

TRANSFERRING RIGHTS OF SUIT UNDER BILLS OF LADING: THE CONFLICT OF LAWS IMPLICATIONS

Nick Francis*

1. Introduction

In the context of international trade, the bill of lading is an extremely important document. It is primarily important in relation to a contract for carriage of goods by sea; but can also be relevant to the contract for the international sale of goods, the international financing of trade and transport insurance. While the issue of substantive rights under bills of lading has been the focus of much legislative, judicial and academic consideration over time, the issue of the transfer of rights of suit under a bill of lading has come into particular focus more recently in the New Zealand and the rest of the Commonwealth. This follows the substantial changes made to the way rights of suit were transferred by the *Carriage of Goods by Sea Act 1992* (COGSA 92) in England. In New Zealand this led directly to the enactment of the *Mercantile Law Amendment Act 1994* (NZ) (MLAA 94), adopting a virtually identical approach to that in England.

There has been, however, relatively little attention focussed upon what should be considered a very important part of this legislation, that being the implications under conflict of laws theory of addressing the problem at a national level rather than at an international level. An example of this in New Zealand is the decision of the High Court at Auckland in *Starlink Navigation Ltd v The Ship "Seven Pioneer"*.¹ The issue before the court, in that case, was whether the plaintiff could bring a claim in (either tort or contract) against the carrier of goods that were damaged whilst being transported. This would seem to be archetypal example of a situation where the court would need to apply conflict of laws theory to determine whether the transfer was governed by the New Zealand system for transferring right of suit or by another legal system. Unfortunately this approach was not taken, and the case was resolved without any discussion at all of the New Zealand system of transferring rights or whether these should have applied, thereby losing a valuable chance for judicial consideration of the issue.

This article will attempt to address this lack of consideration by examining the conflict of laws implications of the transfer of rights of suit under bills of lading. It will consider first the development of the bill of lading, including an examination of the reasons why transferability is so important to the bill as a commercial instrument, the source of the problems that inhibit its transfer and finally the old and new methods used to overcome these problems. This article will continue by considering the application of conflict of laws theory to the transfer of rights under a bill of lading, assessing whether the MLAA 94 should be considered a mandatory statute and then examining the possible ways of characterising the issue and the implications that each of these would have. In the final section I will draw on the observations from the previous sections to offer some arguments in favour of an internationally unified approach toward the transfer of rights under a bill of lading.

* Solicitor, Chapman Tripp, Auckland. This article is based on my LLB (Hons) dissertation, The University of Auckland, 2004. I would like to thank and acknowledge Paul Myburgh and Elsabe Schoeman from the University of Auckland for their invaluable guidance, feedback and support throughout the process of writing my dissertation.

¹ (2001) 16 PRNZ 55 (*The Seven Pioneer*).

2. The Functional Development of the Law Relating to Bills of Lading

2.1 Bills of Lading and their Functions

While there is no absolute definition of a bill of lading, it can be described as a document issued by or on behalf of the carrier of goods by sea to the person with whom there is a contract for the carriage of those goods.² At the most basic level it contains promises by the carrier to carry the goods to the agreed destination, subject to its terms, and deliver them there according to the instructions of the shipper. It also contains a promise by the shipper to pay the charges under the contract, known as freight.³

The functions of a bill of lading are traditionally recognised as being threefold. First, a bill of lading is a receipt for the goods shipped by the carrier. Second, it acts as a document of title to the goods. Finally, it is a document containing or evidencing the contract of carriage.⁴ While these are the traditional categories into which a bill of lading can be broken down, it is important to note that bills of lading perform a broader legal and commercial function: as well as being a receipt, evidence of the contract of carriage and a document of title to which goods relate, it also provides a mechanism for transferring rights and imposing liabilities arising under the contract to persons who were not originally parties to the contract.⁵ It is important to note that while there is a close link between the function as a document of title and as a mechanism to transfer rights these are distinct functions. The fact that a bill of lading can be a document of title without being able to transfer rights and that it is not a document of title merely because it is capable of transferring contractual rights is a distinction that can be traced back to the very foundations of the bill of lading, as it is presently known.⁶ Each of the three functions outlined will be examined in turn.

2.2 The Bill of Lading as a Receipt

2.2.1 Historical Development of the Receipt Function

The necessity of the receipt function of a bill of lading can be traced back to the growth in trade between the ports of the Mediterranean after the 11th century, which led to the need for a record of goods that were shipped.⁷ Originally this could be done by the ship's register, however, by the 14th century, when merchants were no longer constantly travelling with their goods, carriers were using a document called an on-board record as a receipt for goods shipped, with a copy being sent by a merchant to advise the person who would receive the goods about their nature and use.⁸ Originally there was no need to prove the consignee's entitlement to the goods because such entitlement was recorded in the carrier's register before the voyage began. However, as international trade began to develop the possibility of goods being traded at sea resulted in the need for a document that could be transferred, by the shipper at least, and could evidence an entitlement to receive the cargo once it had reached its destination.⁹ There is no evidence bills of lading were used in this way in 14th century and it was not until the mid 16th century that transferability started to become an issue.¹⁰ In this way, the modern bill of lading began life as a simple bailment receipt that was required to obtain delivery of the goods once they reached their destination,¹¹ rather like a modern sea waybill.

² Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* (1st ed, 2001), 1 (*Carver on BOLs*).

³ *Ibid.*

⁴ *Carver on BOLs* above n 2; John F Wilson, *Carriage of Goods by Sea* (4th ed, 2001) 121-122 (*Wilson*).

⁵ *Carver on BOLs* above n 2, 1.

⁶ See *Carver on BOLs* above n 2, 1, particularly fn 1 and 2 which give examples to support this proposition.

⁷ MD Bools *The Bill of Lading: A document of title to goods* (1997), 1 (*Bools*).

⁸ *Bools* above n 7, 3.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Wilson* above n 4, 122.

2.2.2 The 'Modern' Receipt Function

A bill of lading will normally contain statements as to the quantity and description of the goods shipped, along with the condition in which they were received by the carrier.¹² These representations of fact are commercially important due to the fact that a bill of lading is prima facie evidence of the facts stated in it, so that it provides evidence of the condition of the goods and the date of shipment.¹³ The common law position is that since the bill of lading is only prima facie evidence of any statements of fact, a carrier will not be liable for damage to goods, stated in a bill of lading to have been shipped in good condition, if the carrier is able to prove that the goods were damaged at the time of shipment.¹⁴ This rule only applies between the carrier and the shipper, whereas against the transferee of the bill of lading the carrier is prevented from denying the truth of the statements in the bill of lading, with a transferee able to rely upon the doctrine of estoppel at common law. However, problems arose in the situation where there was no authority for the bill of lading to be signed, such as where goods had not been put onboard, and where the rule in *Grant v Norway*,¹⁵ that the master of a ship had no authority to bind the shipowner to a statement in the bill of lading, operated to prevent such an estoppel argument and to prevent contractual liability as between the shipper and the carrier.¹⁶ Since this problem could not be adequately overcome within the common law there have been various legislative modifications to attempt to resolve the issue.

