "bearer" delivery orders.

In case of "demanding delivery", such an act should involve choice or election to enforce contractual rights as well.[559] Demanding delivery of "any of the goods" suffices to trigger entire liability in relation to goods as per s. 3 (1), as is the case with delivery.[560] Berthing facilities or cooperation for discharge are not regarded as "demanding delivery" within the meaning of the Act.[561] Neither does taking routine samples amount to demanding delivery.[562] The act of demand should involve formality.[563] Lord Hobhouse in *the Berge Sisar* opined that if the buyer demanded the goods, before acquiring rights, such a demand would have no legal basis. Accordingly, rejection of such a

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[557] The carriers should force the buyers to issue an indemnity letter providing that due to delivering without production of the bill, the buyer shall indemnify the carrier for all his losses that he can acquire by virtue of s. 3 (1) against the buyer. Only such worded letter of indemnity may cover such loss normally would fall within s. 3 (1).

[558] See MD Bools, *The Bill of Lading: a document of title to the goods: an Anglo-American Comparison* (LLP 1997), 113 (hereinafter Bools).

[559] Where "demand" is followed by delivery, there is no need to rely on demand. If demanding of delivery is refused or the goods are demanded but not taken later by the buyer, demand may cause some difficult results. These problems are examined below. See below, 5. Cessation of the liability.

[560] Save for delivery orders. The Act evidently states under s. 3 (2) that the buyer of delivery order will liable only to the extent of the goods to which the order relates. This is the case even if the buyer has two delivery orders from the same bulk but demands only the goods to which one of the orders relates. But in the case of bills of lading, if a buyer of two or more bills of lading evidencing the different part of same goods demands the goods by production of the only one of them, this would make him liable under all his bills. See, *the Aegean Sea* [1998] 2 Lloyd's Rep 39.

[561] *The Berge Sisar* [2001] UKHL 17, [32] – [36]. Since the buyer burdens liabilities of another party, the House of Lords reviewed those subsections narrowly.

[562] Ibid, [38].

[563] Ibid, [33].

demand with no legal basis would be regarded as an "*act devoid of legal significance*".[564] That is to say, following that decision, it is safe to assume that application of sub-section (c) is restricted to the cases only where actual delivery occurs.[565] Therefore, merely producing a letter of indemnity to obtain the goods would not be considered a demand for delivery for the purpose of the Act either. This is because a letter of indemnity does not oblige the carrier to deliver against it. It just gives choice to the carrier and indemnifies him against claims that can be made under the bills of lading, when the goods are delivered.[566] Therefore, the only action that can be considered as an incidence of a formal demand is the production of bills of lading.[567]

In the case of delivery orders and sea waybills, the buyer/consignee is entitled to demand delivery of the goods without production of the relevant document.[568] Therefore, the issue of formal demand may not arise under these documents. However, can the same be said for straight bills? It was already said that straight bills are sea waybills for the purpose of the Act.[569] On the other hand, there is some *dicta* in *the Rafaela S* where the issue revolved around whether straight bills were bills of lading or "a similar document of title" under the Hague-Visby Rules. The House of Lords held that straight bills are bills of lading under the common law and accordingly they need to be produced against delivery of the goods.[570]

Whether they need to be presented under the common law rule is outside the topic of this thesis but even if they do, it is submitted by the author that the buyer/consignee need not produce straight bills to demand delivery for the purpose of the Act, and accordingly, such demand would trigger s. 3 (1).[571] The definitions of the 1992 Act are only applicable within the boundaries of the Act. The Act does not have an impact on other legislations or the common law rules. Straight bills are

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[564] *The Berge Sisar* [2001] UKHL 17, [35].

[565] Ibid, [35]. This part of decision is criticized by Prof. R Thomas in "Bills of Lading – The Position of Holders and Intermediate Holders Under the English Carriage of Goods by Sea Act 1992" [2001] 5 IntML 165, 169. See also, Baughen and Campbell "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3. With due respect, it is submitted by the author too that this decision on sub-section (c) is open to criticism. First of all, there might be another legal basis for demand such as title to the goods. Such legal basis would avoid the possibility of devoid of legal significance. The policy of the 1992 Act was the simplification. Such technical approach brings back difficulty to applicability of the Act. Otherwise, the decision of Lord Hobhouse on the point will make "demanded" in sub-section (c) dead word. This would be against the policy of the Law Commission and the Act.

[566] *The Aegean Sea* [1998] 2 Lloyd's Rep, 39, 61.

[567] *Fortis Bank v Indian Overseas Bank* [2011] 2 Lloyd's Rep 190, [28]; where the presentation of the bill was expressly considered as act of demand under s. 3 (1) a.

[568] In the case of sea waybills or delivery orders, they do not need to be produced to obtain delivery. Identity check will suffice. See, The Law Commission report, 5.7. Therefore "formal demand" under such documents could be identity check if it involves any election to avail himself to enforce contractual rights.

[569] S. 1 (2) b. The Law Commission report, 2.50, 4.12, 5.7. See also, *The Chitral* [2000] 1 Lloyd's Rep 529, 532; *the Happy Ranger* [2002] EWCA Civ 694, [30]; *the Rafaela S* [2005] UKHL 11, [22], [50]; *AP Moeller Maersk v Sonaec* [2010] EWHC 355, [13].

[570] *The Rafaela S* [2005] UKHL 11, [20], [45].

[571] For detailed discussion on the matter, see, Carver, 6-016 ff; Benjamin, 18-094 ff; Debattista, 2.34; P Todd, "Bill of Lading as Document of Title" [2005] JBL 762; G McMeel, "Straight Bills of Lading in the House of Lords – the Rafaela S" [2005] LMCLQ 273; GH Treitel "The Legal Status of Straight Bills of Lading" [2003] LQR 608; S Girvin, "Bills of Lading and Straight Bills of Lading: Principles and Practice" [2006] JBL 86; DYH Lee and P Sooksripaisarnkit "The Straight Bill of Lading: Past, Present, and Future" [2012] 18 JIML 39.

the best examples of this. The fact that they are treated as sea waybills under the Act does not prevent them from being bills of lading under the common law. Therefore, if the 1992 Act treats straight bills as sea waybills, then for the purpose of the Act, demand without production of the straight bill should be valid and accordingly such demand should be considered as triggering s. 3 (1).[572] If production were required for the purpose of the Act, it must also follow that rights of suit should have been transferred when becoming holder, as is the case for bills of lading under which it is not at the time of issue of the document.

Here are some examples on whether the buyer's actions can trigger "demand" or "delivery" in s. 3 (1).

Case 1: The buyer demands delivery of a cargo of fishmeal without producing the bill of lading and during discharge to the container yard to the order of the carrier, the cargo gives out a smell of burning. Completion of discharge causes some extra costs since the fire was smothered with CO2 and the cargo was ventilated. The carrier claims "increased cost of discharge" resulting from the dangerous nature of the goods against the buyer/transferee. The buyer would not have liability imposed since there is no formal demand. The buyer would not then become liable on the basis of delivery either, since the goods were discharged to the yard to the order of the carrier.

Case 2: A cargo of Russian gasoil is discharged on production of the bills of lading to the shore tanks of the buyer/transferee. Following the discharge, the buyer takes samples from the cargo and decides to reject it. At the same time, the carrier claims damages from the buyer for the contamination caused by the cargo to the tank of the vessel. The buyer would become subject to liability under s. 3 (1) both on the ground of making a formal demand by producing the bill and taking actual delivery of the goods to his shore tank. The position would be different, if he had rejected the goods before taking full possession of them.

4.1.2. By making claim

As is the case in taking or demanding delivery, making a claim under the carriage contract as to sub-section (b) should involve choice by way of election, which should illustrate a positive step to enforce contractual rights.[573] To trigger s. 3 (1) b, claims must be made under the carriage contract. If the claim is based on any other legal basis outside the contract, such as in tort, the claimant buyer will not be regarded as having triggered this sub-section.[574]

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[572] This should be the case, even if the straight bill expressly provides production of the bill. Such express provision gives only right to reject demand without production to the carrier, this will not alter formality of such demand under the Act.

[573] *The Berge Sisar* [2001] UKHL 17, [33].

[574] However where such claims can also be based on the contract of carriage, such circumvention of the Act will precluded by the general principle that a claim in tort will be governed by contract if it is available under the contract too. See Benjamin, 18-170. See also, *Greater Nottingham Co-operative Society Ltd v Cementation*

S. 3 (1) b will not be satisfied, when the buyer/transferee makes a claim before being the "lawful holder" under the Act.[575] Given that being the lawful holder is not required for sea waybills and delivery orders, the buyers of such documents who make a claim after the issue, would be open to trigger sub-section (b). Like "demand", "making a claim" requires formality as well.[576] There must be some legal assertion made to the carrier by way of making a claim. Arrest of a vessel was treated as a good illustration of a formal claim.[577] A question arises at this point; would the buyer be liable as a result of a claim based on an invalid reason? Unlike "demand" within sub-section (c), whether a claim is based on a valid, legitimate reason or not, such a claim can make the buyer liable against the carrier.[578] A claim by its nature is something disputable. Therefore, the Act requires formality of the claim, not the validity of its reason. Assume that the arrest of a vessel was made on an incorrect legal basis, but it was based upon the contract of carriage. In any case, such a claim would fall within the meaning of the Act since the claim was made in a formal way.

On the other hand, in *the Ythan* a request for security, which is a tacit threat of arrest, was held *obiter* as not a formal claim.[579] The reason given by the court was that unlike an arrest, a request for security in the form of a letter of undertaking is not a formal claim but a contractual agreement.[580] In the case, the identity of the claimant was not known and accordingly it was not impliedly or expressly stated that a request for security was made on behalf of the bill of lading holder.[581] Given that Aikens J's decision on the point was *obiter* only, it is submitted that request for security can be arguably treated as a claim within the sub-section, depending on the wording and disclosure of the claimant's identity.[582] Also, Aikens, in the current edition of his book (2nd edition), argues that the buyers whose identities are specified in the request for security may find themselves subject to liability as per s. 3 (1).

Here is an example of a "claim" for the purpose of the Act.

Case: The insurer of the buyer, on the buyer's behalf, commences proceedings against the carrier for the loss of his container without knowing that his dangerous cargo caused the damage to the vessel. Thereby, the buyer may find himself under potential liability due to triggering s. 3 (1) b by making a formal claim.

Piling & Foundations Ltd [1989] QB 71; *Red Sea Tankers Ltd v Papachristides (The Hellespont Ardent)* [1997] 2 Lloyd's Rep 547.

[575] *The Ythan* [2005] EWHC 2399 (Comm); [2006] 1 Lloyd's Rep 457.

[576] *The Berge Sisar* [2001] UKHL 17, [33].

[577] *The Ythan* [2005] EWHC 2399 (Comm); [2006] 1 Lloyd's Rep 457, [98], [103]-[111].

[578] *The Berge Sisar* [2001] UKHL 17, [35].

[579] *The Ythan* [2005] EWHC 2399, [103].

[580] Ibid, [103].

[581] Ibid, [103].

[582] This is also suggested in the current edition of Aikens' book; see Aikens, 8.104. It is also suggested that if the carrier refuses request for security, this may force the hand of the buyer to make an arrest. See, Baughen, "Sue and be Sued? Dangerous Cargo and the Claimant's Dilemma" [2006] 5(4) STLI 14.

5. Cessation of the liability

Sale chains, particularly under c.i.f. sales, are not uncommon in international trade. A buyer acquiring contractual rights under a bill of lading before taking delivery may transfer the bill to a subsequent buyer, and accordingly his rights formerly vested in him become extinct.[583] Although the 1992 Act expressly prescribes divestment of rights, there is, however, nothing in the Act indicating cessation of liabilities.[584] Therefore, in this part of the chapter, an examination will be conducted as to whether the imposed liability on the buyer is divested, and, if so, whether there are exceptions to the rule.

Despite nothing corresponding in the Act, the issue of cessation of transferred liabilities was resolved to a great extent by the House of Lords in *the Berge Sisar*.[585] In the case, the intermediate buyer who took a routine sample of the goods did not take the delivery, but re-sold the cargo to the ultimate buyer who took the cargo without production of the bills. Well after the cargo was delivered, the bills eventually arrived, and the intermediate buyer endorsed and forwarded them to the ultimate buyer.[586] The carrier made a claim for the damage caused to the vessel by the dangerous nature of the cargo against the intermediate buyer who only became a holder for a short period of time.[587] Although it was held that the liability was not imposed on the intermediate buyer as per s. 3 (1), the House of Lords went further and also answered the question as to whether the statutory liability would cease on a further transfer of the bills of lading.[588]

Before the case reached the House of Lords, the issue was discussed in detail at the Court of Appeal where by majority it was held that the intermediate buyer who triggered s. 3 (1) was automatically relieved of the liability once the bills of lading were endorsed to ultimate buyers.[589] The majority (Neill LJ dissenting) opined that the position of the buyer who incurred liability under s. 3(1) was not irrevocable unless and until taking actual delivery of the goods.[590] Millett LJ opined that the liability should be substituted rather than being additional; where the intermediate buyer withdraws his demand or claim and endorses the bill, the liability should not remain with him.[591] In holding this, he relied on a case that was held under the 1855 Act, *Smurthwaite v Wilkins,*[592] in which the

[583] S. 2 (5) a.
[584] S. 3 (3) only provides the continuity of the original party's liability.
[585] *The Berge Sisar* [2001] UKHL 17.
[586] Both the intermediate and ultimate buyer become lawful holder as to s. 2 (2) a.
[587] By virtue of s. 2 (2) a.
[588] Taking routine samples was not regarded demand within the meaning of s. 3 (1). Discussed above. See, 4.1.1. taking or demanding delivery.
[589] [1998] 2 Lloyd's Rep 475 (Neill LJ dissenting).
[590] Until what point is the buyer's position reversible? As to the Millett J's speech, unless and until taking actual delivery of the cargo, his position is reversible. That is to say, after actual delivery, there is no way the buyer divest himself of the liability. See, [1998] 2 Lloyd's Rep 475, 486.
[591] Ibid, 486.
[592] (1862) 11 CB (NS) 842; 142 ER 1026, affirmed by the House of Lords in *the Giannis NK* [1998] AC 605.

intermediate holder was relieved of the liability by way of endorsement.[593] At the House of Lords, the decision of the majority was upheld on similar grounds.[594] In addition, the House of Lords held that even if the liability had been incurred by the intermediate buyers, they would have been relieved of it once the bill was endorsed.[595] The decision was based on the "principle of mutuality"[596] (a party can only become liable, if he wishes to enforce his contractual rights), which governs the provision of the Act.

It is possible to argue against this part of the decision. Firstly, Neill LJ's dissenting judgment in the Court of Appeal is significant in several respects. He opined that once the liability was incurred, it should irreversibly attach to the buyer. In holding this, he relied on the preliminary views of Thomas J in *the Aegean Sea* where the learned judge also argued in favour of the continuity of the liability from the moment of imposition.[597] Secondly, both the majority at the Court of Appeal and the House of Lords in holding this decision said that there was no intention to reverse the decision of *Smurthwaite v Wilkins* in the Act.[598] It is difficult to agree with this argument. *Smurthwaite v Wilkins* was held under the 1855 Act in which the rights and liabilities would be transferred simultaneously. The position is to a great extent different under the 1992 Act. The Act expressly divorces the transfer of rights and liabilities. It enables rights and liabilities to travel pursuant to different sections (s. 2 and s. 3) with different methods.[599] Additionally, neither in the Law Commission report nor in the Act is there any suggestion on divestment of the imposed liability to the transferee, nor is there any mention of *Smurthwaite v Wilkins* in the report. Furthermore, whilst the Act only explicitly provides divestment of rights by virtue of s. 2 (5), there is nothing in the Act in relation to divestment of liabilities. Moreover, s. 2 states "transfer" for rights, while s. 3 makes a party "subject to" liabilities.[600] It is safe to assume that the difference in the wording of the relevant sections was done deliberately. Therefore, it may be argued that s. 3 *sub-silentio* indicates no cessation of transferred liabilities. On these grounds, it is difficult to see why the operation of the repealed 1855 Act, which would transfer rights and liabilities together, should be preserved under the 1992 Act where it expressly deals with them separately under different provisions. Put differently, if the rights and liabilities do not come

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[593] Ibid, 487. The majority decision of the Court of Appeal on the reliance of a case from 1862 was heavily criticized by some commentators; Gaskell, 4.48; Reynolds "The Carriage of Goods by Sea Act 1992 Put to the Test – the Berge Sisar" [1999] LMCLQ 161; Mildon and Scorey "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94; N Campbell "Defining the Frontiers of the Bill of Lading Holder's Liability – the Berge Sisar and the Aegean Sea" [2000] JBL 196. But see also the comment on the decision of the House of Lords on its entirety; GH Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344.

[594] In addition to *Smurthwaite v Wilkins*, the House also relied on several authorities for principle of mutuality; *Sewell v Burdick* (1886) 10 App Cas 74; *Brandt v Liverpool* [1924] 1 KB 575. See, *The Berge Sisar* [2001] UKHL 17, [31].

[595] *The Berge Sisar* [2001] UKHL 17, [44]-[45], per Lord Hobhouse.

[596] *The Berge Sisar* [2001] UKHL 17, [31].

[597] [1998] 2 Lloyd's Rep 475, 484. See also, *The Aegean Sea* [1998] 2 Lloyd's Rep 39, 52.

[598] *The Berge Sisar* [2001] UKHL 17, [44]-[45]; [1998] 2 Lloyd's Rep 475, 486.

[599] Part of III of the Law Commission Report is headed "Separation of Contractual Rights and Duties", 3.15.

[600] Mildon and Scorey "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94, 103.

together under the Act, why should they leave together if there is nothing on divestment of liabilities in the Act?

Although the criticism made above has some valid points, the author ultimately believes that divestment of the liabilities by way of endorsement should indeed be preferred on the ground of the principle of mutuality.[601] There should be a link between benefit and burdens.[602] A party should not have liabilities imposed on him under a contract in which he does not seek to exercise his rights. The wording of s. 3 (1) may also support this inference. Imposition of liabilities expressly depends on the possession of rights under s. 3 (1) in which it only imposes liabilities on a party "in whom rights are vested". When the intermediate buyer endorses the bill, he is to be divested of the rights as per s. 2 (5) and from that moment he will become a party "in whom rights were vested". Therefore, s. 3 (1) will not be considered as satisfied. On the other hand, s. 3 (3) provides only the original party's concurrent liability.[603] This may also tacitly presume that any party other than the original shipper may be divested of his liabilities under the Act.

Nevertheless, it is also submitted by the author that the decision of the House of Lords on this point needs alteration to some extent. With this decision, as soon as the intermediate buyer endorses the bill, the incurred liability is not automatically transferred to the endorsee but vanishes. But what if the end buyer does not wish to exercise his rights at all? Millett J, in giving the judgment, indicated several times that the liability should remain with the intermediate buyer (endorser) until the endorsee exercise his contractual rights;

> *"... that is to say, liable unless and until he [the intermediate buyer] endorses the bill to someone who also fulfils the conditions of liability."*[604],
> *"... the holder endorses the bill in favour of a third party who becomes liable, the previous holder is exonerated."*[605]

It is submitted by the author that the judgment of the House of Lords should be applied with the approach of Millett J due to the policy of the Act.[606] Otherwise it may be misemployed. Assume that the intermediate buyer, who incurred the liability, only in order to be relieved of it, endorses the bill to a further party or a shell company, which will deliberately avoid exercising his rights under the contract. Indeed one may argue that the endorsee does not have to enforce the contract. But then a

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[601] The editors of Carver suggest that it is fairer that liability is to fall upon the ultimate buyer rather than on the intermediate Carver, 5-102. See also, Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344, 351, 352.
[602] *The Berge Sisar* [2001] UKHL 17, [45].
[603] S. 3 (3); This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.
[604] [1998] 2 Lloyd's Rep 475, 487.
[605] Ibid, 487.
[606] Since the liability in the case was not incurred by the intermediate buyer, the decision of the House of Lords on the cessation of liability is obiter. Thus, it is open to alter.

question arises at this point; if he does not wish to exercise the contract at all, why would he purchase the goods and accept the document? Therefore, to secure the redress option of the carrier and to prevent the misemployment of the decision, the incurred liability should remain with the intermediate buyer until the next endorsee exercises his rights. Otherwise, this part of the judgment will be vulnerable and open to abuse by the traders.

On the other hand, although the current position is preserved, the author suggests that the liability may not be divested but remain with the intermediate buyer. S. 5 (2) explicitly provides that a party becomes a holder in "good faith". As discussed above, good faith only means honest conduct under the Act.[607] Thus, if the subsequent endorsee just takes the bill and becomes holder not to enforce the contract but with the intention to enable the intermediate buyer to escape from the liability, it is difficult to say that the subsequent endorsee will be regarded as a holder in good faith for the purpose of the Act. That is to say, given the lack of good faith, the endorsee may not become the holder for the purpose of the Act and the intermediate buyer may preserve his position of becoming lawful holder, and accordingly his liability never vanishes.[608]

Some practical questions may arise at this point. What happens if the buyer fulfils s. 3 (1) by making a claim or demanding delivery but subsequently withdraws his claim or demand, or his demands are rejected by the carrier and the buyer subsequently does not endorse the bill? Although the House of Lords approached this in doubt, it is submitted by the author that the liability remains with the buyer[609] on the ground of the principle of mutuality. S. 3 (1) is expressly worded in the present tense declaring that a party should be "in whom rights are vested". Albeit withdrawn, unless endorsed to a further party, the rights are still vested in the buyer. He can only be divested of his rights by way of endorsement as per s. 2 (5). And according to the House of Lords in *the Berge Sisar*, the rule is simple; the liability ceases only when the intermediate buyer endorses. That is to say, until the moment of endorsement, the incurred liability as per s. 3 (1) remains with him. The rejection of a formal demand by the carrier or the withdrawal of a claim or demand would be unlikely to divest the buyer of this imposed liability.

A second question is, what would happen to the incurred liabilities by B1, if B2 rejects the bill back to B1? The answer to this question depends on whether B2 became the lawful holder in good faith. If B2 accepts the bill with the intent to become the holder in good faith and some later time rejects it by a further endorsement, it is submitted that B1 who incurred the liability previously will cease to be liable following the transfer of the bill to B2, and accordingly once he becomes the holder again with re-endorsement, he will be regarded as the new holder and his previously incurred liability will not revive. However, his position would be different, if B2 rejects the bill from the very

[607] See above, 2.1.4. "lawful" holder.

[608] Such situations are tacitly assumed by Lord Hobhouse; "*It is possible that the conduct of one or other party may give rise to estoppels…*". See, *The Berge Sisar* [2001] UKHL 17, [43].

[609] On the similar suggestion see, Scrutton, 3-033.

beginning without having any intent to be the holder. In that case, the author opines that B2 will never be the holder for the purpose of the Act. Accordingly, B1 will remain the holder and therefore will not be divested of the incurred liability.

5.1.1. Exceptions to the rule

We have seen that the liabilities of an intermediate buyer/transferee may cease on making a further transfer of the bill of lading. Although this may appear to be a means of escape from the incurred liabilities for the transferees, the author thinks that this does not mean that the rule is watertight and has no exceptions. The incurred liability becomes irreversible, once actual delivery of the goods is taken so as to prevent *"any further dealing with the goods"*[610] between the carrier and the transferee, since it is *"the final act of contractual performance on the part of the carrier"*[611].

Apart from this, even in the case of making a claim or demand, the liability can be irreversible, if the goods become lost before further endorsement. Suppose the transferee/buyer made a formal demand from the carrier but before taking the delivery, the vessel and his cargo became lost due to the dangerous nature of his cargo. Or suppose the transferee/buyer commenced proceedings against the carrier for the loss of his cargo without knowing that it was the dangerous nature of his cargo which caused the damage to the vessel. In both scenarios, even if the buyer made a further transfer of the bill, the liability would irrevocably attach to him. For the purpose of the Act, once the goods are lost, the bill of lading becomes spent.[612] In order for a further transfer of the bill to be valid under s. 2 (2) a, the ultimate endorsee must become the holder "by virtue of a transaction effected in pursuance of any contractual arrangements" which should be concluded before the bill became spent. In the above examples, it would be unlikely if there were any contractual arrangements pre-dating loss of cargoes, once the intermediate transferee made a claim or demand from the carrier.

It is evident that liabilities can be divested under transferable bills of lading. That is to say, the liabilities incurred under sea waybills or delivery orders may be irreversible. However, there can be exceptions both under sea waybills and delivery orders. For sea waybills, the rights of the sea waybill shipper are preserved pursuant to s. 2 (5) including his right to redirect the goods under a new contract of carriage, where the rights have been transferred to the buyer/consignee under s. 2 (1) b.[613] Thus, where a sea waybill is issued to the shipper/seller which is deliverable to B1, and later the shipper/seller validly redirects the goods to B2, while B2 obtains the rights under the contract of carriage via s. 2 (1) b, the rights of B1 in the first sea waybill become extinguished pursuant to s. 2 (5)

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[610] *The Berge Sisar* [1999] QB 863, 864 (CA).
[611] *The Berge Sisar* [2001] UKHL/17, [32].
[612] *The Ythan* [2005] EWHC 2399.
[613] *AP Moller-Maersk A/S (trading as Maersk Line) v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm); [2010] 2 All ER 1159. See also, the Law Commission report, 5.23.

b.[614] Similarly, the rights of the shippers or holders of the bills of lading will be preserved by s. 2 (5), when rights are transferred to the person identified in the delivery order. When this is the case, as for the bills of lading, it is submitted that the liabilities incurred will cease, once a new sea waybill or delivery order is issued on the basis of the principle of mutuality.[615] Indeed, for such a substitution, cooperation is needed with the carrier who may not be willing to lose an additional liable party. Additionally, delivery orders can be made out "to order" or "bearer". When this is the case, liabilities can be divested, as is the case in bills of lading, once the rights are acquired under s. 2 (1) c by a further party.

III. Conclusion

The chapter has sought to answer whether the liability arising from dangerous goods is transmissible from the shipper/seller to the buyer/transferee under the carriage contract by means of the 1992 Act and, if so, whether the law can be justified. There is no reason to repeat the above discussions, but in brief, the author strongly opines that this liability is justifiably transmissible from the seller/shipper to the buyer/transferee.

The chapter has also examined how the mechanism of the Act to impose liability operates and whether the incurred dangerous liability can be divested. The examination appears to suggest that there is no injustice in imposing this liability on the buyer, since the balance between the carrier and the buyer is ensured by other aspects.

The reasons given in supporting of this argument are as follows. Firstly, the courts appear to apply restrictedly the mechanism of s. 3 (1) in favour of the buyer/transferee. However, this does not mean that buyers can readily feel safe under all situations, since the very same courts have clearly embraced transferability of the dangerous goods liability, once s. 3 (1) is satisfied. Secondly, even if s. 3 (1) is satisfied by the buyer/transferee, the liability will not be incurred, unless rights are acquired by him. Thirdly, the liability is not automatically transferred at the time the rights are vested in the buyer. The principle of mutuality, which constitutes the basis of the Act, requires that he will not bear any obligations, unless he wishes to exercise rights under the contract. Lastly, unless an irreversible step is taken, buyers by trading transferable bills of lading will have a wild card option, which relieves them of the liability, even if it is incurred preliminarily. Nonetheless, as discussed above, in considering liability for dangerous goods, buyers should be aware that the option may not be watertight and the liability may irrevocably attach under exceptional situations, particularly when accepting delivery of the goods. In Chapter 4, when there is no contractual nexus between the carrier and the buyer on the other side of the voyage, namely in the delivery stage, it will be examined whether the carrier or other

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[614] Ibid.

[615] However, if the practice adopted requires cancellation and re-issue of straight bill to the same consignee to avoid delay and discharge formalities, such practice may not prevent the consignee being a party who acquired rights under the Act; see, *Finmoon v Baltic Reefers* [2012] 2 Lloyd's Rep 388, [43].

victims affected by the dangerous goods are entitled to sue the buyer/consignee for damages or losses arising from dangerous goods under the common law actions.

CHAPTER 4
OTHER MECHANISMS FOR IMPOSITION OF THE LIABILITY ON THE BUYER

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I. Introduction

In Chapter 3, it was shown that under a contractual regime, the liability arising out of dangerous goods is transmissible from the seller/shipper to the buyer/transferee, once s. 3 (1) of the 1992 Act is satisfied. Since the Act came into force, there has been almost no need to rely on other common law actions outside the contract, given that it has created a comprehensive contractual regime between the carrier and the buyer who is not the shipper. However, albeit rarely, there may be some residual situations for which there are no contractual actions falling within the scope of the 1992 Act. [616] The Act has not abolished the common law actions and does not govern the law outside the contract. As such, particularly in the absence of a contract, routes under the common law actions for recourse can be significantly relevant.

In Chapter 2, it was shown that at the shipment stage the non-contracting seller may be subject to liability under tort and an implied contract against the carrier. In this chapter, when there is no contractual nexus between the carrier and the buyer on the other side of the voyage, namely at the delivery stage, it will be examined whether the buyer could be subject to liability for damages or losses arising from dangerous goods under the common law actions. To put it differently, it will be discussed whether the buyer can take advantage of the absence of a contractual regime, and accordingly escape the liability. While doing so, the author will also offer his view on the availability of those common law actions in respect of dangerous goods liability in comparison with the contractual liability of the buyer as transferee.

[616] Examples are not exhaustive but the bill of lading might not have reached the buyer at all. Or the shipping document that is used may not fall within the 92 Act. Or as was the case in *East West Corp*, there may not have been contractual action due to divestment but no re-vestment of the rights; *East West Corp* [2003] QB 1509.

II. Liability under *the Brand v Liverpool* Doctrine

Although in practice title to sue problems are resolved by the 1992 Act, it did not abolish the well-established common law *Brand v Liverpool*[617] doctrine. In the case, a separate contract from the original contract was implied on bill of lading terms between the receiver and the carrier on delivery of the cargo against presentation of the bill of lading.[618] Although the importance of the doctrine was reduced by the 1992 Act, but there may still be circumstances where such a contract can be implied. For instance, a document outside the ambit of the 1992 Act may have been used.[619] When this is the case, a contract can be implied between the carrier and the receiver/buyer depending on whether the facts of the case satisfy the doctrine.[620]

At first glance, when a contract is implied, it might be thought that the carrier may have a claim for damages caused by dangerous goods under the implied contract against the buyer, given that it is implied on bill of lading terms. However, in *the Athanasia Comninos,* Mustill J held that the dangerous goods obligations were not transferred to the buyer/receiver under *the Brand v Liverpool* contract, and indicated that the buyer/receiver would only assume rights and liabilities concerning the carriage and delivery of the goods and the payment therefor.[621] Therefore, if the 1992 Act does not apply and a contract is implied between the carrier and the buyer, it is safe to assume that the buyer does not attract dangerous goods liability hereunder.

III. Bailment Action

Where a person delivers his goods into the custody of another party that accepts these goods voluntarily, a relationship of bailment can be established between those parties.[622] In terms of carriage of goods by sea, bailment in most cases arises between the shipper/bailor and the shipowner/bailee once the goods are shipped. Even though it may have some features in common, bailment action differs from both contractual and tort actions.[623] It can exist independent of contract but may also co-

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[617] *Brandt v Liverpool, Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 KB 575.
[618] In *Cremer v General Carriers (The Dona Mari)* [1974] 1 W.L.R.341, the contract was implied on the terms of a ship's delivery order.
[619] For such examples, see *Ilyssia Compania Naviera SA v Ahmed Abdul Oawi Bamadoa (The Elli 2)* [1985] 1 Lloyd's Rep 107; *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos (No 2))* [1990] 2 Lloyd's Rep 395.
[620] The application of the doctrine was restricted by the following cases; *Aramis (cargo owners) v Aramis (owners) (The Aramis)* [1989] 1 Lloyd's Rep 213; *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep 311.
[621] [1990] 1 Lloyd's Rep 277, 281. For detailed analysis see, Chapter 2, 2.1.3. Bare f.o.b. seller's liability under implied contract.
[622] NE Palmer, *Palmer on Bailment* (3rd edn, Sweet &Maxwell 2009) 64-71, (hereinafter Palmer on Bailment). See also, *East West Corp* [2003] QB 1509; [2003] EWCA Civ 83, [24]; *the Pioneer Container* [1994] 2 AC 324, 341-342; *Morris v C W Martin & Sons* [1966] 1 QB 716.
[623] *East West Corp* [2003] EWCA Civ 83; 2003 QB 1509, [24] – [32]; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1, [50]. See also, *TRM Copy Centres v Lanwall* [2009] 1 WLR 1375.

exist and survive on the contractual terms already made between those parties.[624] Thus, where the parties' relationship is governed by the 1992 Act, bailment will add nothing to the contract.

However the scope of 1992 Act is only limited to contract and bailment is an independent cause of action today.[625] Thus, the 1992 Act albeit seldom, may give no right of action,[626] and accordingly parties may seek to rely on bailment action. A detailed discussion of bailment is outside the scope of this thesis. In this part, weight will be given to whether the buyer who is not the shipper can attract the dangerous goods liability under bailment.

At common law, the bailor of the goods can be held liable in respect of dangerous goods against the carrier.[627] Hence, where the shipper is also the bailor - who is almost invariably the seller in c.i.f. sales[628] but may be either the seller or the buyer under f.o.b. sales depending on the terms - the carrier will naturally base his claim on contract rather than bailment against the shipper/bailor. However, a two-phased question arises at this point: Can the consignee/buyer rather than the shipper be considered the bailor and, if so, can he have dangerous goods liability imposed under bailment?

1. Buyer as original bailor

In *the Aliakmon*, Lord Brandon in rejecting the argument that the bailment was between the buyers/consignee and the carrier, held that the "*only bailment was one by the sellers [shipper] to the shipowner*".[629] On the other hand, there appears to be a contradictory perspective in *the Berge Sisar* in which Lord Hobhouse opined *"The bill of lading acknowledges the receipt of the goods from the shipper [seller] for carriage to a destination and delivery there to the consignee. It therefore evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee [buyer] as bailor*".[630] If the words of Lord Hobhouse are valid, the rule that the shipper is the bailor could be rebuttable; as such, the buyer/consignee can be the bailor of the goods.

Between Lord Brandon's and Lord Hobhouse's view, the editors of *Carver* and *Benjamin* suggest that the former view is to be preferred, which indicates that the seller/shipper may want to

[624] *Akts De Danske Sukkerfabriker v Bajamar Cia (The Torenia)* [1983] 2 Lloyd's Rep 210, 216.
[625] See *the East West Corp* [2003] QB 1533, [45] and *Yearworth* [2009] EWCA Civ 37; [2010] QB 1. On the same view, see also, Sir R Aikens, "Which Way to Rome for Cargo Claims in Bailment When Goods Are Carried by Sea?" [2011] LMCLQ 482, 485. See also, the Law Commission report, 2.39, 2.45, 5.24.
[626] As was the case in *East West Corp* [2003] EWCA Civ 83, due to endorsement, the shipper may have been divested of right of suit by s. 2 (5) of the 1992 Act but bailment may allow him to put his claim against the shipowner.
[627] Benjamin, 18-092, fn 772; Carver, 6-012, fn 89; GH Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344, 353, fn 79. The bailor can also be liable for damages arising out of unsafety or defect of the goods; *Blakemore* (1858) 8 E&B 1035; *Coughlin v Gillison* (1899) 1 QB 145. See also Palmer on Bailment, 636, 1580; NE Palmer and E McKendrick, *Interests in Goods* (2nd edn, LLP 1998), 486 (hereinafter Palmer and McKendrick).
[628] *The Aliakmon* [1986] AC 785, 818.
[629] Ibid. Emphasis added.
[630] [2001] UKHL 17, [18]. Emphasis added. His Lordship supported his view with two old cases; *Ryans v Nix* (1839) 4 M & W 775 and *Evans v Nichol* (1841) 3 M & G 614. Although the case was not decided on bailment grounds, it is difficult to deny this speech and its authority since it was held in the House of Lords.

retain the title in the goods and the bills of lading as security for payment.[631] Accordingly, the learned commentators further add that there is no such presumption merely due to the fact that the bill names the buyer as consignee.[632] *Prima facie* as a rule, the author also thinks that Lord Brandon's view in *the Aliakmon* should be preferred. Nevertheless, this does not necessarily mean that the two views cannot be reconciled. In *the Albazero*, it was held that the goods could be bailed in three different ways;

> *"The first category of cases comprises those in which it was held that the consignee rather than the consignor was the proper person to sue. The ground of decision in those cases was that the consignor, in delivering the goods to the carrier, was acting as agent for the consignee, and that the property and risk in the goods were either in the consignee before such delivery or passed to him upon its taking place.*
> *The second category of cases comprise those in which it was held that the consignor rather than the consignee was the proper person to sue. The ground of decision in those cases was that the consignor, in delivering the goods to the carrier, was acting as principal on his own account, and that the property and risk in them remained in him during the carriage."*[633]

In *the Aliakmon*, the property did not pass on shipment. It did not even pass later since the consignee/buyers were not able to pay and they were holding the bills as agent of the sellers, given the further agreement between them. Accordingly, the buyers in the case cannot be classified in the first group of *the Albazero*. It is therefore the seller who was the bailor who would fall within the second category.

On the other hand, the first category emphasises that the consignee is the bailor, if the property passes before or on shipment.[634] Although this is not very common under c.i.f. and f.o.b. sales, the property may pass to the consignee/the buyer on delivery of the goods to the carrier.[635] Some support for such a reconciliation between the views can be found both in the Court of Appeal[636] and House of Lords[637]. In *Kum v Wah Tat Bank Ltd*, it was held by the Privy Council that it was the consignee who was the original bailor, not the shipper since the property passed on shipment.[638] In *East West Corp*, Mance LJ applied the principles of *the Albazero* to determine who the bailor was in the case.[639] In *the Scottish & Newcastle*, yet again Lord Mance citing *the Albazero, the Berge Sisar*

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[631] Carver, 6-012; Benjamin, 18-092. Aikens also supports this view, see, 9.62.
[632] Ibid.
[633] [1977] AC 774, 786. The third category is irrelevant here.
[634] It is very unlikely that the property passes before shipment on sea carriage. See *Texas Instruments Ltd v. Nason (Europe) Ltd* [1991] 1 Lloyd's Rep. 146.
[635] For such examples, see, *Scottish & Newcastle v Othon Ghalanos* [2008] UKHL 11; *the Sevonia Team* [1983] 2 Lloyd's Rep 640; *the San Nicholas* [1976] 1 Lloyd's Rep 8; *the Dunelmia* [1970] 1 QB 289; *the Athanasia Comninos* [1992] 1990] 1 Lloyd's Rep 277.
[636] *East West Corp* [2003] QB 1533.
[637] *Scottish & Newcastle v Othon Ghalanos* [2008] UKHL 11.
[638] [1971] 1 Lloyd's Rep 439, where the pledge was completed on shipment of the goods.
[639] [2003] QB 1533, [34].

and East West Corp, was also inclined to hold that the consignee/buyer could be the bailor on the grounds discussed above.[640]

All these authorities appear to show that the view of Lord Hobhouse in *the Berge Sisar* can only be supported once qualified with the classification of *the Albazero*.[641] Moreover, if the facts of the case prove that the property passes on shipment, the consignee/buyer may be regarded as the original bailor within the first category of *the Albazero*.[642]

Indeed, one may argue that where the consignee/buyer is the original bailor, he may also be regarded as the original party to the carriage contract[643] and the carrier may have a claim for damages arising from dangerous goods against that buyer who is considered as the original party to the carriage contract.[644] This is no doubt possible under many f.o.b. contracts as discussed in Chapter 2. However, there are some examples of such f.o.b. sales where the property passed on shipment to the buyer but it was still the seller/shipper who was held to be a principal party to the carriage contract.[645] This was the case in *Kum v Wah Tat Bank Ltd,* where the consignee was regarded as the bailor, and the shipper was a different party.[646] That is to say, albeit not very common, it is possible that the shipper and the original bailor can sometimes be different parties.

If this inference is correct, this makes the f.o.b. buyer/consignee who is considered the original bailor technically exposed to liability for damages arising from dangerous goods. However, the author is not aware of any case, which renders the consignee/bailor liable for dangerous goods. There are several reasons for this. Firstly, the *prima facie* rule that the shipper is the bailor is rarely rebuttable, since title in the goods seldom passes on shipment under c.i.f. and f.o.b. sales.[647] Secondly, bailment was not properly considered as an independent cause of action until the 1960s.[648] By the enactment of the 1992 Act, to a great extent cases became governed by a contractual regime. Thus, there is almost no need to rely on bailment, since the parties put forward their claim under contract.

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640 [2008] UKHL 11, [41] – [43].

641 Very recently two views on bailment were brought before the court. Regrettably, Males J were not able to examine them in detail since the bailment would not assist the claimants in the case; *Sumanu Natural Resources Ltd and SJM Gems International Ltd v Mediterranean Shipping Company SA* [2014] EWHC 2829 (Comm). The decision was affirmed in the Court of Appeal; [2016] EWCA Civ 34.

642 It was Brandon J (later became Lord Brandon) who first defined three categories at first instance in *the Albazero* [1974] 2 Lloyd's Rep 38. It was later approved by the House of Lords. It was also Lord Brandon who delivered the decision in *the Aliakmon*. Therefore it can be safely assumed that in *the Aliakmon* he held that it was the seller/ shipper who was the bailor because the seller/shipper fell within the second category that his Lordship defined in *the Albazero*.

643 *The East West Corp* [2003] QB 1533, [34]. For an example of this where the consignee/buyer was considered the shipper, see, *Scottish & Newcastle v Othon Ghalanos* [2008] UKHL 11.

644 See, *the Athanasia Comninos* [1990] 1 Lloyd's Rep 277.

645 *The Sevonia Team* [1983] 2 Lloyd's Rep 640; *the San Nicholas* [1976] 1 Lloyd's Rep 8; *the Dunelmia* [1970] 1 QB 289; *the Athanasia Comninos* [1992] 1990] 1 Lloyd's Rep 277. See Chapter 2.

646 [1971] 1 Lloyd's Rep 439, where the pledge was completed on shipment of the goods.

647 *Mitsui & Co. Ltd.* v. *Flota Mercante Grancolombiana SA (The Ciudad de Pasto)* [1988] 1 W.L.R. 1145.

648 *Morris v Martin* [1966] 1 QB 716; *Building and Civil Engineering Holidays Management Ltd v Post Office* [1966] 1 QB 247.

Indeed, bailment is considered as an independent cause of action today.[649] But where a contractual relationship arises under the 1992 Act, the courts arguably and understandably feel reluctant to impose dangerous goods liability on the buyer/consignee under bailment, even if he is regarded as the original bailor. This is because if there is a contract between them, the consignee/buyer will not be subject to liability unless s. 3 (1) is triggered. Thus, provided that there is a contractual nexus, it is thought that the courts would likely defy such an attempt of the shipowner to circumvent the mechanism of s. 3 (1), in order to render the buyer liable under bailment.

2. Buyer as attornee

Where the title in the goods passes at a stage after the shipment of the goods, the consignee/buyer will not be regarded as the original bailor, and accordingly there will not be bailment between the bailee and the buyer. However, it is trite law that if an attornment is established, the consignee/buyer will replace the original bailor as the new bailor/attornee.[650] Attornment is a recognition that the goods are held on behalf of the successor in the title rather than the original bailor and the former is entitled to delivery of them.[651] An attornment will usually not be established merely on the ground of naming a party in the bill of lading or transferring the bill to the relevant party.[652] If this is correct, then only an actual attornment can be said to establish bailment between the buyer and the bailee.[653] Such an attornment therefore will usually take place on presentation of the bill for demanding or taking delivery of the goods.[654] However, the mechanism of attornment is not

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[649] See *the East West Corp* [2003] QB 1533 and *Yearworth* [2009] EWCA Civ 37; [2010] QB 1. On the same view, see also, Sir Richard Aikens "Which Way to Rome for Cargo Claims in Bailment When Goods Are Carried by Sea?" [2011] LMCLQ 482, 485.

[650] *The Aliakmon* [1986] 1 AC 785, 815.

[651] *The Gudermes* [1993] 1 Lloyd's Rep 311, 324.

[652] *The Aliakmon* [1986] 1 AC 785, 818; *the Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, 406; *the Future Express* 2 Lloyd's Rep 542, 550. See also, *the Starsin* [2003] EWCA Civ 174; [2003] 1 Lloyd's Rep 239, [136]. There are some arguments against necessity of attornment. See, G McMeel "The Redundancy of Bailment" [2003] LMCLQ 169, 196-198. There are also other arguments that transferable bills carry attornment with it. See, RM Goode, *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 1985), 6-7; RM Goode, *Commercial Law* (1st edn, Harmondsworth 1982), 63. Debattista also thinks that attornment automatically travels with order bills of lading. See, Debattista, 2.7. Lorenzon also thinks that the subsequent holder may become bailor by virtue of transfer of rights under the 92 Act; See, Aikens "Which Way to Rome for Cargo Claims in Bailment When Goods Are Carried by Sea?" [2011] LMCLQ 482, 492, fn 55. For contra-views, see, Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344, 354; Carver, 6-014; Benjamin, 18-093. For a detailed analysis, see P Todd "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539. See also, N Curwen, "The Bill of Lading as a Document of Title at Common Law" in P Park and B Andoh (eds), *Mountbatten Yearbook of Legal Studies* (Southampton Solent University 2007), 139, 151. For authorities against attornment, see, *the Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep 321, 340. See also, dictum of Devlin J in *Heskell v Continental Express Ltd* (1949) 83 L1 L Rep 438, 453; and dictum of Lord Hobhouse in *the Berge Sisar* [2001] UKHL 17, [18].

[653] *The Aliakmon* [1986] 1 AC 785, 818.

[654] *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, 406. Treitel "Bills of Lading: Liabilities of Transferee" [2001] LMCLQ 344, 354; Aikens "Which Way to Rome for Cargo Claims in Bailment When Goods Are Carried by Sea?" [2011] LMCLQ 482, 492. But see, S Baughen "Bailment or Conversion? Misdelivery Claims against Non-contractual Carriers" [2010] LMCLQ 411, 421, fn 48. But the problem may

exhaustive. There can be an attornment even in the case of delivery without presentation of the bills of lading.[655]

So, at this point, the question that arises is whether the buyer/attornee can become liable for losses and damages arising out of dangerous goods, once an attornment is established. Unlike the original bailor, he cannot be said to owe any duty in relation to shipment of such goods to the bailee. Accordingly, he would not have any liability imposed on him under the common law duty. However, where an attornment is established between the bailee and the buyer, the courts opine that it would be on the terms of original bailment, which is in most situations on bill of lading terms.[656] This is also the case, where there is sub-bailment, which generally arises when the carrier is the time charterer not the shipowner[657] or where the initial carrier delivers the cargo to another carrier for transhipment.[658] Although it appears to be unclear whether the bailee can enforce all or some of his rights against the bailor or attornee, some learned commentators think that the bailee can do so.[659] If this is correct, then since most bills of lading incorporate the Rules, the buyer/attornee will be technically open to have liability imposed on him under Art IV r 6 for dangerous goods.[660] Indeed, in most cases there will be a contractual nexus and the carrier will not need to rely on bailment. Nonetheless, this might be an option for the shipowners when there is no contract.

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arise where the delivery is made by sub-bailee. However Baughen thinks that if the delivery is made by the authority of head-bailee, the buyer may find himself bound as a result of attornment. See, S Baughen "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393, 398.

[655] *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395, 406. Attornment may arise during negotiations between the shipowner and the buyer; see, *the Gudermes* [1993] 1 Llody's Rep 311. In respect of ship's delivery orders, the carrier will attorn to the holder of the order by issuing the order. Such bailment will be likely on bill of lading terms. On the other hand any delivery order issued by other than carrier will not carry any attornment. See, P Todd, *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa 2007), 7.133, 7.134 (hereinafter Todd Bankers Documentary Credits). However, there will not be attornment at all, when the buyer takes the delivery of the goods on behalf of the shipper/seller; *the Aliakmon* [1986] AC 785.

[656] *The Aliakmon* [1986] AC 785, 818; *the Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395. See, also *Sumanu v Mediterranean Shipping Company SA* [2014] EWHC 2829, [31]. The terms can be implied; *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591, 611-612. Bailment may be on charterparty terms too. This is likely to arise where the shipper is also the charterer, and accordingly the original bailment arises on charterparty terms; *The Gudermes* [1993] 1 Llody's Rep 311.

[657] *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd* [1924] AC 522. In the case, the shipowner who was not the carrier under the bill was entitled to rely on the terms of charterer's bill against the bailor. However modern authority rejects such approach indicating that in such a case the terms of sub-bailment are rather on the terms of time charter than the bills of lading. See, *Morris v Martin* [1966] 1 QB 716; *the Pioneer Container* [1994] 2 AC 324; *the Forum Craftsman* [1985] 1 Lloyd's Rep 291, 295; *the Starsin* [2004] 1 AC 715, [137]. See also, *the Mahkutai* [1996] AC 650. See also Aikens, 9.81.

[658] *The Pioneer Container* [1994] 2 AC 324 (Privy Council). The sub-bailee would be able to rely on all terms of sub-bailment even including not germane ones. Such as jurisdiction clauses, provided that the original bailor has expressly or impliedly consented these terms. However the Courts will most likely find that the original bailor has tacitly consented to be bound by the Hague or Hague-Visby Rules. See, Baughen, "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393, 401. See also, *Morris v Martin* [1966] 1 QB 716 which was applied in *the Pioneer Container.*

[659] Mckendrick and Palmer, 1375-1376; R Lord and MD Bools [1999] IJOSL 194. See also *the Winson* [1982] AC 939, 961. See also, Aikens, 9.58.

[660] The courts may be reluctant to manipulate the term "shipper" though not to impose liability onto the attornee/buyer. However if the bill contains also merchant clause, the liability is more likely to arise.

At first glance, this may seem unfair where the attornee/buyer has no duty to the bailee in respect of shipment of dangerous goods. However, the bailee's entitlement to damages arising from dangerous goods can be justified on several grounds. Firstly, attornment has a retrospective effect and accordingly the attornee will be entitled to rights against the bailee for losses and damages that had already occurred before he became the subsequent bailor/attornee.[661] Then, in turn it should follow that there would be no injustice, if the bailee were retrospectively entitled to rights against the attornee for the obligations that occurred at an earlier stage. Moreover, while the courts appear to be inclined to enlarge the bailee's liability when the terms are relied upon by the bailors,[662] why should the terms be restrictedly interpreted when they are relied upon by the bailees?[663] Thirdly, as said above, attornment will usually be established on demanding or taking delivery of the goods between the buyer and the bailee. Under a contractual relationship, when there is delivery or demand, s. 3 (1) will be satisfied and the buyer will become liable under the 1992 Act. However, in case there is no contract but bailment on terms, why should the buyer/attornee be able to take advantage of this and escape liability, when normally he would have had liability imposed on him due to a demand or delivery under contract?[664] Transferring rights and liabilities under the 1992 Act is based on the principle of mutuality, which provides that the party who wishes to exercise rights should be burdened with the liabilities as well. That being the case, although there is no contract but instead a bailment relationship, the author thinks that the same principle should apply and accordingly when the buyer/attornee is willing to exercise his rights on terms of bailment by demanding and taking delivery, he should also bear the responsibilities thereunder.

IV. Document of Title Function

Under c.i.f. and f.o.b. contracts, the seller is required to tender a transferable (or negotiable) shipped bill of lading unless otherwise stipulated in the sale contract.[665] A shipped bill of lading issued as "to order" or "bearer" is a transferable document.[666] Accordingly, this transferable document

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[661] *The Gudermes* [1993] 1 Llody's Rep 311. See also, *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48. Palmer suggests that too. See, Palmer on Bailment, 90.

[662] *Sandeman Coprimar v Transitos Integrales* [2003] QB 1270, where the bailee was found liable for loss of the goods which occurred after delivering them to a subsequent bailee.

[663] The Editors of Cooke also favours the view that attornee should be liable for dangerous goods under bailment pursuant to the Hague or Hague-Visby Rules. See, Cooke, 18.133.

[664] In *East West Corp*, the bailee could not take the advantage of not having contractual nexus with the shipper and but became liable under bailment; see, *East West Corp v DKSB* [2003] QB 1509.

[665] In terms of received bills of lading, the authorities are not conclusive. See, *the Marlborough Hill* [1921] 1 AC 444; *the Diamond Alkali* [1921] 3 KB 443. Mate's receipt is not regarded as document of title at common law; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429. However it can be upon proof of custom. See, *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439, 443-444.

[666] Although in the very first case where the document of title function was established, the bill of lading was mentioned as "negotiable and transferable", bill of lading technically is not a negotiable in the sense that it gives the transferee better title than the transferor; *Lickbarrow v Mason* (1794) 5 TR 683, 685. It is just a popular usage to indicate its transferable feature. See, *Gurney v Behrend* (1854) 3 El & Bl 622, 633-634; *Heskell v*

is regarded as a document of title to the goods at common law.[667] Once transferred, the holder of a document of title becomes entitled to constructive possession of the goods.[668] This function is described in the case law in many forms.[669] The famous *dictum* of Bowen J from *Sanders v Maclean* perfectly illustrates how it operates;

> *"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo."*[670]

Erle CJ in *Meyerstein v Barber* held that *"…the indorsement and delivery of the bill of lading while the ship is at sea operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do."*[671] The bill of lading as a document of title symbolizes the goods and its delivery is equivalent to delivery of the goods.[672] By the function of constructive possession,[673] the buyer holds something that not only represents the goods but also puts the goods at

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Continental Express Ltd (1949-1950) 83 Ll LR 438, 453; *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439, 446; *the Future Express* [1993] 2 Lloyd's Rep 542, 547; *the Rafaela S* [2005] UKHL 11, [37]. For discussions on transferability and negotiability, see also, R Negus, "The Negotiability of bills of lading" (1921) 37 LQR 442; C Debattista, *Sale of Goods Carried by Sea* (Butterworths 1990), 19; A Tettenborn, "Transferable and Negotiable documents of title – a redefinition?" [1991] LMCLQ 538; N Palmer and E McKendrick, Interests in Goods, Chapter 22, 'The Bill of Lading as a Document of Title', 547, 554.

[667] Apart from order and bearer bills, the position of straight bill of lading is not straightforward. However, the House of Lords held that straight bill of lading is document of title in the sense of the 1971 Act. In The House, Lord Bingham agreeing with the reasoning of Rix J from the Court of Appeal also inclined to hold that it is document of title at common law too. See, *the Rafaela S* [2005] UKHL 11, [20]-[24]. But for discussions among the commentators, see; Carver, 6-016; Benjamin, 18-094; P Todd, "Bill of Lading as Document of Title" [2005] JBL 762; G McMeel, "Straight Bills of Lading in the House of Lords – the Rafaela S" [2005] LMCLQ 273; GH Treitel "The Legal Status of Straight Bills of Lading" [2003] LQR 608; S Girvin, "Bills of Lading and Straight Bills of Lading: Principles and Practice" [2006] JBL 86; DYH Lee and P Sooksripaisarnkit "The Straight Bill of Lading: Past, Present, and Future" [2012] 18 JIML 39.

[668] *The Delfini* [1990] 1 Lloyd's Rep 252, 268.

[669] In this part of chapter, we shall only examine whether the carrier may have rights against the holder of a document of title for damages caused by dangerous goods, not the infinite discussion of document of title generally. For this, see, Carver, 6-007 ff; Benjamin, 18-089 ff; Palmer and McKendrick, 63, 547; Scrutton, 10-001; Aikens, 6.1; Todd, Bankers Documentary Credits, 7.1; Todd, "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539; Bools, 173; Debattista, *The Sale of Goods Carried by Sea*, 15; Bridge, 351; Tetley, 532; T Schmitz, "The Bill of Lading as a Document of Title" [2011] JITLP 10 (3) 255; S Thomas, "Transfers of Documents of Title under English Law and the Uniform Commercial Code" [2012] LMCLQ 573; C Pejovic, "Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions" [2001] JBL 461; N Curwen, "The Bill of Lading as a Document of Title at Common Law" [2007] MYLS 139.

[670] (1883) 11 QBD 327, 341.

[671] (1866) LR 2 CP 38, 45.

[672] *Barber v Meyerstein* (1870) LR 4 HL 317, 322; *Sewell v Burdick* (1884) 13 QBD 159, 171; *Clemens Horst Co v Biddell Bros* [1912] AC 18, 22-23. This is also compatible with s. 27 of the Sale of Goods Act 1979 in which delivery requirement is defined. See also, Sassoon, 113.

[673] Constructive possession can be often called as symbolic too. Some commentators can also use "symbolic" possession to define something different from constructive. See, AP Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths 1989), Chapter 3; Bools, 184.

his disposal.[674] That is to say, a document of title establishes a special relationship between the actual possessor of the goods (the carrier) and the possessor (the buyer) of the bill of lading. From the moment of transfer, the buyer/holder who has the right to the goods becomes the creditor while the carrier who owes the duty to deliver against the document of title becomes the debtor in this relationship which has nothing to do with contract but possessory title.[675]

From the moment of transfer of the bill, the carrier is only obliged to deliver the goods to the holder of the document of title, not to the transferor or original shipper.[676] That is to say, if the carrier delivers the goods to someone other than the buyer/holder or refuses to deliver to the buyer/holder, the buyer will have an alternative course of action in conversion[677] to contractual action.[678] However, just because the buyer will have a right of action for conversion arising out of the document of title to the goods,[679] no liability of the buyer will arise against the carrier. Accordingly, the carrier will not have a right of action for loss or damage suffered in consequence of the shipment of dangerous goods against the buyer/holder.

V. Potential Tort Actions against the Buyer

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[674] *Mitchell Cotts & Co Ltd v Hairco Ltd* (1943) 77 Ll L Rep 106; *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814, 818; *The Parchim* [1918] AC 157, 171-172; *Biddell Brothers v E Clemens Horst & Co* [1911] 1 KB 934, 956.

[675] Unlike in bailment, attornment takes no part to establish relationship between the carrier and holder in terms of document of title; *The Future Express* [1992] Lloyd's Rep 79, 94 per Diamond J.

[676] It is noteworthy that transfer of document title does not necessarily also pass the property if there is no intention of the parties so; *Sanders v Maclean* (1883) 11 QBD 327, 341. The conventional view is that the bill of lading ceases to be document of title once the goods are delivered to the person entitled to; *Barber v Meyerstein* (1870) LR 4 HL 317; *Barclays Bank v Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep 81. However it was *obiter* held by Diamond J in *the Future Express* that the bill of lading does not become stale until the goods are delivered against production of it; [1992] 2 Lloyd's Rep 79, 96. This point was left open in the Court of Appeal; [1993] 2 Lloyd's Rep 542. See also, *the Delfini* [1988] 2 Lloyd's Rep 59, 608. Very recently, this argument was supported in the Court of Appeal, see, *the Erin Schulte* [2015] 1 Lloyd's Rep [53]. The bill of lading also appears to remain as document of title even if the goods are lost; *Manbre Saccharine v Corn Products* [1919] 1 KB 198. See also, Cooke, 18.149.

[677] *The Sormovskiy* 3068 [1994] 2 Lloyd's Rep 266, 283. See also, *Sze Hai Tong Ltd v Rambler Cycle Co Ltd* [1959] AC 576.

[678] *Glyn Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 592; *the Stettin* (1889) 14 PD 142; *Sze Hai Tong Ltd v Rambler Cycle Co Ltd* [1959] AC 576; *the Sormovskiy* 3068 [1994] 2 Lloyd's Rep 266; *Motis Exports Ltd v Dampskibsselskabet AF 1912, Aktieselskab* [2000] Lloyd's Rep 211; *the Houda* [1994] 2 Lloyd's Rep 541; *Trucks & Spares Ltd v Maritime Agencies Ltd* [1951] 2 All ER 982; *the Happy Ranger* [2002] EWCA Civ 694; *the MSC Amsterdam* [2007] EWCA Civ 794.

[679] Action in conversion seeks to protect possession or the immediate right to possession; *Rogers v Kennay* (1846) 9 QB 594, 596; *International Factors Ltd v Rodriguez* [1979] QB 353. See also, P Todd, "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539, 545-552; Todd, Bankers Documentary Credits, 7.61-7.66; N Palmer and E McKendrick, Interests in Goods, ch 22, 'The Bill of Lading as a Document of Title', 547, 557. It is submitted that this should be the position except for the facts that the bill should be held on behalf of someone else or there could be no possessory rights to transfer under the bill. Otherwise there would be no need to assistance of constructive possession, had the property been sufficient to confer a right to sue in conversion. For such examples see respectively*; the Aliakmon* [1986] AC 785; *the Future Express* [1993] 2 Lloyd's Rep 542. See also, *the Ythan* [2005] EWHC 2399.

By means of the 1992 Act, the buyers[680] in most cases will have a contractual nexus with the carriers and accordingly those parties will have an action in contract against each other. Although the problems in relation to contractual actions have largely been resolved by the 1992 Act, there are still some leftover situations not covered by the Act.[681] When one of these arises, the claimants will seek to have an action in tort against the defendants. On this, English case law appears to show that in the maritime law context, most of the tort actions concern claims in negligence by the cargo owners/buyers against the carriers/shipowners.[682] However, this does not mean that the carriers are not entitled to sue the cargo owners in tort actions. In addition to the carriers, there may have been other victims affected by dangerous goods that normally do not have a contractual relationship with the cargo owner.

1. **Actions in negligence and vicarious liability**

At this point, the question that arises is whether the carrier or other victims can sue the end buyer/cargo owner in tort for the liability arising out of the shipment of dangerous goods. In *the Orjula,*[683] due to defective packing and staging, the drums of acid leaked and caused damage to the vessel and containers, which were supplied by the carrier. For the damage, the carrier sued in tort both the shipper/seller named in the bill of lading and the party who supplied the drums of chemicals to the shippers and also stuffed them in the containers. It was held by Mance J that the defendants owed a duty of care for the damage to the containers and the vessel, and accordingly the carrier would be entitled to claim in tort against the supplier for the alleged negligence in the stowage of the containers.[684]

In addition in *the Kapetan Georgis*, the time charterer who was sued by the shipowner for damages arising from dangerous goods, in return issued a third party notice against the shipper/seller who did not have a contractual relationship with the time charterers.[685] The charterers claimed in tort against the shipper/sellers that they owed a duty to take reasonable care that the goods shipped were not dangerous, and accordingly they were liable due to negligent shipment of excessively gaseous

[680] Who are not original party to carriage contract.
[681] Following examples can be given; the bill of lading might have been lost before reaching the buyer or a document which is outside the scope of the Act may have been used such as mate's receipt as was in *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439. Or contractual rights may not have been vested due to problems in endorsement; *East West Corp v DKSB* [2003] QB 1509.
[682] For such examples, see, *Margarine Union G.m.b.H. v. Cambay Princes S.S. Co* (*The Wear Breeze)* [1969] 1 QB 219; *the Aliakmon* [1986] AC 785.
[683] *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395, 403. See also, A Tettenborn, "Tort Liability and environmental responsibility" [1996] LMCLQ 8.
[684] Ibid, 403. For a supportive speech for a claim in tort for dangerous goods, see, *the Fiona* [1994] 2 Lloyd's Rep 506, 521-522 (per Lord Hoffmann). For where the shipper owed duty of care against the charterer in tort, see, *Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep 352.
[685] *Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep 352.

goods. It was eventually held that the charterers had a good arguable claim in negligence.[686] Additionally, in the Court of Appeal in *the Fiona,* where some of the crew lost their lives due to an explosion caused by dangerous goods, Lord Hoffmann opined *"Their [crew] interests are protected by … the law of tort. If the personal representatives of the victim of this accident were to sue in tort, they would in English law on the Judge's findings recover against BP [the shipper/seller]".*[687]

The authorities above expressly illustrate that not only the shipowner but also other victims like the charterer, crew members and other cargo owners can be entitled to claim in tort for damages[688] caused by dangerous goods against the party which in all three cases were the shipper/sellers whose negligent actions during or before shipment caused the loss or damage. Therefore, it would be safe to state that end buyers may not owe any duty of care to the carriers or to other third parties, and accordingly may not be sued in negligence unless they can be said to have taken part before or during shipment in a way to cause the damage.

Given that action in negligence against the end buyers is not an option for the carriers, they may seek to sue the end buyers in tort for potential vicarious liability.[689] Considering the nature of the vicarious liability of the buyer against the carrier in tort, where the employers become liable for the wrongdoings of their employees, it is submitted that such an action would likely fail against the end buyers as well. Firstly, it is not plausible to argue that the sellers under c.i.f. and f.o.b. sales who made the shipment of the goods can be regarded as employees of the buyers.[690] Such an assumption is not operable, particularly under c.i.f. sales where string sales are not uncommon, and accordingly the initial shipper/seller and end buyer are unlikely to have any contractual relation. Secondly, the argument that the sellers may have acted as agents for the buyers in respect of the shipping of the goods may not be plausible either[691] on two grounds; first, where the buyer is not the original party – the shipper - to the contract of carriage, the shipper/seller acts only as principal in respect of shipment of the goods: second, the property in the goods hardly ever passes before shipment under c.i.f. and f.o.b. sales.[692] Thus, where the property in the goods lies with the shipper/seller before shipment, it is not arguable that the seller acts as agent of the buyer during shipment. Therefore, given that the sellers in respect of shipment, mostly act as principal, and may not be regarded as employees of the buyers under c.i.f. and f.o.b. sales, the carriers' action under vicarious liability against the end buyers would likely fail as is the case with action in negligence.

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[686] Ibid, 356.
[687] [1994] 2 Lloyd's Rep 506, 521-522 (emphasis added).
[688] In such a case, recoverable damages in tort can be more limited than claims made in contract, since pure economic losses which are not linked to physical damage may not be recoverable in tort claims; *the Orjula* [1995] 2 Lloyd's Rep 395, 401.
[689] *McKay Massey Harris Proprietary Ltd v Imperial Chemical Industries of Australia and New Zealand Ltd and United Stevedoring Company Ltd (The Mahia No2*) [1960] 1 Lloyd's Rep 191, 224-225. (Australia)
[690] Ibid.
[691] They may have acted as forwarding agents; *the Mahia No 2* [1960] 1 Lloyd's Rep 191, 224-225.
[692] *Texas v Nason Europe* [1991] 1 Lloyd's Rep 146; *the Berge Sisar* [2001] UKHL 17, [18].

2. The rule in *Rylands v Fletcher*

The above shows that the buyers who have no contractual nexus with the carrier and have taken no part during or before shipment in causing any loss or damage, may, to a great extent, feel safe and claims for shipment of dangerous goods may not be pursued against them in negligence or vicarious liability. However, there might be an alternative option for the carrier in which he may have a valid claim against the buyer in tort by way of analogy under the rule established in *Rylands v Fletcher,*[693] since a defendant does not necessarily need to take part in or commit any sort of legal wrong to be found liable hereunder.

In the case, the defendant had built a reservoir on his land for his water mill. While the independent contractors of the defendant were building the water mill, they also noticed that there were several disused shafts on the defendant's land. When the reservoir was filled with water, the water penetrated through and damaged the mineshafts of the claimant. Therefore, the question was whether the defendant was liable for damages done to the coalmine even though the defendant did not know that there were shafts on his land. The decision of the Court of Exchequer Chamber, which was upheld by the House of Lords, was that the defendant was found under strict liability against the claimant.[694]

2.1. Conditions of the rule

The rule in *Rylands v Fletcher* has been applied ever since under English law and reviewed by the modern authorities.[695] In order for a defendant to be held liable, there are some conditions to be satisfied under formulation of the rule. Whether the buyer in our case satisfies those conditions to be held liable for the dangerous goods against the carrier under the rule, will be examined below by way of analogy.

The very first condition is that there should be a "dangerous thing". As Blackburn J opined in *Rylands v Fletcher*, *"anything likely to do mischief"*[696] can be regarded as dangerous. In the House of Lords in *Transco v Stockport* where the rule was reviewed, Lord Bingham thought that whether a

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[693] (1863) LR 3 HL 330.
[694] (1863) LR 3 HL 330, 339-340.
[695] *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264; *Transco v Stockport Metropolitan Borough Council* [2004] 2 AC 1. For detailed analysis on the rule, see, W Stallybrass, "Dangerous Things and the Non-Natural User of Land" [1929] 3 CLJ 376; FH Newark, "Non-Natural User and *Rylands v Fletcher*" [1961] 24 MLR 557; T Weir, "*Rylands v Fletcher* Reconsidered" [1994] CLJ 216; DP Nolan, "The Distinctiveness of *Rylands v Fletcher*" [2005] 121 LQR 421; J Murphy, "The Merits of Rylands v Fletcher" [2004] 24 OJOLS 643.
[696] (1866) LR 1 Ex 265, 279.

thing can be considered dangerous under the rule is dependent on the defendant's use of it. Thus, even water stored in a dam can be regarded as a dangerous thing.[697] In supporting this, the case law appears to prove that anything can be a dangerous thing, such as gas, electricity, oil, explosions, water or even flagpoles[698] or fairground rides[699]. In the context of dangerous goods under the law of carriage of goods by sea, similar to the rule in *Rylands v Fletcher* the case law appears to prove that any goods can be regarded as dangerous, since dangerousness concerns surrounding situations rather than merely the nature of the goods.[700] In particular, under the IMDG Code where the dangerous goods are expressly classified, there is no difficulty to satisfy the first condition under the rule.

The second condition is that a dangerous thing "which is naturally supposed not be there"[701] should be brought or kept on land. To put it differently, there should be "non-natural use of land". In *Transco v Stockport* where the rule was reviewed, what is meant by "non-natural use" was examined and it was held that the use of land must be extraordinary and unusual. In the case, the House of Lords drew a line between usual and extraordinary use in terms of risk created to the property of a third party, if an escape results from that use. In *Cambridge Water*, Lord Goff *obiter* held that *"storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of "non-natural use".*[702] If the storage of chemicals even on industrial premises can be regarded as classic case of "non-natural use" in a maritime law context, when goods, which are considered dangerous, particularly goods expressly classified as dangerous under the IMDG Code, are brought onto a vessel, such "use" on the vessel might be regarded as "non-natural use" under the rule, since in the event of escape of such goods on the vessel, the risk posed to the vessel and other cargo can be considered unusual or exceptional in the light of the approach taken in *Transco v Stockport*.

Thirdly, for the purpose of applying the rule, there should be an escape from land where the defendant has occupation of or control over to land where he has no occupation.[703] To hold the defendant liable under the rule, the case law appears to prove that the defendant neither has to be the owner nor the tenant of the land from which a thing escapes.[704] In the House of Lords case of *Transco v Stockport*, Lord Bingham opined that being an "occupier of land" would suffice to be a potential defendant under the rule.[705] In *Rainham v Belvedere* where the explosives were stored on a premises, Lord Sumner said that the defendants could not escape liability under the rule merely on the ground

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[697] [2004] 2 AC 1, [10]-[11].
[698] *Shiffman v Order of the Hospital of St John Hospital* [1936] 1 All ER 557.
[699] *Hale v Jennings Brothers* [1938] 1 All ER 579.
[700] See, *the Athanasia Comninos* [1990] 1 Lloyd's Rep 277; *the Giannis NK* [1998] AC 605.
[701] *Rylands v Fletcher* (1866) LR 1 Ex 265, 280.
[702] *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264, 309.
[703] *Read v J Lyons & Company Ltd* [1947] AC 156, 168.
[704] *Eastern & South African Telegraph Co v Cape Town Tramways Co* [1902] AC 381; *West v Bristol Tramways Co* [1908] 2 KB 14; *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772; *Rainham Chemical Works Ltd v Belvedere Fish Guano Ltd* [1921] 2 AC 465; *Shiffman v Order of St John* [1936] 1 All ER 557.
[705] [2004] 2 AC 1, [11].

that they had no tenancy or independent occupation.[706] Moreover, the place occupied by the defendant does not have to be independent from the place occupied by the claimant. Thus, the rule can even apply to a case where escape occurs from a theatre to a shop, which forms part of that theatre.[707] Although a vessel is not land by way of analogy it can be considered as floating land in its maritime context.[708] Support for this can be found in *Ruck v Hatfield* where in an f.o.b. sale, the vessel was regarded as the "floating warehouse" of the buyer.[709] Where the property in the goods passed to the buyer or where the buyer has constructive possession over the goods through document of title, the goods will be regarded as in the control and at the disposal of the buyer.[710] Once control over the goods passes to the buyer through a document of title, the carrier can be said to carry those goods to the buyer. Accordingly, by way of analogy with *Rainham v Belvedere*, from that moment, it can be argued that the buyer can be regarded as "occupier" of a place on the vessel where his goods are stored or loaded for the purpose of applying the rule. If that analogy is correct, once an escape (like an explosion or leak) occurs from the place (bulk, container etc.) that is occupied by the buyer's goods to the vessel (floating premises) which is outside his occupation and such an escape causes damage to the vessel, it might be argued that the third condition is also satisfied.[711]

The last condition, which was added by Lord Goff in *Cambridge Water*, is that the damage caused by the escape should be foreseeable.[712] The claimant does not have to show that escape is reasonably foreseeable. For the purpose of satisfying the rule, he only has to show that in the event of escape, damage would be suffered. This condition is relatively easier to satisfy than the others under the maritime law context. Suppose a cargo of fishmeal is stored in a container and carried on a vessel. Suppose further that the fishmeal caused an explosion and managed to escape and damage the vessel. The carrier does not have to show that escape was foreseeable. All the carrier has to prove is that for the purpose of the rule that it was reasonably foreseeable that damage would be suffered in the event of such escape.

2.2. Defences available to the buyer

The fact that the defendant does not necessarily need to commit any wrong to be found liable under the rule does not mean that he cannot take advantage of a number of defences. Firstly, if the

[706] *Rainham Chemical Works Ltd v Belvedere Fish Guano Ltd* [1921] 2 AC 465, 479.
[707] *Peters v Prince of Wales Theatre* [1943] KB 73.
[708] The claimant does not have to be the owner, legally recognized interest in land like tenancy would suffice. See, *Transco v Stockport* [2004] 2 AC 1. [9], [11].
[709] *Ruck v Hatfield* (1822) 5B & Ald 632; 106 ER 1321. Same can be opined for c.i.f. sales too.
[710] *Mitchell Cotts & Co Ltd v Hairco Ltd* (1943) 77 Ll L Rep 106; *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814, 818; *The Parchim* [1918] AC 157, 171-172; *Biddell Brothers v E Clemens Horst & CO* [1911] 1 KB 934, 956.
[711] Even if this analogy is accepted as operable, it would unlikely be applicable to legally dangerous goods, since there will be no damage to the vessel and loss will be purely economic.
[712] *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264.

escape occurs from the act of a person whom the defendant cannot control, then the defendant will have a defence against the claimant.[713] In our case, the buyer indeed can be said to have a defence, if he argues that the escape resulted from the act of the shipment, which is fulfilled by the shipper whom the buyer cannot control. The buyer cannot be said to have control over the shipper when the shipper contracted with the carrier as principal. Secondly, the defendant may have a defence, if the claimant consented to the storage of a dangerous thing by the defendant, provided the escape does not occur as a result of the defendant's negligence.[714] In our case, even if the carrier has not consented to the shipment of the goods with the knowledge, the carrier would be unlikely to prove the end buyer's negligence, unless he can be said to have taken part during or before shipment to cause the loss or damage.

2.3. Conclusion on the rule

It is not easy to apply by way of analogy a land-based strict liability case to cases in the maritime context. Even if it is accepted that all the conditions appear to be satisfied by way of analogy under the rule as discussed above, the buyer may have a number of valid defences against the claim of the carrier for the damage caused by the dangerous goods. Accordingly, even if sued by the carrier under the rule, he would be able to defeat such a claim by the available defences to him, as would be the case in the other tort claims discussed above.

VI. Conclusion

The question at the beginning of this chapter was whether the buyer could take advantage of the absence of a contract and escape the liability arising out of dangerous goods. Unlike the contractual regime provided by the 1992 Act, the common law actions appear to protect the buyer/consignee against the carrier/shipowner and other potential victims of dangerous goods.

Once established, under the implied contract it can be said that the buyers are not at risk of attracting the liability. In addition, they will not be in danger of being sued for dangerous goods either, just because they hold a document of title that gives constructive possession of the goods.

Under the rules of tort, the buyer/consignee unlike the seller/wet shipper,[715] can be said to be under protection against the carriers and other potential victims of dangerous goods, unless they took part before or during shipment in a manner to cause damage or loss. This is also true under the rule in

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[713] *Box v Jubb* (1879) 4 Ex D 76; *Rickards v Lothian* [1913] AC 263; *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85. For other available defences like act of god or fault of the claimant, see, *Rylands v Fletcher* (1868) LR 1 Ex 265, 280; *Nichols v Marsland* (1876) 2 Ex D1; *Greenock Corporation v Caledonian Railway Co* [1917] AC 556.

[714] *Peters v Prince of Wales Theatre* [1943] KB 73.

[715] See, Chapter 2, 2.1.4. Bare f.o.b. seller's liability in tort.

Rylands v Fletcher, although it does not require the defendant to be in any sort of legal wrong to render him liable. Unlike under the 1992 Act, the law of tort appears to protect the buyer, when he as consignee is neither at fault nor has no rights to exercise. The author thinks that this is also consistent with the principle of mutuality, which constitutes of the policy of the 1992 Act. According to the principle, a beneficiary should not be relieved of his obligations, once he seeks to enforce that contract. Put differently, if the buyer does not become party and does not take the benefit of contract either, he should not be liable thereunder. On the same grounds, there is therefore no reason why the buyer should bear a liability that normally arises from a contractual obligation, under the law of tort, while he is neither party to that contract nor benefits from it.

On the other hand, unlike the other common law actions, the buyer, when regarded as the original bailor, technically can be said to become liable under the bailment action. However, the courts may justifiably be reluctant to impose such a liability on the buyer/consignee under bailment with the existence of a contractual regime, given that he would normally and only be subject to this liability once s. 3 (1) is satisfied. Accordingly, it is unlikely that the shipowners would be allowed to circumvent the mechanism of s. 3 (1). Where the buyer is the bailor as a result of actual attornment established on demanding or taking delivery of the goods, the author suggests that the courts should show more readiness to render the buyer/attornee liable, particularly where the carrier only has a minimal chance of gaining redress from the shipper due to practical difficulties like having no assets within reach. Given that they would normally have been subject to the liability under s. 3 (1) on demanding and taking delivery of the goods, the courts should not allow them to take advantage of a absence of contract, when they wish to exercise their rights by demanding or taking delivery of the goods under the bailment on terms. Following the examination of both contractual and non-contractual regimes in Chapter 3 & 4 respectively, in case the buyer who is not the shipper as transferee would incur this liability, in the next chapter whether the international sale of goods law would provide remedy to the buyer for such loss against the seller will be examined.

CHAPTER 5
CAUSAL LINK BETWEEN THE BREACH UNDER THE CONTRACT OF SALE AND THE DAMAGE CAUSED BY THE GOODS

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I. Aim of the Chapter

In Chapter 3, it was determined that the liability arising from dangerous goods is transmissible to the buyer who is not the shipper from the shipper/seller under the carriage contract by virtue of the 1992 Act. It was also shown in Chapter 4 that the buyer's position in non-contractual actions appears to be safer than under the contract save for the fact that the buyer can technically be said to become liable under the bailment action, although the courts may justifiably be reluctant to impose such a liability on the buyer thereunder.

Once this liability is imposed on the buyer who is not the shipper – which is invariably the case under c.i.f. sales and often under f.o.b. sales[716] - he will seek to recover this loss both under contractual and non-contractual[717] actions from parties, whichever are available to him. Starting with contractual actions, as a matter of course, he will not be able to recover this loss under the carriage contract, given that it is attached to him thereunder. Therefore, the only potential contractual action available to the buyer will be under the sale contract, since this loss is inherited under the carriage contract tendered by his seller in pursuance of the sale contract.

In order to recover the loss consequent upon the damage caused by the goods, before any issue of remoteness arises, which will be discussed in Chapter 6, and in pursuance of s. 51(2) of the Sale of Goods Act 1979 (the 1979 Act), the buyer should first prove a causal link between the loss and breach of the seller under the sale contract.[718] Since this loss has not yet actually fallen on the buyer/transferee, this area – whether there might be a causal link between such loss and breach of the

[716] Save for bare f.o.b. and some classic f.o.b. contracts. See generally, Chapter 2. Findings of this chapter is not applicable to the buyer who is already the shipper.
[717] See generally, Chapter 7.
[718] S. 51(2); "… loss directly and naturally resulting… from the seller's breach…". *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 225; *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113. See also, Benjamin, 16-051.

seller - is unexplored under sale of goods law, and accordingly it is unknown whether the buyer is entitled to potential recovery.

Therefore, in this Chapter, it will be examined whether it is possible to find a causal link between the loss consequent upon the damage caused by the goods and the seller's breach under the sale contract.[719] In doing so, the relevant sections of the 1979 Act and the common law principles which could be of some assistance will be discussed in detail. If a causal link is found, then Chapter 6 will consider whether this loss is too remote to recover under the principles of the law of damages.

II. Potential Sections under the 1979 Act

1. S. 32 (2) reasonable carriage contract

By virtue of s. 32 (2) of the 1979 Act, the seller is under a duty to make a reasonable carriage contract *"on behalf of the buyer".* This sub-section applies when sale of goods involves transport of the goods. In terms of c.i.f. and c. & f. contracts, the seller is already contractually bound to make a carriage contract although the sub-section applies, even if the seller is not contractually bound to do so but merely authorized by the buyer.[720] However, under f.o.b. sales, due to their flexibility, s. 32 (2) applies to only certain types of it.[721] It is no doubt applicable to f.o.b. with additional duties where the seller concludes the contract of carriage either in his own name or through the agent of the buyer.[722] It is also applicable to classic f.o.b. and its variation, modern classic f.o.b.[723] where the seller is named as the original party in the carriage contract either as principal or agent of the buyer.[724] The only f.o.b. contract to which s. 32 (2) does not apply is "bare" f.o.b. in which the seller plays no part at all in making the carriage contract but where it is concluded by the buyer.[725] The bare f.o.b. buyer's position is in practice immaterial here, since he already attracts the dangerous goods liability as the shipper of the goods, and accordingly s. 32 (2) will be of no use against his seller.[726]

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[719] The courts have refused to apply any formal test for establishing a causal link between the breach and the loss. They have relied on common sense to guide their findings as to whether there is a causal link or not. *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360; *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667. See also, Chitty, 26-058.

[720] Benjamin, 18-296. *Houlders Bros & Co Ltd v Commisioner of Public Works* [1908] AC 276, 290; *Tsakiroglou & Co v Noblee Thorl GmbH* [1961] 2 All ER 179. Although s. 32 (2) states "on behalf of the buyer", it is submitted that this should not restrict the application of the sub-section to c.i.f. sales where the seller concludes the carriage contract as a principal. *Scottish & Newcastle International Ltds v Othan Ghalanos Ltd* [2008] UKHL 11; [2008] 1 CLC 186, [39]. See also, Bridge, 4.07; Debattista, 4.18.

[721] Discussed in Chapter 2. For types of f.o.b. sales see also; *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402.

[722] Benjamin, 18-296; Debattista, 4.18.

[723] See, Chapter 2 II.2.2. Classic f.o.b.

[724] In Benjamin 18-289, it is suggested that s. 32 (2) applies where the buyer is named as the shipper and directly party to carriage contract but in fact such contract was concluded by the seller. If that is the case, the buyer/named shipper may also have a right to recourse against the seller under s. 32 (2) for the liability falling upon him where the proximate cause of the loss is the seller's fault in concluding carriage contract. It is also submitted that s. 32 (2) even applies where the seller is named as the shipper in the bill as the agent of the buyer.