The earliest of these was the *Bills of Lading Act 1855* in England, which said that a bill of lading representing goods shipped was, in the hands of a transferee for valuable consideration, 'conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped'.¹⁷ This has now been replaced by the COGSA 92 in England but prior to this, the Hague-Visby Rules also attempted to resolve this problem at an international level. Where a contract of carriage is covered by the Hague-Visby Rules, Article III.3 requires the carrier to issue a bill of lading to the shipper on demand. Article III.4 then provides that 'such bill of lading shall be prima facie evidence of the receipt by the carrier of the goods therein described'¹⁸ reflecting the common law position. However, this Article goes on to say that 'proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.'¹⁹ This approach differs from the common law in that there is no requirement of valuable consideration, and it likewise appears to exclude the principle in *Grant v Norway*.²⁰ However, since not all bills of lading are covered by the Hague-Visby Rules, it was still possible for the rule in *Grant v Norway* to apply in certain situations.²¹

In order to remedy this and to remove the uncertainty inherent under the rule in *Grant v Norway*, England passed the COGSA 92. The carrier can now be liable to the transferee of the bill of lading and the problem of the authority of the person signing the bill of lading has been removed. This was done by section 4 of that Act, which made the bill of lading conclusive evidence against the carrier in favour of any lawful holder of that bill. The relationship between section 4 and the Hague-Visby Rules is of some importance. Since the COGSA 92 is a domestic statute of England, its effect is presumptively restricted to bills of lading governed by English law. Further, section 5(5) of COGSA 92 provides that 'the preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (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*.' This regulation of the relationship between the Hague-Visby Rules and the COGSA 92 demonstrates that, where the document could be governed by either, the Rules should decide the outcome rather than section 4. In New Zealand the situation as regards the rule in *Grant v Norway* is quite different,

¹² Ibid.

¹³ *Carver on BOLs* above n 2, 15.

¹⁴ Ibid.

¹⁵ (1851) 10 CB 665.

¹⁶ *Wilson* above n 4, 125. See also *Carver on BOLs* above n 2, 16-27 for a discussion of the common law position and some of the problems in respect of both the shipper and transferees of the bill of lading.

¹⁷ Section 3, *Bills of Lading Act 1855* (UK) (now repealed).

¹⁸ *Carver on BOLs* above n 2, 29.

¹⁹ Ibid.

²⁰ *Wilson* above n 4, 128; Stewart C. Boyd, Andrew S. Burrows and David Foxton *Scrutton on charterparties and bills of lading* (20th ed, 1996) 433 (*Scrutton*).

²¹ *Carver on BOLs* above n 2, 30-31.

as the MLAA 94 omitted to include a provision equivalent to s 4 COGSA 92. Since it is not adequately dealt with by the Hague-Visby Rules or by s 15 of the *Mercantile Law Act 1908* (NZ)(which creates a statutory estoppel against the master or other person signing the bill of lading, rather than the carrier) it is still possible for the rule in *Grant v Norway* to apply in New Zealand.

Having considered the receipt function of the bill of lading, it is now necessary to consider the other two functions of a bill of lading, as a document of title to the goods and then as evidence of the contract of carriage.

2.3 The Bill of Lading as a Document of Title to the Goods

2.3.1 Historical Development of the Bill of Lading as a Document of Title

The development of the bill of lading as a document of title to the goods that it represents arose from the changing manner of international trade discussed briefly above. During the second quarter of the 16th century, when merchants had stopped travelling with their goods, and the possibility of goods being shipped before the ultimate recipient was known, it became necessary for the bill of lading to bear some sort of transferability.²² There were two different kinds of transferability during this period: either, to shipper and their assigns, or to a third party and their assigns.²³ The change in trading practice so that the identity of the person to whom the goods were finally destined was unknown is credited as the likely reason for this development. This also give rise to the need for the bill of lading to evidence an entitlement to the goods, as neither the bill, nor the ships register indicated the person to whom the carrier should deliver.²⁴

There is some suggestion from the wording of bills of lading that during this period they gave the holder a right against the carrier, an important step in development of document towards what it is today. However, it is uncertain where this right came from, as arguably it does not come from an agreement with the carrier. The reasons for this are twofold. First, merchants were unlikely to consider the origin of the right, and second because bills of lading were not yet regarded as embodying contract of carriage and most did not contain provision for the contract.²⁵ The issue of the document of title function of the bill of lading was settled in the well-known case of *Lickbarrow v Mason*.²⁶ In this case the court recognised a custom of merchants that the transfer of a bill of lading by which goods were stated to have been ‘shipped by any person or persons to be delivered to order or assigns’²⁷ enabled the property in the goods to be transferred to the transferee of the bill.²⁸ This approach makes the bill of lading a document of title to goods, being a document relating to goods, which when transferred, operates as a transfer of the property in the goods.²⁹ The decision in *Lickbarrow v Mason* is also often treated as deciding that bills of lading were either negotiable or quasi-negotiable, although an examination of the decision reveals that it would be difficult to justify developing such a broad principle.³⁰ The proprietary function of the bill of lading that was evidenced in *Lickbarrow v Mason*³¹ was assimilated into English common law due to the developing needs of international trade. Bearing these origins in mind, it is possible to look at the modern position of a bill of lading.

²² *Bools* above n 7, 4.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.* There is some disagreement on this point. *Bools* cites William Porter Bennett, *The History and Present Position of the Bill of Lading* (1914) as supporting the notion that the bill of lading was used as a contractual document as early as 14th century. This text was not available to me at the time of writing this article.

²⁶ (1794) 5 T.R. 683 (HoL); 101 ER 380

²⁷ *Ibid.*, 685.

²⁸ *Carver on BOLs* above n 2, 239.

²⁹ *Ibid.*

³⁰ See *Bools* above n 7, 8-19 for a discussion of the facts of the case and its progression through the courts. *Bools* concludes that the case does not support such a broad interpretation, a conclusion that appears fairly sound.

³¹ Above n 26.

2.3.2 The 'Modern' Document of Title Function³²

The bill of lading acts as a symbol of the goods, so that the right to possession of the goods transfers to the transferee with the bill of lading.³³ This arises necessarily from the nature of sea transport, which is 'normally lengthy, and invariably slow'.³⁴

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 endorsement and delivery of the bill of lading operates as symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods....It is a key which in the hands of a rightful owner is intended to unlock the door of a warehouse, floating or fixed, in which the goods may chance to be.³⁵

This neatly summarises the reason and manner in which a bill of lading functions as a document of title. Not all bills of lading function as a document of title, only those that are drafted as 'order' bills, meaning those that instruct a carrier to deliver goods to a named consignee or his 'order or assigns'.³⁶ While a bill of lading that only makes provision for delivery to a named consignee is a 'straight' bill and was generally considered to lack the necessary negotiable quality to qualify as a document of title,³⁷ the recent decision of the Court of Appeal in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)*³⁸ has thrown this into some doubt by holding that a straight bill of lading was a document of title.³⁹ This one aspect of negotiability, being that the bill of lading is transferable by indorsement, has led to a description of bills of lading as 'negotiable'. However, as far back as *Lickbarrow v Mason* the court held that negotiability was not referred to in the same way as a bill of exchange but rather only in relation to the passing of property in the goods. There are two legal attributes that negotiable instruments, such as bills of exchange, possess which bills of lading lack. The first is that the transferor of the bill of lading can give no better title than that which she possesses, meaning the transferee takes subject to any defects in the transferor's title.⁴⁰ Second, the rules governing consideration for the transfer of a bill of exchange do not apply to a bill of lading.⁴¹ The general interpretation of the commercial description of a bill of lading as 'negotiable' is therefore taken as meaning it is transferable, and distinguishing it from a 'straight' bill, outlined above.

The three purposes for which possession of a 'negotiable' bill of lading may be regarded as equivalent to possession of the goods to which it relates are: first, the holder of such a bill can claim delivery of the goods when they are discharged; second, the holder can transfer the ownership of the goods during transit by an indorsement of the bill; third, the bill can be used as security for a debt.⁴² The development of the bill of lading as a document of title in this manner has been very successful, so that it has developed to fulfil a tripartite role connecting the contract of carriage, the sale of goods in transit and the raising of financial credit.⁴³ It is important to remember that the primary relevance of the bill of lading as a document of title is in relation to the contract of carriage, and that as regards the carrier, the other two functions are essentially 'parasitic'.⁴⁴ The linking function performed by the bill of lading must be kept in mind while turning to consider the function of the bill of lading as evidence of the contract of carriage.

³² Following the lead of The Law Commission, 'Rights of Suit in Respect of Carriage of Goods by Sea Report No. 196' (1991) (*Rights of Suit*) this article will adopt the spelling "indorse" and "indorsement" rather than "endorsee" and "endorsement".

³³ Raoul Colinvaux, (ed) *Carver's Carriage by Sea* (13th ed, 1982), 1113 (Carver).

³⁴ *Wilson* above n 4, 137.

³⁵ *Carver* above n 33, 1113 quoting Bowen L.J. in *Sanders v Maclean* (1883) 11 QBD 327, 341.

³⁶ *Wilson* above n 4, 137.

³⁷ *Carver* above n 33, 1115; *Carver on BOLs* above n 2, 249; *Wilson* above n 7, 137.

³⁸ [2003] EWCA Civ 556, [2003] 3 All ER 369, [2005] UKHL 11, [2005] 2 All ER 86.

³⁹ *Ibid*, [145], [146], [159].

⁴⁰ *Carver on BOLs* above n 2, 249; *Wilson* above n 4, 138.

⁴¹ *Carver on BOLs* above n 2, 249.

⁴² *Wilson* above n 4, 138.

⁴³ *Ibid*. *Wilson* notes that important thought the multiplicity of functions is, it has been criticized as sometimes being incompatible, particularly by shipowners, who argue that it unfairly burdens them by involving them in parts of the transaction in which they have no concern.

⁴⁴ *Wilson* above n 4, 141.

2.4 The Bill of Lading as Evidence of the Contract of Carriage

2.4.1 The Historical Development of the Bill of Lading as Evidence of the Contract of Carriage

Early bills of lading in the 14th century provide no real evidence that they fulfilled any sort of contractual function. Indeed, where there were only a small number of cargoes per ship, there would have been no need for the bill of lading to usurp what was essentially the function of the charterparty.⁴⁵ As international trade developed during the course of 16th century, however, and the difficulty of having all shippers as party to a charterparty increased, the contract function of the bill of lading began to develop also.⁴⁶

It is possible to distinguish two types of bills of lading during this transitional period. The first, continuing in the manner of old, contained no independent terms, and made reference to the existing charterparty.⁴⁷ This type of a bill could be interpreted in either of two ways: either as incorporating the terms of the charterparty into the bill of lading contract; or so that the carriage was to be governed by the charterparty alone. It would appear to be a rather strained interpretation that the bill of lading should so completely overwhelm the charterparty, which leads to commentators to favour the second interpretation.⁴⁸ Another type of bill of lading existed at this time, however, with no reference to another agreement and containing terms that governed the shipment, therefore implying that it alone would govern transaction.⁴⁹ The increasing number of cargoes per vessel meant that a charterparty with all shippers was impractical and hence contract of carriage began to be embodied in bill of lading. However, since the number of cases without a charterparty was small, the bill of lading was not usually seen as performing a contractual function because a charterparty usually existed to govern the relationship between the shipper and the carrier.⁵⁰ The practise of issuing bills of lading without a charterparty began to emerge as natural progression when the bills of lading began to be drawn up before the person to whom cargo was to be delivered was known. This worked together with the custom of merchants that entitled the holder to delivery, so that there was an obligation on the carrier to compensate if it failed to deliver. This obligation was separate from the contract so was not contractual in nature.⁵¹ Thus the function of the bill of lading as containing or evidencing the contract began during 15th and 16th centuries, but did not become prevalent until later.

2.4.2 The 'Modern' Function of the Bill of Lading as Evidence of the Contract of Carriage

The generally accepted view of the bill of lading, as regards its function relating to the contract of carriage, is that between the carrier and the shipper it does not fully 'contain' the contract of carriage but rather provides evidence of it.⁵² There are two features of law that explain why the bill of lading is only evidence of the contract of carriage and its terms: in the majority of cases, the contract of carriage is made before the bill of lading is signed,⁵³ and there is no requirement of a written record to conclude such a contract.⁵⁴ In addition, the historical commercial practice of carriers as to the manner in which cargo was accepted has changed over time, and will most likely continue to do so,

⁴⁵ *Bools* above n 7, 5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 4.

⁴⁸ *Ibid.*, 5.

⁴⁹ *Ibid.* See particularly n 22, where several examples of such bills of lading from the mid 16th century are cited.

⁵⁰ *Ibid.*, 6-8 for a discussion of the 17th century works that support these ideas.

⁵¹ *Ibid.*, 8.

⁵² *Carver* above n 33, 59; *Carver on BOLs* above n 2, 61; Charles Debattista *The Sale of Goods Carried by Sea* (2nd ed, 1998) 135 (*Debattista*); *Wilson* above n 4, 134.

⁵³ *Carver on BOLs* above n 2, 61.

⁵⁴ *Debattista* above n 52, 135.

further reinforcing the informal manner of formation of the contract.⁵⁵ An example of a carrier who would load any goods with which it is presented, or notified, illustrates the way the inference of a carriage of contract could be taken from the conduct of the shipper and the carrier by, respectively, presenting and loading the goods.⁵⁶ The more common present practice is for shipping to be booked in advance, so that the carriage contract comes into existence even earlier, and there is always an 'antecedent contract' in terms of a document such as a booking note.⁵⁷ The commercial practice as to when the bill of lading is issued has also changed over time, with the result that the time between the formation of the contract of carriage and the issue of the bill of lading has lengthened.⁵⁸

Under the Hague-Visby Rules, as between a transferee of the bill of lading and the carrier, the bill of lading is the contract, in the sense that it alone contains the contractual terms between the parties, to the exclusion of any terms agreed between the shipper and the carrier outside the bill of lading.⁵⁹ The reason for this is that the buyer only has notice of the terms recorded in the bill of lading, and to seek to enforce any other terms would be a violation of the general principle of contract law that a party is only bound by those terms of which he has notice at the time the contract is concluded.⁶⁰

Having briefly examined the three functions of a bill of lading, it is now possible to conduct a more in depth assessment of the problem of transferring rights of suit under a bill, followed by an examination of the methods used to overcome this difficulty.

3. The General Problem of Transferring Rights of Suit under a Bill of Lading

The problem that arises in relation to transferring rights of suit under a bill of lading is inherent in nature of the transaction. In a typical international sales transaction the goods are shipped by a shipper (who is often the seller of the goods) on terms that they are to be delivered at a destination by the carrier, not to the shipper, but to a third person, who is the consignee.⁶¹ The primary problem occurs where the goods are sold while on board, which is an extremely common feature of modern international trade, particularly with bulk cargoes.⁶² The goods can be resold many times before the arrival at their final destination (in a chain contract)⁶³ so that the person to whom delivery will be made is not able to be ascertained at the time the contract of carriage is made. Further complications arise where the person to whom delivery is made is not the buyer but for example a financier such as a banker, who had provided finance against a pledge of the goods.⁶⁴

The main reason for this difficulty is privity of contract.⁶⁵ In the most straightforward case where shipper (A) contracts with carrier (B) to carry/deliver goods to consignee (C), C can not sue A on contract of carriage, nor can A sue C, as C is not a party to that contract.⁶⁶ However, privity of contract is not the only problem, as the notion that transferee of a bill of lading could not sue the carrier developed before the concept of privity was finally recognised.⁶⁷ A further reason that privity alone is not the source of the problem is that countries which do recognise the rights of third party beneficiaries under a contract, such as the United States and New Zealand via the *Contracts*

⁵⁵ Carver on BOLs above n 2, 61.

⁵⁶ Ibid.

⁵⁷ Ibid, 62. See n 11 that provides an extensive list of case law to support the idea of an antecedent contract that is later formalized via the bill of lading.