[725] Benjamin, 18-296; Bridge, 7.51.

[726] See, Chapter 2 II.2.1. Bare f.o.b.

Apart from the bare f.o.b. seller, under varieties of c.i.f. and other f.o.b. sales, the seller is not relieved of his duties once he makes a reasonable contract of carriage. He is also under a duty to procure and tender a bill of lading, which must contain or evidence this reasonable contract, given that the bill is to govern the contractual relationship between the buyer and the carrier, once it is transferred to the buyer.[727] Technically speaking, these are separate duties. However, since they are closely connected and almost identical, once the contract is not concluded on reasonable terms, this will also lead to the tender of a shipping document containing an unreasonable contract, thus justifying a breach under the sale contract. As discussed in Chapter 3, the buyer as transferee only becomes liable for damages or losses arising from dangerous goods following a breach under the carriage contract evidenced and contained in the bills of lading. As a matter of course, the buyer therefore would initially seek to find a solution under s. 32 (2), since it is the most directly relevant section to the seller duty to conclude a contract of carriage;

> *"Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."*

S. 32 (2) provides a general protection for the buyer under the Act 1979 which arises by implication of law and "may only be negative or varied by express agreement".[728] If the seller fails to do as stated in the sub-section, the buyer will have two options against the seller. First, he may reject the goods[729] and sue for damages for non-delivery.[730] However it is unlikely that this option would be open to the buyer who becomes liable against the carrier, because if the buyer rejected the bills of lading and declined to accept the delivery, not only would he be able to put the entire risk back on the seller retrospectively but also avoid the dangerous goods liability even if he triggered s. 3 (1) of the 1992 Act.[731] That is to say, there would be no loss for the buyer arising from the transferred liability to recover under s. 32 (2).[732] Alternatively, where the buyer does not reject the goods but accepts the

[727] See, s. 2 (1) of the 92 Act. Indeed the shipping document could be ship's delivery order or sea waybill if the parties agree on this in the sale contract. See COGSA 1992 s. 1 (3) – (4).
[728] S. 55 (1). In addition to this, s. 32 (2) starts with "unless authorized by the buyer". Thus, clear authorization is required by the buyer in order to negative or vary the impact of s. 32 (2). On similar argument, see also, *Bigge v Parkinson* (1862) 7 H & N 955.
[729] Or indeed he may reject the documents if possible.
[730] Under s. 51.
[731] See Chapter 3 II.5. Cessation of the liability. *Borealis AB v Stargas Ltd and Others (The Berge Sisar)* [2001] UKHL 17.
[732] On the other hand, the seller's failure in relation to s. 32 (2) may not be apparent until the bills of lading are delivered to the buyer but the buyer may have taken the delivery of the goods without production of the bills lading. In such cases, the buyer will not be able to be relived of the liability even if he later on rejects the bill given that the buyer's liability under the 1992 Act is irreversible once the actual delivery is taken. See, Chapter 3 II.5. Cessation of the liability.

delivery, he will be entitled to sue for damages or loss resulting from the seller's failure to make a reasonable carriage contract under s. 32 (2).

The practical question that arises at this point is what does the seller's duty to make reasonable carriage contract under this sub-section entail? Although it preserved its position under English law for more than a century, not only did it attract limited judicial examination, but it was also given very little consideration even from learned scholars.[733] If the existent authorities regarding the duty of the seller to make a reasonable carriage contract were to be categorized, they could be divided into three headings; it must be "on usual terms",[734] "giving the buyer protective rights against the carrier"[735] and be "which is appropriate[736] to grant sufficient protection to the goods while in transit"[737].[738] Given that there has been no reported case in which an actual transfer of the dangerous goods liability from the seller/shipper to the buyer/transferee has occured, naturally there is also no reported case to have dealt with the buyer's position under s. 32 (2) from this perspective. That being the case, the following will respectively examine under those three aspects whether there might be a causal link between the seller's breach of s. 32 (2) and the buyer's loss consequent upon the damage caused by the dangerous goods.

1.1. Contract on "usual terms"

The first aspect of s. 32 (2) is that the seller is under a duty to enter into a carriage contract on usual terms.[739] In other words, the buyer would be entitled to sue the seller for a breach of the sale contract on the basis that the carriage contract concluded by the seller is on unusual terms. At this point, the practical question is: "What could these usual terms be?"

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[733] For a detailed examination on s. 32 (2) see, F Lorenzon, CIF and FOB Contracts, 2-024 ff; F Lorenzon, "When is a CIF seller's carriage contract unreasonable? – section 32 (2) of the Sale of Goods Act 1979" [2007] 13 JIML 241. See also, Benjamin, 18-296 ff; Bridge, 4.101; Lista, 69 ff; M Mark, *Chalmers' Sale of Goods Act 1979* (8th edn, Butterworths 1981) 186-189 (hereinafter Chalmers); E McKendrick, *Goode on Commercial Law* (5th edn, Penguin Books 2016) 278-279 (hereinafter McKendrick); J Adams and H MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 409-410. See also, JM Davies "What is reasonable contract" [2003] 3 (4) STL 1.

[734] *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress)* [1996] 2 Lloyd's Rep 319; *Tsakiroglou & Co v Noblee Thorl GmbH* [1961] 2 All ER 179; [1962] AC 93; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* (1940) 68 Ll L Rep 75; *TW Ranson Ltd v Manufacture d'Engrais et de Produits Industriels Antwerp* (1922) 13 Ll L Rep 205; *Burstall & Co v Grimsdale and Sons* (1906) Com Cas 280.

[735] *Hansson v Hamel and Horley* [1922] 2 AC 36.

[736] *Thomas Young and Sons Ltd v Hobson and Partners* (1949) 65 TLR 365; *BC Fruit Market Ltd v The National Fruit Co* (1921) 59 DLR 87.

[737] *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146; *Gatoil International Inc v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep 350.

[738] The categorization is inspired from Professor Lorenzon's works. See, Lorenzon, C.i.f. and F.o.b. Contracts 2-025; Lorenzon, "When is a CIF seller's carriage contract unreasonable?", 244.

[739] *The Northern Progress* [1996] 2 Lloyd's Rep 319, 328; *Tsakiroglou & Co v Noblee Thorl GmbH* [1962] AC 93, 121-122; [1962] AC 93; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* (1940) 68 Ll L Rep 75, 81. In case of incorporation of the Incoterms 2010 Rules, the contract should be on "usual terms" as well; the Incoterms 2010 Rules, CIF, A3; CFR, A3; FOB, A3.

The terms of the contract should be usual for the trade concerned[740] at the time of shipment[741]. In *Tsakiroglou,*[742] where the usual route was suspended after the sale contract was concluded, it was held by the House of Lords that the route chosen afterwards by the seller at the time of shipment was the usual and customary route albeit being longer than the suspended one. What is that "usual"[743] for the "trade concerned"? Does it have a broader meaning than "reasonable"? The answers to the questions were given in *Tsakiroglou* by Viscount Simonds and Lord Radcliffe respectively;

> *"The answer must depend on the circumstances of each case."*[744]

> *"Various adjectives or phrases are employed to describe the point of reference. I can quote the following from judicial decisions: recognised, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety: and, of course, reasonable. I put "reasonable" last because I think that the other phrases are at bottom merely instances of what it is reasonable to imply having regard to the nature and purpose of the contract."*[745]

In the sense of "trade concerned", on the circumstances of the case, the question was whether the goods required any special packing or stowing to withstand the longer route.[746] The House of Lords held there was no evidence requiring the need to take special precautions for the goods to survive the longer voyage.[747] On the other hand, in terms of what is usual, the passage above also proves that various adjectives can be used to describe "usual" and accordingly reasonable no doubt has a broader meaning than usual.

Considering the shipment of dangerous goods, if the alternative adjectives stated by Lord Radcliffe above are employed, the question is: "What is the usual/recognized/customary/current/proper thing in the sale of dangerous goods?" Put differently, in the words of Lord Radcliffe, what is reasonable *"having regard to the nature and purpose of the contract?"* To find out what is the usual thing in the sale of dangerous goods, it is necessary to look into the same line of business in order to make the contract efficacious.

As the contract is a sale of goods involving sea transport from the seller to the buyer, the shipper of dangerous goods is under an implied absolute obligation to enable the carrier in relation to

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[740] Lorenzon, 2-026; McKendrick, 6-010. Lorenzon, "When is a CIF seller's carriage contract unreasonable?", 244.
[741] *Finska v Westfield* (1940) 68 Ll L Rep 75; *Tsakiroglou & Co v Noblee Thorl GmbH* [1962] AC 93, 121-122.
[742] [1962] AC 93.
[743] What is usual in the trade is regarded as "mercantilely reasonable". See, *Sanders v MacLean* (1883) 11 QBD 327, 337.
[744] Particularly his Lordship was answering, "What is usual route?" [1962] AC 93, 114.
[745] Ibid, 122.
[746] The goods must be in a fit and satisfactory state to reach the agreed destination. See, *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 Lloyd's Rep 47, 55. Reversed on different grounds in the Court of Appeal [1961] 2 Lloyd's Rep 326.
[747] Ibid, 123.

the nature and characteristics of the goods to take reasonable precautions for their safe carriage.[748] The common law implies such a duty in relation to shipment of dangerous goods, not because the contractual parties must have intended to include it, but as a result of a necessary aspect of the relationship.[749] The law no doubt considers this duty more than usual as "recognized" and "customary" as necessary for the business efficacy, and accordingly does not leave it to the parties' intention. That is to say, if such a duty, particularly considering its absoluteness, were not to be regarded at least as "usual" in the trade of dangerous goods, it would not be implied by the law into all carriage contracts on shipment of dangerous goods.[750] Moreover, where the Rules apply, the common law obligation is replaced by an express term found in Art IV r 6 of the Rules on the shipment of dangerous goods.[751] Therefore, in the formulation of Lord Radcliffe, in respect of the shipment of dangerous goods, providing the carrier with sufficient instructions to enable him to take necessary precautions for safe carriage of the goods should be regarded as the "usual thing", according to the *dicta* from *Tsakiroglou* above.

A question immediately, arises at this stage: "When a 'usual thing' is not duly performed under the carriage contract, would the buyer be allowed recovery in damages against the seller for breach of the sale contract?" The seller is indeed under a duty to tender a shipping document evidencing a carriage contract on usual terms but he does not promise due performance of the carriage contract in the manner stipulated. However, if the buyer is concerned about further duties or specific obligations in the carriage contract and is willing to preserve his rights against the seller as well as the carrier, he should stipulate in the sale contract those terms imposing specific obligations in relation to the carriage.[752] By doing so, the buyer would be able to preserve his rights against the seller, once the latter did not comply with the requirements in the carriage contract. For instance, where the carriage contract provides direct shipment as a result of a stipulation in the sale contract, shipment with an indirect route would be considered breach of the sale contract.[753] But does it always necessarily mean that every specific obligation regarding the carriage of goods should be written in the sale contract, in order for the buyer to preserve his rights against the seller?

In the case of c.i.f. and f.o.b. contracts, such sales contain a variety of obligations including those written in the contract itself and those supplied by the implication of law for the business

[748] *Brass v Maitland* (1856) 6 E & B 470; *Bamfield v Goole & Sheffield Transport* [1910] 2 KB 94; *Great Northern Railway v LEP Transport* [1922] 2 KB 742. Indeed, this is a common law obligation and where the Hague-Visby or Hague Rules apply, this obligation is supplanted and Art IV r 6 replaces it except for the obligation in relation to legally dangerous goods. However Mr Justice Pearson in *the Atlantic Duchess* said that in terms of dangerous goods, the obligation is substantially the same regardless of arising at Common law or under the Rules by virtue of Art IV r. 6; *Atlantic Oil Carriers Ltd v British Petroleum Co Ltd (The Atlantic Duchess)* [1957] 2 Lloyd's Rep 55, 121.

[749] As per Lady Hale SCJ on the implied terms generally; *Societe Generale London Branch v Geys* [2012] UKSC 63; [2013] 1 AC 523, [55].

[750] Unless otherwise expressed by the parties.

[751] The common law obligation in relation to legally dangerous goods is not replaced by the Rules. See, *Effort Shipping Ltd v Linden Management SA* (*The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep 337.

[752] *Indian Oil Corp Ltd v Vanol Inc* [1991] 2 Lloyd's Rep 634; *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep 440.

[753] *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep 440.

efficacy of the transaction.[754] This is because even though it is considered that the seller performs his duty only by tendering shipping documents evidencing the carriage contract on usual terms, once the "usual thing" in that business line is not duly performed, the sale contract may be deprived of its business efficacy given that the carriage contract may not provide any substantial assistance to the buyer. Accordingly, the courts on occasions, imply terms in the sale contracts imposing particular obligations on the seller regarding the obligations under the carriage contract, in order to preserve business efficacy in the sale contract.[755] In order for the court to imply a term in the sale contract, in *Tsakiroglou*, Lord Radcliffe said; *"It is necessary first to ascertain what is the commercial nature or purpose of the adventure that is the subject of the contract; that ascertained, it has next to be asked what within this scope are the essential terms which, so far as not expressed, must be implied in order to make the contract efficacious as a business instrument. The natural way to answer this question is to find out what is the usual thing in the same line of business."*[756]

An example of such an implication can be found in *Ranson v Manufacture d'Engrais*[757] where 56 tons of ground basic slag was sold under c.i.f. terms. The goods were found to be damaged when unloaded. The buyers claimed that the goods were damaged in consequence of shipping on a sailing vessel. The sale contract was silent on specifying on what kind of vessel the goods were to be shipped. Greer J, in order to give the sale contract business efficacy, sought to find out what was the usual thing in this particular line of business. The court accordingly found that it was that they should have been carried on a steamship rather than a sailing one. The seller was found in breach of an implied term in the sale contract that the particular type of goods should have been carried on a steamship. Accordingly, such a bill of lading evidencing a carriage contract for those goods in a sailing vessel was not due performance of the sale contract, and the bill was held to be bad tender. However, since the buyer accepted the goods, they were entitled to recovery in damages under the sale contract from the seller for breach of the implied term.[758]

Considering the test of Lord Radcliffe in *Tsakiroglou* for implying a term in the sale contract, first it should be ascertained "*what is the commercial nature or purpose of the adventure that is the subject of the contract*".[759] Considering the nature and purpose of the sale of dangerous goods under c.i.f. and f.o.b. terms, the subject of the contract is sale of goods that require precautions having regard to their nature and characteristics for their preservation and safe carriage during transit. What the usual thing is in this line of business is, as already outlined above, that the seller concluding the carriage contract in c.i.f. and f.o.b. sales should provide the carrier with the information enabling him

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[754] *Tsakiroglou & Co v Noblee Thorl GmbH* [1962] AC 93, 120.
[755] *Ranson v Manufacture d'Engrais* (1922) 13 Ll L Rep 205. See also, *Finska v Westfield Paper* (1941) 46 Com Cas 87, 91-93. The bill of lading with an invisible defect can be considered invalid tender in the trade; *PT Putrabali Adyamulia v Societe Est Epices Same v Enrico Webb James Snc* (*The Intan 6V 360A SN)* [2003] 2 Lloyd's Rep 700, [26]-[27]. The case was concerned whether notice of appropriation was valid, though.
[756] *Tsakiroglou & Co v Noblee Thorl GmbH* [1962] AC 93, 122.
[757] (1922) 13 Ll L Rep 205.
[758] Ibid, 205. See also, *the Tsakiroglou* where the claimants asserted existence of an implied term that the shipment should be by the usual or customary route. However, the House of Lords rejected to imply such a term. [1962] AC 93, 114.
[759] [1962] AC 93, 122.

to take necessary precautions having regard to the nature of the goods. If this duty against the carrier is not duly performed, not only will the goods cause damage to the carrier, but also for this reason they will often be in a damaged state or lost.

In *Ranson*, the court implied that term into a sale contract on c.i.f. terms because the usual thing in making the carriage contract for that type of goods was to ship them on a steamship. The seller did not duly perform this duty, accordingly that implication was necessary to provide business efficacy to the sale contract. Otherwise, once the goods were found to be damaged, the buyer would not have had recovery against the carrier, because the carrier was not under an obligation to carry the goods on a steamship, unless the seller instructed him to do so in the carriage contract. Nor would he have had any remedy against the seller under the sale contract in the absence of an express or implied term in this regard. In such a case, the buyer would be left alone with his loss without having any contractual remedy. However, the court implied a term to satisfy the business efficacy and allowed the buyer to recover against the seller.

Similarly, in case of dangerous goods, if the goods are not afforded the required precautions for their safe carriage, they may not only cause damage to the carrier but also be found damaged or lost. C.i.f. and f.o.b. sales are performed by the shipment of goods under and the tender of documents containing a contract of carriage in which it imposes some specific obligations regarding the carriage of goods, given that the ultimate aim is the preservation of the goods during transit. The buyer of the goods pays in exchange for the transport document, providing him the right of suit against the carrier. If the goods are damaged during transit, that transport document normally provides him with substantial rights against the carrier. However, if there is no practical remedy against the carrier under the carriage contract no matter how reasonable it may be or alternatively if there is no remedy either against the seller in the sale contract, it is submitted that the sale contract would be deprived as a whole of its business efficacy.

If the "usual thing" is not duly performed in the trade of dangerous goods, namely that the goods are not afforded the precautions their nature requires, once the buyer accepted such goods, he would not have any recovery against the carrier but in fact would be subject to the liability arising from them when exercising his contractual rights under the carriage contract.[760] Furthermore, if no term is implied in the sale contract indicating that the goods should be provided with the necessary precautions for safe carriage, the buyers would be deprived of any substantial remedy under the sale contract as well. This conclusion, it is believed by the author, will deprive the sale contract of its business efficacy, unless a term is implied in the contract, as was done in *Ranson*. Moreover, business efficacy requires that a party should not be deprived of substantially the benefit that the parties intended him to receive under the contract.[761] Something that should not be forgotten is the connection between the trade and the carriage law. As a consequence of this, the nature and purpose of c.i.f. and f.o.b. sales require that the goods are carried in pursuance of these contracts for the benefit of the

[760] By virtue of s. 3 (1) of the 92 Act.
[761] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26, 70.

buyer. Nonetheless, it would be difficult to argue about business efficacy, where the buyer had no remedy under the sale contract against the seller, nor against the carrier in the carriage contract.

Indeed, there might be some criticism against implying such a term in the sale contract on the ground that the courts may not easily imply terms in the sale contract regarding specific obligations under the carriage contract, which are not negotiated between the seller and the buyer when drafting.[762] However, the core of commercial law has been advanced by supplying from the common use of the trade what is the unexpressed intention of the parties. Moreover, s. 32(2) starts with "unless otherwise authorised by the buyer" and if not surrendered by the buyer, the seller is under a duty to conclude a carriage contract on usual terms "having regard to the nature of the goods and other circumstances of the case". Thus, regarding the duty in the shipment of dangerous goods, there is no need for the buyer's authorization or negotiation, since either implied or express, it is already considered usual in the carriage contract. Thus, concluding a carriage contract with such a term is clearly considered as the unexpressed intention of the parties. Therefore, the author opines that implying a term indicating the "usual thing" in this line of business in the sale contract that the goods should be afforded the necessary precautions for their preservation and safe carriage is unlikely to be considered to add an extra obligation on the seller which requires an express detailed negotiation between the seller and the buyer, since the traders in this line of business are *a fortiori* well aware of the fact that, for the safe carriage and preservation of the goods, they should be afforded with the precautions they require on shipment.

1.2. The contract must be appropriate to grant sufficient protection to the goods

The second aspect of a "reasonable" carriage contract imposes on the seller a duty to conclude a contract granting protection to the goods while in transit.[763] This aspect is rather related to the physical protection of the goods and may force us to look beyond the mere terms of the contract and accordingly require the contract to be reasonable in a wider sense.

The case law proves some support in that sense. In *Tsakiroglou*, the longer route was not found unreasonable by the House of Lords given that there was no sign that the longer *"voyage would be prejudicial to the condition of the goods or would involve special packing or stowing"*[764] or *"could damage the [goods]"*.[765] Or similarly in *the Rio Sun,*[766] where the cargo of crude oil was solidified during discharge, the c.i.f. buyers claimed that the sellers were in breach of s.32 (2), since the cargo required heating en-route and they failed to procure a carriage contract providing so. However, it was found that the contract providing no heating during the voyage was reasonable, given that it was not

[762] Debattista, 7.13. For *contra* argument on this see also, Lorenzon, "When is a CIF Seller's carriage contract is unreasonable?", 246, 250.
[763] In 1888 Sale of Goods Bill, clause 40 (2) where Lord Chalmers found the common law implied duty *"to make the carrier responsible to the buyer for the safe custody and carriage of the goods."*
[764] [1962] 2 AC 93, 123.
[765] Ibid, 118.
[766] [1985] 1 Lloyd's Rep 350.

necessary for the survival of the particular cargo for the contemplated voyage.[767] Although Bingham J found on the facts of the case that heating was unnecessary for the cargo in question, the learned judge, with regard to the duty of the seller to make a reasonable contract opined:

> *"In considering the cargo, [the sellers] were, in my view, bound to possess reasonable knowledge of the characteristics of the goods they were selling and ensure that their contract of affreightment provided, whether expressly or by virtue of the duty lying on the shipowner, for the taking of any necessary precautions to preserve the goods during the voyage in question."*[768]

There is probably no better way to set out the duty of the seller for the second aspect than Bingham J did in *the Rio Sun*, but his words prove that for the preservation of the goods during the voyage, the seller is under such a duty to ensure the carrier takes any necessary precautions under the carriage contract. Additionally, in *Texas v Nason*, Tudor Evans J, on s. 32 (2) said that the seller has a statutory obligation to make an "appropriate in circumstances" contract of carriage on behalf of the buyer.[769] "Appropriate", it is submitted, must indicate something which involves all aspects of a case to make the contract suitable for the preservation of the particular goods in question. Bingham J in *the Rio Sun*, speaking of the seller's duty, also stressed that the seller should conclude an "appropriate" contract of carriage for the voyage and the goods.[770] After indicating that, he examined the appropriateness of the contract by discussing all aspects of the case, including the nature of the goods and the necessary precautions if required.[771]

In supporting "appropriate in circumstances", when returning to s. 32 (2), even the literal wording of the sub-section appears to be wide enough to prove that the contract should be reasonable from all aspects of the case for the preservation and safe carriage of the goods; *"reasonable having regard to the nature of the goods and the other circumstances of the case"*. For instance, the nature of the goods may not ordinarily have required taking special precautions but the circumstances of the case may have made it essential to do so. In a Canadian case where the goods in question were cabbages, they were found in a frozen condition on arrival, since the seller failed to make a carriage contract stipulating they were to be carried in heated wagons despite the fact that their nature did not normally require heating.[772] In holding that the contract was unreasonable, Stuart J said; *"... whereby the latter would be bound to protect the cabbages from frost while in transit because that would clearly be the only contract which would be 'reasonable having regard to the nature of the goods and the other circumstances of the case'"*[773].

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[767] Ibid, 360.
[768] Ibid, 360.
[769] [1991] 1 Lloyd's Rep 146, 149.
[770] [1985] 1 Lloyd's Rep 350, 360.
[771] Ibid.
[772] *BC Fruit Market Ltd v National Fruit Co* (1921) 59 DLR 87.
[773] Ibid, 95.

Additionally, the pre-existing common law cases which were the origin of s. 32 (2) may be of some assistance along the same lines, given that the 1979 Act does not exclude the common law rules provided they are not inconsistent with its provisions[774].[775] In *Clarke v Hutchins* in describing the duty of the seller, it was held;

> *"… [the seller's] duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods and to put them into such a course of conveyance, as that in the case of a loss the [buyer] might have his indemnity against the carriers"*[776]

In *Pointin v Porrier* the same duty of the seller was similarly re-defined by Grove J, as was in *Clarke v Hutchins*;

> *"[the seller] must take reasonable precautions to insure safe delivery and if it does not … it cannot be said to have been a proper delivery."*[777]

Similar wording in relation to the seller's duty can also be found in the submission of Lord Chalmers for the first draft of the Sale of Goods Bill;

> *"… the seller must entrust the goods to the carrier on such terms as may be usual for making the carrier responsible to the buyer for the safe custody and carriage of the goods."*[778]

All the phrases from the authorities above; "appropriate for the goods", "to preserve the goods during the voyage in question", "the safe delivery of the goods and to put them into such a course of conveyance", "take reasonable precautions to insure safe delivery" and "for the safe custody and carriage of the goods" appear to indicate that the duty of the seller primarily aims at the preservation and safe carriage of the goods in a wider sense.

This effectively amounts to the fact that the second aspect strongly focuses on the contract to be appropriate with its integrity involving all aspects of the circumstances and nature of the goods for their preservation and safe carriage during the voyage. As a matter of principle, therefore, the proposition from the cases above, particularly Lord Bingham's from *the Rio Sun* would extend to any necessary precautions for the survival of the goods. For instance, particular goods may require heating or refrigerating or ventilation or special packing for their preservation during transit. If loss or damage to the goods is the likely result of failing to afford that particular protection they require, such a contract, it is submitted that would fail to fulfill the second aspect of s. 32 (2).[779]

On the other hand, under carriage of goods by sea law, case law appears to prove that once the contract fails to provide all necessary precautions for the carriage of dangerous goods, the likely result is not only damage to the carrier but also loss of or damage to the goods.

For instance, when a cargo of fishmeal is not treated with anti-oxidant, they may require considerable air circulation by means of channels during voyage. The particular nature and

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[774] S. 62 (2).

[775] *Clarke v Hutchins* (1811) 14 East 475; *Cothay v Tute* (1811) 3 Camp 129; *Buckman v Levi* (1813) 3 Camp 414. Halsbury's Laws of England (5th edn, Lexis Nexis 2014), 188; Chalmers, 65-66.

[776] *Clarke v Hutchins* (1811) 14 East 475, 476. Emphasis added.

[777] (1885) 49 JP 199.

[778] Sessional Papers of the House of Lords 1888. Sale of Goods Bill 1888 cl 40 (2).

[779] See also Lorenzon on the same view, "When is a CIF seller's carriage contract unreasonable? – section 32 (2) of the Sale of Goods Act 1979" [2007] 13 JIML 241, 247-248.

characteristics of this type of fishmeal requires ventilation during transit to prevent heating of the goods effectively. When the carrier is not instructed about the precaution the goods require, the goods are likely to heat. Thus, burning of the goods is the likely result of heating, and this may cause both damage to the carrier and to the goods.[780] Another good example is gasoil. Some types of gasoil, when the necessary measures are not provided, may produce excessive levels of bacteria.[781] When a particular type requires heating during the voyage, and if the cargo is not afforded this, it may produce unacceptable units of bacteria, which may not only render it of unsatisfactory quality, but also cause contamination in the tanks of the vessel.[782]

Container cargoes can be another good example. According to the data collected from the Cargo Incident Notification System (CINS), the majority of incidents in recent years in relation to container shipping were the result of poor or defective packaging.[783] When the cause of damage or loss is attributable to poor or defective packaging, the goods are not deemed to have been packed in a way that they can be carried safely during the intended voyage. When this is the case, there is also no difficulty to see that such poor or defective packing would not only cause damage to the carrier but would also "be prejudicial to the condition of the goods" as well. As to the *dicta* in *Tsakiroglou*, the goods may require special packing or stowing for the voyage if necessary, and failing to afford them the protection they require may also fail the test of s. 32 (2).[784] Another example is a cargo of calcium hypochlorite, which is known to be explosive at 60C. However, sometimes the nature of the cargo shipped can be different from the ordinary type and be potentially explosive at a lower temperature.[785] When this is the case, for the protection of the goods in question, unheating or cooling may be required, as their particular nature demands. Otherwise, due to an abnormal critical ambient temperature, the goods may explode resulting in both loss of the goods and damage to the carrier as well as other goods onboard.[786] A similar example can be given from a s.32 (2) case where a cargo of cabbages was shipped on a heated train car.[787] The bill of lading failed to stipulate that the cabbages were to be so carried and accordingly they were found to be frozen on arrival. The carriage contract tendered was found to be unreasonable *"having regard to the nature of the goods and the other circumstances of the case",*[788] given that it failed to make it clear the protection the cabbages required.

Another good example is a cargo of iron ore. The International Maritime Solid Bulk Cargoes (IMSBC) Code, which is mandatorily applicable under SOLAS 1974, provides guidelines on certain types of solid bulk cargoes to ensure they are carried safely. S. 7 of the Code divides solid bulk cargoes into three groups: Group A consists of cargoes which may liquefy, Group B cargoes possess a chemical hazard, and Group C cargoes are neither liable to liquefy (Group A) nor to possess chemical

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[780] *General Feeds Inc v Burnham Shipping Corporation (The Amphion)* [1991] 2 Lloyd's Rep 101.
[781] *Marimpex Mineralol Handelsgesellschaft MBH v Louis Dreyfus Et Cie Mineralol Gmbh* [1995] 1 Lloyd's Rep 167.
[782] Ibid.
[783] "Mis-Decleration in 27 percent of the incidents", Maritime Risk International, October, 2016.
[784] [1962] 2 AC 93, 123.
[785] *The Aconcagua* [2010] 1 Lloyd's Rep 101.
[786] Ibid.
[787] *BC Fruit Market Ltd v The National Fruit Co* (1921) 59 DLR 87.
[788] Ibid.

hazards (Group B). Even though, iron ore fines normally can fall within Group A, given that they are likely to liquefy, sometimes they might be misclassified as non-liquefiers in Group C. Due to such misclassification, the carrier may not have been enabled to take the necessary precautions which the goods required, such as; *"it should be kept dry at all times, the holds should be inerted and temperature and gas monitoring should be carried out"*.[789] Eventually, the cargo could be exposed to moisture, which may lead iron ore to liquefy causing damage itself or even the sinking of vessels.

Indeed, there is no limit to examples of dangerous goods cases. All the cases outlined above appear to show that there is a strong correlation between loss of or damage to the goods and the lack of precautions they require for safe carriage. When the contract of carriage fails to provide for any necessary precaution for safe carriage, the examples above prove that not only damage to the carrier but loss of or damage to the goods is also the likely result. This also proves that those measures are not only necessary for safe carriage but eventually also necessary for the preservation of the goods during transit. This is because failure to afford the necessary precaution for safe carriage as exampled above, will not only cause damage to the carrier but also to the goods themselves. That is to say, it is hard to speak of preservation of the goods, once they are fundamentally under the risk of being damaged or loss as is in most dangerous goods cases. This proves that these precautions are not only crucial for safe carriage but also for their preservation and survival. Therefore, this makes it necessary for those measures that the goods require to be provided in a *reasonable* contract. This is because under the second aspect, the contract must grant sufficient protection to the goods during transit. Accordingly, the contracts in the examples outlined above can hardly be said to have granted sufficient protection to the goods, once they are damaged or loss, when they could have been preserved, if the goods had been afforded the particular protection they required for safe carriage.

This result deductively supports the proposition that under the dangerous goods cases, once the goods are likely to become loss or damaged as a proximate result of the lack of measure required for safe carriage, it is submitted that these contracts also fail to afford the goods the preservation they require under the second aspect of reasonable carriage contract. Put differently, if the goods become lost or damaged as a result of failing to provide the relevant precaution the goods require – which is mostly the case in dangerous goods cases -, it cannot be said that the contract is appropriate for the particular goods and grants the sufficient protection to the goods. Had the contract provided those precautions, the goods would have been afforded with the protection and accordingly they would have been preserved too. Otherwise, as the examples outlined above show, the loss of or damage to the goods is the likely result of failing to provide those precautions for safe carriage.

One example may illustrate this proposition more plainly. When a cargo of excessively gaseous coal requiring ventilation is not afforded relevant precautions, not only damage to the carrier but also the goods is likely to result. Because when they are not ventilated as required, the goods will not only cause damage to the vessel as a result of burning, but also they will no doubt be in damaged

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[789] Gard, "Dangerous solid cargoes in bulk; DRI, nickel and iron ores", *A selection of articles previously published by Gard AS*, January 2014, www.gard.no/ikbViewer/Content/6227919/Dangerous%20solid%20cargoes%20in%20bulk%20%20January%202014.pdf.

state. The very purpose of the second aspect of s. 32 (2) is to grant sufficient protection to the goods appropriate to the circumstances during transit. It is submitted by the author that the contract of carriage that fails to make it clear that ventilation is to be applied, would fail to afford the goods the protection they require, since they would likely become loss or damaged as a result of this. Put differently, had the contract provided the necessary ventilation to be applied, the goods would not have been lost or damaged and they would not have caused any damage to the carrier either. Thus, a contract that fails to make it clear ventilation to be applied cannot be said to be an appropriate one even at the minimum level of granting sufficient protection to the goods during transit, once the contract lacks that necessary measure and the lack of that measure is the cause of loss or damage to the goods.[790] This proves ventilation is not only a necessary measure for safe carriage, but also crucial for the preservation of the goods during transit.

Once any particular measure required for the safe carriage of the dangerous goods is not afforded, the examples outlined above show that it is not plausible to argue that the carriage contract grants sufficient preservation to the goods, for the very same reason they are also likely to become damaged or lost. Therefore, it might be difficult to argue that the contract is reasonable *per se* in a wider sense and "appropriate in circumstances". In respect of Lord Bingham's words in *the Rio Sun* – the contract of carriage should provide *"whether expressly or by virtue of the duty lying on the shipowners, for the taking of any necessary precautions to preserve the goods"*[791] - when the contract lacks a particular precaution and that precaution is the cause of loss of or damage to the goods which is the case in most of the dangerous goods cases.[792] Therefore, the bill of lading tendered which fails to afford the necessary measures to protect the goods during transit would not fulfill the second aspect of s. 32 (2).

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[790] Indeed one may argue that s.32 (2) cannot be triggered, if the goods are not lost or damaged. However, albeit very unlikely in the dangerous goods cases, it is submitted that even if the goods are not damaged or lost, the buyer should be entitled to damages under s. 60 of the 1979 Act in which it entitles rights, duties or liabilities in the Act can be enforced by action. See, Bridge, 4.101, fn 376.

[791] [1985] 1 Lloyd's Rep 350, 360.

[792] For instance, the goods can be classified as "legally dangerous goods" under the Common law principle, if the goods lead to "legal obstacles" and thereby liable to cause delay to the vessel. For instance, the goods may fail to comply with customs regulations under the law of the place of discharge; *Mitchell Cotts & Co v Steel Brothers & Co Ltd* [1916] 2 KB 610. See also, *the Giannis NK* [1994] 2 Lloyd's Rep 171, 179; *The Darya Radhe* [2009] 2 Lloyd's Rep 175. In *the Rio Sun*, Bingham J held that the contract should not only be appropriate to the goods but also to the voyage in question. Indeed, in the case, his reference to the voyage in question was made in relation to the delay occurred in discharging the cargo due to the conduct of the master. Accordingly, the seller was not held to foresee unordinary incidents once making the carriage contract. However, it is submitted that there is no reason to restrict his reference to appropriateness of the contract to the "voyage in question" to incidents like only delay caused by the conduct of the master. As is for the goods, the contract should be "appropriate in circumstances" to the voyage in question with all aspects. Accordingly, there is nothing unordinary for the seller to conclude a carriage contract providing compliance with the law of the destination. Indeed, when a delay caused is attributable to non-compliance with the formalities of import, the buyer may not argue that the seller is in breach, since the procurement of any import licence is normally the obligation of the buyer under c.i.f. sales. See, *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All ER 552. See also, Lorenzon, 8-039. This is also the case under the Incoterms 2010 Rules, CIF B2. And indeed same can be said for f.o.b. buyer, the Incoterms 2010 Rules, FOB B2. In contrast, if the goods are liable to cause delay or detention given that the cargo is not allowed to the country of destination by the local authorities due to their particular characteristics or abnormal condition, the buyer may be able to argue that the goods are not of satisfactory quality. This is discussed elsewhere, see below, 2.2.1. Satisfactory quality of the goods.

1.3. The contract must confer substantial protective rights

The third aspect of "reasonable" carriage contract is that the contract must confer protective rights to the buyer *vis-a-vis* the carrier. This was established in *Hansson v Hamel and Horley.*[793] At first glance, it could seem arguable that once the buyer obtains title to sue against the carrier under the shipping document tendered by the seller by virtue of s. 2 (1) of the 1992 Act, the seller can be held to be discharged from his duty under the rule.[794] However, it is submitted that this may not always be true from the outset since the application of this rule may vary from one case to another depending on the particular facts of each case.

This aspect may sometimes be called as "continuous documentary cover",[795] which was established by the House of Lords in *Hansson v Hamel and Horley.*[796] In the case, the goods had to be transshipped, but the tendered bill of lading did not cover the entire voyage from the initial port of loading to the port of destination but only the second leg of the voyage. It was found by the House of Lords that such a bill of lading tendered by the seller was a defective bill of lading. This was because, the so-called through bill of lading provided no continuous documentary cover from the shipment to destination, given that it should have given documentary protection to the buyer including the first leg of the voyage. This is however only one side of the rule settled in the case. In fact, the rule established in *Hansson* is that the bill of lading should not only provide continuous documentary cover but additionally "substantially confer protective rights throughout*"; "When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout. He is not buying a litigation…"*[797]

This passage illustrates that the rule no doubt speaks of more than providing procedural continuous documentary cover. There might therefore be a strong connection between the second and the third aspect of reasonableness. The case law may lend some support in that direction. In *Holland Colombo v Segu and Others,*[798] despite the fact that the bill was a proper through bill of lading providing continuous documentary cover, the Privy Council found that *"a bill of lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such 'continuous' cover".*[799] In another case,[800] where the goods were sold on "c. & f. liner terms Rotterdam", the court held that "liner terms" meant that the responsibility to discharge was on the carrier. In contrast, the bill of lading tendered by the seller placed the responsibility for discharge on the seller (or the buyer with a right to indemnity

[793] [1922] 2 AC 36. The House of Lords followed *Landauer & Co v Craven & Speeding Bros* [1912] 2 KB 94 where it was held that the tendered bills of lading did not give continuous documentary cover to the c.i.f. buyer throughout the voyage.
[794] Debattista, 7.12. This should be regarded as the minimum requirement for a carriage contract as to s. 32(2); Lorenzon, "When is a CIF Seller's carriage contract is unreasonable?", 246.
[795] Benjamin, 19-027; Debattista, 7.14.
[796] [1922] 2 AC 36.
[797] Ibid, 46.
[798] *Holland Colombo Trading Society Ltd v Segu Mohammed Khaja Alawadeen and Others* [1954] 2 Lloyd's Rep 45.
[799] Ibid, 53.
[800] *Soon Hua Seng Co Ltd v Glencore Grain Co Ltd* [1996] 1 Lloyd's Rep 398.

against the seller). It was therefore held that the bill of lading did not grant any *"documentary protection or rights against the carriers in respect of the discharging operation."*[801] In *Young (T) & Sons v Hobson and Partner,*[802] the electrical engines that were sold on f.o.r. terms[803] were damaged because they were improperly secured by battens. The carriage contract tendered by the seller provided the goods to be carried at the owner's risk. However, they could have been carried for the same cost at the carrier's risk. The Court of Appeal held that the contract was unreasonable in the circumstances, since it failed to afford sufficient protection to the goods and accordingly, the buyer was not entitled to protective rights against the carrier.

Some pre-Act cases, which underpinned s. 32 (2) may also lend some assistance to finding a connection between the two aspects. In *Clarke v Hutchins,*[804] it was held that it was the duty of the seller *"to do whatever necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance, as that in case of a loss the [buyer] might have his indemnity against the carrier."*[805] In *Pointin v Porrier,*[806] where the court followed *Clarke v Hutchins*, it was decided that the contract of carriage must provide *"reasonable precautions to insure the safe delivery, and if and if it does not, and in the case of loss the defendant has no indemnity against the carrier, it cannot be said to have been a proper delivery."*[807]

It is evident from the rule established in *Hansson v Hamel* that the bill of lading must give the buyer substantial protective rights. The cases outlined above show that once the contract fails to afford the goods the protection they require, it also fails to give any substantial protective rights against the carrier. Accordingly, any bill of lading that fails to provide substantial protective rights to the buyer should be considered bad tender.[808] For instance, if the goods require heating during shipment for their preservation and the carriage contract fails to make it clear that the goods are to be so carried, the contract will fail to grant sufficient protection to the goods. For this reason, the buyer will also be deprived of any substantial rights against the carrier, given that the contract tendered would fail to provide for heat to be applied to the goods and the buyer would not have indemnity against the carrier for something, which is not in the contract. Put differently, had the contract provided the goods were to be so carried, in case of undue performance of the carrier, the buyer would have had substantial rights against the carrier. It is therefore submitted that this proves the argument that once the contract fails the test of the second aspect of reasonableness, it also fails the third test as well.

In the second aspect, it is argued that there is a strong correlation between loss of or damage to the dangerous goods and the precautions they require for safe carriage. When the contract of carriage fails to provide for any necessary precaution that their nature requires, loss of or damage to

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[801] Ibid, 401.
[802] (1949) 65 TLR 365.
[803] Free on rail.
[804] (1811) 14 East 475.
[805] Ibid, 476 (emphasis added).
[806] (1885) 49 JP 199.
[807] Ibid.
[808] *Soon Hua Seng Co Ltd v Glencore Grain Co Ltd* [1996] 1 Lloyd's Rep 398, 401.

the goods is also likely to result. It is also said on the second aspect that that also proves those measures are not only necessary for safe carriage but eventually also crucial for the preservation of the goods during transit. Thus, when ventilation is required for a cargo of excessively gaseous coal, and the contract fails to provide for the application of ventilation, due to lack of ventilation, the goods are likely to be found heated and for this reason, both damage to the goods and to the carrier is the likely result.