⁵⁸ Ibid, 63.

⁵⁹ Debattista above n 52, 136.

⁶⁰ Ibid.

⁶¹ Carver on BOLs above n 2, 151.

⁶² Paul Todd, *Cases and Materials on International Trade Law* (1st ed, 2003) 16-17 (Todd).

⁶³ Ibid.

⁶⁴ Carver on BOLs above n 2, 151.

⁶⁵ Ibid which cites the decision in *Effort Shipping Co. Ltd v Linden Management S.A. (The Giannis K)* [1998] AC 605, 616 to support this proposition.

⁶⁶ Ibid.

⁶⁷ Ibid.

(*Privity*) Act 1982 (NZ), face the same problems.⁶⁸ One possible reason why the law was not advanced to apply to situations under bills of lading is that it is difficult to regard the remote transferees of bills of lading as third parties upon whom the carrier and shipper intended to confer legal benefits.⁶⁹ Another is the relatively limited right of consignees of a bill to redirect the goods, while a third is that bills of lading are often concerned with transferring both the rights and the liabilities, whereas with regard to third party beneficiaries the law is normally concerned only with rights.⁷⁰

Some exceptions exist to the doctrine of privity, which are relevant to the transfer of rights under the bill of lading. The first of these exceptions is agency, where the shipper makes the contract with the carrier as agent for the consignee, the consignee thereby acquiring rights as a party to the contract. However, this explanation does not apply to most international trade situations.⁷¹ The second exception is assignment. The benefit of a contract of carriage is a chose in action. However, because the common law generally did not give effect to assignment of a chose in action, the transfer of a bill of lading did not transfer the shipper's contractual rights against carrier to the transferee.⁷² It was possible to assign a chose in action in equity, or once statutory provision made for it. However, statutory and equitable assignment did not and does not satisfactorily solve the problem we are dealing with, nor does it account for the passing of liabilities under the contract, which is a major part of the transfer of a bill of lading.⁷³

For these reasons, the acquisition of rights and imposition of liabilities under a bill of lading has traditionally been governed by statute. The previous method of transferring rights under the *Mercantile Law Act 1908* (NZ) in New Zealand, and the *Bills of Lading Act 1855* in England, was linked to transfer of property, while transfer of liabilities was linked to, and occurred at same time as, the acquisition of contractual rights. The new scheme, respectively under the MLAA 94, and the COGSA 92 is outlined below, and is followed by a discussion of the problems that this solution poses in terms of conflict of laws.

4. The Old Statutory Regime for Transferring Rights of Suit

4.1 The *Bills of Lading Act 1855*

As discussed above, at common law, the doctrine of privity, combined with the unique features of the bill of lading, meant that the contract of carriage was not transferred by either a transfer of the bill of lading or of the passage of the property in the goods.⁷⁴ This raised obvious problems for parties dealing with bills of lading outside of the contractual relationship, such as financiers and indorsees, and eroded the value of a bill of lading as a commercial instrument. For a bill of lading to function properly as a freely negotiable document it was, and still is, essential for a purchaser who takes a bill of lading to acquire contractual rights against the carrier, particularly in the event of damage to or loss of cargo at sea. Likewise, a bank or other lender that took a bill of lading as security would find the value of that bill extremely reduced if it had no contractual rights against the carrier.⁷⁵ Since the common law did not address this issue, the defect was remedied by statute, in England by the *Bills of Lading Act 1855* and in New Zealand by the *Mercantile Law Act 1908* (NZ). Section 13 of the latter Act had the equivalent effect as section 1 of the *Bills of Lading Act 1855*, which in essence provided that the transfer of the bill of lading also effected the transfer of the contract of carriage.⁷⁶ Section 1 of the *Bills of Lading Act 1855* provided that:

⁶⁸ Ibid, 152.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid, 152-153.

⁷² Ibid, 153-154.

⁷³ Ibid.

⁷⁴ Carver above n 33, 85.

⁷⁵ Todd above n 62, 610-611.

⁷⁶ *Rights of Suit* above n 32, 5.

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Section 13 of the *Mercantile Law Act 1908* (NZ) repeated this provision almost verbatim,⁷⁷ so that it is possible to proceed without distinguishing between the two sections, and for convenience s 1 will be dealt with here, as the basis for New Zealand's s 13.

The *Bills of Lading Act 1855* was ostensibly a legislative reaction to the decision in *Thompson v Dominy*⁷⁸ which held that simply because the transfer of the bill of lading could transfer property in the goods, it did not necessarily follow that it transferred the contract also.⁷⁹ The effect of s 1 was therefore to reverse this reasoning and to statutorily tie contractual rights and liabilities to the passing of property, so that only if the transfer of the bill of lading passed property did it also pass contractual rights.⁸⁰ While this approach was effective to some degree, it did not take long for some of the problems with linking contractual rights to the passing of property to become apparent.⁸¹ The essential problem with s 1 was that it passed the shipper's contractual rights and liabilities to an indorsee/consignee only if property in the goods passed "upon or by reason of" the consignment or endorsement.⁸² The Act therefore required a causative link between the passing of property and the consignment or indorsement before the consignee or indorsee could sue the carrier under the bill of lading. The exact nature of this link therefore became essential to assessing whether the right to sue under the bill of lading had passed, and was the subject of much legal dispute. The conflict between a literal reading of the words of s 1, or the 'narrow view', where property had to pass at the same time as the indorsement or consignment and the 'wide view' where s 1 applied provided property passed from shipper to consignee/indorsee under a contract in pursuance of which goods were consigned/indorsed to that person under a bill of lading, but which failed to pay regard to the words of the section, was resolved in *The Delfini*⁸³ by the Court of Appeal.⁸⁴ In that case, the Court decisively held in favour of an interpretation of "by reason of" that did not require concurrent passing of property and indorsement of the bill of lading, but did require that the indorsement play an essential causative role in the passing of property in the goods.⁸⁵ The emphasis on the causative role favoured by the Court has been described as the 'via media' option;⁸⁶ however, it appears to be closer to the narrow interpretation of s 1. The effect was, in many cases, to prevent a cargo owner from relying on s 1 to effect a statutory transfer of the contractual rights. This problem with the link between property and contractual rights, along with the other problems under the Act, are set out below.

4.2 Problems with the *Bills of Lading Act 1855*

The first problem posed by the Act was that it covered only bills of lading, and made no provision for the documents such as sea waybills or ship's delivery orders, which it was felt ought to be covered by the same rules.⁸⁷

⁷⁷ Section 13 of the *Mercantile Law Act 1908* (NZ) was worded as follows:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned passes on or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities, in respect of such goods as if the contract contained in the bill of lading had been made with himself.

⁷⁸ (1845) 14 M & W 403; 153 ER 532.

⁷⁹ *Todd* above n 62, 613.

⁸⁰ *Ibid.*

⁸¹ For an example of the early criticisms see: Carver 'On Some Defects in the Bills of Lading Act, 1855' (1890) 6 LQR 289.

⁸² *Rights of Suit* above n 32, 5; Nicholas Gaskell et al *Bills of Lading: Law and Contracts* (2000), 120 (*Gaskell*).

⁸³ *Enichem Anic Spa v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd's Rep 252.

⁸⁴ *Gaskell* above n 82, 120.

⁸⁵ [1990] 1 Lloyd's Rep 252, 261 per Purchas LJ, 274 per Mustill LJ, 275 per Wolff LJ.

⁸⁶ *Rights of Suit* above n 32, 6.

⁸⁷ See Part V of *Rights of Suit* above n 32, 31-38.

The problems created by the link between passing of property and contractual rights under s 1 appeared in a number of cases. In particular the Law Commission Report⁸⁸ identified a number of situations where s 1 did not effect a statutory transfer of contractual rights, which are set out below.