When this is the case, the buyer would be to all practical effects deprived of any substantial rights against the carrier as the contract failed to afford ventilation to be applied. The buyer would then not be entitled to sue the carrier for failing to ventilate the goods. Accordingly, such a bill tendered will also fail the third aspect of reasonableness, given that it fails to give substantial protective rights against the carrier. More significantly, let alone the substantial protective rights against the carrier, if the vessel is damaged as a result of this, the buyer may find himself inheriting the liability arising from the goods under the bill tendered by virtue of s. 3 (1) of the 1992 Act.[809] The buyer will not indeed automatically attract the liability unless he fulfills one of the conditions set out in s. 3 (1) of the 1992 Act while exercising his contractual rights against the carrier. Once he inspects the goods on arrival, he may promptly reject them, if they are in a defective state and cause some damage to the vessel. However, this may not always be apparent beforehand and s. 3 (1) may already have been triggered. Alternatively, the buyer may not be aware that they are in such a state given the seller's failure but may have thought it due to the carrier's fault, and accordingly may seek to recover his loss from the carrier.

The seller is not under a duty to tender a bill of lading, which ensures the recovery against the carrier.[810] However, as Lord Sumner opined in *Hanson,* the buyer should not *"buy a litigation".*[811] The rationale behind s. 32 (2) is that it grants such a reversing effect entitling the buyer to a right to redress against the seller, once the contract fails to provide substantial protective rights against the carrier. In a case like this, the buyer not only "buys a litigation" under the bill of lading that fails to give substantial rights, but is also under a potential risk of being liable against the carrier. If the contract has provided such steps as are necessary to preserve the goods during transit having regard to the nature and the particular circumstances of the case, the buyer would be entitled to substantial rights against the carrier, even if the goods were not so afforded during transit. Therefore, it is submitted by the author that the bill of lading that fails the second aspect, on the grounds discussed above will also fail in the third aspect due to failing to give protective rights against the carrier.

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[809] Indeed, at first glance, in case the Hague or the Hague-Visby Rules govern the contract, it might be argued that the buyer would be able to allege that the carrier is in fault of seaworthiness as to Art III r.1 or loading, stowing or discharge as to Art III r.2; *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] CLC 933; [2000] 2 Lloyd's Rep 255; *the Fiona* [1993] 1 Lloyd's Rep 257. However, it would not be plausible to argue this, once the buyer has already become subject to liability as to s. 3(1) of the 1992 Act, since this would amount to that the carrier was in fault neither of them.

[810] *Wimble Sons & Co Ltd v Rosenberg & Sons* [1913] 3 KB 743, 757.

[811] [1922] 2 AC 36, 46.

2. Other potential links between breaches of the seller and the damage caused by the goods

In this part of the chapter, it will be considered - alternative to s. 32 (2) -, whether there might be a proximate relation between some breaches under the sale contract and the damage caused by dangerous goods. Accordingly, in supporting this it is to be illustrated that the causal link between some breaches under the sale contract and the damage done by dangerous goods can be stronger than first thought.

2.1. Description of the goods

Under the 1979 Act, the seller undertakes to deliver the goods in compliance with the sale contract.[812] In particular, under c.i.f. and f.o.b. sales involving sea transport, the seller is supposed to ship the contractual goods as agreed in the contract. One aspect of "contractual goods as agreed in the contract" takes form in terms of identity of the goods under a statutory implied conditions laid down in s. 13. (1): *"Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description."*

To begin with, the shipped goods should be in conformity with the description in the contract as per s. 13, where there is a contract of sale by description.[813] If the goods tendered are different in any aspect from the description agreed in the contract, they would fail the test of s.13. Although the requirement in the section is a very strict one,[814] there is no definition of "description" is in the 1979 Act. However, a comprehensive definition of "description" can be found in the following *dictum* by Lord Diplock;

> *"The 'description' by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied. It is open to the parties to use a description as broad or narrow as they choose. But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy. The key to section 13 is identification."*[815]

Each contract revolves on its own terms and hence description of the goods is to be considered in the very words used in each contract and may vary from one case to another. Indeed, not every word stated to describe the goods forms part of the description as per s. 13. They should be

[812] S. 27.

[813] *Scaliaris v E Ofverberg & Co* (1921) 37 TLR 307.

[814] The buyer is entitled to reject even for minor discrepancies, if the goods is not in conformity with the description in the contract. However, although strictness for this requirement is questioned by Lord Wilberforce, his lordship also opined that description of unascertained goods "as to which each detail of the description must be assumed to be vital". See, *Reardon Smith Line v Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989, 998. See also Lorenzon, 2-042, 4-021.

[815] *Ashington Piggeries v Christopher Hill Ltd* [1972] AC 441, 503-504.

worded in a way to identify the subject matter of the contract, if they are to be considered part of the description.[816] There could be other kinds of statements that identify the subject matter of the contract, which can be considered as part of the description such as stipulations regarding time of shipment.[817] However, they will not be dealt with here, given that only the statements as to physical characteristics can be relevant to dangerous goods.[818]

As stated above, although there is no definition of "description" in the Act, however there are considerable examples in case law, which may be of some assistance to see the applicability of s. 13. In *Tradax v European Grain,*[819] where the contract of sale was for soya bean meal, a "maximum 7.5% fibre" was found to be part of the description used to identify the subject matter of the contract and any percentage above 7.5% was not regarded as acceptable in terms of the description.[820] In *Toepfer v Continental Grain Co*[821] where the subject of the contract was "hard amber durum wheat", "hard" was found to be as part of the description, given its reference to the quality of the goods. Similarly, in *Toepfer v Warinco AG,*[822] where soya bean meal was described "fine-ground", the shipped soya bean meal that was coarse-ground was held not to be in conformity with the description in the contract.

As is the case in the examples outlined above, when the shipped goods do not conform with the contractual description, the seller is considered in breach of s. 13. Similarly, sometimes the liability arising from dangerous goods may have resulted from non-compliance of the shipped goods with their description stated in the carriage contract. In *the Amphion*[823], the goods were described as "anti-oxidant treated fishmeal" in the charterparty. However, the fishmeal shipped was not one which conformed to the description in the contract, given that it was in fact "not properly treated". Evans J held that the charterers were found in breach, as the goods did not comply with the description, and the shipowner only accepted to carry the goods of a particular description in the carriage contract.[824] Subsequently, the learned judge found that it was unnecessary to hold whether the charterers also breached the implied duty of common law regarding the shipment of dangerous goods, since they were already in breach of the contractual description.[825]

The Amphion appears to prove that it is also likely that the dangerous goods liability may arise from the non-conformity with the contractual description in the carriage contract. This case may also be of some assistance to illustrate that there might be proximity between the seller's breach as per s. 13 under the sale contract and the damage caused by dangerous goods. Assume that in the sale contract, the subject matter of the contract was described as "antioxidant treated fishmeal". Also

[816] Benjamin, 18-321.
[817] *Bowes v Shand* (1877) 2 App Cas 455.
[818] See generally, Benjamin, 18-314 ff., and Lorenzon, 4-016 ff.
[819] *Tradax Export SA v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep 100, 104-105. For a similar statement see, *Vargas Pena Apezteguia y Cia v Peter Cremer BmbH* [1987] 1 Lloyd's Rep 394.
[820] But see also, *Tradax Export SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604.
[821] [1974] 1 Lloyd's Rep 11, 13.
[822] [1978] 2 Lloyd's Rep 569.
[823] *General Feeds Inc v Burnham Shipping Corporation (The Amphion)* [1991] 2 Lloyd's Rep 101.
[824] Ibid, 103-105.Evans J followed the test of Mustill J in *the Athanasia Comninos* where the issue was revolving around whether the shipped goods were in conformity with the description in the contract; [1990] 1 Lloyd's Rep 277.
[825] Ibid, 105-106.

assume that as was the case in *the Amphion,* the cargo shipped did not comply with the description in the contract, given that it was in fact one which was "not properly treated". Also suppose that the seller tendered a bill of lading indicating the goods as "antioxidant treated fishmeal" as agreed in the contract.

Once the vessel is damaged by the fishmeal, this would be the result of being "not properly treated". The very same reason that causes damage to the vessel is also what makes the goods non-conform to the description under the sale contract. That is to say, in a case like this the reason that renders the goods non-conforming to the description as per s. 13 could be the same reason that renders the goods dangerous. When this is the case, it is submitted that it would not be wrong to say that there might be a causal link between the damage caused by the goods and the non-conformity with the description under the sale contract. Put differently, the damage caused by the goods would not have occurred, had the goods been in conformity with the contractual description as per s. 13.

A hypothetical example could be of some assistance to see the relation. Let us suppose that the contract of sale is for "X" goods with a "maximum 10% 'Y' level" which forms part of the description under the sale contract, as was the case in *Tradax v European Grain*[826].[827] Also assume that the "Y" level is in fact 20% in the goods, which makes the goods non-contractual as per s. 13. Also suppose that the vessel is damaged as a result of the high level of "Y". Once the buyer proves that the damage done to the vessel would not have occurred, had the "Y" level in the goods been below 10% as required in the description, there is nothing to suggest otherwise than that the damage caused by the goods would be a result of the non-conformity with the description as per s. 13 under the contract of sale.

In supporting the argument above, some assistance can be found in a sale of goods case where the subject of the contract was described as "normal Russian gasoil" under a c.i.f. contract.[828] It was held that the word "normal" formed part of the description. However, the oil was not accepted as "normal", because the bacteria level was not within the limits of "normal Russian gasoil". As a result, the vessel's tanks were found to be damaged due to contamination from the high bacteria level, which was also the cause of the breach under s. 13.[829]

This case and the examples discussed above, - depending on the case-by-case analysis where the facts are fit -, it is submitted by the author, support the idea advocated above that there might sometimes be a causal link between the damage caused by the goods and the breach of s. 13.[830]

[826] [1983] 2 Lloyd's Rep 100, 104-105.

[827] Sometimes such specifications can be classified as stand alone conditions or warranty or innominate terms of the contract instead of being part of description under s. 13. This might be immaterial, since the issue is not the right to reject here but claiming damages resulted from the breach as to s. 53 or 51. Indeed breach of s. 13 gives right to reject to the buyer but the buyer will no doubt have right to claim damages from the seller, regardless of however the term –either warranty or condition- is classified. For such examples see, *Montague L Meyer Ltd v Kivisto* (1930) 142 LT 480; *Tradax Internacional v Goldschmidt* [1977] 2 Lloyd's Rep 604. See also, s. 15A.

[828] *Marimpex Mineralol Handelsgesellschaft MBH v Louis Dreyfus Et Cie Mineralol Gmbh* [1995] 1 Lloyd's Rep 167.

[829] Although it was not the issue in the case, it is evident from the report that the charterers accepted the liability; [1995] 1 Lloyd's Rep 167, 173.

[830] One may argue against this proposition on the ground that cause of the loss is the shipper's breach under the carriage contract. However, the breach of contract does not have to be the sole cause of the loss. *Galoo Ltd v*

Accordingly, the damage caused by the goods may sometimes flow from the reason that renders the goods non-corresponding with the description under the sale contract.[831]

2.2. Satisfactory quality and other common law principles

2.2.1. Satisfactory quality of the goods

The second statutory condition laid down by the 1979 Act is s. 14 (2) in which it obliges the seller to supply the goods of a satisfactory quality[832] - which was merchantable quality before an amendment made by the Sale and Supply of Goods Act 1994 -; *"Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality".* Although there is no definition of satisfactory quality in the Act,[833] some aspects which could be relevant to the quality of the goods are prescribed in s. 14 (2B);

> *"(2B)For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—*
> *(a)fitness for all the purposes for which goods of the kind in question are commonly supplied,*
> *(b)appearance and finish,*

Bright Grahame Murray [1994] 1 WLR 1360, 1374-1375. As long as the defendant's breach of contract is one of two causes, which is co-operating in causing the loss, the defendant becomes liable to the claimant for that loss; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 212, 227; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1047-1048; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] QB 665, 813-814; *Carlos Soto Sau and Another v AP Moller-Maersk AS (The Sfl Hawk)* [2015] EWHC 458, [32]. The claimant does not have to prove that the defendant's breach was "the" dominant cause as long as it was "an" effective cause; *County Ltd v Girozentrale Securities* [1996] 3 All ER 834. Thus, the shipper's breach (either implied or express) under the carriage contract does not prevent the buyer from claiming against his seller so long as the seller's breach is "an" effective cause. In most cases, the bills of lading incorporate the Rules and Art IV r 6 does not burden duty to warn the carrier over the shipper's shoulders. It is an indemnity provision and accordingly the shipper does not have to be in fault to be liable against the carrier. The liability under Art IV r 6 arises when the carrier has not consented the nature and the characteristics of the goods with the knowledge. That is to say, the carrier's damage under the provision results from the nature and the characteristics of the goods, which are unknown to him. Therefore as advocated above, as long as the buyer proves that the nature or the characteristics of the goods causing damage to the carrier also render the goods non-conforming to the description as per s.13 (or any other breach), it is submitted that the buyer would be able to prove that the seller's breach is "an" effective cause of the loss. Under these circumstances, the seller becomes liable for the buyer's loss and the court does not have to choose whichever cause was the dominant or the most effective one; *County Ltd v Girozentrale Securities* [1996] 3 All ER 834.

[831] It is trite law that when the goods do not conform the contractual description, the seller does not only breach a condition of the contract, but he is also considered as failed to perform it entirely. Thus, where the seller entirely fails to perform the contract due to non-conformity with s. 13, he should not also have the advantage of such failure which also the underlying reason of the buyer's liability *vis-à-vis* the carrier. As Lord Abinger stated; "*the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."; Chanter v Hopkins* (1838) 4 M & W 399, 404. For a similar statement see also, *Bowes v Shand* (1877) LR 2 App Cas 455, 480, as per Lord Blackburn. See also, Chalmers, 121.

[831] As to s. 14 (2A), goods must be of satisfactory quality, *"if they meet the standard of reasonable person would regard as satisfactory"* who should be in the position of the buyer; *Bramhill v Edwards* [2004] EWCA Civ 403; [2004] 2 Lloyd's Rep 653, [39].

[832] As to s. 14 (2A), goods must be of satisfactory quality, "if they meet the standard of reasonable person would regard as satisfactory" who should be in the position of the buyer; *Bramhill v Edwards* [2004] EWCA Civ 403; [2004] 2 Lloyd's Rep 653, [39].

[833] There was one definition of "merchantable" quality in the previous version of s. 14 (6) which was repealed.

(c)freedom from minor defects,

(d)safety, and

(e)durability."

When considering whether the goods supplied are of satisfactory quality under those aspects, any description of the goods in the contract[834] and the price paid should be taken into account, if relevant. In other words, if the goods sold under a description do not satisfy one of the aspects stated in s. 14 (2B) at the time of shipment,[835] they may not be considered of satisfactory quality within s. 14 (2).

When the goods are of unsatisfactory quality and the reason that renders them unsatisfactory as per s. 14 (2) may sometimes mirror the reason that has induced the damage incurred by the carrier when it comes to the shipment of dangerous goods. Put differently, there might be a causal link between the unsatisfactory quality of the goods and the reason for the damages or expenses incurred by the carrier. *Marimpex v Louis Dreyfus*[836] may be of some assistance to see the relevant proximity. It was a c.i.f. sale by description in which the gasoil was described "normal Russian gasoil". The issue was whether the gasoil was of satisfactory quality under that description. Clarke J held that the gasoil was neither normal Russian gasoil nor of satisfactory quality due to the unacceptable units of bacteria. Accordingly, it was not found fit for any purpose without treatment.[837] It was also evident from the report that the reason that made the goods unsatisfactory as per s. 14 (2) was also the cause of contamination in the tanks, namely the bacteria level in the gasoil.[838] The case therefore appears to support the argument that the damage done to the carrier may sometimes result from the defect that makes the goods unsatisfactory under s. 14 (2).[839]

A cargo of fishmeal is another good example to support this argument. Under sale of goods law, fishmeal can be held to be of unsatisfactory quality, when it contains excessive amounts of oil or fat.[840] On the other hand, under carriage law, a cargo of fishmeal could be treated as dangerous when it causes spontaneous heating and combustion, for the very same reason, which renders them unsatisfactory, namely the excessive amounts of oil or fat.[841]

Other dangerous goods cases are also helpful to support the argument above. In the *Agios Nicolas,*[842] the goods shipped was iron ore concentrate and they were held to be dangerous because of

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[834] Not only the statements falling within s. 13 but also other statements which may not be considered description within the meaning of s. 13 can be relevant the quality of the goods; See, *Harlingdon and Leinster v Christopher Hull Fine Arts Ltd* [1991] 1 QB 564, 565, 583, 586.

[835] *Scottish & Newcastle International Ltd v Othon Ghalanos* [2008] UKHL 11, [52]; *Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG* (*The Mercini Lady)* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442, [21] and [40].

[836] [1995] 1 Lloyd's Rep 167.

[837] Ibid, 178.

[838] Where the contamination which required special cleaning was held physical damage resulted from dangerous goods; *the Orjula* [1995] 2 Lloyd's Rep 395; *the Berge Sund* [1993] 2 Lloyd's Rep 453.

[839] See, fn 829.

[840] *Soproma SpA v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367; *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441; [1971] 1 Lloyd's Rep 245.

[841] *Islamic Investment Co 1SA v Transorientshipping Ltd and Alfred C Toepfer International Gmbh (The Nour)* 1 Lloyd's Rep 1.

[842] *Micada Compania Naviera SA v Texim* [1968] 2 Lloyd's Rep 57.

the high level of moisture content, which was not made known to the shipowner. Assuming that such iron ore was sold under a c.i.f. or f.o.b. sale; the high level of moisture in the goods, which made them dangerous, may have also rendered them of unsatisfactory quality of as per s. 14(2). For example, iron ore may liquefy, if the moisture content is above a critical amount, which would render it unsatisfactory.[843]

Another example is *the Aconcagua*, where the cargo of calcium hypochlorite, which is normally in danger of exploding over 60C, was held dangerous given that it was abnormally in danger of exploding at 40C. As was the case in *Marimpex v Louis Dreyfus,* if the buyer can prove that the goods are not fit for any purpose with such a low explosive temperature without any treatment, such goods may also be considered of unsatisfactory for the very same reason, which caused the damage to the carrier. However, even though it is unsatisfactory, the buyer may not trigger s. 14 (2) at all, if he has examined the goods or the relevant matter was specifically drawn to the buyer's attention before the contract was made.[844] However, this is unlikely under some f.o.b. and particularly c.i.f. sales where the buyer usually takes no part in the shipment of the goods.[845]

Another suitable example can be found in *the Giannis NK*[846] where the shipped goods were groundnut pellets destined for the Caribbean. The goods were infested with insects, which were the reason for their quarantine, by the agricultural authorities of the Dominican Republic. Accordingly, they were ordered to be dumped at sea along with the other cargo on board which, however, did not carry any risk of infestation. The cargo was ultimately found to be dangerous as per Art IV r 6 of the Hague-Visby Rules, due to being infested with insects, which gave rise to loss of other cargo, which were dumped at sea.

From the perspective of the sale contract, the cause of damages in *the Giannis NK* could have been the same reason that made the groundnut pellets of unsatisfactory quality as long as the buyer could prove the goods were not fit any purpose without treatment as per s. 14 (2). For instance, the buyer would likely argue that the groundnut pellets would not be fit for human consumption or any other common purposes since they were not even allowed into the country. If this assumption were correct, the damage caused by the goods could be considered to be the same as what rendered the goods unsatisfactory under s. 14 (2).

Nevertheless, the inference above may sometimes prove wrong. For instance, it is possible that elsewhere there may not be such strict regulations and accordingly entry of such goods into other countries might not have been an issue at all. Where that is the case, the goods may not be held to be unsatisfactory under s.14 (2). However, the buyer may seek to invoke s. 14 (3) in which the seller is obliged to supply the goods for the particular purpose which is made known to him by the buyer,[847] if he can prove that he relied on the seller's skill and judgment for the particular purpose that was made known to the seller.

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[843] Ibid, 60.
[844] S. 14 (2C).
[845] Exception could be bare f.o.b. contract. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402.
[846] *Effort Shipping v Linden Management (The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep 337.
[847] See, *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.

In *Phoenix v LB Clarke,*[848] potatoes were the subject of the sale contract for delivery in Poland. As was the case in *the Giannis NK*, the potatoes were not allowed into the country by the Polish authorities, as they were diseased. The buyers sought to invoke both s. 14 (2) and s. 14 (3) – which was s. 14(1) at that time under the 1893 Act - respectively on the grounds that they were of no merchantable quality and not fit for their particular purpose either which was for their use in Poland. The buyer could not invoke s. 14 (3) either, since he could not prove that there was an express term or warranty on their particular suitability for use in Poland. They also failed under s. 14 (2), as potatoes of that quality could have been sold elsewhere. When this is the case, even if the disease in question had rendered the goods dangerous, the buyer would not be able to argue that the cause of disease was the unsatisfactory quality of the goods, since no breach had been committed under s. 14 (2). However, he would be able to rely on s. 14 (3) for the disease, once he proved that the particular purpose was made known to the seller.

2.2.2. Implied duties and other contractual statements

When the buyer is concerned about some aspects in relation to the goods, the contract of sale may often stipulate specifications or quality statements regarding the goods or additionally there might be some implied duties provided by the common law. In addition to protection provided by s. 13 and s. 14, it should be noted that for a breach of the contract, the buyer might also rely on those specifications or quality statements stipulated in the contract, or those implied duties which avail that the goods are of a non-contractual quality, if relevant. There might sometimes be a causal link between those statements in the contract and implied duties and the damage caused by the goods to the carrier.

A suitable example of contractual specifications and quality statements can be found in the dangerous goods case, *the Berge Sisar.*[849] The buyers purchased from the sellers a cargo of grade propane, which was arguably not up to the contractual quality and could be considered as defective. As was the case in *Marimpex* outlined before, it was evident from the report that the tanks of the vessel were contaminated due to the non-contractual quality of the propane.[850] Subsequently, the carrier claimed his loss arising out of the contamination from the buyers as the holders of the bills of lading under the 1992 Act for breach of the obligation under Art IV r 6. In return, the buyer claimed under the sale contract from the seller as a consequential loss of the breach for the goods non-conforming with the quality statements as agreed in the contract in respect of any sum they might be found liable to pay to the carrier.[851] Although, the buyer was not ultimately found liable against the

[848] *Phoenix Distributors Ltd v LB Clarke (London) Ltd, Cullen Allen & Co (Third Parties)* [1967] 1 Lloyd's Rep 518.
[849] [2001] UKHL 17; [2001] Lloyd's Rep 663.
[850] Although it was disputed between the seller and the buyer whether the defect in quality of the propane was before shipment, it can be at least assumed that the defect in the goods were pre-loading since the issue that the House of Lords trying to solve was whether the liability resulted from the goods was transferred to the buyer or not under the 1992 Act. Had the defect occurred after shipment, the dispute would have been revolving on whether the carrier was in fault or not.
[851] Ibid, [15].

carrier, since s. 3 (1) of the 1992 Act was not triggered by the buyer on the facts, the case can be said to illustrate that the contamination caused by the propane may have resulted from the defect that rendered the propane of a non-contractual quality.

In addition, what is advocated for in s. 13 and 14 (2) and the contractual statements above can also be put forward for the implied undertaking established in *Mash & Murrell*[852] that the goods should be in a merchantable state at the time of shipment[853] to withstand normal voyage.[854] Under this principle, the goods either evidently may not be in a merchantable state at the time of shipment or they may appear to be sound during shipment but there could be a latent defect existing at the time of shipment, which may become apparent later. In either of the cases, the reason rendering the goods unlikely to endure the normal voyage may be the cause of damage done to the vessel.[855] Examples are not limited, but, for instance, it is not uncommon that the damage caused by the dangerous goods could be the result of poor or defective packing[856].[857] On the other hand, the goods may sometimes require special packing to preserve their merchantable condition during the voyage and for this reason, Lorenzon suggests that the principle from *Mash & Murrell* can be extended to packing of the goods.[858] If this assumption is correct, if they have not been properly packed to endure the intended voyage, it is not only the goods that may be in an unmerchantable state to endure the voyage failing the test of *Mash & Murrell*, but also the vessel may be damaged as a result of such poor or defective packing.[859]

Similarly, unless the instructions are given by the buyer, the f.o.b. seller is under an implied duty as to the packing of the goods, if the nature of the goods requires packing to preserve them from the risk of deterioration during intended voyage.[860] As a result of this, the seller may bear the burden of responsibility for loss or damage caused by defective or poor packing.[861] Additionally, sometimes

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[852] [1961] 1 WLR 862; [1961] 1 Lloyd's Rep 46. Reversed on other grounds; [1962] 1 WLR 16; 2 Lloyd's Rep 1.

[853] *Scottish & Newcastle International Ltd v Othon Ghalanos* [2008] UKHL 11, [52]; *The Mercini Lady* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442, [21] and [40].

[854] It is also arguable that the seller could be held in breach of s. 14 (2) under "durability" as well as under the principle of *Mash & Murrell*. See Benjamin, 18-306.

[855] Similar assumption can be made where the seller is under another implied duty in which he is responsible for skilfully and carefully loading of the goods; *A Hamson & Son (London) Ltd v S Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep 553. His failure to do so may not only cause loss in the goods, but additionally could be the reason of damages done to the carrier.

[856] *Brass v Maitland* (1856) 6 E & B 470; *Bamfield v Goole & Sheffield Transport* [1910] 2 KB 94; *Great Northern Railway v LEP Transport* [1922] 2 KB 742. For instance, in case of sale of radioactive materials which are classified in Class 7 in the IMDG Code, they should be packed in accordance with the provisions stipulated in the Code.

[857] In case, packing is part of description, under these circumstances s. 13 could be breached as well. See, *Re Moore & Co and Landauer & Co* [1921] 2 KB 519.

[858] See Lorenzon, 10-037.

[859] Nevertheless, the seller cannot be found responsible for any deterioration during transit unless its cause is due to inherent vice. The same applies where there is a certificate final clause as to quality. *The Mercini Lady* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442.

[860] Lorenzon, 10-037.

[861] *George Wills & Sons Ltd v T Brown & Sons* (1922) 12 Ll L Rep 292; *Sime Darby & Co Ltd v Everitt* (1923) 14 Ll L Rep 120. *Board of Trade v Steel Brothers & Co Ltd* [1952] 1 Lloyd's Rep 87. In case of incorporation of the Incoterms 2010, the seller is also under an obligation as to packing both under f.o.b. and c.i.f. & c.f.r. sales. See, FOB A9, CIF A9, CFR A9.

packing can be stipulated as a separate responsibility in the contract. Where the seller breaches his duty either express or implied due to improper packing, sometimes such defective or improper packing may not only be the cause of the deterioration of the goods, but also may be the cause of the damage done to the carrier, as was the case in early dangerous goods cases such as *Brass v Maitland*[862] and *Bamfield v Goole*[863] where the losses resulted from defective or improper packing.[864] Put differently, the deterioration of the goods and damage incurred by the carrier may have resulted from the same fact, namely improper or defective packing. This may prove that there is a causal link sometimes between the cause of damage done to the carrier and the breach under the sale contract resulting from improper or defective packing.

III. Conclusion

In order to recover the loss consequent upon the damage caused by the dangerous goods, the buyer should first prove a causal link between the loss and breach of the seller under the sale contract. Since this area is unexplored under sale of goods law, it was examined above whether the buyer may find a causal link between the loss consequent upon the damage caused by the goods and the seller's breach under the sale contract.

To start with the causal link between the other potential breaches of the conditions implied by the 1979 Act like description or satisfactory quality of the goods and the loss consequent upon the damage caused by the goods to the carrier, it was shown above that there might indeed be a causal link between those breaches and the loss. Depending on the facts of each case, the buyer may not always be able to invoke the particular breach, if the facts do not prove the link between the loss and the breach. Therefore, the suggestions made may not fit every case and accordingly, there may not be one general solution for this.

Having said that, in order to provide a general solution to the buyer, it is advocated above by the author that s. 32 (2) may be of general and inclusive assistance to find a causal link between the loss caused by the goods and the breach hereunder. Under the first aspect of s. 32 (2), it is suggested that unless a term indicating the "usual thing" in this line of business – that the goods should be afforded the necessary precautions having regard to the nature of the goods and circumstances of the case for their preservation and safe carriage of them - is implied in the sale contract, it would be deprived of its business efficacy which requires that a party should not be deprived of substantially the benefit that he is supposed to receive under the contract according to the intent of the parties.[865]

Particularly under the second and the third aspect, it is suggested that the buyer may trigger s. 32 (2). When discussing the second aspect, it was shown that there is a strong correlation between loss or damage to the goods and the lack of precautions made for their safe carriage. As outlined in the

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[862] (1865) 6 E&B 470.

[863] *Bamfield v Goole And Sheffield Transport Company Limited* [1910] 2 KB 94. See also, *Great Northern Railway Company v LEP Transport and Depository Ltd* [1922] 2 KB 742.

[864] Indeed, it is the buyer who should prove the causal link between the damage done to the carrier and detoriortion of the goods.

[865] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26, 70.

examples of the carriage of goods by sea law cases, when the contract fails to provide for any necessary measure that the nature of the goods requires, not only does it cause damage to the carrier, but also loss or damage to the goods is also very likely result. Since the lack of a particular measure that the goods require can cause damage to the goods, it would not be plausible to argue that the contract afforded the protection the goods require for their preservation during voyage. This is because, had it been provided, loss or damage would not have occurred. This makes it clear that that measure should have been afforded in the contract, since the goods would have been preserved with them. Accordingly, that also proves that those measures are not only necessary for safe carriage, but also ultimately that they are crucial for the preservation of the goods during transit. Therefore, it is submitted by the author that a contract that fails to afford those measures that the goods require for survival, would not fulfil the second aspect of s. 32 (2). For this reason, it is also thought that such a bill of lading tendered will also fail the third aspect, since the buyer would not have a substantial right on this against the carrier for an obligation which is not contained in the contract.

The courts normally adopt a restrictive approach in terms of transfer of the liability to the buyer under the 1992 Act as seen in Chapter 3. However, if the liability is actually transferred onto him, then those suggestions outlined above appear to be more feasible, and the courts may – and should - show more readiness to interpret s. 32 (2) with the approach taken above in favour of the buyer to shift the loss back onto the seller. Since the potential causal link could be established between the loss consequent upon the damage caused by the goods and the seller's breach, in Chapter 6, it will be discussed whether the loss of the buyer would be recoverable from the seller on the principles of the law of damages applicable in sale of goods.

CHAPTER 6

RECOVERY OF THE LOSS UNDER THE CONTRACT

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I. Aim of the Chapter

It was shown in Chapter 5 that there might be a causal link between the loss inherited by the buyer consequent upon the damage caused by the dangerous goods and the seller's breach under the sale contract. However, this does not necessarily mean that all damages can be recoverable, despite them flowing from that breach. The loss should not be considered too remote to recover.

In this chapter, therefore, in order to determine whether the buyer can recover such loss from his seller under the sale contract, the principles in the law of damages for breach of contract will be examined to understand the extent of their applicability to the sale contracts. Particularly, given that there is no reported case on the recoverability of such loss,[866] it will be discussed whether the law of damages applicable in sale of goods achieves the recover of such consequential loss of the buyer from his seller. It is worth noting at this point that the discussion in this part will be limited to the relevant parts of rules on contractual damages.[867]

In the first part, in relation to the rule of remoteness established in English law which guides the law of damages, which itself consists of two limbs, it will be discussed whether this loss is considered too remote and, if not, under which limb does this consequential loss fall. Following this, considering particularly consequential losses claimed under c.i.f. and f.o.b. sales, it will be examined whether the courts may allow the recoverability of this loss under the rule of remoteness. The last part will analyze whether an analogy can be drawn with other sale of goods cases that involve no sea transport.

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[866] See, *the Berge Sisar* [2001] UKHL 17; [2001] 1 Lloyd's Rep 663. Where the buyer would claim against his seller under the sale contract in respect of the consequential loss that they might be adjudged liable to pay the carrier his loss transferred under the 1992 Act resulted from dangerous goods. However since the liability was not transferred to the buyer, the matter remained unresolved.

[867] For detailed examinations of contractual damages on sale of goods law, see generally, H McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) Chapter 23 (hereinafter McGregor); Chitty, Chapter 44, Benjamin, Chapter 17, 18 & 19.

II. Damages under the 1979 Act

Under the 1979 Act, the buyer has several available options, depending on the facts, to recover his losses in the event of a breach of contract by the seller.[868] In brief, s. 51 entitles the buyer to bring an action for damages for non-delivery of the goods where the seller fails to do so. On the other hand, s. 53 comes into play for the measure of damages for breach of warranty or breach of condition, which technically gives rise to the right to reject but it is not used by the buyer as a ground for rejection. That is to say, s. 53 is relevant, when delivery of defective goods are not rejected but accepted by the buyer.[869] That makes s. 53 the most relevant section for the buyer for recovery of such consequential loss, given that in case of delivery of the goods, the liability attaches to the buyer irreversibly as discussed in Chapter 3.[870] In addition to ss. 51 and 53, the buyer by virtue of s. 54, has a separate right to recover for special damages in respect of losses that result from special circumstances known to the seller at the time the contract was made.

1. The rule of remoteness

The 1979 Act is not designed to eliminate the common law rules, unless they are inconsistent with the provisions of the Act.[871] That is to say, the buyer's losses would be recoverable under the 1979 Act as well as under the rules of common law. To determine the contractual liability for damages, since 1854, English law has been guided by the rule of remoteness established in *Hadley v Baxendale*[872];

> *"the damages which ... may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*[873]

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[868] Although the buyer's remedies are prescribed in sections 51, 52, 53 and 54, s. 52 is not relevant to subject of this Chapter, since difficulties may arise in exercising this section in case of c.i.f. and f.o.b. sales. See, Benjamin, 19-229, 20-128.

[869] This section would apply to all breaches of s. 13, 14 and 15 including breaches of other contractual undertakings with regard to the condition of the goods. See, Benjamin, 17-047; McGregor, 23-059; Chitty, 44-411.

[870] See Chapter 3 II.5. Cessation of the liability. In case of rejection, as the buyer rejects the goods before taking the delivery, the liability will be unlikely transferred to the buyer since such rejection will most likely avert the impact of s. 3(1) of the 1992 Act even if there is a formal demand under it. On the other hand, in case rejection of the documents, there will be no liability transferred under the 1992 Act either, except for the fact that where the goods are delivered to the buyer before the bill of lading is rejected. In such a case, the discussion for s. 53 (2) and relevant analogous common law principles would be applicable. Despite being unlikely, even in case of non-delivery, the buyer could be subject to the liability under s. 3 (1) a & b of the 1992 Act via formal demand or claim under the carriage contract which is discussed in Chapter 3 II.4. Imposition of the liability.

[871] See, s. 54 and s. 62. See also, Benjamin, 16-051, 20-128; McKendrick, 10-014.

[872] *Hadley v Baxendale* (1854) 9 Ex 341.

[873] Ibid, 354.

There are two limbs in this rule and these provide that not all damages that result from a breach are recoverable. The first limb of the rule prescribes recoverable damages arising in "the usual course of things", whilst the second limb requires disclosure of special circumstances to recover damages arising outside "the usual course of things". Both limbs can be found in the 1979 Act. The first limb is incorporated into the 1979 Act by ss. 51(2) and 53(2)[874] in which the latter prescribes *"The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."*[875] Albeit not directly, it is also regarded that the second limb is incorporated by s. 54.[876] Given the incorporation of the limbs into the 1979 Act, it is submitted that the interpretation of the rule by the case law can be of assistance in understanding the extent to which those sections can be stretched to apply such consequential loss.[877]

The rule of remoteness in *Hadley v Baxendale* has been repeatedly depicted by the courts at all levels and it appears that its orthodox approach has mostly been preserved.[878] However, at this point, before discussing the features of the rule in depth, it is worth noting that in a recent House of Lords case – *the Achilleas*[879] - regarding losses for late delivery under a time charterparty, the House of Lords introduced a novel dimension to the rule of remoteness. It was held that the loss would not be recovered, even if it fell within the rule of remoteness, unless the defendant is considered to have "assumed contractual responsibility" for the loss suffered. *The Achilleas* may have an impact on the direction of the rule of remoteness but this has not yet occurred in case law which interpreted the novel dimension in *the Achilleas*; the orthodox approach is still preserved by the courts.[880]

More significantly, in a recent sale of goods case on f.o.b. terms, *Sapiol v Inerco,*[881] it was argued whether the novel dimension of *the Achilleas* qualified s. 53 (2) and s. 54, namely the rule of remoteness in *Hadley v Baxendale*. *The Achilleas* was held to be a highly exceptional case and on this

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[874] *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, 800, 807.

[875] In case of consequential loss arising from non-delivery, what is discussed for 53 (2) would be *mutadis mutandis* applicable to s. 51 (2) since both sub-sections wording is almost identical. S. 51 (2); *"The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract."*

[876] *Saipol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm), [14]; *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, 807. See also, Benjamin 16-048, 17-001, 17-047; Bridge, 12-75; McKendrick, 10-015; McGregor, 8-209, 23-060; Chitty, 44-388, 44-411.

[877] *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, 807, 809.

[878] In the Court of Appeal, *Victoria Laundry v Newman Industries* [1949] 2 KB 528; *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791; *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37. In the House of Lords, *Czarnikow v Koufos (The Heron II)* [1969] 1 AC 350; *Royal Bank of Scotland* [2005] UKHL 3; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48.

[879] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2009] 1 AC 61; [2008] 2 Lloyd's Rep 275.

[880] For the favorable view on the law has not changed, see *ASM Shipping Ltd v TTMI Ltd (The Amer Energy)* [2009] 1 Lloyd's Rep 293; *Classic Maritime v Lion Diversified Holdings* [2009] EWHC 1142; [2010] 1 Lloyd's Rep 59; *Pindell Ltd v Airasia Bhd* [2010] EWHC 2516; *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; [2010] 1 CLC 241; *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542; [2010] 1 CLC 470; *Saipol SA v Inerco Trade SA* [2014] EWHC 2211. See also, McGregor, 8-173; Scrutton, 20-005; Brdige, 12-19. See also, M Stiggelbout, "Contractual Remoteness, 'scope of duty' and Intention" [2012] LMCLQ 97; P Wee, "Contractual Interpretation and Remoteness" [2010] LMCLQ 150; S Sabapathy, [2013] "Falling Market and Remoteness" [2013] LMCLQ 284.

[881] *Saipol SA v Inerco Trade SA* [2014] EWHC 2211.

ground, the applicability of the approach taken by *the Achilleas* to ss. 51 (2), 53 (2) and 54 was rejected by the court. It is therefore submitted, following this decision, that the rule continues to apply to c.i.f. and f.o.b. contracts without being qualified by *the Achilleas.*

In rejecting the application of *the Achilleas*, in *Saipol v Inerco*, Mr Justice Field showed also the correct path to follow regarding how a claim for consequential loss under the 1979 Act should be pursued. In holding that not all consequential losses necessarily fall within the second limb of the rule, namely s. 54, the learned judge opined that such losses can be claimed under s.53 (2) as well, depending upon the facts of the case. Subsequently, he said that the starting point should be s. 53 (2) to hold whether a consequential loss falls within the first limb of *Hadley v Baxendale* following the assessment of the facts of the case.[882] If a loss does not fall within the first limb, he opined that the buyer should resort to s. 54 next.

Before examining the application of the rule of remoteness, it is worth mentioning the rules of mitigation.[883] The buyer must comply with these rules and accordingly he should not be able to recover the loss caused by the seller's breach, if he could have avoided or minimised it by taking reasonable steps.[884] Under the "avoidable loss" rule,[885] the buyer would be barred from recovering any part of his loss, which might be because of his neglect to take such steps.[886]

However, the author opines that the rules of mitigation may not be applicable to the buyer's loss in question due to the type of loss he is burdened with. The rules of mitigation are almost directly connected to "market price" rules prescribed in s.50 (3) and s.51 (3).[887] Nevertheless, the buyer in our case is faced with a loss consequent upon damage caused by the goods. Under sale of goods law, the rules of mitigation require the buyer to act immediately upon becoming aware of the breach of the seller and in order to minimise his loss, and accordingly he is required to buy or sell the goods if there is an available market.[888] However, it should be said that the buyer is not under any kind of "duty" to mitigate[889] but mitigation is considered as an assumption that whether the buyer could have avoided loss by taking reasonable steps.[890] Moreover, under this assumption, whether the buyer took reasonable steps to avoid his loss is a question of fact, depending on the facts of each case.[891]

When the goods arrive which conform to the contract, the buyer is reasonably expected to take delivery. However, not all damage caused by the goods are apparent from the outset and they may not have been observed until delivery or some later time. When this is the case, it is submitted

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[882] The decision in *Saipol v Inerco* is also consistent with *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 in which it was held that s. 53(2) was the "starting point" and *prima facie* rule in s. 53(3) for the measure of the damages should not apply where the buyer's true loss more.

[883] On this see generally, Benjamin, 16-054 ff.

[884] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys* [1912] AC 673; *Darbishire v Warran* [1963] 1 WLR 1067; *The Solholt* [1983] 1 Lloyd's Rep 605.

[885] Ibid.

[886] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys* [1912] AC 673, 689.

[887] Benjamin, 16-054.

[888] S.50 (3) and s. 51 (3) of the 1979 Act. See also, *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201; *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718.

[889] *Darbishire v Warran* [1963] 1 WLR 1067, 1075; *The Solholt* [1983] 1 Lloyd's Rep 605, 608

[890] *Thai Airways International Public Co Ltd v K I Holdings Co Ltd* [2015] EWHC 1250, [34].

[891] *Payzu Ltd v Saunders* [1919] 2 KB 581, 588, 589; *Lesters Leather and Skin Co Ltd v Home and Overseas Brokers Ltd* (1948) 64 TLR 569; *The Solholt* [1983] 1 Lloyd's Rep 605.

that there are no reasonable steps that the buyer could take to avoid his loss, since the liability arising from the goods irreversibly attaches to the buyer/transferee under the 1992 Act, when he takes delivery of the goods.

In the alternative scenario where the goods do not conform to the contract, it is not always easy to anticipate that the goods do not conform due to the seller's breach. Moreover, since the risk generally passes on or as from shipment, the buyer may reasonably choose to accept the goods and claim damages from the carrier under the carriage contract procured by the seller. This is because it may not always be apparent from the goods themselves or from the documents that the seller is in fact in breach and more significantly that the goods caused damages to the carrier. When this is the case, the buyer can be forced to accept the goods, since his rejection can be treated wrongfully, if he cannot prove that the seller is in breach of the contract. Even if the buyer genuinely thinks that the seller is in breach of the contract before accepting delivery of the goods but after demanding or claiming from the carrier, rejection or re-sale of the goods may not always be a practical solution due to other surrounding circumstances,[892] such as the difficulty in finding a subsequent buyer for the defective goods with potential liability in a limited time.

Therefore, in the light of the scenarios outlined above that the buyer could be in, it is submitted by the author that it would not be easy for the buyer to comply with the rules of mitigation to minimise his loss consequential upon the damage caused by the goods, which can hardly be said to be due to his neglect to take reasonable steps. In any of the scenarios above, he can rarely be said to be aware that he can have liability imposed on him under the 1992 Act before it actually attaches to him. Even if he can be said to be aware of it, it would be correct to say that the buyer could not have avoided the loss, even if he had acted reasonably as illustrated above. Accordingly, he should not be barred from claiming against the seller.

2. Application of the rule to the loss of the buyer

Following the judgment by Mr Justice Field in *Saipol*, once the buyer proves, as examined in Chapter 5, that there is a causal link between the damage caused by dangerous goods and the seller's breach under the sale contract, the starting point to claim for such loss should be s. 53 (2)[893]. If the loss does not fall within s. 53 (2), then s. 54 should be the next resort for the buyer. It is submitted by the author that such a loss shows more proximity to fall within the first limb rather than the second one which will be discussed below.

As cited above, losses arising naturally in the ordinary course of things are recoverable under the first limb. As to the second limb, disclosure of special circumstances is required which are outside the usual course of things, as they might cause unanticipated losses. The underlying logic of the second limb therefore is that the parties should have a chance to discuss and allocate unknown

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[892] *Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG* (*The Mercini Lady (No 2))* [2012] EWHC 3009; [2013] 1 All ER 610.
[893] Or s.51 (2), depending on the facts.

additional risks that may arise from special circumstances outside the ordinary course of things.[894] If there was entirely an unknown risk, which was not discussed or allocated to the defendant, those risks would not be regarded as recoverable under the rule. Put differently, only the risks that are contemplated by the parties can be recoverable under the contract.

The next step is that possession of the relevant knowledge is required, in order for a loss to be assumed within the contemplation of the parties. As to the first limb of *Hadley v Baxendale*, the knowledge is imputed onto the defendant and he is assumed to possess as a reasonable man, the knowledge of what loss is likely to result from a breach of contract in the usual course.[895] On the other hand, once the second limb comes into play and a breach is likely to cause more unanticipated loss than it would in the ordinary course of things, the defendant must possess actual knowledge of special circumstances.[896] Hence, the categorization of a fact as basic or special knowledge determines whether the case falls within the first or second limb.[897] As Lord Wright opined in *Monarch Steamship,* the profession of the parties can be of assistance on what kind of knowledge can be imputed onto the parties[898];

> *"... what reasonable business men must be taken to have contemplated as the natural and probable result if the contract was broken. As reasonable business men, each must be taken to understand the ordinary practices and exigencies of the other's trade or business".*[899]

The Mercini Lady (No 2)[900] is a good example of this. The f.o.b. buyer concluded a charterparty with the shipowner for the carriage of gasoil. Although, the seller had no direct contractual relation with the shipowner, he as the f.o.b. seller was assumed to have contemplated that there could be a demurrage clause in the charterparty concluded between the buyer and the shipowner, since he was supposed to have known the ordinary practices of such contracts when trading in that business. Accordingly, the knowledge of demurrage clauses in the charterparty was imputed onto him by the court. Where sale contracts are on f.o.b. or c.i.f. terms, the parties trading in this business are considered to be well aware of the general practices and operation of such contracts involving sea transport. When making the carriage contract, the seller under c.i.f. sales and often under f.o.b. sales,[901] as the shipper of the goods, is already aware that the liability arising from the shipment of dangerous goods falls on him. Following the payment from the buyer, once the shipping document is tendered, all practical interest in being party to that carriage contract thereunder lies with the buyer. Accordingly, the seller can be said to be familiar with the 1992 Act for regulating the transfer of

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[894] *Hadley v Baxendale* (1854) 9 Ex 341, 355.
[895] *Hadley v Baxendale* (1854) 9 Ex 341, 355; *Victoria Laundry v Newman Industries* [1949] 2 KB 528, 539.
[896] *Hadley v Baxendale* (1854) 9 Ex 341, 355; *Victoria Laundry v Newman Industries* [1949] 2 KB 528, 539, 540.
[897] *Victoria Laundry v Newman Industries* [1949] 2 KB 528, 539; *the Heron II* [1969] 1 AC 350, 416.
[898] McGregor, 8-194.
[899] *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196, 224. See also, *The Heron II* [1969] 1 AC 350, 424.
[900] [2012] EWHC 3009; [2013] 1 All ER 610. See below, 3. Consequential losses under c.i.f. and f.o.b. sales.
[901] See, generally Chapter 2 on this.

contractual rights and liabilities under the shipping documents tendered by him. For this reason, he is also assumed to possess the knowledge of the fact that the buyer of the goods may attract the liability under the 1992 Act, when exercising the contractual rights under the carriage contract evidenced in the bill of lading procured by him. Hence, it is submitted that for such a loss, there is no reason why the knowledge should not be imputed onto the seller.

Even if it were assumed that in order to recover such loss, the actual knowledge of the seller was required, it is submitted that the seller can be said to have possessed the actual knowledge of it. Under the second limb, when the claimant seeks to recover for unusual losses arising from special circumstances, he must prove that the defendant had the actual knowledge of the relevant facts at the time the contract was made.[902] This is because, following the actual knowledge of a particular fact, the defendant may not be willing to accept the additional risk arising out of it.[903] It is therefore crucial that there should be communication of the special circumstances between the buyer and the seller.

When considering the loss in question, whilst the – so-called - additional risk would be the loss arising from the dangerous goods, the special circumstance would be the undertaking of that loss by the buyer. However, as a matter of course, as outlined above under c.i.f. and often f.o.b. sales, the seller can be said to have already assumed such risk by being the shipper.[904] When the seller contracts with the carrier, he is familiar with the international conventions regulating such contracts, and the risk of liability arising from dangerous goods is already contractually allocated by the common law or the Hague-Visby Rules to him.[905] Thus, it is submitted that this situation does not create an additional risk. On the contrary, he is well aware that it is something already contemplated and allocated by the law onto him from the start.

In addition, it is not plausible to argue that undertaking of such loss by the buyer under the 1992 Act can be a special circumstance, given that the seller is well aware that under the shipping document tendered by him, the buyer can have this liability imposed on him, as a matter under the 1992 Act. Moreover, actual knowledge of special circumstances is only necessary where the defendant would not have been liable without it.[906] Once the buyer becomes subject to the liability under the 1992 Act, the seller/shipper's liability will not extinguish but he will remain liable as the original party against the carrier as well.[907] Therefore, on these grounds, the author opines that such loss should be recoverable under the first limb rather than the second limb. Even if it is accepted that s.54 namely the second limb, comes into play for such a loss, the inference above makes it clear that the seller can be said to have actual knowledge of the special circumstance and no additional risk which is not contemplated is taken on by the seller.

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[902] *Victoria v Newman* [1949] 2 KB 528, 539. *Jackson v Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377, [35]-[36].

[903] *Safet-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175, 183-184. See also, *the Achilleas* [2008] UKHL 48.

[904] *The Athanasia Comninos* [1990] 1 Lloyd's Rep 277, 280.

[905] In string sales, the seller can be intermediate party who may not conclude the carriage contract personally. For discussion on string sales, see below, 6. Rolling back of the loss under string sales.

[906] McGregor, 8-191; Benjamin, 16-047.

[907] S. 3(3), the 1992 Act.

In addition to the possession of imputed or actual knowledge of a fact, in order to render the seller liable under either limb, according to the rule in *Hadley v Baxendale*, he should not ask himself at the time of the breach whether the loss caused was foreseeably the result of that breach but instead that, at the time the contract was made, as a reasonable man, whether he should have contemplated that the loss in question was likely to result.[908] The rule therefore does not prospectively require anticipation of a particular loss resulting from a particular breach. In *the Heron II,*[909] where the claimant charterers were sugar merchants, they suffered a loss by reason of a fall in the market price of sugar due to late delivery of the goods by the shipowners. Lord Morris held on the basis of the above formulation;

> *"I think that such a ship owner must reasonably have contemplated that if he delivered the sugar at Basrah some nine or ten days later than he could and should have delivered it then a loss by reason of a fall in the market price of sugar at Basrah was one that was liable to result or at least was not unlikely to result."*[910]

The rule also does not require that the defendant should have contemplated the exact details of the loss and the exact manner of its occurring.[911] Moreover, a loss does not even have to be a necessary result of that breach.[912] It is enough upon the knowledge available to the defendant, as a reasonable man if he could have foreseen the loss was "liable to result". For instance, in the case of sale of ferro-silicon, where the seller breaches his duty to pack the goods - either express or implied -, or in the case of unsatisfactory quality of fishmeal, where it contains excessive amounts of oil or fat, the seller does not have to contemplate in what manner such improper packing or unsatisfactory quality of the goods causes damage to the carrier. It would suffice that when considering his breach, the seller would have concluded that the damage incurred by the carrier was "liable to result",[913] and, accordingly for that loss, the buyer could be adjudged against the carrier under the 1992 Act when exercising his contractual rights.

Furthermore, a loss would not become too remote merely because the possibility of the event causing the loss would have been less than an even chance.[914] Even an exceptional loss may flow naturally from the breach and satisfy the first limb of the rule. In *the Heron II*, Lord Pearce illustrated such an example when discussing the rule in *Hadley v Baxendale*;

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[908] *Czarnikow v Koufos (The Heron II)* [1969] 1 AC 350, 388, 406, 410, 414, 425; *Victoria Laundry v Newman Industries* [1949] 2 KB 528, 539, 540. See also, *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175.
[909] [1969] 1 AC 350.
[910] [1969] 1 AC 350, 406.
[911] *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496, 1524. *The Heron II* [1969] 1 AC 350, 417. See also *Brown v KMR Services Ltd* [1995] 4 All ER 598; *Kpohhraror v Woolwich Building Society* [1996] 4 All ER 119.
[912] *Victoria Laundry v Newman Industries* [1949] 2 KB 528, 540.
[913] For the degree of probability, different phrases were suggested such as "liable to result", "not unlikely to occur", "real danger" or "serious possibility". See, *The Heron II* [1969] 1 AC 350, 406, 415, 425; *Victoria Laundry v Newman Industries* [1949] 2 KB 528, 540.
[914] *The Heron II* [1969] 1 AC 350, 388.

> *"A thing may be a natural (or even an obvious) result even though the odds are against it. Suppose a contractor was employed to repair the ceiling of one of the Law Courts and did it so negligently that it collapsed on the heads of those in court. I should be inclined to think that any tribunal (including the learned baron himself) would have found as a fact that the damage arose "naturally, i.e., according to the usual course of things." Yet if one takes into account the nights, weekends, and vacations, when the ceiling might have collapsed, the odds against it collapsing on top of anybody's head are nearly ten to one."*[915]

In *the Achilleas*, Lord Walker opined that liability does not depend upon the question of probability; it is also a *"... question of what the contracting parties must be taken to have had in mind, having regard to the nature and object of their business transaction"*.[916] Subsequently, his Lordship gave a suitable example for the inference; *"If a manufacturer of lightning conductors sells a defective conductor and the customer's house burns down as a result, the manufacturer will not escape liability by proving that only one in a hundred of his customers' buildings had actually been struck by lightning."*[917]

When considering *"the nature and object of their business transaction"* in c.i.f. and f.o.b. sales, the seller is well aware that the buyer as transferee can be both entitled to rights and have liabilities imposed under the shipping document tendered by him by virtue of the 1992 Act. For this reason, it is submitted that the seller should not be able to escape from the liability on the basis that the liability of dangerous goods are rarely imposed on the buyer as transferee under the 1992 Act.

Support can be found in a recent case where the loss was not regarded too remote on the basis that it was within the contractual duty, although it was very unlikely to result.[918] Toulson LJ in *Supershield v Siemens,*[919] opined that the rule of remoteness cannot be examined without taking into consideration the purpose of the contract and the scope of its obligations.[920] He subsequently held that if the loss could be held to be within the scope of the duty, it could not be considered too remote, even if it would not have happened in ordinary circumstances.[921]

Under c.i.f. and often f.o.b. contracts, once the seller fulfills his physical obligations and ships the goods in conformity with the sale contract, the seller is under a duty to tender the buyer a reasonable carriage contract that confers protective rights throughout, thus enabling the carrier to take any necessary precautions for the preservation of the goods during the voyage. This is because, the risk in the goods remains with the buyer while the goods are in transit and he has all the practical interest in that carriage contract against the carrier. If the contract tendered is deemed to be

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[915] Ibid, 416-417.
[916] *The Achilleas* [2009] 1 AC 61, [78].
[917] Ibid.
[918] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; [2010] 1 CLC 241.
[919] [2010] EWCA Civ 7; [2010] 1 CLC 241.
[920] Ibid, [40], [43]. While He was considering the exclusionary impact of *the Achilleas* on the "assumption of responsibility", he opined that the same principle could also have inclusionary impact.
[921] Ibid, [40], [43].

unreasonable, the seller can be said to have failed in his duty to tender a reasonable carriage contract and the buyer of the goods is to all practical effects deprived of any substantial rights against the carrier. When the contract fails to afford the goods the protection they require, they may not only be found in a damaged state but also sometimes cause damage to the carrier as argued in Chapter 5.[922] When this is the case, the contract may fail the test of reasonableness, particularly the second and third aspect of it.

Although this is discussed in detail in Chapter 5, there is no harm in illustrating it with an example. In the case of sale of excessively gaseous coal, extra ventilation may be required for the preservation of the goods during transit. If the contract fails to provide ventilation, the goods can be heated and may start burning. If this occurs, it is not only the goods but also the vessel or other cargo on board that can be found to be damaged. For this reason, both damage to the goods and to the carrier would be the result of failing the test of reasonableness. Thus, once the buyer as transferee comes under liability for the damage caused by the goods, it is submitted on the basis of Toulson LJ's decision in *Supershield v Siemens* that this loss can be held within his duty and should not be considered too remote, given that it is the likely result of failing the second and the third aspect of the seller's duty to tender a reasonable carriage contract.

3. Consequential losses under c.i.f. and f.o.b. sales

In the above paragraphs, the possibility of recovery of such a loss under the rule of remoteness with the support of case law is discussed. When considering consequential losses under c.i.f. and f.o.b. sales in particular, the case law proves that the buyer can recover losses in respect of dead freight, demurrage or damages done to third parties that he may have paid as a result of the seller's breach or in respect of extra costs in order to supply replacement cargoes to execute the existing contracts.[923]

In the recent case of *the Mercini Lady (No 2),*[924] which was under a sale contract on f.o.b. terms for the sale of gasoil, the samples were taken from the cargo prior to loading, in order to certify it to be on-specification. The buyer had chartered the vessel for the shipment of the gasoil. By the time of arrival to the discharge port, further samples were taken to test the quality of the goods but this time the cargo was found to be off-specification. Since it was not possible for the buyer to reject it under the circumstances, he had to find a new buyer to sub-sell the goods. While the tests were being carried out and a new buyer was sought, the buyer not only incurred demurrage costs under the charterparty, but also further costs of freight in order to deliver the cargo to the new buyer. The buyer

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[922] See, II.1.2. Contract must be appropriate to grant sufficient protection to the goods.

[923] *J&J Cunningham Ltd v Robert A Munro Ltd* (1922) 28 Com Cas 42; *Trading Society Kwik-Hoo-Tong v Royal Commission on Sugar Supply* (1923) 16 Ll LR 343; *Marimpex Mineralol Handelsgesellschaft MBH v Louis Dreyfus Et Cie Mineralol Gmbh* [1995] 1 Lloyd's Rep 167; *Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG* (*The Mercini Lady (No 2))* [2012] EWHC 3009; [2013] 1 All ER 610. For the seller's recovery of consequential loss in respect of demurrage, see, *Vitol SA v Phibro Energy AG (The Mathraki)* [1990] 2 Lloyd's Rep 84.

[924] [2012] EWHC 3009; [2013] 1 All ER 610.

claimed damages including consequential losses for the breach of the implied term under s. 14 (2) that the cargo was of satisfactory quality. The gasoil was held to be of unsatisfactory quality under s. 14(2). Subsequently, the court also found that the buyer was entitled to recover under s. 53 (2) from his seller as consequential loss for the sums that he had to pay both for demurrage and extra cost of freight given that the time spent during the tests carried out and in the search for a new buyer resulted from the unsatisfactory quality of the gasoil.[925]

It was already said above that the rationale behind the rule in the first limb is tacit allocation of risk. Although there was no discussion in the report, it would be safe to say that the risk of demurrage and additional freight were assumed as within the contemplation of the parties. Accordingly, since the claim of the buyer in *the Mercini Lady* was allowed under s. 53(2), namely the first limb of the rule, the fact that there can be demurrage clauses under the charterparty between the buyer and the shipowner and the possibility of resale along with the further cost of freight for the delivery to the new buyer must have been imputed onto the seller.[926]

When comparing the consequential loss of the buyer in *the Mercini Lady* with the loss that he may have to pay to the carrier in consequence of the liability flowing from dangerous goods under the 1992 Act, it is submitted that the latter kind of loss can arguably be as recoverable as the former from his seller as a consequential loss on a similar basis. In *the Mercini Lady*, the buyer's demurrage loss resulted under the charterparty that he as the charterer himself agreed on its terms with the shipowner, including demurrage terms. Unlike the bills of lading, charterparties are not regulated by international conventions and freedom of contract is fully preserved. The seller therefore can be said to have had no control over or any knowledge about the demurrage clauses stipulated in the charterparty or about the additional freight for sub-sale. Even so, the seller in *the Mercini Lady* came under liability for the loss that resulted from a demurrage clause under a contract that he may not have had a glimpse of its terms. On the other hand, unlike in the charterparty example above, the seller as the party to the contract evidenced in the shipping document, is well aware of the terms hereunder and knows that the shipping document tendered by him to the buyer is governed by the 1992 Act and thereunder the buyer may inherit liabilities for the dangerous goods. When compared to the demurrage and additional freight, the risk of the buyer's loss under the 1992 Act should be considered as being well within the contemplation of the seller.

Under English law, when applying the rule of remoteness with factual causation between the loss and the breach, the courts are *"not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions…"*.[927] Therefore, the courts do apply "common sense" when approaching the remoteness between the breach and the loss. Particularly

[925] Although there is no mention to s.53 (2) in the relevant part of judgment, the buyer made the claim under s. 53 (2). Also the court referred with apparent approval to the relevant passage of Benjamin where consequential losses are recognized as recoverable under s. 51(2) and 53(2). See, Benjamin, 20-128.

[926] Despite the fact that the seller may not quantify particular time allowance for laytime and demurrage.

[927] *Monarch Steamship Line Co Ltd v Karlshamns Oljefabriker (AB)* [1949] AC 196, 228. See also, *ENE Kos I Ltd v Petroleo Brasileiro SA (No 2)* [2012] 2 AC 164 and *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32. See also, *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370; *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360. In *the Athanasia Comninos*, a similar common sense approach was applied to the factual causation between the charterer's orders and loss; [1990] 1 Lloyd's Rep 277, 296.

when c.i.f. and f.o.b. cases are examined, it will be seen that the courts, without elaborating in detail, take only basic common sense into consideration in deciding consequential losses under these contracts.[928] When examining the decision in *the Mercini Lady*, the court, without getting into details, found that the buyer came under liability for demurrage as a result of the seller's breach because of the unsatisfactory quality of the goods.[929] In holding that the ground for consequential loss was considered that samples were taken in order to carry out test in relation to quality of the goods – which showed the unsatisfactory quality of the goods -, leading to the need to find a new buyer. For this reason, it was found that the majority of the time that caused demurrage was spent as a result of the seller's breach.[930] The court simply accepted that had there been no breach of the seller, the demurrage would not have been incurred by the buyer.[931]

Although it was examined in detail in Chapter 5 that there might be a causal link between the damage caused by the goods to the carrier and the seller's breach, in order to see the application of the rule of remoteness with the factual causation between the seller's breach and the buyer's loss under the 1992 Act, there would be no harm to repeat some of them briefly. In *Marimpex*, given the abnormal level of bacteria in the gasoil, the cargo was neither of satisfactory quality as per s. 14(2) nor did it conform with the description under s. 13(1). Due to the very same reason, namely the abnormal amount of bacteria, the tank of the vessel was found to be damaged. Had there been no breach of the seller, the gasoil would not have damaged the vessel. Similarly, in *the Berge Sisar,*[932] the cargo caused contamination in the tanks of the vessel due to the non-contractual quality under the sale contract. Had the goods been of a contractual quality, there would not have been any contamination. Sometimes defective packing of the goods causes damage to the vessel,[933] and for the very same reason, the seller can be held in breach of the sale contract, since the goods can be considered to be of a defective condition because of improper packing which meant they were unable to endure the voyage.[934] Had the goods been duly packed, they would not have caused any damage to the vessel.

Another good example is a cargo of fishmeal. Under sale of goods law, fishmeal can be considered of unsatisfactory quality under the sale contract where it contains excessive amounts of oil or fat.[935] On the other hand, under carriage law, a cargo of fishmeal could be held as dangerous, given

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[928] *J&J Cunningham Ltd v Robert A Munro Ltd* (1922) 28 Com Cas 42; *Trading Society Kwik-Hoo-Tong v Royal Commission on Sugar Supply* (1923) 16 Ll LR 343; *Marimpex Mineralol Handelsgesellschaft MBH v Louis Dreyfus Et Cie Mineralol Gmbh* [1995] 1 Lloyd's Rep 167; *the Mercini Lady (No 2)* [2012] EWHC 3009; [2013] 1 All ER 610; *Vitol SA v Phibro Energy AG (The Mathraki)* [1990] 2 Lloyd's Rep 84.
[929] [2012] EWHC 3009, [69].
[930] Ibid.
[931] Ibid, [70].
[932] [2001] UKHL 17.
[933] *Brass v Maitland* (1856) 6 E & B 470; *Bamfield v Goole & Sheffield Transport* [1910] 2 KB 94; *Great Northern Railway v LEP Transport* [1922] 2 KB 742.
[934] Provided that he is under a duty to pack the goods against his buyer. See, *Re Moore & Co and Landauer & Co* [1921] 2 KB 519; *George Wills & Sons Ltd v T Brown & Sons* (1922) 12 Ll L Rep 292; *Sime Darby & Co Ltd v Everitt* (1923) 14 Ll L Rep 120; *Board of Trade v Steel Brothers & Co Ltd* [1952] 1 Lloyd's Rep 87; *Tsakiroglou & Co v Noblee Thorl GmbH* [1961] 2 All ER 179; [1962] AC 93. See also, Lorenzon, 10-037.
[935] *Soproma SpA v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367; *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441; [1971] 1 Lloyd's Rep 245.

the very same reason, namely the excessive amounts of oil or fat, which may cause spontaneous heating and combustion.[936] If the goods had not had excessive levels of oil or fat, they would not have spontaneously heated or combusted.

All the examples outlined above vary from one case to another and there is no particular invariable breach of the seller linking the loss of the buyer consequent upon the damage caused by the goods to the carrier. However, when compared to other potential breaches, as examined in detail in Chapter 5, particularly under the second and third aspect, s. 32 (2) may prove more inclusive as a general solution for the buyer. When the contract of carriage fails to provide for any necessary precaution that the nature of the goods requires for safe carriage, they may not only cause damage to the carrier but also loss of or damage to the goods.[937] This also proves that those measures are not only necessary for safe carriage but ultimately also crucial for the preservation and survival of the goods during transit.

For instance, if the nature of the goods requires cooling or ventilation to be applied during transit for its safe carriage, and if the contract fails to provide so, once it starts burning both damage to the goods and to the carrier is likely to result. This therefore makes it necessary for their preservation and survival that in a reasonable contract such protection the goods require be provided. If the contract fails to afford the dangerous goods the preservation they require, they are likely to become lost or damaged as a proximate result of that failure. If they are to become entirely lost or damaged due to the lack of a necessary measure, it can hardly be said that the contract is appropriate for the particular goods and nor does it grant the goods the protection they require. Put differently, such a failure may not only cause damage to the carrier but also the goods may become lost or damaged as a result of the same failure in providing the relevant precaution in the contract. That, in most cases, it is submitted, proves the loss imposed on the buyer under the 1992 Act consequent upon the damage caused to the carrier is not too remote to the breach of s. 32 (2). Had the contract afforded that measure the nature of the goods require, the goods would not have been damaged or become loss and accordingly no harm would have been caused to the carrier either.

It should also be noted at this point that once there is a breach of s. 32 (2), the loss is recoverable under ss. 51 (2) and 53 (2) as well as under common law rules of damages.[938] Additionally, unlike other sections of the 1979 Act, s. 32 (2) explicitly and uniquely provides its own right to damages from the seller, when he is in breach of s. 32(2); *"and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."* When reading the subsection literally, it is submitted that the former part starting with *"if"* may only indicate the criteria when the buyer is entitled to damages.[939] The sentence plainly ends merely with "damages" without

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[936] *Islamic Investment Co 1SA v Transorientshipping Ltd and Alfred C Toepfer International Gmbh (The Nour)* 1 Lloyd's Rep 1.
[937] See, fn 906.
[938] S. 62 (2) of the 1979 Act.
[939] However, it is submitted that even if the goods are not lost or damaged, the buyer should be entitled to recovery for damages under s. 60; *"Where a right, duty or liability is declared by this Act, it may (unless otherwise provided by this Act) be enforced by action."* See also, Bridge, 4.101, fn. 376.

indicating any restriction on what it would be. When considering the sub-section with its autonomous reference to damages which is not found in other sections of the 1979 Act – apart from specific sections of damages -, it is submitted by the author that it might be interpreted to extend to recover such loss as a direct loss rather than a consequential one.

Considering the courts' approach when applying the rule of remoteness with factual causation, they do apply common sense between the breach and consequential loss in sale of goods cases. All these examples appear to prove that, with the approach taken by the courts, the loss of the buyer should not be considered too remote but within the contemplation of the parties, and accordingly had there been no relevant breach of the seller, the goods would not have caused damage either. The author therefore ultimately opines that the loss imposed on the buyer under the 1992 Act consequent upon the damage caused by the goods does satisfy the rule of remoteness applicable to the sale of goods cases, and accordingly it can be claimed from the seller on the grounds advocated above.

4. Analogy with other sale of goods cases

Recovery of such loss can also be established on the grounds of analogy with sale of goods cases that involves no transport of the goods. The buyer can be entitled to recover damages for injuries to himself, his family or property caused by the seller's breach if it were within the contemplation of the parties at the time the contract was made.[940] Thus, for instance, where the goods are sold for human consumption, the buyer is entitled to recover damages for injuries or illness caused by its defective condition.

Assume that a c.i.f. or f.o.b. buyer purchased under a sale contract ordinary fishmeal but due to its high levels of oil and fat, the goods were of unsatisfactory quality. Also suppose that the goods caused damage to the vessel, due to very same reason, namely, their abnormal oil and fat content. Once the buyer becomes subject to the liability under the 1992 Act for the damages incurred by the carrier, and accordingly when the carrier recovers his loss from the buyer, the carrier would be subrogated by the buyer by virtue of the 1992 Act and the latter would be put in a position, as if the goods had directly injured or damaged him or his property by their unsatisfactory quality. This analogy is even more plausible by virtue of s. 32(1), where the goods are deemed to be delivered to the buyer, when the seller delivers the goods to the carrier.[941] He would therefore bear the burden of the loss caused to the vessel in the stead of the carrier, analogically resembling the position of the buyer where his family or his property is directly injured as a result of the seller's breach. Hence, the

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[940] *Priest v Last* [1903] 2 KB 148; *Wren v Holt* [1903] 1 KB 610; *Frost v Aylesbury Dairy Co Ltd* [1905] 1 KB 608; *Jackson v Watson & Sons* [1909] 2 KB; *Square v Model Farm Dairies Ltd* [1939] 2 KB 365; *Grant v Australian Knitting Mills Ltd* [1936] AC 85; *Godley v Perry* [1960] 1 WLR 9; *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68; *Alfred McAlpine COnsttruction Ltd v Panatown Ltd* [2001] 1 AC 518.

[941] S. 32 (1); "… delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."

analogy outlined above may support the idea that the buyer subrogating the carrier for loss should be entitled to recovery as the buyer from the sale of goods cases involving no sea transport.

Another analogy, arguably a more plausible one, can be established from *Lambert v Lewis,* where it was held that providing within the reasonable contemplation of the parties at the time the contract was made, the buyer may recover compensation paid to a third party from his seller, if the following conditions are fulfilled; a) if the third party or his property is not unlikely to be damaged in consequence of the seller's breach; and b) as a result of this damage, the buyer would not be unlikely to be found liable to reimburse the third party for damage or loss resulting from the seller's breach.[942]

Firstly, there is no difficulty in considering the carrier as a third party, since he is not party to the sale contract. Moreover, the carrier's contractual relationship with the seller under the carriage contract or with the buyer after the transfer of contractual rights under the 1992 Act is not an obstacle to establish this analogy. This is because the legal basis of the buyer's liability against the carrier is not necessarily supposed to be under the law of torts; it could be under contract as well.[943] Thus, for the first condition, it was already outlined above that the damage caused to the carrier may have resulted as a consequence of the seller's breach under the sale contract. Once the buyer proved the causal link between the loss and the seller's breach on the grounds argued in Chapter 5,[944] then the first condition of *Lambert v Lewis* would be considered as fulfilled. In addition, it may not be difficult to satisfy the second condition, once the buyer finds himself legally[945] liable under the 1992 Act as per s. 3(1).

Support for this analogy can be found in a c.i.f. sale case where the buyer was entitled to recover the sum that he had to pay a third party that resulted from the seller's breach. In *Marimpex,*[946] upon arrival, the gasoil was discharged into a shore tank in order to carry out tests for the quality of the goods. Following the tests carried out, the gasoil was found to be of unsatisfactory quality as per s. 14(2) due to an abnormal level of bacteria in it. In consequence of this, the shore tank was found to be contaminated. Accordingly, the court allowed the buyer's claim against the seller as a consequential loss in respect of the sum that the buyer had to pay to the shore tank owner for the damage that resulted from the unsatisfactory quality of the goods.

Following the fulfillment of the two conditions therein provided along with a similar consequential loss allowed in a c.i.f. case, the author ultimately opines that an analogy with the principle accepted in *Lambert v Lewis* can be plausibly established for the buyer's loss paid to the

[942] *Lexmead (Basingstoke) Ltd v Lewis and Others* (*Lambert v Lewis)* [1982] AC 225. Albeit not applied in the relevant case, this principle was accepted by the House of Lords. See the previous cases on the principle, *Mowbray v Merryweather* [1895] 2 QB 640; *Scott v Foley, Aikman & Co* (1899) 16 TLR 55. See also, Benjamin, 17-075; Chitty, 44-431; McGregor, 23-085.

[943] *Mowbray v Merryweather* [1895] 2 QB 640; *Scott v Foley, Aikman & Co* (1899) 16 TLR 55. See also, Benjamin, 17-075; Chitty, 44-431.

[944] See generally Chapter 5 on this.

[945] The claim of the third party is not necessarily defended before the court. If the claim is reasonable settled out of court, the buyer may also recover his loss paid under the settlement from the seller. See, *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422.

[946] *Marimpex Mineralol Handelsgesellschaft MBH v Louis Dreyfus Et Cie Mineralol Gmbh* [1995] 1 Lloyd's Rep 167.

carrier under the 1992 Act in consequence of the seller's breach, and it is arguably submitted that the buyer's claim based on this principle should be allowed.[947]

5. Intervening act of the buyer

At this point, one may argue that the buyer's triggering s. 3 (1) of the 1992 Act may break the link between his loss and the seller's breach of contract in question.[948] However, it is submitted that such an act of the buyer should not be treated as an intervening act[949] that breaks the link between the breach and the loss.[950]

Firstly, in order to break the link between the loss and the breach, the buyer's act should be considered unreasonable in the circumstances.[951] Under the 1992 Act, the buyer becomes subject to liability only when exercising his contractual rights under the carriage contract, namely demanding or taking delivery of the goods or making claim under the contract.[952] It would be implausible to argue that seeking to exercise his contractual rights should be treated as unreasonable conduct.

Secondly, the conduct of the buyer *"must constitute an event of such impact that it obliterates the wrongdoing…"*[953] of the seller in order to break the link. That is to say, the conduct of the buyer must be the true cause of the loss rather than the breach of the seller. The buyer's exercising of his rights under the 1992 Act, it is submitted cannot be treated as obliterating the wrongdoing of the seller. This is because exercising rights under the carriage contract is not the cause of the loss. It should be remembered that since the risk passes on or as from shipment, all practical interest in being party to the carriage contract lies with the buyer. He only becomes artificially party to it by way of statute and it is a contract for the benefit of a third party, namely the buyer. Therefore, exercising contractual rights is the ordinary consequence of this, not the cause of the loss. Unless the buyer is the shipper – which is not the case here - and has taken part during or before shipment, the buyer's triggering of s. 3 (1) of the loss therefore would hardly have an impact on obliterating the wrongdoing of the seller.

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[947] The buyer additionally may recover costs incurred in defending the carrier's claim; *Scott v Foley* (1899) 16 TLR 55, 56; *Brittannia Hygenic Laundry Co Ltd v John I Thorneycroft Co Ltd* (1925) 41 TLR 667; reversed on the other grounds (1926) 42 TLR 198.

[948] *Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd* [1955] 2 QB 68; *Reardon Smith Line Ltd v Australian Wheat Board* [1956] AC 266.

[949] Although, the question of whether the link is broken is fact sensitive, in case of the loss transferred under the 1992 Act, on the part of the buyer, -unless he took part in the shipment- his only subsequent conduct that may be regarded as the break of the chain of causation can be triggering s. 3(1) of the 1992 Act.

[950] Indeed, in such a case, the burden is on the buyer who must prove that the seller's breach is an effective or dominant cause of the loss rather than triggering s. 3 (1). See, *Carlos Soto Sau and Another v AP Moller-Maersk AS (The Sfl Hawk)* [2015] EWHC 458; [2015] 1 Lloyd's Rep 537, [33]. *Borealis AB v Geogas Trading SA* [2010] EWHC 2789; [2011] 1 Lloyd's Rep 482, [43]; *Galoo Ltd V Bright Grahame Murray* [1994] 1 WLR 1360, 1374-1375. See also *Hi-Lite Electrical Ltd v Wolseley UK Ltd* [2011] EWHC 2153, [131]-[135]. For a detailed examination of causation under contracts, see McGregor, 6-137 – 6-154; Chitty, Vol 1, 26-057 et seq.

[951] *Lambert v Lewis* [1982] AC 225.

[952] S. 3 (1).

[953] *Borealis v Geogas Trading* [2010] EWHC 2789, [44]; *Carlos Soto Sau and Another v AP Moller-Maersk AS (The Sfl Hawk)* [2015] EWHC 458; [2015] 1 Lloyd's Rep 537, [33].

Even if such conduct of the buyer was accepted as an intervening event and the loss was said to have resulted from the combined operation of the seller's breach and the conduct of the buyer, this would not relieve the seller of the liability. If an intervening event is reasonably expected by the parties at the time the contract was made, it is accepted that such an event would not break the link between the loss and the breach.[954]

When the goods arrive at the destination, if they appear to conform to the contract, what is reasonably expected from the buyer would be to demand or take delivery of them. However, there might be some hidden damages caused by the goods to the carrier, which may not appear until delivery or some later time. Alternatively, if they do not conform to the contract, since the risk generally passes on or as from shipment, the buyer may choose to claim damages from the carrier under the carriage contract procured by his seller. Another scenario is that if he thinks that the seller is in breach of one of the conditions of the sale contract, either in relation to the goods or documents, the buyer would have two separate rights to reject the goods and documents. However, rejection may not always be the practical solution and subsequently, the buyer may elect to accept the goods and claim damages in return from his seller, instead. In either of the cases, the buyer may not know that the damage to the carrier resulted from the seller's breach since his fault would unlikely to be apparent from the goods or on the face of the bills of lading. Even if at first glance he thinks that the seller could be in breach of the contract, he may not be able to reject the goods or documents, since his rejections can be treated wrongfully, if he cannot prove that the seller is in breach of one of the conditions. That is to say, even if triggering s. 3(1) is accepted as an intervening act, it would be unlikely to break the link, since the conducts of the buyer from the above scenarios would be reasonably expected within the normal practices and operation of c.i.f. and f.o.b. contracts at the time contract was made.

Additionally, even if it is accepted that the seller's breach and the buyer's such conduct are concurrent causes, it is submitted that the link is unlikely to be broken. This is because the seller's breach does not have to be "the" effective cause of the loss but it is sufficient so long as his breach was "an" effective cause of the loss.[955] This is the case, even if the seller's breach and the buyer's conduct are together equally effective to cause the loss.[956] It would therefore be enough for the buyer to prove that the seller's breach is one of the effective causes of the damage done to the carrier.

6. Rolling back of the loss under string sales

It is not uncommon for commodities to be sold multiple times before or during transit through a string of contracts of sale. Although this might usually happen under c.i.f. contracts, an f.o.b. buyer,

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[954] *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196.

[955] *Borealis v Geogas Trading* [2010] EWHC 2789, [44]; *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905, [45]; *Flanagan and Cloes v Greenbanks Ltd* [2013] EWCA Civ 1702; *Carlos Soto Sau and Another v AP Moller-Maersk AS (The Sfl Hawk)* [2015] EWHC 458; [2015] 1 Lloyd's Rep 537, [33].

[956] *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1047-1048; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] QB 665, 813-814; *ENE 1 Kos Ltd v Petreleo Brasileiro SA (No 2)* [2012] UKSC 17; [2012] 2 AC 164, [71].

following the shipment of the goods, may sell them to a sub-buyer on c.i.f. terms as well.[957] While only the initial seller will be responsible for the shipment of the goods, other sellers in the string will only deal with tendering of the documents further down the chain.[958] No matter how long the string is, only the ultimate buyer in the string will be in a position to attract the liability *vis-à-vis* the carrier.[959] When this is the case, the buyer, given the doctrine of privity of contract under English law, will not be able to sue the initial seller further up the string but only his seller who he is in a contractual relationship with.[960]

The 1979 Act provides a system of strict liability for defective goods.[961] That is to say, although a seller may not be personally at fault, he may be liable towards his buyer, given the fault of the initial seller.[962] C.i.f. sales are generally considered as sale of goods through performance of the documents.[963] Not being the initial seller will not prevent an intermediate seller from being in breach of his contractual duties towards his buyer.[964] For instance, a c.i.f. seller – and often f.o.b. seller - is under a duty to conclude a reasonable carriage contract by virtue of s. 32 (2). Additionally, the seller is also under a duty to tender bills of lading evidencing the carriage contract. Albeit separate duties, once the seller fails to fulfill the former duty, the latter can in most cases be said to have been breached as well; that is to say, when the initial seller makes an unreasonable carriage contract and down the string an intermediate seller procuring a bill of lading that contains or evidences such a contract will be regarded in breach too.[965] It is submitted that that is why the duty of the seller is mostly defined as to "make or procure" a reasonable carriage contract.[966]

That being said, the law will provide the end buyer in the string a defendant, namely his own seller. Thus, on the grounds discussed in the above headings,[967] when the ultimate buyer recovers his loss from his seller under the last contract, as a result of breach of s. 32(2) or other contractual undertakings as to the description or condition of the goods, the seller in the last contract as having been the buyer of the penultimate contract, will seek to indemnify himself from his seller up the string

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[957] For an example, see *Norsk Bjerningskompagnie A/S v Owners of the Panthanassa (The Panthanassa)* [1970] P 187; *Esteve Trading Corp v Agropec International (The Golden Rio)* [1990] 2 Lloyd's Rep 273.

[958] That is the rationale behind why c.i.f. sales are considered as sale of goods through the performance of the documents. See, *Gardano and Giampieri v Greek Petroleum George Mamidakis and Co* [1962] 1 WLR 40, 52; *The Gabbiano* [1940] P 166, 173-174; *Smyth (Ross T) v Bailey (TD) Sons & Co* [1940] 3 All ER 60, 68; *Arnhold Karberg & Co Blythe Green Jourdain & Co* [1916] 1 KB 495; *Hindley & Co Ltd v East Indian Produce Co Ltd* [1973] 2 Lloyd's Rep 515.

[959] See, Chapter 3 II.5. Cessation of the liability.

[960] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847. Indeed a sub-buyer as "a third party" under the Contracts (Rights of Third Parties) Act 1999, may enforce particular terms in the main contract between the seller and the buyer provided that the contract should state that that sub-buyer can, or the contract should confer a benefit to him who is clearly identified. See, Benjamin, 17-080, 17-085; Chitty, 44-437.

[961] MG Bridge, "Markets and damages in sale of goods cases" [2016] LQR 405, 420.

[962] *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441. See also, *Kasler and Cohen v Slavouski* [1928] 1 KB 78; *Biggin & CO Ltd v Permanite Ltd* [1951] 1 KB 422.