4.2.1 Where the Indorsee Obtained Only Special Property as a Pledgee

In *Sewell v Burdick*⁸⁹ the House of Lords held that an indorsee who is a mere pledgee does not obtain the full or general property in the goods and thus is not liable for freight. However, the other side of this is that where a person holding the bill of lading wishes to realise their security and take up the goods, they are unable to rely on the 1855 Act to sue the carrier, and would instead have to rely on an implied *Brandt v Liverpool* contract.⁹⁰ This left parties that held the bill of lading as security, such as banks, in a rather uncertain position.

4.2.2 Where the Buyer was on Risk but Property had not Passed

This problem arose in the case of *The Aramis*,⁹¹ where there was no delivery under one bill of lading so that there was no passing of property, and in *The Aliakmon*⁹² where the seller transferred the bill of lading but reserved the right of property until later.⁹³

4.2.3 Where property passed after consignment or indorsement

In the case of bulk goods, typically the property in the goods cannot pass until they have been ascertained. In England s 16 of the *Sale of Goods Act 1979* (UK) acted to prevent property passing until ascertainment, while in New Zealand s 18 of the *Sale of Goods Act 1908* (NZ) performed this function. Property in bulk goods therefore could not normally pass until they were discharged from the vessel. This was the case in *The Aramis*,⁹⁴ where short delivery was made of goods that formed part of a larger bulk.⁹⁵

4.2.4 Where property passed before/ independently of consignment or indorsement

This was the problem faced in *The Delfini*⁹⁶ where the indorsements took place eleven days after the completion of delivery and were thus too removed to meet the requirement of being essentially causative of the passing of property.

Essentially the final three categories are all different aspects of the same problem, which according to Rights of Suit is that the buyer of the goods, who is on risk during the sea transport and to whom a bill of lading is transferred, is unable to assert remedies against the carrier in respect of loss or damage to the goods.⁹⁷ The comprehensive examination of the Law Commission in *Rights of Suit* of the various other options available to circumvent these problems, either by using the 'wide view' of s 1 discussed above,⁹⁸ or by framing the cause of action in terms of an

⁸⁸ *Rights of Suit* above n 32, 5.

⁸⁹ (1884) 10 App Cas 74.

⁹⁰ *Rights of Suit* above n 32, 5.

⁹¹ [1989] 1 Lloyd's Rep 213.

⁹² *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785.

⁹³ *Rights of Suit* above n 32, 5.

⁹⁴ *The Aramis* above n 91.

⁹⁵ *Rights of Suit* above n 32, 5.

⁹⁶ *The Delfini* above n 83.

⁹⁷ *Rights of Suit* above n 32 6.

⁹⁸ See n 84 above and related text in relation to the *Bills of Lading Act 1855* .

implied *Brandt v Liverpool* contract, or under an assignment or via a tortious claim concluded that the best solution was via reform of the statutory scheme.

The decision of the Court in *The Delfini*⁹⁹ had rejected the wide interpretation of s 1 of the *Bills of Lading Act 1855*, so that this was no longer a viable alternative, especially given the implications of the decision, particularly for the oil trade, which the English and Scottish Law Commissions believed 'seriously weaken[ed] the bill of lading as a commercially useful document.'¹⁰⁰ In the context of international trade, and particularly in a documentary credit situation, where there are often long chains of buyers and comparatively short ocean voyages and the ship reaches its destination before the documents, the bill of lading will often cease to be effective to transfer contractual rights under the reasoning in that case, creating holes and 'no longer [giving] effect to reasonable commercial certainty.'¹⁰¹

The possibility of an implied contract, like that found in *Brandt v Liverpool, Brazil & River Plate Steam Navigation Co Ltd*¹⁰² was also considered by the court. Following the decision in that case, in some circumstances when a bill of lading is presented to the ship to obtain delivery of goods, a contract can be implied between the carrier and the holder of the bill of lading, on the terms contained in that bill.¹⁰³ However, despite the usefulness of this type of contract in filling gaps left by the *Bills of Lading Act 1855*, the essentially fictional nature of the contract, along with the practical difficulty in finding the required elements of offer, acceptance and intention to contract expressed by the Court of Appeal in *The Aramis*,¹⁰⁴ meant that it was seen as a poor substitute for fresh legislation.¹⁰⁵

The possibility of using an assignment of contractual rights by the buyer was also seen as a poor substitute for the reform of the *Bills of Lading Act 1855*. The need for voluntary compliance from both the buyer and foreign sellers generally was seen as a practical difficulty, while the technical requirements of an assignment, for example notice to the carrier of each assignment, also weighed against this approach.¹⁰⁶

Finally, the possibility of claims being made against a carrier based in tort rather than contract was considered to be undesirable due to the difficulty of the claimant proving the requisite degree of ownership to establish a negligence claim.¹⁰⁷ A further issue was the possibility of upsetting the allocation of risk performed by the contract, and the evasion of contractual provisions that incorporate a set of internationally accepted rules, such as the Hague-Visby Rules.¹⁰⁸

The uncertain application of the *Bills of Lading Act 1855* meant that cargo claimants would often have to plead their claim in a number of different ways, giving rise to different substantive and procedural requirements in each case.¹⁰⁹ It was this sort of uncertainty that drove the review and eventual law reform that has occurred since 1992, which is discussed below.

⁹⁹ *The Delfini* above n 83.

¹⁰⁰ *Rights of Suit* above n 32, 7.

¹⁰¹ *Ibid.*

¹⁰² [1924] 1 KB 575.

¹⁰³ *Rights of Suit* above n 32, 8.

¹⁰⁴ *The Aramis* above n 91.

¹⁰⁵ *Rights of Suit* above n 32, 9; *Gaskell* above n 82, 121.

¹⁰⁶ *Rights of Suit* above n 32, 9.

¹⁰⁷ *Rights of Suit* above n 32, 9.

¹⁰⁸ *Ibid.*, 10.

¹⁰⁹ *Gaskell* above n 82, 121.

5. The New Statutory Regime for Transferring Rights of Suit¹¹⁰

5.1 The *Carriage of Goods by Sea Act 1992*

The recommendation for reform put forward by *Rights of Suit*, and subsequently adopted in England by the *Carriage of Goods by Sea Act 1992* COGSA 92, was to remove the connection between passing of property and the transfer of contractual rights and to allow the lawful holder of a bill of lading to sue the carrier in contract for loss or damage to the goods covered by that bill.¹¹¹ In New Zealand, the passage of the MLAA 94 repealed s 13 of the *Mercantile Law Act 1908* (NZ) and replaced it with four new sections (ss 13, and 13 A-C) that have an identical effect to the COGSA 92 (with one exception that will be considered later).¹¹² According to *Rights of Suit* this approach would be similar to that taken in the United States and European nations such as France, German and the Netherlands.¹¹³

Section 2(1) of the COGSA 92 (equivalent to s 13A MLAA 94) provides that: ‘A person who becomes – (a) the lawful holder of a bill of lading...shall (by virtue of becoming the holder of the bill...) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been party to that contract.’ The effect of this provision is that title to sue is established by enquiring whether the bill of lading is lawfully held, rather than whether property in the goods has passed. Section 5(2) COGSA 92 (identical to s13(2) MLAA 94) defines the lawful holder as any of the following:

- 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 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 lawful holder of a bill of lading therefore will be consignees in possession of the bill, indorsees who have possession of the bill of lading by way of delivery and the holders of bearer bills.¹¹⁴ The holder of a spent bill of lading may in certain circumstances also have a right of suit under sub-paragraph (c). The scope of the new approach has been considered by the Courts in England in a number of cases,¹¹⁵ however, a detailed analysis of its application is unnecessary and unproductive in the context of this article.

A further significant change made by the COGSA 92 and adopted by the MLAA 94 is the separation of contractual rights and liabilities. While *Rights of Suit* considered there was no real problem with the link between rights and liabilities under the *Bills of Lading Act 1855*,¹¹⁶ the new lawful holder rule put into place under the new statute meant that such a link would make all holders subject to liabilities, even those holding the bill as security, such as banks.¹¹⁷ This would effectively amount to a reversal of the position in *Sewell v Burdick*¹¹⁸ potentially exposing

¹¹⁰ For further discussion see *Rights of Suit* above n 32; *Gaskell* above n 82, Chapter 4; J Beatson and JJ Cooper ‘Rights of Suit in Respect of Carriage of Goods by Sea’ [1991] LMCLQ 196, 199 (*Beatson and Cooper*); Barney Reynolds ‘Further Thoughts on The Carriage of Goods by Sea Act 1992 (UK)’ 25 *J Mar L & Com* 143 (1994) (*Reynolds*) and Stephen D Girvin ‘Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective’ (2002) 119 *South African LJ* 317-351 (*Girvin*).

¹¹¹ *Rights of Suit* above n 32, 11; *Gaskell* above n 82, 122.

¹¹² Paul Myburgh ‘Maritime Transport and Marine Pollution: Law Reform in New Zealand’ [1995] LMCLQ 167, 170 (*Myburgh*).

¹¹³ *Rights of Suit* above n 32, 11-12.

¹¹⁴ *Gaskell* above n 82, 123.

¹¹⁵ For example *Aegean Sea Traders Corporation v Repsol Petroleo S.A. and Another (The Aegean Sea)* [1998] 2 Lloyd’s Rep 39 and *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 are both discussed in *Gaskell* above n 82, 123-124. Further discussion can also be found in *Debattista* above n 52, 85-88.

¹¹⁶ *Rights of Suit* above n 32, 23. But see *Todd* above n 62, 614-615 that points out that the link between rights and liabilities posed some problem for banks.

¹¹⁷ *Rights of Suit* above n 32, 23.

banks to commercially undesirable and unaccepted liability under the bill of lading.¹¹⁹ For this reason, the COGSA 92 and the MLAA 94 required the holder of a bill of lading to take action under the contract before they became liable under it.¹²⁰ The exact elements required to have assumed liability under this section has been discussed at length elsewhere, and it is sufficient for the purposes of this article to note that the change has occurred.

The impact of the changes made by the COGSA 92 has been profound within the Commonwealth, and has caused many countries to alter their approach towards the transfer of rights of suit via statutes that have a similar effect to COGSA 92.¹²¹ For example, Hong Kong and Singapore have both enacted the provisions of COGSA 92 verbatim,¹²² while Australia uses different techniques ranging from verbatim adoption to incorporation into other commercial legislation.¹²³ As discussed above, New Zealand enacted provisions with the same effect as COGSA 92, with the exception of s 4 of that Act, abolishing the rule in *Grant v Norway*,¹²⁴ which was an ‘unexplained omission’ from the MLAA 94, and therefore denies a plaintiff in New Zealand protection from the operation of that rule.¹²⁵ The lack of provision to this effect appears to be without reason, and it is “startling” that the chance was not taken to reform the area, given that the rule is definitely part of the law of New Zealand, and the issue is not completely resolved by the present law.¹²⁶ Canada is the only ‘major’ Commonwealth country to continue to operate under the provisions of the *Bills of Lading Act 1855*, which is implemented by its own *Bills of Lading Act RS C 1985*.¹²⁷ South Africa, which is the focus of the article by Girvin, has also adopted a lawful holder approach based on the COGSA 92.¹²⁸

Aside from the practical importance of the changes made by the COGSA 92, I consider that two other equally important facts appear from this law reform. First, aside from the obvious practical problems it sought to address, the fact that the proponents of this law reform saw it as bringing English law into line with other major jurisdictions appears to have been an important point in its favour. In the two paragraphs explaining the choice of the ‘lawful holder’ approach to the transfer of rights of suit, *Rights of Suit* refers twice to the unifying effect of that approach in regards to other legal systems.¹²⁹ The second important point is the effect that the law reform had upon other jurisdictions that had previously used a similar link between passing of property and rights of suit. As discussed above, Canada is the only major Commonwealth country still using the old approach. Australia, Hong Kong, New Zealand, Singapore and South Africa have all enacted some form of the ‘lawful holder’ approach towards transferring rights of suit.¹³⁰ Together these two facts give an indication of the importance that commercial certainty and uniformity play in an area such as international carriage, a factor that was (very briefly) mentioned in Parliamentary debates in New Zealand prior to the passage of the MLAA 94.¹³¹

The importance of uniformity in international carriage will be further considered later, however now it is necessary to examine the law in relation to the transfer of rights under bills of lading overlaid with conflict of laws theory, and some of the problems that arise in this regard.

¹¹⁸ *Sewell v Burdick* above n 89.

¹¹⁹ *Rights of Suit* above n 32, 23.

¹²⁰ Section 3 *Carriage of Goods by Sea Act 1992* (UK); section 13B MLAA 94.

¹²¹ *Girvin* above n 110, 337-342 contains an excellent discussion of the general changes made by some of the major Commonwealth countries.

¹²² According to *Girvin* above n 110, 340-342 COGSA 92 applies in Hong Kong via the Bills of Lading and Analogous Shipping Documents Ordinance 1993, while in Singapore the Bills of Lading Act applies COGSA 92 by virtue of the Application of English Law Act 1994.

¹²³ *Girvin* above n 110, 338-340.

¹²⁴ *Grant v Norway* above n 15.

¹²⁵ *Girvin* above n 110, 341.

¹²⁶ *Myburgh* above n 112, 170.

¹²⁷ *Girvin* above n 110, 341.

¹²⁸ *Ibid*, 345.

¹²⁹ See paragraphs 2.21 and 2.22 of *Rights of Suit* above n 32, 11-12.

¹³⁰ See above n 121 and related text.

¹³¹ (1994) 543 New Zealand Parliamentary Debates 4287-4288 (John Blincoe). Interestingly, the discussion is in relation to the omission to expressly exclude the operation of the rule in *Grant v Norway*, which is discussed above. Unfortunately, as stated, no explanation or reasons are advanced for this absence.

6. The Conflict of Laws Problem of Rights of Suit under Bills of Lading

6.1 The Application of Conflict of Laws Theory to Rights of Suit under Bills of Lading

6.1.1 Classification/Characterisation of the Issue

The first issue that must be considered in relation to the application of conflict of laws theory to any issue, but more particularly here, to rights of suit under bills of lading, is the juridical nature of the issue in question.¹³² This is achieved by the process of classification or characterisation of the cause of action.¹³³ The process of characterisation is very important as it entails the allocation of the issue raised into its correct legal category, a process that can potentially impact greatly upon the substantive outcome with regard to rights under a bill of lading.¹³⁴ An extensive examination of the theories of characterisation and the *lex fori* versus *lex causae* debate¹³⁵ is unnecessary in this article. The issue of characterisation is particularly significant with regard to bills of lading, as different characterisations have different implications as to when the statutory amendment to the transfer of rights under a bill of lading can be applied by a New Zealand Court. An examination of the different ways in which the MLAA 94 could be applied will enable an accurate assessment of whether the 'lawful holder' rule can be said to apply ubiquitously. It is possible to identify three possible characterisations for the transfer of rights under a bill of lading.¹³⁶ The issue could be classed as: First, the identification of the proper parties to an action arising out of a bill of lading; second, effecting a transfer of a chose in action (being the rights under the bill of lading); or finally, a contractual issue under the bill of lading. The decision as to which characterisation the court favours will necessarily impact upon how it chooses the *lex causae* to decide the issue, and whether any foreign law must be taken into account. Each characterisation will be considered in turn. First, however, it is necessary to consider the possibility that the MLA is a mandatory statute, which must be applied by the New Zealand courts to any case within their jurisdiction, regardless of the applicable *lex causae*.