[963] *Arnhold Karberg & Co v Blythe Green Jourdain & Co* [1916] 1 KB 495, 510, 514.

[964] *Hindley & Co Ltd v East Indian Produce Ltd* [1973] 2 Lloyd's Rep 515.

[965] Benjamin, 19-025; Bridge, 4.101.

[966] *Houlder Bros & Co Ltd Commissioner of Public* [1908] AC 276, 290; *Tsakiroglou & Co v Noblee Thorl GmbH* [1961] 2 All ER 179. See also, Benjamin, 19-025.

[967] See above, 2. Application of the rule to the loss of the buyer.

for the loss imposed under the last contract, and this will continue until the liability reaches the first buyer regardless of the length of the string[968].[969] Therefore, the first buyer will seek to roll back the liability of the snowball from the initial seller/shipper who is in fact the source of the defect both under the carriage and sale contract.

Where this is the case, in order for the first buyer to recover from the seller for the liability rolled back up the string,[970] the first condition is that the probability of resale should be within the contemplation of the parties.[971] It is a trite law that under c.i.f. sales, it is not uncommon practice in the trade to resell the goods before or while afloat.[972] It is especially true that the probability of resale increases when the seller is under a duty to tender bills of lading, which may hint at the possibility of the resale given its the transferable feature. For instance, where the first contract of sale is on f.o.b. terms, the seller is normally under a duty to tender a transferable document, namely a bill of lading. When this is the case, there is also no difficulty in assuming that it is probable that the buyer may resell the goods.

The second condition is that it should also be within the contemplation of the initial seller and his buyer that each contract in the string would include the same or similar undertakings in respect of the description or condition of the goods, which make the buyer, and each sub-buyer under their own contracts in breach to their own buyers.[973] It was already stated above that c.i.f. sales are sale of goods through performance of the documents. Before the goods reach their destination, they might be sold multiple times through documents and often be sold on identical or similar undertakings as to the description or condition of the goods without any variation. When this is the case in practice, it is not an unknown fact that not being the initial seller would not exempt an intermediate seller from being in breach of his undertakings to his own buyer.[974]

Indeed, one may argue that variations or exemption clauses in one of the contracts in a string may break the causal link between the contract and prevent the loss from rolling back further up the chain. However, unlike for the market loss,[975] for other consequential loss arising from it such as physical damage, the courts can be said to have rarely allowed such variations to break the link in the

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[968] *Biggin v Permanite* [1951] 1 KB 422, 432; *Kasler v Slavouski* [1928] 1 KB 78.

[969] Instead of multiple actions, each party in the string may also seek to join their contractual parties to the existent action. See, *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.

[970] Not only the loss arising from dangerous goods, the first buyer may also recover from the seller costs for defending the sub-buyers claim in the court. *Kasler v Slavouski* [1928] 1 KB 89; *Godley v Perry* [1960] 1 WLR 9, 16-17. Additionally, the buyer may be entitled to recover the loss even if he reasonable settled with his buyer out of court, provided that it was reasonable to settle and the amount was reasonable. See, *Biggin v Permanite Ltd* [1951] 214, 320; *Comyn Ching & Co Ltd v Oriental Tube Co Ltd* [1979] 17 BLR 56; *Siemens v Supershield Ltd* [2009] EWHC 927, [64].

[971] *R&H Hall Ltd v WH Pim Junr & Co Ltd* (1928) 33 Com Cas 324; (1928) 30 Ll L Rep 159 (The sale contract was on c.i.f. terms). See also, *Hammond Co v Bussey* (1887) 20 QBD 79; *Patrick v Russo-British Grain Export Co* [1927] 2 KB 535; *GC Dobell Co v Barber and Garratt* [1931] 1 KB 219; *Biggin v Permanite* [1951] 1 KB 422 (reversed on the other grounds [1951] 2 KB 314).

[972] *Hall v Pim* (1928) 30 Ll L Rep 159, 161.

[973] *Kasler v Slavouski* [1928] 1 KB, 85; *Biggin v Permanite* [1951] 1 KB 422, 433-434.

[974] *Hindley & Co Ltd v East Indian Produce Ltd* [1973] 2 Lloyd's Rep 515.

[975] *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348, 359.

chain of sales.[976] Even if a variation is allowed in one of the contracts in the string in relation to description or any other undertaking as to the condition of the goods, the courts may not have considered it as material but in contrast have allowed the claim, provided that the loss resulted from a defect in the goods which was covered by the description or undertakings in the initial seller's contract as well as in the other contracts in the string.[977]

Hence, even if there exists a variation in one of the contracts in the string, as soon as it is proved that the damage resulted from the initial seller's breach under the contract, the first buyer would be likely to be entitled to the cumulative loss from the seller that he inherited from the successive sub-buyers in the string. This might be the case, even if one of the sub-contracts in the string included an exemption clause with regard to the condition of the goods or latent defects in them; such clauses in sub-contracts may not enable the initial sellers to exempt themselves from the liability.[978]

III. Conclusion

This chapter, by following the causal link established between the loss imposed on the buyer under the 1992 Act consequent upon the damage caused by the goods and the seller's breach, has sought to examine whether his loss is considered too remote under the rule of remoteness and whether it can be recovered as a consequential loss in the light of the law of damages applicable to sale of goods cases. The author suggests that it can be recovered and is more likely to fall within the first limb of the rule of remoteness than the second one. The reasons supporting this argument are as follows. The buyer does not seek to recover an unusual loss arising from a special circumstance, which is not unknown to the seller/shipper, since this loss is already something allocated by the law to him. Therefore, it can hardly be said that the seller takes on an additional risk, which is not contemplated by him. It is also well within the contemplation of the parties that the buyer may have this liability imposed on him under the 1992 Act, once he wants to exercise his contractual rights against the carrier.

Under English law, when applying the rule of remoteness, the courts do approach the link between the breach and the loss with "common sense". Particularly under the sale contracts on shipment terms, the courts, without elaborating in depth, take into consideration only simple factual causation between the loss and the breach in allowing claims for consequential losses under the rule of remoteness. Accordingly, the case law appears to show that the courts often allow such losses

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[976] *Biggin v Permanite* [1951] 1 KB 422, 433. For a similar view, see *British Oil and Cake Co Ltd v Burstall & Co* (1923) 39 TLR 406, 407.

[977] Benjamin, 17-083; Chitty, 44-436.

[978] The courts do strictly interpret such exemption clauses, particularly in chain sales. In *Henry Kendall v William* [1969] 2 AC 31 where two contracts in a chain sale included exemption clauses in relation to latent defect, such clauses was not held so as to exempt the initial c.i.f. sellers from the liability. See also, *the Ashington Piggeries* [1972] AC 441 and *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690, 696-699, where the sellers argued that given the exemption clause regarding to latent defects in the sub-contract, they were not liable to his buyers for the loss that the buyers inherited from their sub-buyers. However, the sellers were eventually found liable.

under c.i.f. and f.o.b. sales where available. It was therefore advocated above that the buyer's loss which was inherited consequent upon damage caused by the goods is not too remote to recover from the seller's breach and his claim should be allowed against the seller. In that regard, particularly considering the buyer's innocence in this loss, the courts may and should show more readiness to allow recovery than they would normally do under c.i.f. and f.o.b. sales. Especially considering that s. 32 (2) prescribes its autonomous reference to damages, the author opines that the courts should interpret this section extensively to allow recovery of this loss as a direct loss rather than a consequential one when breached.

In supporting this conclusion, the author ultimately sought to establish an analogy with the principles created in other sale of goods cases involving no sea transport. Particularly in relation to the analogy established with the principle accepted in *Lambert v Lewis*, it is submitted that it can arguably be operated in favour of the buyer to recover the loss from the seller. In the following chapter, in order to produce alternative solutions to a contractual regime in mounting a remedy for the buyer, potential non-contractual actions, which may be of assistance, will be examined.

CHAPTER 7
NON-CONTRACTUAL REMEDIES

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I. Aim of the Chapter

Suggestions were made in Chapter 5 and 6 for how the buyer/transferee can mount a remedy for the dangerous goods liability inherited from the shipper/seller under the sale contract against his immediate seller. Developing alternative remedies on a different legal basis for the buyer's loss might be required, given that the suggestions made under the sale contract are yet to be tested before the courts, and accordingly they might fall short in providing an adequate remedy against his immediate seller. Even if they provide effective solutions, the potential for redress against his seller may fail given the difficulties in practice such as intervening insolvency or a lack of assets within reach. If this is the case, he may seek his right to remedy on an alternative legal basis against potential alternative parties. Even if complete solutions are ensured under the sale contract, this will not necessarily eliminate the need for an examination of an alternative remedy on an alternative legal basis.

Therefore, to provide an alternative remedy to his potential contractual action, non-contractual actions, which might be executable in favour of the buyer, will be considered. The examination will begin with the Civil Liability (Contribution) Act 1978 (the 1978 Act), where the right to contribution between wrongdoers is available by way of statute. In the first part of this chapter, it will be discussed whether the buyer/transferee could be entitled to claim for contribution in respect of his loss under the 1978 Act from the shipper/initial seller. In the second part, a potential remedy will be sought in tort actions, which may operate for the benefit of the buyer against the initial seller/shipper.

II. Suggestions under the 1978 Act

1. Basic scheme of the Act

Where A1 and A2 are jointly or severally, or both jointly and severally liable to B for the same damage, A1 may find himself liable to B for the entire damage of B, because B may seek to recover damages from A1 alone. B would normally take into consideration his own interest and would

be willing to proceed his claim against a party that has the biggest pockets and the most handily realisable assets. This appears fair to B but not to A1. When this is the case, A1 would seek to claim contribution from A2. The common law was not sympathetic to contribution between several wrongdoers who were liable for the same damage, unless there was an express or implied contribution agreement.[979]

Such a right to contribution arises only by way of statute under English law. S. 1 of the 1978 Act[980] states; "… any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)". Accordingly, s. 6 (1) prescribes "a person is liable in respect of the damage … if the person who suffered it … is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)". Therefore the Act provides right to contribution among wrongdoers, even if the liability arises from a different cause of action,[981] such as where one is liable in tort and another for breach of contract[982] or for breach of trust[983]. The rationale behind the Act is to ensure that a wrongdoer would not be unjustly enriched where his liability to a third party has been discharged by a claimant who is also liable to the same third party.[984] Liability in respect of the 1978 Act means a liability that has been or could be established in an action filed in England and Wales, even if the rules of private international law indicate that foreign law is to be applied to solve any issue in dispute.[985] A claim for contribution under the 1978 Act is hence considered *sui generis,* since *"[it] creates a cause of action in its own right, the ambit of which is to be discerned from the terms of the Act itself."*[986]

Accordingly, where a c.i.f. or f.o.b. buyer[987] became subject to liability under the 1992 Act for dangerous goods against the carrier, the shipper/seller's liability would not be extinguished and they

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[979] *Merryweather v Nixon* (1799) 8 TR 186; 101 ER 1337; *Farebrother v Ansley* (1808) 1 Camp 343; 170 ER 979; *Wilson v Milner* (1810) 2 Camp 452; 170 ER 1215; *Weld-Blundell v Stephens* [1920] AC 956; *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 768.

[980] The 1978 Act repealed and replaced the Law Reform (Married Women and Tortfeasors) Act 1935. See, the Law Commission's Report No 79, *Law of Contract: Report on Contribution* (HC 181) (1977). For general and more extensive discussion on the Act, see, Chitty, 17-029 ff; M Jones, *Clerk & Lindsell on Torts*, (21st edn, Sweet & Maxwell 2016), 4-12 ff (hereinafter Clerk & Lindsell); C Mitchell, *The Law of Contribution and Reimbursement*, (Oxford 2003), 4.20 ff; P Bugden, S Lamont-Black, *Goods in Transit* (3rd edn Sweet & Maxwell 2013), 11-013 ff; AM Dugdale, "Civil Liability (Contribution) Act 1978" [1979] 42 MLR 182; C Mitchell, "The Civil Liability (Contribution) Act 1978" [1997] 5 RLR 27.

[981] *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 WLR 1397, [41].

[982] *Thomas Saunders Partnership v Harvey* (1989) 30 Con LR 103, 121; *the Carnival* [1994] 2 Lloyd's Rep 14; *Eastgate Group Ltd v Lindsey Morden Group Inc* [2002] 1 WLR 643, 646; *Heaton v AXA Equity and Law Life Assurance Soc plc* [2002] 2 AC 329, 335. Where two parties are liable for breach of contract, see, *Co-operative Retail Services Ltd v Taylor Yound Partnership* [2002] UKHL 17.

[983] *Friends' Provident Life Office v Hiller Parker May & Rowden* [1997] QB 85, 99-104.

[984] *Dubai Aluminum Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, [76], per Lord Hobhouse.

[985] S. 1 (6) of the 1978 Act. See also, *RA Lister Co Ltd v EG Thomson (Shipping) Ltd* [1987] 1 WLR 1614; *Virgo SS Co SA v Skarrup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep 352.

[986] *The Kapetan Georgis* [1988] 1 Lloyd's Rep 352, 357. See also, *Cf Harvey v RG O'Dell Ltd* [1958] 2 QB 78, 107 noted with approval in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398, 407.

[987] Indeed the buyer could be liable for dangerous goods as original party as well, where he is the shipper under bare f.o.b. and sometimes under classic f.o.b. types. On this, see generally, Chapter 2.

would both become jointly liable.[988] The carrier would then have an option to pursue his claim against either or both depending on that who he considers to have the deepest pockets or the most easily realisable asset within the reach of the carrier. This appears to be fair to the carrier. However, once the buyer comes under liability for this, he would justly seek to adjust his loss and show willingness to recover this from the party from which he inherited it, namely the shipper/seller.[989] This is untested and therefore it is not known whether the buyer is entitled to claim contribution for this liability under the 1978 Act from the shipper/seller[990] who is the source of the liability, since the liability has not yet been transferred. In the following discussion, it will be examined that whether the buyer can be entitled to claim contribution in respect of his damage under the 1978 Act from the shipper/seller and, if so, what proportion would be just and equitable between them.

2. Same damage, same victim

In order for a claim for contribution to succeed under the 1978 Act, there are some conditions to be fulfilled. The first condition is that the potential contributor and the claimant should be liable to the same party.[991] Put differently, the damage caused by the potential contributor and by the party seeking contribution must have been suffered by the same victim.[992] It is immaterial whether their liability to the same victim arises at different times.[993] Thus, there is no apparent problem to fulfill the first condition in respect of the buyer's claim for contribution, since he as the claimant and the shipper/seller as the potential contributor would become liable to the same party, namely the carrier under the 1992 Act for the liability arising from the dangerous goods,[994] although the former's liability may arise at a some later time to the latter's.

The second condition is that the party seeking contribution and the potential contributor should be liable for "the same damage".[995] "Damage" is considered synonymous with "harm" or "loss" and "the same damage" does not therefore have a broad interpretation.[996] In *Royal Brompton Hospital NHS Trust v Hammond (No 3),*[997] the House of Lords held that *"the liability in respect of the same damage"* should be given only their natural and ordinary meaning *"without any glosses,*

[988] By s. 3 (3) of the 1992 Act. For the potential non-contractual liability of the buyer against the carrier, see generally Chapter 4.
[989] This was exactly what the buyer sought to do against the shipper/seller in *the Berge Sisar*. The liability eventually was not transferred to the buyer though, *the Berge Sisar* [2001] UKHL/17, [15].
[990] Apart from the shipper, sometimes the charterer can also be liable *Chandris* v. *Isbrandtsen-Moller* [1951] 1 KB 240. Therefore it will be discussed below whether the buyer can claim contribution from the charterer under the 1978 Act, where the charterer is liable for dangerous goods against the shipowner.
[991] By s. 1(1) of the 1978 Act.
[992] *Birge Construction Ltd v Haiste Ltd* [1996] 1 WLR 675, 680, 682.
[993] *Re Securitibank Ltd* [1986] 2 NZLR 280, 287-288.
[994] By s. 3(1) and (3) of the 1992 Act.
[995] By s. 1(1) of the 1978 Act.
[996] *Royal Brompton v Hammond* [2002] UKHL 14; [2002] 1 WLR 1397, [6].
[997] [2002] UKHL 14; [2002] 1 WLR 1397.

extensive or restrictive".[998] The ordinary meaning of "the same damage" was formulated by Lord Bingham in *Royal Brompton v Hammond (No 3).* According to this formulation, A1's claim for contribution by A2 depends upon the damage, loss or harm for which A1 would be liable to B corresponding (even if some of it) with the damage, loss or harm for which A2 would be liable to B. This appears to accord with the equity of the situation, in which it seems only fair that A2 makes contribution to A1 of a fair portion of what both A1 and A2 owe in law to B.[999] Put differently, the formulation requires overlapping that A1 should be liable to B in respect of the damage which must also correspond with the damage for which A2 is liable to B.

Assume that A1 and A2 are supposedly liable to B in respect of some damage, harm or loss. When either (A1 or A2) pays a sum to B on account of their respective liability, unless that payment operates to reduce the liability of the other to B, the damages caused by them cannot be regarded as "same" so as to fall within the 1978 Act. When returning to the buyer's claim for contribution from the shipper/seller for the liability of dangerous goods, the author opines that their case is one to which the 1978 can be applied. Firstly, s. 3(1) of the 1992 Act clearly indicates that the buyer can only become subject to "the same liabilities" of the shipper under that contract as if he had been a party to that contract. As stated above, contribution can be claimed whatever the legal basis of the liability, whether tort or breach of contract. In this case, however, when the buyer as transferee is considered liable for dangerous goods against the carrier under the 1992 Act,[1000] he statutorily becomes party to the same contract that the shipper already is party to, and accordingly inherits the identical liability of the shipper, in respect of the same damage caused by dangerous goods. Whatever damage is caused by the dangerous goods, as to s. 3 (1) of the 1992 Act, they would become jointly liable for the same damage against the carrier under the same contract. In such a case, when damage arises under the same contract resulting from the same breach, it would not be plausible to construe their liability in respect of different damages. Even according to the formulation of Lord Bingham, there is no reason why their liability should not be regarded in respect of the same damage, if the buyer makes payment to the carrier on account of his liability arising from dangerous goods as per s. 3 (1) of the 1992 Act, which will operate to reduce or extinguish the liability of the shipper/seller to the carrier.

To support this argument, an analogy can be made with *the Kapetan Georgis,*[1001] where an explosion occurred on board the vessel from a cargo of coal during its carriage. The shipowners pursued their claim against the time charterers for the loss caused by the shipment of dangerous goods. Following this, the charterers joined the shippers in the proceedings and made a claim based on tort and under the 1978 Act against the shippers alleging that the shippers were also liable for the shipment of dangerous goods against the shipowners for the same damage. Hirst J held that the time

[998] Ibid, [27].
[999] Ibid, [6].
[1000] On this see, generally Chapter 3.
[1001] [1988] 1 Lloyd's Rep 352.

charterers were entitled to contribution from the shippers under the 1978 Act.[1002] The learned judge did not even consider analyzing in depth whether it was “the same damage” or not, but both the charterers and the shippers’ liability was regarded in respect of “the same damage”. The case clearly shows that when the charterer and the shipper become liable for a shipment of dangerous goods, albeit under different contracts, the damage caused by those goods is regarded as “the same damage” under the 1978 Act. Considering the buyer as transferee who inherits the same liability for the same damage from the shipper, the author opines that it would be plausible to argue that their liability can be considered in respect of the same damage so as to fall within the 1978 Act.

It is also submitted by the author that *the Kapetan Georgis* may pave the way for the buyer’s claim for contribution from alternative parties by way of analogy. In the case, the charterers’ claim against the shipper under the 1978 Act was held to be sound by the court. That is to say, when a similar case arises, the shipper can be entitled to contribution from the charterer in return for the charterer also being responsible for the damage caused. This would also mean that in case the buyer inherits the shipper’s liability under the 1992 Act, provided that the charterer is also in breach of loading dangerous goods against the carrier as occurred in *the Kapetan Georgis*, their liability can be considered in respect of the same damage for the purpose of the 1978 Act given that the charterer’s and the shipper’s liability arising from dangerous goods was considered to be from “the same damage”. When this is the case, the buyer may be entitled to an alternative contribution claim under the 1978 Act from the charterer as well as the shipper/seller, indeed providing to the extent of the charterer’s responsibility for the damage in question. Apart from this, during shipment of dangerous goods, alongside the shipper, other parties (like the bare f.o.b. seller or the supplier who has no contractual relation with the carrier) can be found liable against the carrier in tort for dangerous goods, as they may have caused or contributed negligently to the damage or loss arising from the shipment of dangerous goods.[1003] When this is the case, providing the responsibility for the damage in question, the buyer/transferee may have also an alternative claim for contribution from those parties alongside the shipper/seller under the 1978 Act, where those parties are regarded liable to the carrier. It is also worth noting that the fact that the measure of damages can be different in contract from tort does not alter the view that the damage is the same for the purpose of the 1978 Act.[1004]

[1002] Ibid, 359. Since Hirst J reached a decision in tort, his decision on the 1978 Act is considered only *obiter*.

[1003] See, *the Orjula* [1995] 2 Lloyd’s Rep 395. Also for discussion on this, see Chapter 2 II.2.1.4. Bare f.o.b. seller’s liability in tort. This analogy may also be of some assistance to bare f.o.b. buyer or classic f.o.b. buyer who is named as the shipper in the bills of lading. In case the non-contractual sellers causes or contributes to the damage arising from dangerous goods during or before shipment, when the buyer as the shipper becomes subject to liability from shipment of those goods against the carrier, as was the case in *the Orjula*, if the buyer/shipper can prove that their sellers’ negligent act or fault contributed to the damage in tort, the buyer may have a contribution claim from their sellers under the 1978 Act.

[1004] *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446; [2001] 2 All ER 1050; [2002] 1 WLR 643.

3. Apportionment of the liability

When A1 and A2 are subject to liability for the same damage to the same party as discussed above, the question becomes one of proportion of that liability between A1 and A2 under the 1978 Act. Apportionment of liability is significant because money may highly turn on this issue. Thus, when A1 seeks to recover contribution from A2, s. 2 (1) of the 1978 Act prescribes that the amount of contribution recoverable from any person "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". In order for apportionment to be "just and equitable", the court assesses the relative responsibility of the parties which involves consideration of the causative relevance of their respective acts and omissions and their relative blameworthiness.[1005] Thus, s. 2 (2) of the 1978 Act gives great flexibility to the courts in deciding whether to exempt any person from liability to make contribution or order a party to contribute what amounts to a complete indemnity.[1006]

When it comes to a case between the shipper/seller and the buyer/transferee, the question that arises is: "How would the court apportion the liability in-between them so that it is just and equitable?" Although apportionment under the 1978 Act is on a case-by-case basis, the case between those parties can be more straightforward than it is thought it would be. As said above, assessment of relative responsibility requires consideration of both blameworthiness and the causative relevance of the respective acts and omissions of the parties. In returning to the core of the liability arising from dangerous goods, in most cases it arises from the acts or omissions of the shipper before or during shipment, which would cause the damage to the carrier. Examples are not limited but the most common are the shipper may not have enabled the carrier to take the necessary precautions to carry the goods safely[1007] or the goods may have been insufficiently packed[1008]. On the other hand, unlike the shipper, the buyer/transferee would be unlikely to have any physical nexus with the goods or instigate them before or during shipment. He in most cases takes no part in shipment as transferee and it is likely would not even be party to the carriage contract under the bills of lading until some time after shipment. While the liability of dangerous goods often arises from the acts or omissions of the shipper/seller, it would be implausible to argue that any of the buyer/transferee's actions or omissions

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[1005] *Madden v Quirk* [1989] 1 WLR 702, 707; *Downs v Chappell* [1996] 3 All ER 344, 363; *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, 326; *Randolph v Tuck* [1962] 1 QB 175, 185; *the Miraflores and the Abadesa* [1967] 1 AC 826, 845; *Brown v Thompson* [1968] 1 WLR 1003, 1008; *Baker v Willoughby* [1970] AC 467, 490.

[1006] *Saipem SpA and Conoco (UK) Ltd v Dredging VO2 BV and Geosite Surevys Ltd* [1993] 2 Lloyd's Rep 315; *Resource America International Ltd v Platt Site Services Ltd* [2004] EWCA Civ 665. For complete indemnity awards see, *Nelhams v Sandells Maintenance Ltd* [1996] PIQR 52; *the Sincerity S* [1996] 2 Lloyd's Rep 503; *Ryan v Fildes* [1938] 3 All ER 517; *Semtex Ltd v Gladstone* [1954] 1 WLR 945.

[1007] *Compania Sud Americana De Vapores Sa v Sinochem Tianjin Import and Export Corporation (The Aconcagua)* [2011] 1 Lloyd's 683. See also, *the Fiona* [1994] 2 Lloyd's Rep 506. See also *Northern Shipping Co v Deutsche Seereederei GMBH and Others (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 255.

[1008] *Brass v Maitland* (1856) 6 E & B 470; *Bamfield v Goole & Sheffield Transport* [1910] 2 KB 94; *Great Northern Railway v LEP Transport* [1922] 2 KB 742.

would have any causative relevance to the damage to the carrier.[1009] If any, the mere act done by the buyer would only be to exercise his contractual rights as per s. 3 (1) of the 1992 Act against the carrier, which would make him liable to the carrier by way of transfer. This, however, can hardly be said to have any causative relevance to contribute to the damage caused by the dangerous goods.

It is submitted, therefore, that since the shipper/seller is solely responsible for shipment of such goods, his acts and omissions could be said to be the sole source of the damage to the carrier.[1010] To assist this argument, the question to be asked is: "Could it be said that in any case the buyer would have become liable by way of transfer, if it had not been for the shipper's acts or omissions?" It is submitted that the answer is in the negative. The buyer's liability is subordinate to the shipper/seller's, since he would just inherit it as a result of the 1992 Act. Had the shipper/seller not been liable to the carrier initially, the buyer would not have been transferred a liability subsequently even if triggering s. 3(1) of the 1992 Act.[1011] This would clearly show that the existence of such liability did not depend upon the buyer's subsequent inheritance under the 1992 Act. Put simply, without the buyer being subject to this liability by way of transfer, the shipper/seller alone would still become liable as a result of his acts or omissions during or before shipment.

Thus, under these conditions, in assessing the causative relevance of their respective acts and omissions, the author opines that the shipper's breach of contract is the sole blameworthy conduct compared to the buyer's which would occur only subsequently and in no way can be said to have contributed to the damage. However, a question arises at this point; what if the shipper/seller has no apparent fault in the damage to the carrier? When neither the shipper nor the carrier knows or ought reasonably to be aware of the dangerous nature of the goods, and accordingly the shipper has no apparent fault during shipment, this would not relieve the shipper of the liability, since it is a strict one.[1012] His strict liability does not depend upon the knowledge available to him or his acts or omissions.[1013] When this is the case, the liability would fall on the shipper rather than the carrier, purely as a result of allocation of blameworthiness between the carrier and him on the ground that the shipper would have better means of knowledge of the goods.[1014]

When the causative potency is not apparent, to apportion the liability, sometimes the courts take into account of the moral blameworthiness of the parties and may find one is greater than the other.[1015] When there is no apparent act or omission of the shipper causing the damage, as is the case between the shipper and the carrier, it is submitted by the author that the shipper/seller should be

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[1009] Unless he has instigated before or during shipment but this would make him liable directly to the carrier without triggering the 1992 Act though.

[1010] Indeed the shippers often instruct independent contractors to fulfill the duty of shipment on behalf of them. However this would not relieve the shippers of the liability caused by their contractors' acts or omissions.

[1011] For a similar analogy see, *Shah v Gale* [2005] EWHC 1087.

[1012] *Brass v Maitland* (1856) 6 E & B 470; *Effort Shipping Ltd v Linden Management SA* (*The Giannis NK)* [1998] AC 605; [1998] 1 Lloyd's Rep 337.

[1013] Ibid.

[1014] Ibid.

[1015] *Furmedge v Chester-Le-Street DC* [2011] EWHC 1226.

treated as the sole morally blameworthy party. In considering so, the same rationale behind the strict liability of the shipper against the carrier can be applied between the buyer/transferee and the shipper/seller when allocating blameworthiness under the 1978 Act. In between the carrier and the shipper, the carrier is accepted as a more innocent party than the shipper, given that the latter has better means of knowledge of the goods. Why would this be different in between the shipper/seller and the buyer/transferee who is no doubt at least as innocent as the carrier is, and has played no part during shipment?

This argument can also be supported by way of analogy with vicarious liability cases where the employer albeit innocent, would become liable for the wrongful act of his employee.[1016] For instance, in *Dubai Aluminum v Salaam,*[1017] it was held by the House of Lords that innocence of the vicariously liable employer was not a defence against the apportionment of the liability under the 1978 Act. Likewise, on the shipper's strict liability for dangerous goods, vicarious liability does not depend on the fault of the employer and his innocence is considered immaterial. It was considered by the House of Lords that the feature of vicarious liability is not whether the party concerned is at fault but answerable for the damage caused.[1018] By a similar analogy, it can be said that the shipper, whether at fault or not, is answerable to the carrier - where he is also not aware of the nature of the goods - for the liability arising from the dangerous goods. Therefore, just as for vicarious liability cases, having no fault or omission should not be a defence for the shipper/seller and he should be the one who is considered blameworthy against the buyer.

The contribution regime under the 1978 Act exists to correct as far as possible unjust enrichment at the expense of another.[1019] A person should only be liable to the extent that his wrongdoing is causative and has contributed to the damage in question under the Act. "Just and equitable" apportionment having regard to the buyer's responsibility for the damage, where there is no wrongdoing or no blameworthy conduct on his part and he could in no way be said to have contributed to the carrier's loss, it is suggested by the author that the buyer should be entitled to a complete indemnity from the shipper/seller.

Two questions arise at this point; what if there are alternative defendants for the buyer to claim contribution, like the charterer, an initial seller or a supplier, who has no contractual relation with the carrier as discussed above? Would this affect the complete remedy of the buyer from the shipper/seller? Given that the buyer would still be considered as having perpetrated no wrongdoing, which could in no way be considered the causative of loss to the carrier, it is suggested that having alternative defendants would not affect his complete recovery. However, this may change the

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[1016] *Briess v Woolley* [1954] AC 333; *Ryan v Fildes* [1938] 3 All ER 517; *Semtex Ltd v Gladstone* [1954] 1 WLR 945; *KD v Chief Constable of Hampshire* [2005] EWHC 2550.
[1017] [2002] UKHL 48; [2003] 2 AC 366.
[1018] Ibid, [154].
[1019] Ibid, [76].

apportionment among the defendants themselves, since the court should assess their relative responsibility for the loss caused to the carrier.

Another question may arise at this point; what if one of the defendants, for instance, the shipper/seller, is insolvent or likely to become insolvent or beyond the practical reach of the law? When this is the case, the defendants who are actually available before the court would bear the burden of the entire liability.[1020] Accordingly, the trial judge can only apportion the damages between those available defendants before the court and cannot consider the causal contribution of the party who is not before the court.[1021] However, in a case like this, although the buyer's full recovery would technically appear to be safe, this may not always be the case in practice. As per s. 2 (3) a defendant's contribution is limited to what he would have been liable to pay to the claimant. Thus, for instance, when the shipper/seller is not before the court but the initial seller or the supplier who are liable in tort is, the measure of damages might differ as between the contract and tort. For instance, if the buyer/transferee would come under liability for pure economic loss, he would not be able to recover it from those who are liable in tort, given that they would not become liable for pure economic loss in tort but for loss consequent upon physical damage.[1022] Accordingly, the buyer would only seek contribution from them in respect of those heads of losses for which they were liable in tort.[1023] Put differently, he would not be able to recover from them beyond what they would have been liable to pay to the carrier in tort, regardless of how much his total loss is to the carrier under the contract.

4. Joinder of the shipper/seller or other potential parties

When the situations described above arise, the buyer/transferee in practice may often invoke the 1978 Act for contribution as follows. First, where the carrier sued both the shipper/seller and the buyer/transferee as co-defendants, the buyer may request the court to apportion the liability for the damage caused by reference to the 1978 Act.[1024] Second, where the carrier sued the buyer as sole defendant but the buyer may be entitled to issue third party proceedings[1025] against the shipper/seller

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[1020] Ibid, [71], [167]; *Mayfield v Llewelleyn* [1961] 1 WLR 119. However, as to s. 7 (3), nothing in the 1978 Act can alter the effect of an express contractual provision or an indemnity. For instance where one party's liability is limited to a certain amount by the contract agreed with the victim, that party will not be subject to make contribution more than this agreed amount.

[1021] *Dubai Aluminum v Salaam* [2002] UKHL 48. Unless there is a clear mistake in principle or fact, the trial judge's decision on apportionment will unlikely be altered by an appellate court. See, *Fitzgerald v Lane* [1989] AC 328; *Worlock v SAWS* [1982] 22 BLR 66.

[1022] *The Orjula* [1995] 2 Lloyd's Rep 395. For the liability of the initial seller who has no contractual relation with the carrier, see Chapter 2 II.2.1.4. Bare f.o.b. seller's liability in tort. For example where the liability is resulted from legally dangerous goods and they cause detention of the vessel, such loss would not be recoverable under the 1978 Act from those that are liable in tort, since it is considered just as pure economic loss.

[1023] For the difference between contract and tort in dangerous goods cases in terms of heads of losses see, *the Orjula* [1995] 2 Lloyd's Rep 395.

[1024] *Payne v British Time Recorder Co Ltd* [1921] 2 KB 1; *Pride of Derby and Derbyshire Angling Assoc Ltd v British Celanese Ltd* [1952] 1 All ER 1326; *Diboll v City of Newcastle upon Tyne* [1993] PIQR 16.

[1025] By virtue of rule 20 (mostly called Part 20 proceedings) of Civil Procedure Rules 1998 (CPR).

or other alternative defendant if any, as examined above in order to join them to the action.[1026] Third, where the carrier sued and won a judgment against the buyer as sole defendant, the buyer is still allowed to bring a separate action for contribution against the shipper/seller later.[1027] Where the buyer has made bona fide settlement with the carrier for the loss, he is still entitled to bring a separate action for contribution against the shipper/seller.[1028] However, he should prove that he would have been liable to the carrier assuming that "the factual basis of the claim against him could be established".[1029]

An available defence to the shipper/seller in s. 1 (5) of the 1978 Act against joining third party proceedings would be that, if he can prove that there is a judgment given in England between him and the carrier in his favor for the liability in question, that decision would be considered as conclusive evidence against the potential claims for contribution.[1030] Nevertheless, this appears to be unrealistic, because the buyer would claim for contribution from him only on the basis that he would inherit the same liability of the shipper by way of transfer under the 1992 Act.

When there is a claim for contribution with no international element, contribution claims under the 1978 Act can readily be brought before the English courts as outlined above. However, when there is an international element, the courts may need to serve out of jurisdiction for third party proceedings where he is a necessary or proper party to that claim.[1031] Sale contracts on f.o.b. and c.i.f. terms contain strong overseas elements as parties can often be of different nationalities. Particularly in the case of chain sales, the shipper/initial seller and the end buyer are unlikely to have any contractual proximity with each other. The carriage contract is often concluded with the carrier who might also be of a different nationality. That contract between the shipper/seller and the carrier may not always include an exclusive English law and jurisdiction clause. It may sometimes contain an exclusive arbitration clause or a clause that gives force to a foreign law to govern the carriage contract between them. When this is the case, it may have limited or no connection at all with England and the court may not be able to exercise *forum conveniens* discretion over the carrier and the shipper/seller, since there is a more appropriate forum available to the parties under that contract. Thus, when the buyer becomes liable to the carrier for the dangerous goods under that carriage contract, as the transferee would he be able to join the shipper/seller before the English courts for a contribution claim? To put it differently, the question is: "Can this more appropriate forum or arbitration clause between the carrier

[1026] *McCheane v Gyles (No 2)* [1902] 1 Ch 911; *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All ER 667.
[1027] *West v Buckinghamshire* CC [1985] RTR 306. Foreign courts' judgments do not give any right to claim contribution under the 1978 Act; *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, followed in *Bouygues v Caspian (No 5)* [1997] 2 Lloyd's Rep 533, 540. See also, *Airbus Industrie GIE v Patel* [1997] 2 Lloyd's Rep 8.
[1028] S. 1(4) and (5) of the 1978 Act.
[1029] S. 1 (4).
[1030] By virtue of s. 1(5), foreign court judgments do not establish such conclusive estoppel. See, A Briggs "The International Dimension to Claims for Contribution: Arab Monetary Fund v Hashim" [1995] LMCLQ 437, 440.
[1031] CPR Rule 6.20(3A).

and the shipper be set aside by the courts and accordingly can the 1978 Act have an overriding effect to allow the buyer's claim for contribution against the shipper?"

The case law overwhelmingly suggests that the 1978 Act can be applied directly without assessing how closely the contribution claim is connected with English law.[1032] In *the Benarty,*[1033] the cargo owners claimed before the English courts against the shipowner and the charterer for the damage negligently caused to the cargo. Subsequently, the shipowner claimed for contribution under the 1978 Act from the charterer. Although the bill of lading included an exclusive Indonesian law and jurisdiction clause, the court allowed the claim under the 1978 Act without assessing how closely the case was connected to English law.[1034] In *Arab Monetary Fund v Hashim,*[1035] where the case almost had no connection with English law, Chadwick J held that although in principle a claim for contribution is governed by the law that has closest connection with the claim, the 1978 Act displaced that rule and has an overriding effect.

In *the Kapetan Georgis,*[1036] the shipowner claimed against the charterers who were a US company for the damage caused to the vessel by the shipment of dangerous goods. In return, the charterers made a claim for contribution under the 1978 Act against the shippers who were a Canadian company. Although the carriage contract evidenced in the bill of lading between the shipowner and the shipper contained a Hamburg arbitration clause, this was not considered an obstacle for the charterer's contribution claim against the shipper under the 1978 Act. Moreover, Hirst J held that the 1978 Act establishes a statutory cause of action in its own right, *"the ambit of which is to be discerned from the terms of the Act itself".*[1037] He further added that there was nothing in the Act to restrict its scope to the liabilities only incurred in England and Wales. He opined, *"on the contrary it seems to me that s. 1(6) with its references to private international law, is a small pointer in favour*

[1032] *The Kapetan Georgis* [1988] 1 Lloyd's Rep 352; *the Golden Mariner* [1989] 2 Lloyd's Rep 390; *the Berge Sisar* [1997] 1 Lloyd's Rep 635; *Bouygues Offshore SA v Caspian Shipping Co (No 3)* [1997] 2 Lloyd's Rep 493; *RA Lister Co Ltd and Others v EG Thomson (Shipping) Ltd and Another (No 2) (The Benatry)* [1987] 1 WLR 1614; *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114; *Petroleo Brasiliero v Mellitus Shipping* [2001] EWCA Civ 418; [2001] 1 All ER 933. Whether this approach is correct or not is beyond the scope of this thesis. For this see, G Williams, *Joint Torts and Contributory* Negligence (Stevens & Sons Ltd 1951), para 39; Briggs, "The International Dimension to Claims for Contribution: Arab Monetary Fund v Hashim" [1995] LMCLQ 437; J Harris, "Joinder of Parties Located Overseas" CJQ 290; K Takahashi, "Forum Non-Conveniens Discretion in Third Party Proceedings" [2002] 51 ICLQ 127; K Takahashi, *Claims for Contribution and Reimbursement in an International Context: Conflict of Laws Dimensions of Third Party Procedure* (Oxford 2000), 71.

[1033] *The Benatry* [1987] 1 WLR 1614.

[1034] For a similar case, see also *Bouygues Offshore SA v Caspian Shipping Co (No 3)* [1997] 2 Lloyd's Rep 493 where the owner of a barge which was lost in the South African waters while under tow sued the charterer of the tug in England. Subsequently the charterer sought to join a South African port authority as a third party to claim contribution for their potential liability under the 1978 Act. Colman J without assessing how closely the case was connected to English law, held that amalgamation of all the litigants in one forum which was English law should override over other countervailing considerations.

[1035] [1991] 2 AC 114.

[1036] [1988] 1 Lloyd's Rep 352.

[1037] Ibid, 357.

of an international dimension".[1038] This was later supported by the Court of Appeal in *the Baltic Flame*[1039]. In the case, the cargo owners brought an action against the shipowner alleging that the goods were damaged after shipment. Subsequently, the shipowner joined the charterers for contribution for the damage caused to the goods and in return, the charterers brought a contribution claim against the shipper under the 1978 Act in respect of their potential liability to the shipowner. However, the bill of lading between the shipowner and the shipper contained a London arbitration clause, and accordingly the latter sought to reject the court's exercise of the forum conveniens discretion over their case. Potter J, who delivered the judgment extensively held *"the 1978 Act is strictly territorial in scope. However, it is unequivocal in its application to all proceedings brought in England, and there is nothing in the Act, or in particular in s. 1(6) to limit the right of contribution to liabilities incurred in England and Wales."*[1040]

The judgments outlining that the 1978 Act has an overriding effect and should apply regardless of application of foreign law is indeed supported by the words of s. 1(6); "… it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales." That is to say, the section does not require English courts to have jurisdiction over the claim between the shipper and the shipowner, and accordingly there is nothing in the Act to make its applicability depend upon the governing law of the contract between the victim (the shipowner) and the potential contributor (the shipper/seller). In supporting this, Potter J opined that the Act applies even if the potential liability for contribution has not yet been established in an action in England or Wales. What matters is that the liability could have been established for the same damage, had he been sued in England or Wales. That is also true when considering the facts of the case, since the charterer was not bound against the shipper by the arbitration clause in the bill of lading concluded with the shipowner. In fact, the charterer's position was vulnerable. Otherwise, it would not be possible to render the shipper responsible for a potential contribution to the charterer, since he was not party to arbitration proceedings.

Similar to *the Baltic Flame*, in *the Berge Sisar*, where the carrier sued the buyer/transferee for the liability of dangerous goods under the 1992 Act, subsequently the buyer sought to join the shipper/seller who would have been originally responsible for this liability to claim for contribution under the 1978 Act. Although the bill of lading between the carrier and the shipper contained an arbitration clause, Waller J on a similar ground as the other authorities outlined above, held that the right to claim for contribution by the 1978 Act superseded the right conferred by the arbitration clause and accordingly the shipper/seller should be joined.[1041]

[1038] Ibid.
[1039] [2001] EWCA Civ 418; [2001] 1 All ER 933.
[1040] [2001] EWCA Civ 418, [36].
[1041] *The Berge Sisar* [1997] 1 Lloyd's Rep 635.

It was questioned above whether a choice of a foreign governing law or an arbitration clause between the shipper[1042] and the carrier which may provide a more appropriate forum can prevent the buyer/transferee from recovering contribution from the shipper/seller under the 1978 Act. When considering a claim for contribution under the 1978 Act, the case law predominantly appears to be suggesting that the courts outweigh any countervailing facts against the inconvenience of the English forum, which would otherwise come into play, but exercise *forum conveniens* discretion without assessing how closely the case is connected with English law. Therefore, in the light of this, it would not be wrong to conclude that the buyer's right to recover under the 1978 Act supersedes any right conferred by the choice of a foreign law or arbitration clause between the shipper and the carrier and the courts can be said to readily allow the buyer/transferee's proceedings against the shipper/seller.

III. Suggestions on Tort Actions

Suggestions against the buyer's immediate seller under the contract were made in Chapter 5 in order to provide a solution for the buyer in mounting a remedy for the dangerous goods liability inherited from the shipper/seller. There might be a need to develop different legal bases for the buyer's claim, since these suggestions are yet to be tested before the courts, and ultimately they may not be able to provide a wholly adequate remedy against his seller. Even if they do offer him solutions, his chance of redress against his immediate seller under the contract may fail due to practical difficulties like an intervening bankruptcy or the seller being untraceable. Also, the fact that he has a contractual proximity with the shipper/seller and an effective remedy against him under the contract will not be a bar to an alternative action in tort.[1043] In any case, the end buyer/transferee may or may not have any contractual relationship with the original seller/shipper, since chain sales are not uncommon in international trade. Given that the shipper is the source of the liability arising from the dangerous goods, the buyer may be willing to sue him directly. However, he will not be entitled to contractual action against the shipper/seller,[1044] given the doctrine of privity of contract.[1045] Thus, in this part, a potential effective remedy in tort for his inherited dangerous goods liability will be sought which may operate for the benefit of the buyer/transferee against the shipper/seller.

It is a general principle that an action for negligence can only succeed where the claimant has proprietary interest in the goods at the time the damage occurred.[1046] Accordingly, as a matter of law, that principle bars recoverability of pure economic loss in negligence, unless he was the owner or the

[1042] Or any other third party like a charterer.
[1043] *Clarke v Army and Navy-Co-operative Society Ltd* [1903] 1 KB 155.
[1044] Indeed the bare or classic f.o.b. buyer who is also the shipper does not fall within this group, unless they re-sell the goods further in chain.
[1045] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] 847.
[1046] *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785; [1986] 2 Lloyd's Rep 1.

person entitled to their possession.[1047] Where the buyer/transferee comes under a contractual liability arising from dangerous goods for physical damage to the carrier's vessel, his loss can only be categorized as economic, since he has no proprietary interest in the vessel. At first glance, the buyer therefore could be said to have no hope of redress in tort. Nevertheless, without disputing the validity of this long-established principle, where the claim is part of a chain originating in a claim for physical damage, the application of this principle may be set aside, having regard to decision of the House of Lords in *Lexmead v Lewis*[1048] in which the relevant *dicta* of Lord Diplock on this is as follows;

> *"... I should not wish the dismissal of the dealers' appeal to be regarded as an approval by this House of the proposition that where the economic loss suffered by a distributor in the chain between the manufacturer and the ultimate consumer consists of a liability to pay damages to the ultimate consumer for physical injuries sustained by him, or consists of a liability to indemnify a distributor lower in the chain of distribution for his liability to the ultimate consumer for damages for physical injuries, such economic loss is not recoverable under the Donoghue v. Stevensonprinciple from the manufacturer."*[1049]

This *dicta* of Lord Diplock was later applied in *the Kapetan Georgis*[1050] by Hirst J which can assist in the buyer's hope of redress against the shipper/seller by way of analogy. The facts of the case are not conceptually different from the buyer/transferee's position. The claimants were the owners of *the Kapetan Georgis*, which was time-chartered to the defendants. The cargo of coal which was allegedly dangerous due to being excessively gaseous was loaded by the shippers. Several days later, an explosion on board the vessel occurred resulting in damage and loss of life. The owners brought a claim against the charterers for damages for breach of contract arising from the shipment of dangerous goods. In return, in case they would be held liable to the owners, the charterers claimed against the shippers in tort that the shippers owed a duty to take reasonable care that the loaded coal was not dangerous and that breach of the duty, the shippers were negligent in shipping excessively gaseous coal and the shipper/sellers were in breach of the bill of lading contract in delivering the shipment of dangerous goods.[1051] In following the *dicta* of Lord Diplock, Hirst J held that when the case is hallmarked by a physical damage claim somewhere up the chain and a claimant who became liable for that physical damage caused by a third party's tortious act, the long-established principle may not apply, and accordingly the loss of the claimant may not be considered as a purely economic loss.[1052]

[1047] Ibid.
[1048] *Lexmead (Basingstoke) Ltd v Lewis and Others* [1982] AC 225; [1985] 2 Lloyd's Rep 17.
[1049] *Lexmead v Lewis* [1982] AC 225, 278. Clerk & Lindsell, 4-32.
[1050] [1988] 1 Lloyd's Rep 352.
[1051] The charterers also made claim for contribution under the 1978 Act, which is already discussed above.
[1052] [1988] 1 Lloyd's Rep 352, 356.

As a result, he held that the charterers were entitled to claim in tort against the shippers for their liability to the owners, which resulted from the negligent act of the shippers.[1053]

In those two cases, without abolishing the long-established principle, an exceptional rule emerged; when the claimant comes under a legal liability for physical damage to someone else's property and if the proximate cause of the damage to that property is the third party's negligence, the general rule can be set aside and the claimant may have an effective claim against that third party in tort. In *the Kapetan Georgis*, the charterers became liable against the owners for the physical loss of the vessel and the proximate cause of that loss was the shipper's negligent shipment. Accordingly, the exception came into play and did not require the charterer to have proprietary interest in the vessel whatsoever to claim in tort and his loss was not categorized as pure economic loss but a loss consequent upon that physical loss.

The author therefore opines that if the shipper's dangerous goods liability can be established against the charterer in tort on the grounds outlined above, there is no reason why the same should not apply in favour of the buyer/transferee whose position is conceptually similar against the shipper/seller. This is because, exactly as for the charterer in *the Kapetan Georgis*, when the buyer becomes liable as transferee under the 1992 Act for physical damage to the carrier's vessel caused by the shipment of dangerous goods, the proximate cause of that damage would be the negligence of the shipper, not the buyer/transferee's.[1054] In both scenarios, the shipper is in breach of the bill of lading contract against the carrier due to failing to ship the goods because of their dangerous nature. In both scenarios, neither of them has contractual proximity with the shipper/seller but both come under legal liability to compensate the physical damage caused as a result of the shipper's tortious acts or omissions, since they play no part during or before shipment. Like the charterer, the buyer, as transferee would have no proprietary interest in the vessel but pursues his loss consequent upon the physical loss to the vessel.[1055]

In order for the buyer/transferee to be entitled to claim in tort against the shipper/seller under this exception, the buyer must be subject to liability for physical damage to the carrier's vessel, where the proximate cause of that damage is the shipper/seller's negligence. Once he becomes subject to the liability under the 1992 Act for the shipment of dangerous goods, he does so not as a result of his actions but because of the shipper's breach for shipment of dangerous goods. It would not be wrong to say that his claim is considered as part of a chain, which originates in a claim for physical damage. Otherwise, he would not have inherited the shipper's liability. The exceptional rule created by the House of Lords in *Lexmead v Lewis* is that when the claimant comes under a legal liability for physical damage to someone else's property and if the proximate cause of the damage to that property

[1053] Ibid.

[1054] It is immaterial whether it was resulted from the negligence of an independent contractor acting as the agent of the shipper, since the duty is on the shipper against the carrier.

[1055] See, *Muirhead v Industrial Tank Specialties Ltd* [1986] QB 507; [1986] AC 177.

is the third party's negligence, the general rule can be set aside and the claimant may have an effective claim against that third party in tort. It is on this ground that it is submitted that, like the charterers in *the Kapetan Georgis*, once the buyer/transferee comes under liability to compensate the carrier - which is exactly what happens when the 1992 Act is triggered - for physical damage caused by the dangerous goods and the proximate cause of this damage is the shipper/seller's (third party's) negligence or omissions in shipment of dangerous goods, the general rule should be set aside and the buyer may have hope of redress in tort against the shipper/seller for the liability that he is subject to the carrier.

Indeed, there might be some criticism made against the rule created in *Lexmead v Lewis* and *the Kapetan Georgis* on the basis of abolishing the general rule. However, neither Lord Diplock in *Lexmead v Lewis* nor Hirst J in *the Kapetan Georgis* even disputed the validity of the rule. Instead, they created an exception which may apply limitedly in unique cases. If the dicta of Lord Diplock in *Lexmead v Lewis* (which was reported in 1982) had created a loophole in the general rule, it could have been closed by two cases of the Privy Council and the House of Lords in 1986, which reiterated the general rule.[1056] However, neither was concerned with this exception and neither even cited it. What was made both in *Lexmead v Lewis* and *the Kapetan Georgis* stretched the existing principles in tort to adjust the law to the circumstances of trading methods. As Lord Macmillan opined in *Donoghue v Stevenson*, which is one of the landmark cases on tort; *"The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed".*[1057] In supporting this, Lord Pearce said in *Hedley Byrne v Heller & Partners*; *"How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others".*[1058] On these grounds, it is submitted that the categories of negligence are accepted as dynamic and there is always room to create new duty situations.[1059]

There might also be some criticism on the "floodgates" arguments,[1060] which is that the courts might show some reluctance to allow recovery of economic loss in tort claims as to do so would open the floodgates to claims. The underlying reason is that there might be indeterminate liability to an

[1056] *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785; [1986] 2 Lloyd's Rep 1.

[1057] [1932] AC 562, 619.

[1058] [1964] AC 465, 536.

[1059] On the similar view see, Clerk & Lindsell, 8-05.

[1060] *Ultimares Corporation v Touche* (1931) 174 NE 441. See also, *Muirhead v Industrial Tank Specialties Ltd* [1986] QB 507; [1986] AC 177. Another criticism can be made on the shipper/seller may not know who the ultimate buyer will be in chain sales, so he may not also know to whom his duty is owed. However, tort law on this point clear; it is not required that there must be a specific person to whom the duty is owed when the negligence occurs, the duty can be potential or contingent or owed to a general class; *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 104; *Farrugia v Great Western Ry Co* [1947] 2 All ER 565, 567. In *the Kapetan Georgis*, there was not even a dispute on this point whether the shipper should have known the charterer as an identified person. Therefore the shipper is not required to know the end buyer as an identified person. By reason of transferability of the bills of lading, he can be said to owe that duty to a general class of holders of the bill who are interested in the goods.

indeterminate number of plaintiffs.[1061] Nevertheless, the floodgates argument was disapproved by the House of Lords in *Junior Books v Veitchi*[1062] in order not to allow wrongdoers to avoid liability caused by their wrongdoings. In any case, as was the case in *the Kapetan Georgis,* once the number of plaintiffs is limited to those who are liable to the owner of the property, the floodgates argument is no longer tenable. In the buyer/transferee situation, the author opines that the floodgates argument would not be tenable, given that the number of plaintiffs is only limited to the buyer/transferee who is liable to the carrier for the damage caused by the dangerous goods.

IV. Conclusion on the 1978 Act and Tort Actions

Suggestions were made above under the 1978 Act and in tort to provide non-contractual solutions for the buyer/transferee in mounting a remedy for the liability from dangerous goods. To start with the claim for contribution under the 1978 Act, the rationale behind the Act is to ensure that the wrongdoer would not be unjustly enriched, where his liability to a third party has been discharged by a claimant that is also liable to the same third party. Although there is a lack of conclusive authority on the matter, since the buyer's position satisfies the rationale behind the Act, it is suggested by the author that he may have an arguable claim under the 1978 Act against the shipper/seller or other alternative parties as outlined above. At first glance, although it might appear to be difficult to bring an overseas shipper/seller before the English courts, when there is a more appropriate forum, the case law predominantly proves otherwise. The courts may show readiness to apply the 1978 Act, even if there are other countervailing facts against the inconvenience of the English forum like the choice of foreign law or arbitration clause. Although there is no apparent technical problem with the claim of the buyer under the 1978 Act, there might be some practical difficulties. For instance, the shipper/seller may not have any asset within the reach of the court or he might be insolvent and untraceable. An overseas shipper/seller may refuse to join the proceedings in England, even when a court orders him to do so. Another possibility might be that the buyer may not be able to seek declaratory recognition of the judgment in his favour given in England in the country in which the shipper/seller has assets, and accordingly the buyer may not be able to effectively recover in practice.

Considering his claim in tort, the buyer may have a hope of redress under the exception created by *Lexmaed v Lewis* and *the Kapetan Georgis* against the shipper/seller for the liability for physical damage to the carrier's vessel or other cargoes on board where the proximate cause of the damage is the shipper's negligence. Although it is an exception to the general rule, the courts may be reluctant to set aside the general rule and refuse to apply the exception often. However, considering the position of the buyer/transferee, particularly if the buyer has no practical remedy in contractual actions, the author suggests that the courts should show readiness to apply this exception created in

[1061] *Ultimares Corporation v Touche* (1931) 174 NE 441, 444.
[1062] [1982] 3 All ER 201; [1983] 1 AC 520, 532, 545.

the two cases against the shipper/seller in order for him not to be unjustly enriched where he is actually the source of the liability. However, the fact that there is an action available in tort does not necessarily mean that it does not have its own problems. Firstly, an overseas third party shipper/seller may not readily accept joining a tort action in England or he might be untraceable. Even if he joins, the buyer must himself prove that the proximate cause of the damage to the carrier is the negligence of the shipper/seller. However, it is trite law that the shipper sometimes becomes strictly liable against the carrier for the shipment of dangerous goods regardless of his omissions or actions. When this is the case, the buyer may have difficulty in proving the shipper's negligence caused the damage to the carrier, and accordingly he may not be entitled to claim in tort against the shipper. Even if the buyer proves his negligence, he may not be able to have full recovery against him, given that heads of losses might differ under the contract and in tort. He can only recover economic losses consequent upon physical damage and he is not entitled to pure economic losses in tort actions. For example, once the buyer as transferee became subject to liability for losses resulting from detention of the vessel caused by legally dangerous goods under the contract, he would not be entitled to recovery for this loss since it is regarded as pure economic loss. Thus, his recovery would be only limited to recoverable heads of losses in tort actions, regardless of the head of his losses against the carrier under the contract. Similar practical problems cited under the 1978 Act can arise under tort actions. The seller/shipper may not have any realisable assets within the reach or the buyer may encounter difficulties in the country in which the seller/shipper has realisable assets in seeking declaratory recognition of the judgment in favour of him given in England.

VIII. CONCLUDING REMARKS

I. The Focus and the Research Questions of the Thesis

Under English law, the shipper comes under strict liability against the carrier for damages or expenses arising out of dangerous goods, regardless of whether they arise under the Rules or the common law, and even if he has no fault at all regarding the shipment. It also appears that the word "dangerous" is not considered restrictedly to merely the nature or characteristics of goods; even the most innocuous goods can be dangerous, given the surrounding circumstances. Moreover, the case law proves that liabilities arising out of such goods can be disproportionate and substantial. More significantly, the shipper is not statutorily classified within the group of people entitled to limit his liability against the carrier and shippers in most situations do not purchase insurance products for losses arising out of dangerous goods. Even if available, this would not be on an unlimited basis. That is to say, because money can highly turn on this issue, accordingly traders both sellers and buyers on shipment terms must give utmost importance to the allocation of the liability arising out of such goods.

In order to examine the allocation, the issues to be explored thereunder were stated at the beginning of the thesis. The question that was set up at the centre of the thesis was: "How does the liability arising from the shipment of dangerous goods spread to the parties of international trade, namely between the seller and the buyer under c.i.f. and f.o.b. sales?" This question was then divided into three sub-questions in order to answer the main question more accurately. Firstly, who is the shipper under c.i.f. and f.o.b. sales and do the courts follow a different approach in determining the identity of the shipper, particularly for the purpose of allocation of the dangerous goods liability? Secondly, is this liability actually transmissible to the buyer from the seller, and if so, can the law can be justified? Thirdly, and finally a step frequently missing in other academic studies, would the law of international sale of goods provide any assistance to the buyer for recovery of such loss against the seller? If not, how can this problem be overcome?

II. Summary of the Findings

As stated above, the thesis has three main questions and each of the questions was answered in the relevant chapters. The findings prove that overlooking or leaving these questions unsolved would bring a huge risk along with uncertainties to traders in international trade. The thesis, by answering these questions puts forward some plausible suggestions that could be beneficial to sellers and buyers as well as judicial courts in solving the matters regarding the allocation of the liabilities arising from dangerous goods. Therefore, in order to create links between the chapters of the thesis and wrap everything up, summarizing the findings from these questions would be crucial.

Following a brief insight into the liability arising from dangerous goods under carriage law in Chapter 1, the first question on whether it is the seller or the buyer who bears the liability arising from the dangerous goods as the shipper was answered in Chapter 2. To begin with c.i.f. sales, it is invariably the seller who is the shipper of the goods and attracts the liability. In contrast, the answer is less straightforward under f.o.b. sales, except under bare f.o.b. contracts where the buyer is the shipper, since it is a very flexible instrument and there is no invariable rule. However, under both classic and f.o.b. with additional duties, where the seller is named as the shipper in the bills of lading, and where the seller has no interest in being party to the carriage contract – this is the case mostly where the property passes on shipment - the approach taken by the courts is that the seller is named in the bills of lading as agent of the buyer and accordingly it is the buyer who is considered as the shipper. However, considering the liability arising from dangerous goods, this approach may have been justifiably set aside and the courts would appear to have become inclined to holding the seller/named shipper liable as principal rather than the buyer, even if the facts of the case prove otherwise. The author also advocates this approach on the ground that the seller is the main actor in shipment of the goods who has both physical and contractual direct proximity with the goods when he accepts being named as the shipper in the bill. Therefore, the author suggests that just because the property has passed on shipment, the buyer who neither ships nor sees the goods, and who is also likely located somewhere else other than the shipment port and unlikely to see or touch the bill until endorsement and delivery, should not become liable as the shipper where he has no acts or faults in the shipment. The seller/named shipper as the source of defect should not be permitted to escape the liability arising from his actions or faults simply on the basis that he has lost interest in being party to the carriage contract. The author in Chapter 2 ultimately opined that the general approach in determining the principal party to the carriage contract should be set aside and the law making the seller/named shipper liable should be preferred and followed, even if the facts prove otherwise.

The non-contracting seller's position is also discussed under other mechanisms. Where the seller is party to a separate implied contract with the carrier at the loading stage, the courts may be reluctant to impose dangerous goods liability on the seller under this contract. However, the author suggests that the seller should not be allowed to escape from the liability, particularly where his actions are the source of damages and losses and the buyer is not worth suing. In such cases, the courts should show some readiness to hold the seller liable under the implied contract. On the other hand, even though the carrier does not appear to have fully grasped the potential tort claims for damages arising from dangerous goods under English law, the case law shows that the non-contracting seller can have this liability imposed where he is the source of the fault or negligence.

Following the discussion in Chapter 2 in which it was concluded that it is invariably the seller is the shipper in c.i.f. sales and often under f.o.b. sales – except in bare f.o.b. – and it is also the seller who is named in the bill as the shipper and accordingly attracts the liability, Chapter 3 focused on answering the second question on whether the liability is transmissible from the seller/shipper to the

buyer/transferee under the carriage contract tendered by the seller. Since transferability of this liability is not settled law, one solution would have been to leave the liability merely on the shipper/seller. However, the author suggests that the liability should be transmissible under the 1992 Act from the seller/shipper to the buyer/transferee, given that this is not the policy taken under English law in terms of carriage contract which is based on the principle of mutuality, i.e. it is not only concerned with the transfer of rights but also with the imposition of liabilities. When sale contracts are concluded on shipment terms, carriage contracts are also concluded in pursuance of these sale contracts and a tri-partite relationship between the seller, the buyer and the carrier is established in the centre of international sale of goods. It is eventually the buyer who is the prime reason behind the shipment and those goods are ultimately carried by the carrier for his benefit. Once the buyer becomes artificially party to the carriage contract under the 1992 Act, and it can be queried why such a party who is willing to benefit and exercise rights under that contract would be relieved of obligations thereunder. The author also opines that there is no injustice in transferring this liability to the buyer. Firstly, he is not subject to liability, unless he exercises his contractual rights. Secondly the courts ensure the balance by restrictively applying the imposition mechanism of the 1992 Act. In addition, considering the liabilities arising from dangerous goods, they can be disproportionate, and the seller/shipper may not have any or sufficient realisable assets within reach. The rights of third parties are a matter of commercial necessity, while liabilities of third parties are a matter of policy. English law in terms of carriage contract is based on the principle of mutuality and justifiably favours the protection of the carrier in order to reduce the risk of insolvency under this tri-partite relationship by giving a right to redress against the buyer.

In Chapter 4, the very same question of Chapter 3 was answered on the ground of non-contractual actions, where there is no contractual nexus on the delivery stage between the buyer and the carrier. The result is that the buyer can enjoy the absence of a contractual regime, and can be said to not have had liability imposed under non-contractual actions. One exception would be bailment action which can be said technically possible, but the author suggests that the courts should be reluctant to impose this liability onto the buyer under bailment, when there is an available contractual regime as well.

The last but the most important question of the thesis is: Would the law of international sale of goods provide any assistance to the buyer for recovery of such loss against the seller? This is answered in Chapter 5, 6 and 7. Unlike the view advocated in Chapter 3 in which the imposition of the liability on the buyer is justified on the basis of the tri-partite relationship created under international sale of goods law, the author advocates the view that the buyer as the innocent party under the two-party relationship should have a right to redress against the seller in the sale contract for the liability inherited which arises from the dangerous goods. This issue has not been explored under English law as of yet and accordingly it is unknown whether the buyer may be entitled to recovery under the sale contract for his loss following a breach of the carriage contract. To explore the

unexplored part under the international sale of goods law, firstly, Chapter 5 sought to address a causal link between the buyer's inherited loss consequent upon the damage caused by the dangerous goods and breach of the seller under the sale contract. Although some suggestions are based on the implied conditions of the 1979 Act, like description or satisfactory quality of the goods, to establish a causal link in general between those breaches and the buyer's loss might be difficult, given that facts may vary from one case to another.

In order to provide a more general solution, the author suggests that s. 32 (2) of the 1979 Act is well equipped to solve this causal link problem and the buyer should have an effective right of recourse against the seller for this loss hereunder. The buyer purchases the goods and pays for them in exchange for a shipping document in order to have substantial rights of recourse against the carrier. However, once he becomes liable for the shipment of dangerous goods under that document, he will not have rights of recourse against the carrier but contrarily he will be subject to liability. He may not have a right of recourse against the seller either, if he has no express obligation in regarding to carriage of the goods. Business efficacy requires that a party should not be deprived of substantially the benefit that he is supposed to receive under the contract. However, the buyer in question is to all practical effects deprived of any substantial right against the carrier and the seller. Under c.i.f. and f.o.b. sales the courts have implied terms they can use in order to reinstate the business efficacy of the transaction. Under the first aspect of s. 32 (2), it is therefore suggested by the author that unless a term indicating the "usual thing" in this line of business – that the goods should be afforded with necessary precautions having regard to the nature of the goods and circumstances of the case for preservation and safe carriage of them - is implied in the sale contract, it would be deprived of its business efficacy. Therefore, in order to satisfy business efficacy, the author under the first aspect of s. 32 (2) suggests that a practical solution would be the courts implying a term.

As an alternative to the implication of a term, particularly under the second and the third aspect of s. 32 (2), it is suggested that s. 32 (2) is well equipped to enable the buyer to trigger s. 32 (2) for his loss. When discussing the second aspect, it is shown that there is a strong correlation between loss or damage to the goods and the lack of precautions they require for safe carriage. As outlined in the examples of the carriage of goods by sea law cases, when the contract fails to provide for any necessary measure that the nature of the goods requires, not only does it cause damage to the carrier, but also makes it likely that loss or damage to the goods will result. Since the lack of a particular measure the goods require causes damage to the goods, it would not be plausible to argue that the contract afforded the protection the goods require. This is because had it been provided, loss or damage would not have occurred. This makes it clear that that measure should have been afforded in the contract, since the goods would have been preserved by it during transit. Accordingly, that also proves those measures are not only necessary for safe carriage, but ultimately also crucial for preservation of the goods during transit. Therefore, it is submitted by the author that the contract that failed to afford those measures that the goods require for survival would not fulfil the second aspect of s. 32 (2). For this reason, it is also thought that such a bill of lading tendered will also fail the third

aspect, since the buyer would not have substantial rights on this against the carrier for something which is not contained in the contract.

Following the causal link established between the buyer's loss and the seller's breach in the sale contract in Chapter 5, Chapter 6 sought to address whether the buyer's loss might be recovered in the light of the law of damages applicable to sale of goods cases. Particularly considering the fact that under c.i.f. and f.o.b. sales the courts simply look for simple factual causation between the loss and the breach in order to allow claims for consequential losses under the rule of remoteness, the author suggests that the courts should perhaps show more readiness to allow recovery in favour of the buyer than they normally do in the light of the buyer's innocence in this loss. The author also strongly opines that given the autonomous express reference to "damages" in its wording, the courts should interpret s.32 (2) in a broader sense to allow recovery of this loss as a direct loss rather than a consequential one. An alternative to these suggestions is that in order not to leave the buyer without recovery, it is also suggested that the principle accepted in *Lambert v* Lewis can be established in favour of the buyer for recovery by way of analogy.

Unlike in Chapters 5 and 6, which sought to address contractual solutions, Chapter 7 as an alternative way of remedy, sought to tackle the buyer's problem in mounting a remedy for his loss by way of making suggestions on non-contractual actions. To begin with the claim for contribution under the 1978 Act, even though there is no direct authority on the matter, the author submits that the buyer may have an arguable claim against the seller/shipper, particularly on the ground that the buyer satisfies the rationale behind the 1978 Act which is the prevention of a wrongdoer's unjust enrichment. In addition, a plausible suggestion was made under tort principles. Although it is an exceptional rule which requires that in order to have an arguable claim, the claimant must be subject to liability for physical damage caused to a third party's property, where the proximate cause of the damage is the negligent act or fault of the defendant, the author strongly suggests that the buyer's claim against the seller/shipper plausibly fits the formulation of this exception. Accordingly, considering the position of the buyer/transferee, particularly if the buyer has no practical remedy in contractual actions, the author suggests that the courts should show readiness to apply this exception in tort against the shipper/seller in order for him not to be unjustly enriched where he is actually the source of the liability.

III. Final Conclusion

Overall, the thesis has sought to address and explore the question: "How does the liability arising from the shipment of dangerous goods spread to the parties of international trade, namely between the seller and the buyer under c.i.f. and f.o.b. sales?" along with its three sub-questions. Thus, the subject of the thesis focused on not the liability itself arising from dangerous goods, but on the spread of the liability under the sale contract following a breach under the carriage contract. Moreover, the analysis was not limited to the contractual regime only, but it was also conducted under non-contractual mechanisms. The thesis asked some significant questions which has not yet been

conducted or evaluated by the other works thoroughly. Therefore, it would not be wrong to say that this is the first time such work has been done on the subject of the thesis. Therefore there is no doubt that the thesis could be beneficial in this field to traders in the international trade as well as the courts in solving the issues arising from allocation of dangerous goods liability.

Under c.i.f. and f.o.b. sales, on the shipment stage the liability justifiably mostly falls on the seller as the source of defect rather than the buyer, and the current status of the law in this regard should be preferred and followed. Although transferability from the seller/shipper to the buyer/transferee is not settled law, as a matter of policy established under carriage law in relation to tri-partite relationship, the author justifiably favours transfer of the liability. Once transferred, from this point on, the issue is not expressly solved under the sale of goods law, and accordingly it is not known and unexplored under English law whether the buyer may have any effective remedy to recover his loss. However, unlike the policy of carriage law, once the carrier is left out and obtains his compensation from the buyer/transferee, there is to be only a two-party relationship, namely between the seller and the buyer, and the sale of goods law has its own principles. Therefore, in order to shift the loss back on the source of defect, namely the seller/shipper, the author suggests that the policy to be taken by English courts should be to allow the claim in favour of the buyer who is the more innocent one in this two-party relationship.

In supporting this, the author therefore submits as a major suggestion that s. 32 (2) can be put to use to tackle this issue under contract. S. 32 (2) has been judicially considered very little before the courts and the position of the buyer which this thesis is concerned with has never been pursued in litigation under English law. However it has enjoyed a protected position under English law for well over a century, and has never really been given attention until now. Nevertheless, it still stands and it is the law, albeit dormant in nature. In order to tackle this problem in favour of the buyer, it might perhaps be put to use as advocated by the author in this thesis. Considering the courts normally maintain a restrictive approach to transferring the liability in favour of the buyer, these suggestions may become more feasible, once the liability is actually and irreversibly transferred to the buyer. The courts may and should approach to interpret s. 32 (2) in a wider sense in favour of the buyer to address this issue.

If none of the suggestions above have the desired effect, it is suggested by the author that s. 32 (2) could be amended so as to cover such a loss of the buyer, particularly considering the fact that this is not something unexecuted before under English law. Under the regime of the 1855 Act, the buyers of undivided bulk cargoes could not sue the carriers, if the goods were lost or damaged on the voyage, since the buyer could not obtain any legal title to sue. Although, the problem was originated from the carriage law under the 1855 Act, it has been extensively overcome by the amendments made in the Sale of Goods Act 1995.[1063] Similar to this, if desirable consequences are not obtained with the current wording of s. 32(2), the author opines it should be amended so as to cover such a loss of the buyer.

[1063] The amendments are to s. 16, 18. r.5. of the 1979 Act.

Some suggestions were also made under the 1978 Act and tort principles, which may address this issue under non-contractual actions as well. Nevertheless, it would be worth noting that the buyer should prefer contractual to non-contractual actions and seek recourse against their contractual partner, namely the seller. Although it may seem more desirable to sue the seller/shipper as the source of the problem directly, it may not be as easy as it appears under non-contractual actions, to obtain an effective remedy due to practical difficulties. For instance, the seller/shipper may not have any or sufficient realisable assets within the reach of the court or he might be insolvent and untraceable. Alternatively, given the absence of the contract in between them, an overseas seller may refuse to join the proceedings in England. Another problem might be that there is a failure to seek declaratory recognition of the judgment in favour of the buyer given in England in the country in which the seller/shipper has assets. Moreover, in terms of tort action, the buyer may not be entitled to full recovery, given that heads of losses might differ under the contract and in tort, and accordingly he may not be able to recover pure economic losses. That being the case, the author tends to favour contractual over non-contractual actions, although at first glance it might seem difficult and unjust under string sales, which are a common way for commodities to be sold multiple times on identical or similar terms before arrival. However, there is no injustice done due to two reasons. Firstly, the 1979 Act provides a system of strict liability for defective goods. That is to say, although a seller may not be personally at fault, he may be liable towards his buyer, given the fault of the initial seller. Sales on shipment terms are generally considered as sale of goods through performance of the documents, and accordingly not being the initial seller will not prevent an intermediate seller from being in breach of his contractual duties towards his buyer. That is the unique process of these contracts. Secondly, when the ultimate buyer recovers his loss from his seller under the last contract, the loss will not irreversibly attach to his seller. The intermediate sellers in the string will join or pursue their claims against their sellers, which will eventually reach back to the seller/shipper who is the source of the problem.

BIBLIOGRAPHY

Table of Books, Articles and Official Reports

A

Abbott C., *Treatise of the Law Relative to Ships and Seamen* (5th edn, 1901).

Adams J. and MacQueen H., *Atiyah's Sale of Goods* (12th edn, Pearson 2010).

Aikens R., Lord R. and Bools M.D., *Bills of lading* (2nd edn, Informa 2015).

Aikens R., "Which Way to Rome for Cargo Claims in Bailment When Goods Are Carried by Sea?" [2011] LMCLQ 482.

B

Bassindale J., "Title to Sue under Bills of Lading: the Carriage of Goods by Sea Act 1992" [1992] JIBL 414.

Baughen S. and Campbell N., "Apportionment of Risk and The Carriage of Dangerous Cargo" [2001] 1 IntML 3.

Baughen S., "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393.

Baughen S., "Bailment or Conversion? Misdelivery Claims against Non-contractual Carriers" [2010] LMCLQ 411.

Baughen S., "Charterparty Bills of Lading Cargo Interests Liabilities to the Shipowner" in R. Thomas (ed), *The Evolving Law and Pratice of Voyage Charterparties* (Informa 2009).

Baughen S., "Obligations of the Shipper to the Carrier" [2008] JIML 555.

Baughen S., "Sue and be Sued? Dangerous Cargo and the Claimant's Dilemma" [2006] 5(4) STLI 14.

Baughen S., "The legal status of the non-contracting shipper" [2000] 1 IJOSL 21.

Beale H.G., *Chitty on contracts* (32nd edn, Sweet & Maxwell, 2015).

Beatson J. and Cooper J.J., "Rights of Suit in Respect of Carriage of Goods by Sea" [1991] LMCLQ 196.

Bell A.P., *Modern Law of Personal Property in England and Ireland* (Butterworths 1989).

Bools M.D., *The Bill of Lading: a document of title to the goods: an Anglo-American Comparison* (LLP 1997).

Boyd S., Burrows S. and Foxton D., *Scrutton on Charterparties and Bills of Lading* (20th edn, Sweet & Maxwell 1996).

Bradgate R. and White F., "The Carriage of Goods by Sea Act 1992" [1993] 56 MLR 188.

Bridge M.G., *Benjamin's sale of goods* (10th edn, Sweet & Maxwell 2017).

Bridge M.G., *The International Sale of Goods* (3rd edn, Oxford 2013).

Bridge M.G., "Markets and damages in sale of goods cases" [2016] LQR 405.

Briggs A., "The International Dimension to Claims for Contribution: Arab Monetary Fund v Hashim" [1995] LMCLQ 437.

Bugden P. & Lamont-Black S., *Goods in Transit* (3rd edn Sweet & Maxwell 2013).

C

Campbell N., "Defining the Frontiers of the Bill of Lading Holder's Liability – the Berge Sisar and the Aegean Sea" [2000] JBL 196.

Cooke J., Kimball J. et. al, *Voyage Charters* (4th edn, Informa 2014).

Curwen N., "The Bill of Lading as a Document of Title at Common Law" in P Park and B Andoh (eds), *Mountbatten Yearbook of Legal Studies* (Southampton Solent University 2007), 139.

Curwen N., "The Problems of Transferring Carriage Rights: an equitable solution" [1992] JBL 245.

D

Davenport B., "Reform to Bill of Lading Law – Some Implications for Banks" [1992] JIBFL 305.

Davies J.M., "What is reasonable contract" [2003] 3 (4) STL 1.

Debattista C., *Bills of lading in export trade* (3rd edn, Tottel 2008).

Debattista C., *Sale of Goods Carried by Sea* (Butterworths 1990).

Devlin P., "The Relation between commercial law and commercial practice" [1951] 14 MLR 249.

Dowrick F.E., "A Jus Quaestium Tertio by Way of Contract in English Law" [1956] 19 MLR 374.

Dugdale A.M., "Civil Liability (Contribution) Act 1978" [1979] 42 MLR 182.

E

Eder, Sir B. et. al, *Scrutton on charterparties and bills of lading* (23rd edn, Sweet & Maxwell, 2015).

F

Faber D., "The Problems Arising from Multimodal Transport" [1996] LMCLQ 503.

Ferris C., "The Carriage of Goods by Sea Act 1992" [1992] ICCLR 432.

G

Gard A.S., "Dangerous solid cargoes in bulk; DRI, nickel and iron ores", January 2014, www.gard.no/ikbViewer/Content/6227919/Dangerous%20solid%20cargoes%20in%20bulk%20%20January%202014.pdf.

Gaskell N., Asariotis R. and Baatz Y., *Bills of Lading: Law and Contracts* (LLP 2000).

Gelgec A., "Clause Paramount and its impact on package limitation figures" [2015] 1 Il Diritto Marittimo – Quaderni 147.

Gelgec A., "Separation of Actual and Physical Possession on Bills of Lading under English Law" [2017] 4 Il Diritto Marittimo – Quaderni 1.

Gelgec A., "Who attracts the dangerous goods liability under c.i.f. and f.o.b. contracts?" [2016] 2 Il Diritto Marittimo – Quaderni 29.

Girvin S., "Bills of Lading and Straight Bills of Lading: Principles and Practice" [2006] JBL 86.

Girvin S., "Shipper's liability for the carriage of dangerous cargoes by sea" [1996] LMCLQ 487.

Goode R.M., *Commercial Law* (1st edn, Harmondsworth 1982).

Goode R.M., *Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 1985).

Gower L.C.B., "F.O.B. Contracts" [1956] 19 MLR 417.

H

Halliday S., *An Introduction to the Study of Law* (W Green 2012).

Hansard, 04/02/1992, Carriage of Goods by Sea Bill.

Halsbury's Laws of England (5th edn, Lexis Nexis 2014).

Harris J., "Joinder of Parties Located Overseas" CJQ 290.

Howard T., "The Carriage of Goods by Sea Act 1992" [1993] 24 JMLC 181.

Humphreys G. and Higgs A., "An Overview of the Implications of the Carriage of Goods by Sea Act 1992" [1993] JBL 61.

Hutchinson T., Duncan N., "Defining and Describing What We Do: Doctrinal Legal Research" [2012] 17 DLR 83.

J

Jones M., *Clerk & Lindsell on Torts*, (21st edn, Sweet & Maxwell 2016).

L

Lebhun J., "Practising CIF and FOB today" [1981] 1 ETL 24.

Lee D.Y.H. and Sooksripaisarnkit P., "The Straight Bill of Lading: Past, Present, and Future" [2012] 18 JIML 39.

Lista A., *International commercial sales: The sale of goods on shipment terms* (1st edn, Informa 2016).

Lord R. and Bools M.D. [1999] IJOSL 194.

Lorenzon F. , *C.I.F. and F.O.B. contracts* (6th edn, Sweet & Maxwell 2016).

Lorenzon, F., "When is a CIF seller's carriage contract is unreasonable?" [2007] 13 JIML 241.

M

Mark M., *Chalmers' Sale of Goods Act 1979* (8th edn, Butterworths 1981).

McGregor H., *McGregor on Damages* (19th edn, Sweet & Maxwell 2014).

McKendrick E., *Goode on Commercial Law* (5th edn, Penguin Books 2016)

McMeel G., "Straight Bills of Lading in the House of Lords – the Rafaela S" [2005] LMCLQ 273.

McMeel G., "The Redundancy of Bailment" [2003] LMCLQ 169.

Mildon D. and Scorey D., "Liabilities of Transferees of Bills of Lading" [1999] IJOSL 94.

Mitchell C., “The Civil Liability (Contribution) Act 1978” [1997] 5 RLR 27.

Mitchell C., *The Law of Contribution and Reimbursement*, (Oxford 2003).

Murphy J., “The Merits of Rylands v Fletcher” [2004] 24 OJOLS 643.

Mustill M., “Carriers’ Liabilities and Insrance” in K Gronfors (ed), *Damage from Goods* (Tullbergs Klippan 1978) 69.

N

Negus R., “The Negotiability of bills of lading” (1921) 37 LQR 442.

Newark F.H., "Non-Natural User and *Rylands v Fletcher*" [1961] 24 MLR 557.

Nolan D.P., “The Distinctiveness of *Rylands v Fletcher*” [2005] 121 LQR 421.

P

Palmer N.E. and McKendrick E., *Interests in Goods* (2nd edn, LLP 1998)

Palmer N.E., *Palmer on Bailment* (3rd edn, Sweet &Maxwell 2009).

Peel E., *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015).

Pejovic C., “Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions” [2001] JBL 461.

Posner R.A., “Legal Scholarship Today” [2001] 115 HLR 1314.

R

Reynolds B., “Further Thoughts on the Carriage of Goods by Sea Act 1992 (UK)” [1994] 25 JMLC 143.

Reynolds F. QC, “Bills of Lading and Voyage Charters” in R Thomas (ed), *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009), 210.

Reynolds F., “The Carriage of Goods by Sea Act 1992 Put to the Test – the Berge Sisar” [1999] LMCLQ 161.

Reynolds F.M.B., “The Carriage of Goods by Sea Act 1992” [1993] LMCLQ 436.

Rose F.D., “Liability for Dangerous Goods *(The Giannis NK)”* [1998] LMCLQ 480.

S

Sabapathy S., [2013] “Falling Market and Remoteness” [2013] LMCLQ 284.

Sassoon D.M., “Application of FOB and CIF Sales in Common Law Countries” [1981] 16 ETL 50.

Sassoon D.M., "The Origin of F.O.B. and C.I.F. Terms and the Factors Influencing their Choice" [1967] JBL 32.

Schmitthoff C.M., *The law and practice of international trade* (12th edn, Sweet & Maxwell 2012).

Schmitz T., “The Bill of Lading as a Document of Title” [2011] JITLP 10 (3) 255.

Schwenzer, I.H., *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford 2010).

Sessional Papers of the House of Lords 1888. Sale of Goods Bill 1888.