6.1.2 The *Mercantile Law Amendment Act 1994* as a Mandatory Statute

According to the standard doctrine of conflict of laws, a statute does not apply to a dispute unless it forms part of the *lex causae* governing the dispute, or it is a part of the *lex fori* relating to a procedural matter.¹³⁷ The exception to this general rule is an overriding or mandatory rule or statute of the forum, which will apply to any dispute heard within the forum, regardless of the *lex causae* or the nature of the issue. Where a mandatory rule forms part of the law of the forum it will apply because it is interpreted as applying to all cases within its scope. The MLAA 94 is silent as to the scope of its application as far as conflict of laws is concerned. Likewise, the COGSA 92 contains no indication as to conflictual scope. The Law Commission that drafted the COGSA 92 considered the issue, but ultimately left it unresolved,¹³⁸ while in New Zealand there appears to be equally little consideration of the matter.

Generally, when conflict of laws theory is applied to statutes like the MLAA 94 that are silent as to their scope, it is argued that they should be interpreted in light of a rebuttable presumption against extra-territorial application,¹³⁹ i.e.

¹³² Lawrence Collins et al (eds) *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) (*Dicey and Morris 13th ed*); PM North and JJ Fawcett *Cheshire and North's Private International Law* (13th ed, 1999) (*Cheshire and North 13th ed*); Alba Mayss *Principles of Conflict of Laws* (3rd ed, 1999).

¹³³ The use of the two different terms appears to be nothing more than a semantic difference. *Dicey and Morris 13th ed*, above n 1, 33 favours the use of 'characterisation', while *Cheshire and North* above n 132, vol. 1, 35 favours 'classification'. This article will use the term 'characterisation'.

¹³⁴ See *Dicey and Morris 13th ed* n 132 above, vol. 1, 34.

¹³⁵ An in-depth discussion of the theories of classification can be found in *Dicey and Morris 13th ed* above n 132, vol. 1, 34-45; and *Cheshire and North 13th ed* above n 132, 38-39.

¹³⁶ Toh Kian Sing 'Conflict of Laws implications of the Carriage of Goods by Sea Act 1992' [1994] *LMCLQ* 280 (*Sing*).

¹³⁷ *Dicey and Morris 13th ed* above n 132, vol. 1, 21.

¹³⁸ *Beatson and Cooper* above n 110, 199.

¹³⁹ *Sing* above n 136, 280.

against interpretation as an overriding statute. Commentators such as Dicey and Morris support this approach, albeit to a lesser extent, arguing that where such a presumption against extra-territorial application exists, it is easily rebutted, particularly in the context of maritime law statutes. The reason for this is that statutes relating to international transport generally express the public policy that is inherent in the unification of international transport law, particularly the importance of commercial certainty and convenience.¹⁴⁰ Dicey and Morris use examples, including the *Carriage of Goods Act 1971* (UK), which incorporates the Hague-Visby Rules into English law, to support the thesis that statutes relating to international obligations, including maritime law, are more likely to be considered overriding due to the importance of the public policy of international unification.¹⁴¹ However, all the examples cited by Dicey and Morris refer to statutes specifically incorporating international conventions into the internal law of England, and all the conventions have provisions which determine when they are applicable. Since the reforms introduced by the MLAA 94 and the COGSA 92 are not a statutory incorporation of international obligations, it would be wrong to draw support for the argument that either could be considered as overriding for the reasons above.

In order to assess whether a statute that does not indicate its scope is overriding, the correct approach is to “interpret the statute in light of its purpose and background, so as to read into it the limitations which the legislature would have expressed if it had given thought to the matter”.¹⁴² Since the MLAA 94 lacks the mandatory language that is a feature of the statutes such as the *Carriage of Goods Act 1971* (UK), this must weigh against it being considered an overriding statute. Further, Sing contends that the problems which the MLAA 94 was designed to overcome stemmed from the link between transfer of property in the goods and the statutory assignment of rights under the bill of lading together with issues of privity, issues which he says have only begun to arise fairly recently within the context of maritime law.¹⁴³ I believe this argument should be treated with caution, however, as the issues that inhibit transfer of a bill of lading are inherent in the nature of the bill itself. The universality and transnationality of these problems, discussed above, should weigh in favour of treating the statute as mandatory, rather than against it. While the MLAA 94 responds to a number of problems that have developed fairly recently, and it is unlikely that a statutory response designed to resolve these problems should be considered “imperative policy concerns of the forum for conflict of laws purposes” which could justify it being considered an overriding statute,¹⁴⁴ the general problem of transferring rights of suit has existed for over 150 years.

On this basis, it is arguable that the MLAA 94 could be an overriding statute by drawing a parallel with an argument supporting the proposition that the COGSA 92 is an overriding statute in England. This argument is based upon the fact that the *Bills of Lading Act 1855*, the predecessor to the COGSA 92 in England appeared to have been regarded as mandatory in some cases.¹⁴⁵ Building on this, ‘if the common statutory desideratum of overcoming privity was capable in these cases of giving the abolished [*Bills of Lading Act 1855*] a mandatory character, it should also do so in respect of the [COGSA 92].’¹⁴⁶ Given the English origin of the New Zealand, this argument would also support the case for the MLAA 94 as an overriding statute. However, while there is some case law and commentary that could support the case for the *Bills of Lading Act 1855* being an overriding statute, it would require an extremely creative interpretation to support such a broad proposition and Sing concludes, in my opinion correctly, that the authorities cited ‘either misapplied or ignored choice of law principles’.¹⁴⁷ In New Zealand, there is no indication at all that the either the old or new s 13 are seen as mandatory. Indeed, in *The Seven Pioneer*¹⁴⁸ it was not even considered necessary to examine the provisions of the amended Mercantile Law Act, although, this does appear to be more an oversight than a deliberate omission. In my opinion, it would be very difficult to argue by analogy that

¹⁴⁰ Ibid, 281.

¹⁴¹ *Dicey and Morris 13th ed* above n 132, vol. 1, 24-25

¹⁴² David Goddard and Helen McQueen *Private International Law in New Zealand* (NZLS Seminar, December 2001) (*Goddard and McQueen*).

¹⁴³ *Sing* above n 136, 281.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, 283. See 281-283 for a comprehensive discussion of the sparse case authority to support a reading of the Bills of Lading Act 1855 (UK) as a mandatory statute.

¹⁴⁸ *The Seven Pioneer* above n 1.

the MLAA 94 should be mandatory, especially given that both the MLAA 94 and the original section 13 were based upon their English counterparts.¹⁴⁹

For the reasons set out above, it is very unlikely that the MLAA 94 could be considered an overriding statute of New Zealand. Having established this, it is necessary to turn to an examination of the potential *lex causae* under the various characterisations discussed above.

6.1.3 Application of Characterisation

6.1.3.1 Identification of the Proper Parties to an Action

By characterising the issue under the MLAA 94 as having the effect of identifying the proper parties to an action arising out of a bill of lading (or a waybill or delivery order), it is possible to argue that this should be considered a procedural question, to be decided by the *lex fori*. The principle that the substantive rights of parties may be governed by foreign law but that all matters of procedure must be governed exclusively by the *lex fori* is a well-recognised principle of conflict of laws.¹⁵⁰ In this way, New Zealand courts would apply the MLAA to any dispute heard in New Zealand, regardless of any foreign *lex causae* governing the dispute. Practically, this would mean that a foreign choice of law clause in a bill of lading would not displace the MLAA 94, which would determine whether rights had been transferred.