Stallybrass W., "Dangerous Things and the Non-Natural User of Land" [1929] 3 CLJ 376.

Stiggelbout M., “Contractual Remoteness, ‘scope of duty’ and Intention” [2012] LMCLQ 97.

T

Takahashi K., *Claims for Contribution and Reimbursement in an International Context: Conflict of Laws Dimensions of Third Party Procedure* (Oxford 2000).

Takahashi K., “Forum Non-Conveniens Discretion in Third Party Proceedings” [2002] 51 ICLQ 127.

Tetley W., *Marine Cargo Claims* (4th edn, Cowansville 2007).

Tettenborn A., “Tort Liability and environmental responsibility” [1996] LMCLQ 8.

Tettenborn A., “Transferable and Negotiable documents of title – a redefinition?” [1991] LMCLQ 538.

Tiller E.H., Cross F.B., “What is Legal Doctrine?” [2006] 100 NWLR 517.

Thomas R., “Bills of Lading – The Position of Holders and Intermediate Holders Under the English Carriage of Goods by Sea Act 1992” [2001] 5 IntML 165.

Thomas S., “Transfers of Documents of Title under English Law and the Uniform Commercial Code” [2012] LMCLQ 573.

The Law Commission Report, “Rights of Suit in Respect of Carriage of Goods by Sea” Law Com No 196, Scot Law Com No 130.

The Law Commission’s Report No 79, *Law of Contract: Report on Contribution* (HC 181) (1977).

Todd P., “Bank As Holder Under Carriage of Goods by Sea Act 1992” [2013] LMCLQ 275.

Todd P, “Bank As Holder Under Carriage of Goods by Sea Act 1992” [2015] LMCLQ 155.

Todd P., *Bills of Lading and Bankers Documentary Credits* (4th edn, Informa 2007).

Todd P., “Bill of Lading as Document of Title” [2005] JBL 762.

Todd P., *Cases and materials on international trade law* (Sweet & Maxwell 2003).

Todd P., “The Bill of Lading and Delivery: the Common Law Actions” [2006] LMCLQ 539.

Treitel G.H., “Bills of lading and implied contracts” [1989] LMCLQ 162.

Treitel G.H., “Bills of Lading: Liabilities of Transferee” [2001] LMCLQ 344.

Treitel G.H., “Exemption Clauses and Third Parties” [1955] 18 MLR 172.

Treitel G.H., Reynolds F.M.B., *Carver on bills of lading* (4th edn, Sweet & Maxwell 2017).

Treitel G.H., “The Legal Status of Straight Bills of Lading” [2003] LQR 608.

W

Watts P., *Bowstead and Reynolds on agency* (20th edn, Sweet & Maxwell 2014).

Wee P., “Contractual Interpretation and Remoteness” [2010] LMCLQ 150.

Weir T., "*Rylands v Fletcher* Reconsidered" [1994] CLJ 216.

Williams G., *Joint Torts and Contributory* Negligence (Stevens & Sons Ltd 1951).

Wooldridge F., “The Kinds of F.O.B. Contracts” [1973] Law and International Trade Recht und Internationaler Handel Festschrift fur Clive M Schmitthoff zum 70 Geburtstag 388.

Table of Cases

A

A Hamson & Son (London) Ltd v S Martin Johnson & Co Ltd [1953] 1 Lloyd's Rep 553.

A/S Hansens-Tangens Rederi III v Total Transport Corp (The Sagona) [1984] 1 Lloyd's Rep 194.

Adler v. Dickson [1955] 1 QB 158; [1954] 3 WLR 696; [1954] 3 All ER 397 (CA).

Aegean Sea, The [1998] CLC 1090; [1998] 2 Lloyd's Rep 39.

Airbus Industrie GIE v Patel [1997] 2 Lloyd's Rep 8.

Akts De Danske Sukkerfabriker v Bajamar Cia (The Torenia) [1983] 2 Lloyd's Rep 210.

Al Hofuf, The [1981] 1 Lloyd's Rep 8.

Alfred McAlpine COnsttruction Ltd v Panatown Ltd [2001] 1 AC 518.

Allen v Coltart (1883) 11 QBD 782.

Anderson v Clark (1824) 2 Bing 20.

AP Moller-Maersk A/S v Somiac Villas Cen Sad Fadoul [2010] EWHC 355 (Comm).

Arab Monetary Fund v Hashim (No 3) [1991] 2 AC 114.

Arctic Trader, The [1996] 2 Lloyd's Rep 449.

Armitage v. Insole (1850) 14 QB 728; 117 ER 280.

Arnhold Karberg & Co v Blythe, Green, Jourdain & Co [1916] 1 KB 495.

Asfar v Blundell [1896] 1 QB 123.

Ashington Piggeries v Christopher Hill Ltd [1972] AC 441.

ASM Shipping Ltd v TTMI Ltd (The Amer Energy) [2009] 1 Lloyd's Rep 293.

Athanasia Comninos and Georges Chr. Lemos [1990] 1 Lloyd's Rep 277.

Atlantic Oil Carriers Ltd v British Petroleum Co Ltd (The Atlantic Duchess) [1957] 2 Lloyd's Rep 55.

Attorney-General v Walford (Leopold) Ltd (1923) 14 Ll LR 359.

AV Pound & Co Inc v. M W Hard & Co Inc [1956] AC 588.

B

Baker v Willoughby [1970] AC 467.

Bamfield v Goole and Sheffield Transport Co Ltd [1910] 2 K.B. 94.

Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] QB 665.

Barber v Meyerstein (1870) LR 4 HL 317.

Barclays Bank Ltd v Commissioners of Customs & Excise [1963] 1 Lloyd's Rep 81.

BC Fruit Market Ltd v The National Fruit Co (1921) 59 DLR 87.

Benatry, The [1987] 1 WLR 1614.

Bence Graphics International Ltd v Fasson UK Ltd [1998] QB 87.

Berger & Co Inc v. Gill and Duffus SA [1984] AC 382.

Bergerco USA v Vegoil Ltd [1984] 1 Lloyd's Rep 440.

Beswick v Beswick [1968] AC 58.

Biddell Brothers v E Clemens Horst Co [1911] 1 KB 214.

Biddell Brothers v E Clemens Horst & Co [1911] 1 KB 934.

Bigge v Parkinson (1862) 7 H & N 955.

Biggin & Co Ltd v Permanite Ltd [1951] 1 KB 422.

Biggin & Co Ltd v Permanite Ltd [1951] 2 KB 314 (CA).

Birge Construction Ltd v Haiste Ltd [1996] 1 WLR 675.

Blakemore (1858) 8 E&B 1035.

Board of Trade v Steel Brothers & Co Ltd [1952] 1 Lloyd's Rep 87.

Borealis AB v Geogas Trading SA [2010] EWHC 2789; [2011] 1 Lloyd's Rep 482.

Borealis AB v Stargas Ltd and Others (The Berge Sisar) [2001] UKHL/17; [2001] AC 205; [2001] 1 Lloyd's Rep 663.

Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG (*The Mercini Lady)* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442.

Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG (*The Mercini Lady) (No 2)* [2012] EWHC 3009; [2013] 1 All ER 610.

Bourne v Mason (1668) 1 Ventris 6.

Bouygues Offshore SA v Caspian Shipping Co (No 3) [1997] 2 Lloyd's Rep 493.

Bouygues Offshore SA v Caspian Shipping Co (No 5) [1997] 2 Lloyd's Rep 533.

Bowden Bros and Co Ltd v Little [1907] 4 CLR 1364.

Box v Jubb (1879) 4 Ex D 76.

Bowes v Shand (1877) 2 App Cas 455.

Bramhill v Edwards [2004] EWCA Civ 403; [2004] 2 Lloyd's Rep 653.

Brand v Liverpool, Brazil & River Plate Steam Navigation Co Ltd [1924] 1 KB 575.

Brand (HO) & Co v Morris (HN) & Co Ltd [1917] 2 KB 784.

Brass v Maitland (1856) 119 ER 940.

Briess v Woolley [1954] AC 333.

British Oil and Cake Co Ltd v Burstall & Co (1923) 39 TLR 406.

British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys [1912] AC 673.

British Racing Drivers' Club Ltd v Hextall Erskine & Co [1996] 3 All ER 667.

Brittannia Hygenic Laundry Co Ltd v John I Thorneycroft Co Ltd (1925) 41 TLR 667.

Brittannia Hygenic Laundry Co Ltd v John I Thorneycroft Co Ltd (1926) 42 TLR 198 (CA).

Brown v KMR Services Ltd [1995] 4 All ER 598.

Brown v Thompson [1968] 1 WLR 1003.

Browne v Hare (1853) 3 H & N 484; (1859) 4 H & N 822.

Buckman v Levi (1813) 3 Camp 414.

Bunge Sa v ADM Do Brasil and Others (The Darya Radhe) [2009] EWHC 845 (Comm); [2009] 2 Lloyd's Rep 175.

Burch & Co Ltd v Corry & Co [1920] NZLR 69.

Burstall & Co v Grimsdale and Sons (1906) Com Cas 280.

Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 WLR 401.

C

C Sharpe & Co Ltd v Nosawa & Co [1917] 2 KB 814.

Calcutta SS Co Ltd v Andrew Weir Co [1910] 1 KB 759.

Cambridge Water Co v Eastern Counties Leather [1994] 2 AC 264.

Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd [1986] AC 1.

Carlos Federspiel & Co SA v Charles Twigg & Co Ltd [1957] 1 Lloyd's Rep 240.

Carlos Soto Sau and Another v AP Moller-Maersk AS (The Sfl Hawk) [2015] EWHC 458; [2015] 1 Lloyd's Rep 537.

Carnival, The [1994] 2 Lloyd's Rep 14.

Caspian Sea, The [1980] 1 WLR 48.

Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress) [1996] 2 Lloyd's Rep 319.

Cf Harvey v RG O'Dell Ltd [1958] 2 QB 78.

Chandris v Isbrandsten-Moller [1951] 1 KB 240.

Chanter v Hopkins (1838) 4 M & W 399.

Charing Cross Electricity Supply Co v Hydraulic Power Co [1914] 3 KB 772.

Chew Hong Edible Oils Ltd v Scindia Steam Navigation Co Ltd (The Jalamohan) [1988] 1 Lloyd's Rep 443.

Chitral, The [2000] 1 Lloyd's Rep 529.

Cho Yang Shipping Co Ltd v Coral (UK) Ltd [1997] 2 Lloyd's Rep 641.

Clarke v Army and Navy-Co-operative Society Ltd [1903] 1 KB 155.

Clarke v Dunraven [1897] AC 59.

Clarke v Hutchins (1811) 14 East 475.

Classic Maritime v Lion Diversified Holdings [2009] EWHC 1142; [2010] 1 Lloyd's Rep 59.

Clemens Horst Co v Biddell Bros [1912] AC 18.

Cock v Taylor (1811) 13 *East* 399; 104 ER 424.

Cohen & Co v Ockerby & Co Ltd (1917) 24 CLR 288.

Colin & Shields v Weddel & Co Ltd [1952] 2 Lloyd's Rep 9.

Compania Continental del Peru SA v Evelpis Shipping Corporation (The Agia Skepi) [1992] 2 Lloyd's Rep 467.

Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd [1955] 2 QB 68.

Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2) [1990] 2 Lloyd's Rep 395.

Compania Sud Americana De Vapores Sa v Sinochem Tianjin Import and Export Corporation (The Aconcagua) [2010] 1 Lloyd's 1.

Compania Sud Americana De Vapores Sa v Sinochem Tianjin Import and Export Corporation (The Aconcagua) [2011] 1 Lloyd's 683 (CA).

Comptoir d'Achat et de Vente du Boerenbond v Luis de Ridder Limitada (The Julia) [1949] AC 293.

Comyn Ching & Co Ltd v Oriental Tube Co Ltd [1979] 17 BLR 56.

Concordia Trading BV v Richo International Ltd [1991] 1 Lloyd's Rep 475.

Concord Petroleum Corp v Gosford Marine Panama SA (The Albazero) [1975] 2 Lloyd's Rep 295; [1977] AC 774.

Confetti Records v Warner Music UK Ltd [2003] EWHC 1274 [2003] EMLR 35.

Congimex Compania Geral SARL v Tradax Export SA [1983] 1 Lloyd's Rep 250.

Co-operative Retail Services Ltd v Taylor Yound Partnership [2002] UKHL 17.

Cothay v Tute (1811) 3 Camp 129

Coughlin v Gillison (1899) 1 QB 145.

County Ltd v Girozentrale Securities [1996] 3 All ER 834.

Cowas-Jee v Thompson Kebble (1845) 5 Moore 165.

Craven & Another v Ryder [1816] 6 Taunt 433.

Cremer v General Carriers (The Dona Mari) [1974] 1 WLR 341.

Crow v. Rogers (1726) 1 Stra 592.

Cunningham v. Monro (1922) 28 Comm 42.

Customs and Excise Commissioners v. Aps Samex [1983] 1 All. E.R. 1042.

Czarnikow v Koufos (The Heron II) [1969] 1 AC 350.

D

Darbishire v Warran [1963] 1 WLR 1067.

Darlington BC v Wiltshier Northern Ltd [1995] 1 WLR 68.

David Agmashenebeli, The [2002] EWHC 104; [2003] 1 Lloyd's Rep 92; [2002] 2 All ER 806.

Davies v Swan Motor Co (Swansea) Ltd [1949] 2 KB 291.

Dawson Line Ltd v Aktiengesellschaft "Adler" Fuer Chemische Industrie of Berlin [1932] 1 KB 433; (1931) 41 Ll L Rep 75.

Deutsche Bank AG v Total Global Steel Ltd [2012] EWHC 1201.

Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd [1926] 1 KB 348, 359.

DH Bain v. Field & Co Fruit Merchants Ltd (1920) 3 Ll LR 26.

Diamond Alkali Export Corp v Fl Bourgeois [1921] 3 KB 443.

Dickenson v. Lano (1860) 2 F&F 188.

Diboll v City of Newcastle upon Tyne [1993] PIQR 16.

Dolphina, The [2011] SGHC 273; [2012] 1 Lloyd's Rep 304.

Domald, The [1919] 1 Ll Rep 621.

Domett v. Beckford [1883] 5B. & Ald. 521.

Donoghue v Stevenson [1932] AC 562.

Downs v Chappell [1996] 3 All ER 344.

Drive Yourself Hire Co (London) LD v. Strutt [1954] 1 QB 158.

Dubai Aluminum Co Ltd v Salaam [2002] UKHL 48; [2003] 2 AC 366.

Dunlop v Lambert (1839) 6 Cl & F 600.

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847.

Dutton v. Poole (1677) 2 Lev 210.

E

East West Corp v DKBS 1912 [2003] QB 1509.

Eastern & South African Telegraph Co v Cape Town Tramways Co [1902] AC 381.

Eastgate Group Ltd v Lindsey Morden Group Inc [2001] EWCA Civ 1446; [2001] 2 All ER 1050; [2002] 1 WLR 643.

Effort Shipping Co Ltd v. Linden Management SA (The Giannis NK) [1998] AC 605; [1998] 1 Lloyd's Rep. 337.

El Amria and The El Minia, The [1982] 2 Lloyd's Rep 28.

Elder Dempster, the [1924] AC 522.

ENE Kos I Ltd v Petroleo Brasileiro SA (No 2) [2012] UKSC 17; [2012] 2 AC 164.

Enichem Anic SpA and Others v. Ampelos Shipping Co Ltd (The Delfini) [1988] 2 Lloyd's Rep 599.

Enichem Anic SpA and Others v. Ampelos Shipping Co Ltd (The Delfini) [1990] 1 Lloyd's Rep *252* (CA).

Erg Raffinerie Mediterranee SpA v. Chevron USA Inc [2007] EWCA *Civ* 494; [2007] 2 Lloyd's Rep 542.

Esteve Trading Corp v. Agropec International (The Golden Rio) [1990] 2 Lloyd's Rep 273.

Etablissements Soules et Cie v. Intertradex SA (The Handy Mariner) [1991] 1 Lloyd's Rep 378.

Eurymedon, The [1975] AC 154.

Evans v Nichol (1841) 3 M & G 614.

Evergreen Marine Corp v Aldgate Warehouse (Wholesale) Ltd [2003] 2 Lloyd's Rep 597.

F

Factortame Ltd v Secretary of State for Transport [1990] 2 AC 85.

Farebrother v Ansley (1808) 1 Camp 343; 170 ER 979.

Farrant v Barnes (1862) 11 CB 553; 142 ER 912.

Farrugia v Great Western Ry Co [1947] 2 All ER 565.

Finmoon v Baltic Reefers [2012] 2 Lloyd's Rep 388.

Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper Co Ltd (1940) 68 Ll L Rep 75.

Fitzgerald v Lane [1989] AC 328.

Flanagan and Cloes v Greenbanks Ltd [2013] EWCA Civ 1702.

Fortis Bank SA/NV v. Indian Overseas Bank [2011] EWHC 538; [2011] 2 Lloyd's Rep 190.

Forum Craftsman, The [1985] 1 Lloyd's Rep 291.

Fowler v Knoop (1878) 4 QBD 299.

Fragano v Long (1825) 4 B & C 219.

Friends' Provident Life Office v Hiller Parker May & Rowden [1997] QB 85.

Frost v Aylesbury Dairy Co Ltd [1905] 1 KB 608.

Furmedge v Chester-Le-Street DC [2011] EWHC 1226.

Future Express, The [1992] 2 Lloyd's Rep 79.

G

Gabbiano, The [1940] P 166.

Galoo Ltd v Bright Grahame Murray [1994] 1 WLR 1360.

Gardano and Giampieri v. Greek Petrolium George Manidakis & Co [1962] 1 WLR 40.

Gatoil International Inc v Tradax Petroleum Ltd (The Rio Sun) [1985] 1 Lloyd's Rep 350.

GC Dobell Co v Barber and Garratt [1931] 1 KB 219.

General Feeds Inc v Burnham Shipping Corporation (The Amphion) [1991] 2 Lloyd's Rep 101.

George Wills & Sons Ltd v Thomas Brown & Sons (1922) 12 Ll LR.

Glencore Energy UK Ltd .v Transworld Oil Ltd [2010] EWHC 141 (Comm).

Glencore International AG v MSC Mediterranean Shipping Co [2017] EWCA Civ 365; [2017] 2 Lloyd's Rep 186.

Glencore Grain Rotterdam BV v. Lebanese Organisation for International Commerce [1997] 4 All ER 514.

Glyn Mills Currie & Co v East and West India Dock Co (1882) 7 App Cas 591.

Godley v Perry [1960] 1 WLR 9.

Golden Mariner, The [1989] 2 Lloyd's Rep 390.

Grant v Australian Knitting Mills Ltd [1936] AC 85.

Great Elephant Corp v Trafigura Beheer BV [2013] EWCA Civ 905.

Great Nothern Railway Co v LEP Transport & Depository Ltd [1922] 2 K.B. 742; (1922) 11 Ll. L. Rep. 133.

Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd [1989] QB 71.

Green v. Sichel (1860) 7 CB (NS) 747.

Greenmast Shipping Co SA v. Jean Lion et Cie SA (The Saronikos) [1986] 2 Lloyd's Rep 277.

Greenock Corporation v Caledonian Railway Co [1917] AC 556.

Gulf Interstate Oil Corporation LLC and the Coral Oil Co Ltd v Ant Trade and Transport Ltd of Malta (The Giovanna) [1999] 1 Lloyd's Rep 867.

Gullischen v Stewart Bros (1884) 13 QBD 317.

Gurney v Behrend (1854) 3 El & Bl 622.

H

H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791.

Hadley v Baxendale (1854) 9 Ex 341.

Hain S.S. Co. v Tate & Lyle (1936) 41 Com Cas 350.

Hale v Jennings Brothers [1938] 1 All ER 579.

Hall v Pim (1928) 30 Ll L Rep 159.

Hammond Co v Bussey (1887) 20 QBD 79.

Hansson v Hamel and Horley Ltd [1922] 2 AC 36.

Happy Ranger, The [2002] EWCA Civ 694.

Hardy v Motor Insurers' Bureau [1964] 2 QB 745.

Harlingdon and Leinster v Christopher Hull Fine Arts Ltd [1991] 1 QB 564.

Hart v. Mills (1846) 15 LJ Ex 200.

Heaton v AXA Equity and Law Life Assurance Soc plc [2002] 2 AC 329.

Hedley Byrne v Heller & Partners [1964] AC 465.

Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 AC 31.

Heskell v Continental Express Ltd (1949) 83 L1 L Rep 438; [1950] 1 All ER 1033.

Hindley & Co Ltd v. East Indian Produce Co Ltd [1973] 2 Lloyd's Rep 515.

Hi-Lite Electrical Ltd v Wolseley UK Ltd [2011] EWHC 2153.

Holland Colombo Trading Society Ltd v Segu Mohammed Khaja Alawadeen and Others [1954] 2 Lloyd's Rep 45.

Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12; [2004] 1 AC 715.

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha [1962] 2 QB 26.

Houda The, [1994] 2 Lloyd's Rep 541.

Houlders Bros & Co Ltd v Commisioner of Public Works [1908] AC 276.

Howard v Shepherd (1850) 9 CB 297; 137 ER 907.

Hutchison v Guion (1858) 5 CB 149; 141 ER 59.

I

Ian Stach Ltd v. Baker Bosely Ltd [1958] Lloyd's Rep 127.

Ilyssia Compania Naviera SA v Ahmed Abdul Oawi Bamadoa (The Elli 2) [1985] 1 Lloyd's Rep 107.

Indian Oil Corp Ltd v Vanol Inc [1991] 2 Lloyd's Rep 634.

Ines, The [1995] 2 Lloyd's Rep 144.

International Factors Ltd v Rodriguez [1979] QB 353.

Ireland v Livingston [1871] LR 5 HL 395.

Islamic Investment Co 1SA v Transorientshipping Ltd and Alfred C Toepfer International Gmbh (The Nour) 1 Lloyd's Rep 1.

J

J Raymond Wilson & Co Ltd v. N Scratchard Ltd [1944] 77 Lloyd's Rep 373.

J&J Cunningham Ltd v Robert A Munro Ltd (1922) 28 Com Cas 42.

Jackson v Royal Bank of Scotland [2005] UKHL 3; [2005] 1 WLR 377.

Jackson v Watson & Sons [1909] 2 KB.

Jenkyns v. Brown (1849) 14 QB 496.

John Grimes Partnership Ltd v Gubbins [2013] EWCA Civ 37.

Johnson v. Taylor Bros & Co Ltd [1920] AC 144.

Julia, The [1949] AC 293.

Junior Books v Veitchi [1982] 3 All ER 201; [1983] 1 AC 520.

K

Kapetan Markos (No 2), The [1987] 2 Lloyd's Rep 321.

Kasler and Cohen v Slavouski [1928] 1 KB 78.

KD v Chief Constable of Hampshire [2005] EWHC 2550.

Kpohhraror v Woolwich Building Society [1996] 4 All ER 119.

Kronprinsessan Margareta, The (The Parana) [1921] 1 AC 486.

Kruger & Co Ltd v Moel Tryvan Ship Company Ltd [1907] AC 272.

KSAS Seateam & Co v. Iraq National Oil Co (The Sevonia Team) [1983] 2 Lloyd's Rep 640.

Kum v Wah Tat Bank Ltd [1971] 1 Lloyd's Rep 439.

Kwei Tek Chao v British Traders [1954] 2 QB 459.

L

Landauer & Co v Craven & Speeding Bros [1912] 2 KB 94.

Larrinaga Steamship Co Ltd v The King [1945] AC 246.

Law and Bonar Ltd v. Biritsh American Tobacco Ltd [1916] 115 LT 612.

Leduc & Co v. Ward (1888) LR 20 QBD 475.

Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1983] 1 Lloyd's Rep 203.

Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon) [1986] AC 785; [1986] 2 WLR 902; [1986] 2 Lloyd's Rep 1 (HL).

Lesters Leather and Skin Co Ltd v Home and Overseas Brokers Ltd (1948) 64 TLR 569.

Lexmead (Basingstoke) Ltd v Lewis and Others (*Lambert v Lewis)* [1982] AC 225; [1985] 2 Lloyd's Rep 17.

Lickbarrow v Mason (1787) 2 TR 63; (1793) 126 ER 511.

Lickbarrow v Mason (1794) 5 Term Rep 683.

Losinjska Plovidba v Transco Overseas Ltd (The Orjula) [1995] 2 Lloyd's Rep 395.

Lusograin Comercio Internacional De Cereas Ltd v. Bunge AG [1986] 2 Lloyd's Rep 654.

Lycaon, The [1983] 2 Lloyd's Rep 548.

M

Madden v Quirk [1989] 1 WLR 702.

Maine Shipping Co v. Sutcliffe & Co (1917) 87 LJKB 382.

Magellan Spirit Aps v Vitol Sa (the Magellan Spirit) [2016] EWHC 454.

Mahkutai, The [1996] AC 650.

Manbre Saccharin Co v. Corn Products Co [1919] 1 KB 198.

Marchington v. Vernon (1787) 1 B & P 101.

Margarine Union GmbH v Cambay Prince Co Ltd (The Wear Breeze) [1967] 3 All ER 775; [1967] 2 Lloyd's Rep 315.

Marimpex Mineralol Handelsgesellschaft MBH v Louis Dreyfus Et Cie Mineralol Gmbh [1995] 1 Lloyd's Rep 167.

Marlborough Hill, The [1921] AC 444.

Martyn v. Hind (1776) 2 Cowp 437.

Mash & Murrell Ltd v Joseph I Emanuel Ltd [1961] 1 WLR 862. [1961] 1 Lloyd's Rep 47.

Mash & Murrell Ltd v Joseph I Emanuel Ltd [1961] 2 Lloyd's Rep 326 (CA).

Mayfield v Llewelleyn [1961] 1 WLR 119.

McCheane v Gyles (No 2) [1902] 1 Ch 911.

McKay Massey Harris Proprietary Ltd v. Imperial Chemical Industries of Australia & New Zealand Ltd and United Stevedoring Proprietary Ltd (The Mahia No 2) [1960] 1 Lloyd's Rep 191.

Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona) [1993] 1 Lloyd's Rep 257.

Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona) [1994] 2 Lloyd's Rep 506 (CA).

Merryweather v Nixon (1799) 8 TR 186; 101 ER 1337.

Micada Compania Naviera SA v Texim [1968] 2 Lloyd's Rep 57.

Ministry of Food v Lamport & Holt Line [1952] 2 Lloyd's Rep 371.

Miraflores The, and the Abadesa [1967] 1 AC 826.

Miramar, The [1984] 2 Lloyd's Rep 129.

Miramichi, The (1915) P 71.

Miss Jay Jay, The [1987] 1 Lloyd's Rep 32.

Mitchell Cotts & Co Ltd v Hairco Ltd (1943) 77 Ll L Rep 106.

Mitchell Cotts & Co Ltd v Steel Brothers & Co Ltd [1916] 2 KB 610.

Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd [1943] 2 All ER 552.

Mitchell v. Ede (1840) 1 Ad & El 888.

Mitsui & Co Ltd v. Novorossiysk Shipping Co (The Gudermes) [1993] 1 Lloyd's Rep 311.

Mitsui & Co Ltd and Another v. Flota Mercante Grancolombiana Sa, The Cuidad de Pasto, The Cuidad de Nevia (The Cuidad de Pasto) [1989] 1 All ER 951.

Mobil Shipping and Transportation Co v Shell Eastern Petroleum Ltd (The Mobil Courage) [1987] 2 Lloyd's Rep 655.

Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker [1949] AC 196.

Montague L Meyer Ltd v Kivisto (1930) 142 LT 480.

Morris v C W Martin & Sons [1966] 1 QB 716.

Motis Exports Ltd v Dampskibsselskabet AF 1912, Aktieselskab [2000] Lloyd's Rep 211.

Mowbray v Merryweather [1895] 2 QB 640.

Muirhead v Industrial Tank Specialties Ltd [1986] QB 507; [1986] AC 177.

N

National Mutual Life Association of Australasia Ltd v. Att-Gen for New Zealand [1956] AC 369.

Naviera Mogor SA v Societe Metallurgique de Normandie (the Nogar Marin) [1987] 1 Lloyd's Rep 456.

Nelhams v Sandells Maintenance Ltd [1996] PIQR 52.

Nichols v Marsland (1876) 2 Ex D1.

Nippon Yusen Kaisha v Ramjiban Serowgee [1938] AC 429.

Norsk Bjerningskompagnie A/S v Owners of the Panthanassa (The Panthanassa) [1970] 1 All ER 848; [1970] P 187.

Northern Shipping Co v Deutsche Seereederei GMBH and Others (The Kapitan Sakharov) [2000] 2 Lloyd's Rep 255.

NV Handel My J Smits Import-Export v. English Exporters (London) Ltd [1957] 1 Lloyd's Rep 517.

O

Owners of Cargo Lately Laden on Board the Ardennes v. Owners of the Ardennes (The Ardennes) [1951] 1 KB 55.

P

P&O Nedlloyd v Arab Metals Co [2006] EWHC 2433.

Pace Shipping Co Ltd v Churchgate Nigeria Ltd (the Pace) [2010] 1 Lloyd's Rep 183.

Pacific Molasses Co and United Molasses Trading Co v. Entre Rios Compania Naviera SA (The San Nicholas) [1976] 1 Lloyd's Rep 8.

Parchim, The [1918] AC 157.

Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791.

Patrick v Russo-British Grain Export Co [1927] 2 KB 535.

Payne v British Time Recorder Co Ltd [1921] 2 KB 1.

Payzu Ltd v Saunders [1919] 2 KB 581.

Pepper v Hart [1993] 1 All ER 42.

Perishables Transport Co Ltd v. N Spyropoulos (London) Ltd [1964] 2 Lloyd's Rep 379.

Perry v Kendricks Transport Ltd [1956] 1 WLR 85.

Peters v Prince of Wales Theatre [1943] KB 73.

Petroleo Brasiliero v Mellitus Shipping (The Baltic Flame) [2001] EWCA Civ 418; [2001] 1 All ER 933.

Phoenix Distributors Ltd v LB Clarke (London) Ltd, Cullen Allen & Co (Third Parties) [1967] 1 Lloyd's Rep 518.

Pindell Ltd v Airasia Bhd [2010] EWHC 2516.

Pinnock Bros v Lewis and Peat Ltd [1923] 1 KB 690.

Pioneer Container, The [1994] 2 AC 324.

Pointin v Porrier (1885) 49 JP 199.

Port Jackson Stevedoring Pty v Salmond and Spraggon Pty (the New York Star) [1981] 1 WLR 138.

Port of Brisbane Authority v Santos Ltd [1988] 1 Qd R 645.

President of India v Metcalfe Shipping Company (The Dunelmia) [1969] 2 Lloyd's Rep 476.

Price v. Easton (1883) 4 B & Ad.

Pride of Derby and Derbyshire Angling Assoc Ltd v British Celanese Ltd [1952] 1 All ER 1326.

Priest v Last [1903] 2 KB 148.

Primetrade AG v Ythan Ltd (The Ythan) [2005] EWHC 2399; [2006] 1 All ER 367.

PT Putrabali Adyamulia v Societe Est Epices Same v Enrico Webb James Snc (*The Intan 6V 360A SN)* [2003] 2 Lloyd's Rep 700.

Pyrene Co Ltd v Scindia Navigation Co [1954] 2 QB 402.

Q

Quinn v Burch Bros (Builders) Ltd [1966] 2 QB 370.

R

R Pagnan & Fratelli v NGJ Schourlen NV (The Filipinas I) [1973] 1 Lloyd's Rep 349.

R & H Hall Ltd v WH Pim Junr & Co Ltd (1928) 33 Com Cas 324; (1928) 30 Ll L Rep 159.

RA Lister Co Ltd v EG Thomson (Shipping) Ltd [1987] 1 WLR 1614.

Rafaela S, The [2005] 2 AC 423.

Rainham Chemical Works Ltd v Belvedere Fish Guano Ltd [1921] 2 AC 465.

Randolph v Tuck [1962] 1 QB 175.

Re Moore & Co and Landauer & Co [1921] 2 KB 519.

Re Securitibank Ltd [1986] 2 NZLR 280.

Read v J Lyons & Company Ltd [1947] AC 156.

Reardon Smith Line Ltd v Australian Wheat Board [1956] AC 266.

Reardon Smith Line v Hansen-Tangen (The Diana Prosperity) [1976] 1 WLR 989.

Red Sea Tankers Ltd v Papachristides (The Hellespont Ardent) [1997] 2 Lloyd's Rep 547.

Rederi Aktiebolaget Transatlantic v Board of Trade (1924) 20 Ll L Rep 241.

Resource America International Ltd v Platt Site Services Ltd [2004] EWCA Civ 665.

Rewia, The [1991] 2 Lloyd's Rep 69.

Rickards v Lothian [1913] AC 263.

Rodocanachi v Milburn (1886) 18 QBD 67.

Rogers v Kennay (1846) 9 QB 594.

Ronex Properties Ltd v John Laing Construction Ltd [1983] QB 398.

Ross T Smyth & Co Ltd v TD Bailey, Son & Co [1940] 67 Lloyd's Rep 147.

Royal Brompton NHS Trust v Hammond [2002] UKHL 14; [2002] 1 WLR 1397.

Royal Greek Government v Minister of Transport (The Ann Stathatos) (1949) Ll L Rep 228.

Ruck v Hatfield (1822) 5B & Ald 632; 106 ER 1321.

Rudolph A Oetker v IFA Internationale Frachtagentur AG (The Almak) [1985] 1 Lloyd's Rep 557.

Ryan v Fildes [1938] 3 All ER 517.

Ryans v Nix (1839) 4 M & W 775.

Rylands v Fletcher (1863) LR 3 HL 330.

S

Saffron, The v. Societe Miniere Cafrika (1958) 32 ALJR 286.

Saipem SpA and Conoco (UK) Ltd v Dredging VO2 BV and Geosite Surevys Ltd [1993] 2 Lloyd's Rep 315.

Saipol SA v Inerco Trade SA [2014] EWHC 2211.

Sanders v Maclean (1883) 11 QBD 327.

Sanders v. Vanzeller (1843) 4 QB 260.

Satanita, The [1895] P 248.

Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase) [1981] 1 Lloyd's Rep 175.

Scaliaris v E Ofverberg & Co (1921) 37 TLR 307.

Scott v Foley, Aikman & Co (1899) 16 TLR 55.

Scotson v. Pegg (1861) 6 H & N 295.

Scottish & Newcastle International Ltd v Othon Ghalanos Ltd [2008] UKHL 11; [2008] 1 Lloyd's Rep 462.

Scruttons Ltd v Midland Silicones Ltd [1962] AC 446.

Semtex Ltd v Gladstone [1954] 1 WLR 945.

Seven Pioneer,The [2001] 2 Lloyd's Rep 57.

Sewell v Burdick (1884) *10* App Cas 74.

Shah v Gale [2005] EWHC 1087.

Shaw Savill & Albion Co Ltd v Electric Reduction Co of Canada Ltd and Imperial Chemical Industries of Australia and New Zealand Ltd (The Mahia) [1955] 1 Lloyd's Rep 264.

Shiffman v Order of the Hospital of St John Hospital [1936] 1 All ER 557.

Shipton Anderson & Co v. Weston (John) & Co [1922] 10 Lloyd's Rep 762.

Sig Bergesen Dy & Co and Others v Mobil Shipping and Transportation Co (The Berge Sund) [1993] 2 Lloyd's Rep 453.

Sime Darby & Co Ltd v Everitt & Co (1923) 14 Ll LR 120.

Siat di dal Ferro v Tradax Overseas SA [1978] 2 Lloyd's Rep 470.

Sincerity S, The [1996] 2 Lloyd's Rep 503.

Smith & Snipes Hall Farm LD v. River Douglas Catchment Board [1949] 2 KB 500.

Smurthwaite v Wilkins (1862) 11 CB (NS) 842.

Smyth (Ross T) v Bailey (TD) Sons & Co [1940] 3 All ER 60.

Societe Generale London Branch v Geys [2012] UKSC 63; [2013] 1 AC 523.

Societe Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871.

Solholt, the [1983] 1 Lloyd's Rep 605.

Sonicare International Ltd v East Anglia Freight Terminal Ltd [1997] 2 Lloyd's Rep 48.

Soon Hua Seng Co Ltd v Glencore Grain Co Ltd [1996] 1 Lloyd's Rep 398.

Soproma SpA v Marine & Animal By-Products Corporation [1966] 1 Lloyd's Rep 367.

Sormovskiy, The 3068 [1994] 2 Lloyd's Rep 266.

Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718.

Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada) [1987] 1 Lloyd's Rep 1.

Splosna Pilobna of Piran v Agrelak Steamship Co (The Bela Krajina) [1975] 1 Lloyd's Rep139.

Square v Model Farm Dairies Ltd [1939] 2 KB 365.

Standard Chartered Bank v Dorchester LNG Ltd (the Erin Schulte) [2014] EWCA Civ 1382.

Steven v. Bromley & Son [1919] 2 KB 722.

Stettin, The (1889) 14 PD 142.

Stindt v. Roberts (1848) 17 LJ QB 166.

Stock v. Inglis (1884) 12 QBD 564.

Stock v. Inglis (1885) 10 App Cas 263(HL).

Sumanu Natural Resources Ltd and SJM Gems International Ltd v Mediterranean Shipping Company SA [2014] EWHC 2829 (Comm).

Sunrise Maritime Inc v. Uvisco Ltd (The Hector) [1998] 2 Lloyd's Rep 287.

Supershield Ltd v Siemens Building Technologies FE Ltd [2010] EWCA Civ 7; [2010] 1 CLC 241.

Sutherland v. Allhusen (1866) 14 LT 666.

Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd [2010] EWHC 542; [2010] 1 CLC 470.

Sykes v Midland Bank Executor and Trustee Co Ltd [1971] 1 QB 113.

Sze Hai Tong Ltd v Rambler Cycle Co Ltd [1959] AC 576.

T

Texas Instruments Ltd v. Nason (Europe) Ltd [1991] 1 Lloyd's Rep. 146.

Teheran-Europe Co v. Belton [1968] 2 QB 53**.**

Thai Airways International Public Co Ltd v K I Holdings Co Ltd [2015] EWHC 1250.

The Owners of Cargo Lately Laden on Board the Ship Aramis v. Aramis Maritime Corp (The Aramis) [1989] 1 Lloyd's Rep 213.

The Union Industrielle et Maritime v. Petrosul International (The Roseline) [1987] 1 Lloyd's Rep 18.

Thermo Engineers Ltd v. Ferrymasters Ltd [1981] 1 Lloyd's Rep 200.

Thomas Saunders Partnership v Harvey (1989) 30 Con LR 103.

Thomas Young and Sons Ltd v Hobson and Partners (1949) 65 TLR 365.

Thompson v Dominy (1845) 14 M & W 403; 153 ER 532.

Thorsa, The [1916] P 257.

TICC Ltd v. Cosco (UK) Ltd [2002] CLC 347.

Toepfer v Continental Grain Co [1974] 1 Lloyd's Rep 11.

Toepfer v Warinco AG [1978] 2 Lloyd's Rep 569.

Total Transport Corp v Arcadia Petroleum Ltd (the Eurus) [1996] CLC 1084.

Tradax Export SA v European Grain & Shipping Ltd [1983] 2 Lloyd's Rep 100.

Tradax Export SA v Goldschmidt SA [1977] 2 Lloyd's Rep 604.

Trading Society Kwik-Hoo-Tong v Royal Commission on Sugar Supply (1923) 16 Ll LR 343.

Trafigura Beheer BV v. Mediterranean Shipping Co SA (The MSC Amsterdam) [2007] EWHC 944.

Transco v Stockport Metropolitan Borough Council [2004] 2 AC 1.

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2008] UKHL 48.

Transoceanica v Shipton [1923] 1 KB 31.

Tregelles v Sewell [1862] 7 *H & N* 574.

Triad Shipping Co v Stellar Chartering & Brokerage Inc (the Island Archon) [1994] 2 Lloyd's Rep 227.

Tricerri Ltd v. Crosfields and Calshop Ltd [1958] 1 Lloyd's Rep 236.

TRM Copy Centres v Lanwall [2009] 1 WLR 1375.

Tromp, the [1921] P 337.

Trucks & Spares Ltd v Maritime Agencies Ltd [1951] 2 All ER 982.

Tsakiroglou & Co v Noblee Thorl GmbH [1961] 2 All ER 179; [1962] AC 93.

TW Ranson Ltd v Manufacture d'Engrais et de Produits Industriels Antwerp (1922) 13 Ll L Rep 205.

Tweddle v. Atkinson (1861) 1 B & S 393.

U

UCO Bank v Golden Shore [2005] 2 SLR 735 (Singapore).

Ultimares Corporation v Touche (1931) 174 NE 441.

V

Vantol (JH) Ltd v. Fairclough Dodd & Jones Ltd [1955] WLR 642.

Vargas Pena Apezteguia y Cia v Peter Cremer BmbH [1987] 1 Lloyd's Rep 394.

Victoria Laundry v Newman Industries [1949] 2 KB 528.

Vitol SA v Phibro Energy AG (The Mathraki) [1990] 2 Lloyd's Rep 84.

Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis) [1988] 1 Lloyd's Rep 352.

W

Wackerbarth v. Masson [1812] 2 Camp 270.

Weld-Blundell v Stephens [1920] AC 956.

West v Buckinghamshire CC [1985] RTR 306.

West v Bristol Tramways Co [1908] 2 KB 14.

White & Co v. Furness, Withy & Co Ltd [1895] AC 40.

White v Jones [1995] 2 AC 207.

Williams v East India Co (1802) 3 East 192; 102 ER 571.

Wilson v Milner (1810) 2 Camp 452; 170 ER 1215.

Wimble v. Rosenberg & Sons [1913] 3 KB 743.

Worlock v SAWS [1982] 22 BLR 66.

Wren v Holt [1903] 1 KB 610.

Y

Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37; [2010] QB 1.

Yound v. Moeller (1855) 5 E & B 755.