The task of classifying which matters are substantive and which are procedural is not a simple task, particularly in relation to the question of who is a proper party to an action.¹⁵¹ There is some case authority to suggest that in the case of the assignment of an intangible movable the English law requirement that the assignee must sue in the name of the assignor must be observed even when it is not required by the *lex causae* governing the transaction,¹⁵² an interpretation that favours a procedural classification. However, it would appear to be rather tenuous to extend a blanket procedural classification over all bill of lading claims on the basis of these cases, which contain no suggestion of such an approach.¹⁵³ Both these cases simply appear to be examples of particular fact situations where the court felt justified in treating the rule as procedural, and it is difficult to evolve from them any principle that could support an argument that all cases relating to the parties to an action should be characterised as procedural. Further, there is also equally old case law to support the view that this rule is substantive rather than procedural.¹⁵⁴

It is also difficult to justify conceptually treating all questions dealing with the proper parties to an action as procedural. Most commentators, in my opinion correctly, criticise this as an unwarranted extension of the province of procedure,¹⁵⁵ particularly where there is likely to be an encroachment on the substantive rights available under the *lex causae* or creation of contractual rights between parties where none exist under the *lex causae*.¹⁵⁶ The problem of creating contractual rights between parties, where none existed before, is a legitimate concern in the case of the MLAA 94, where an interpretation of the statute as procedural could result in the creation of a contractual relationship under New Zealand law that might not exist under a foreign *lex causae*. If the MLAA 94 was regarded as procedural, a court would have to apply it to decide the correct parties to an action under a bill of lading, as a New Zealand court can only apply New Zealand procedure. It then follows that a choice of foreign law in a bill of lading would be ineffective, thereby overriding and altering the contractual burden, something a Court would otherwise be extremely hesitant to do. This is potentially a likely result where a bill of lading is governed by a legal

¹⁴⁹ CC Nicoll 'Significant Carriage of Goods by Sea Reform in New Zealand' (1995) 26 *J Mar L & Com* 443, 453 (Nicoll).

¹⁵⁰ *Cheshire and North 13th ed* above n 132, 69; *Dicey and Morris 13th ed* above n 132, 74; *Goddard and McQueen* above n 142, 121.

¹⁵¹ *Goddard and McQueen* above n 142, 124.

¹⁵² See *Dicey and Morris 13th ed* above n 132, 85, which cites *Wolff v Oxholm* (1817) 6 M & S 92; 105 ER 1177 and *Jeffery v M'Taggart* (1817) 6 M & S 126; 105 ER 1190 to support this proposition. *Sing* above n 136, 283 cites the same authority, but with much less conviction.

¹⁵³ *Sing* above n 136, 283.

¹⁵⁴ *O'Callaghan v Thomond* (1810) 3 Taunt. 82; 128 ER 33. See *Dicey and Morris 13th ed* above n 132, 86, for a discussion of the facts and outcome of this case, along with other case law to support the view that the rule was substantive rather than procedural.

¹⁵⁵ *Cheshire and North* above n 132, 79; *Dicey and Morris 13th ed* above n 132, 85.

¹⁵⁶ *Sing* above n 136, 283.

system that does not use a similar 'lawful holder' approach to New Zealand or England, and could act as an invitation to foreign parties to forum shop for an action in New Zealand (or England, or any other country that uses similarly unexacting requirements to establish a contractual nexus).¹⁵⁷

For these reasons, it is very unlikely that a New Zealand court would choose to characterise the issue of the proper parties to an action arising out of a bill of lading as a procedural matter thereby justifying application of the MLAA 94 regardless of the *lex causae* governing the dispute. However, there is a real danger that a court could simply overlook the conflictual dimensions in a case, and simply apply the MLAA 94 automatically, thus achieving this undesirable result by default. *The Seven Pioneer*¹⁵⁸ is a case where something similar occurred. There, the court did not account for the conflict issues, but rather than simply applying the MLAA 94, it never considered it, and used the chosen law in the bill of lading to decide the case.

Given that 'neither principle nor precedent'¹⁵⁹ favours treatment of the MLAA 94 as mandatory or procedural, the presumption against extra-territoriality discussed above acts to rule out its application where the *lex causae* is anything other than the law of New Zealand. It is thus necessary to consider the two other potential characterisations identified.

6.1.3.2 Effecting a Transfer of Contractual Rights in the Bill of Lading

If the Court decides to characterise the cause of action in terms of the transfer of rights of suit under a bill of lading then it will essentially be examining the effect of an assignment of chose in action. The first issue to be considered here is whether the transfer of the right of suit under a bill of lading does or should fall within the category of an assignment of a chose in action. Dicey and Morris point out that it is not easy to state with absolute certainty the choice of law rules that govern the assignment of intangible movables, due to the wide spectrum of property and rights the category encompasses.¹⁶⁰

A chose in action, such as a right of action under a contract, is considered to be an intangible movable that, for the purpose of conflict of laws, is situate where the action may be brought.¹⁶¹ The general rule relating to the assignment of an intangible, as set out in Rule 121, is that the 'question of whether a debt or other intangible thing is capable of assignment, and if so under what conditions (so far as they affect the debtor) is governed by the proper law of the debt or the law governing the creation of the thing'.¹⁶² The proper law of an assignment can be determined in the same way as the proper law of a contract, which is discussed in the following section. Rule 122 could also be relevant here, stating that the 'intrinsic validity of an assignment of a debt or other intangible thing as between the assignor and assignee is governed by the proper law of the assignment.'¹⁶³ In this case, since the enquiry is to establish whether there has been an assignment of the rights under a bill of lading, it would be illogical to attempt to use the actual proper law of the assignment and it is necessary to use the putative proper law of the assignment, that being the proper law that would govern the assignment in the event it were found to have occurred.

If a court were to consider this as an assignment issue, it would be necessary to establish the putative proper law of the assignment in the same way as it would for a contract. However, this approach is seen as unnecessarily complicated by Sing, who proposes instead, 'since the transferred rights are created under the contract of

¹⁵⁷ *Ibid.*

¹⁵⁸ *The Seven Pioneer* above n 1.

¹⁵⁹ *Sing* above n 136, 283.

¹⁶⁰ *Dicey and Morris 13th ed* above n 132, vol. 2, 977

¹⁶¹ Lawrence Collins et al (eds) *Dicey and Morris on the Conflict of Laws* (11th ed, 1987), vol. 2, 908 (*Dicey and Morris 11th ed*). This section refers to the 11th edition of both *Dicey and Morris* and *Cheshire and North* as the enactment of the *Contracts (Applicable Law) Act 1990* (UK) in England implemented the Rome Convention, which now governs assignment and contractual obligations. New Zealand continues to operate from the pre-1990 position in England; hence reference must be made to texts from pre-1990.

¹⁶² *Ibid.*, 957.

¹⁶³ *Ibid.*, 961.

affreightment, the proper law of [the affreightment] has a good claim to regulating dealings of these rights'.¹⁶⁴ The argument that since rights of suit under a bill of lading are essentially contractual in origin it is appropriate to use the proper law of the contract of affreightment will be advanced in the next section. However, there are some other problems associated with using the concept of an assignment to deal with rights of suit under bills of lading that must be considered now.

The principal problem that arises with regard to characterising the issue as relating to an assignment of a chose in action, is that the factual situation that arises in relation to the transfer of a bill of lading does not adequately integrate into the conceptual categories within the law of assignment. A bill of lading is often described as a negotiable instrument of title, however, it does not possess the same sort of negotiability as, for example, a bill of exchange.¹⁶⁵ Neither can it be considered akin to a simple contractual matter, such as a debt, as there are issues of both rights and liabilities to be resolved. Further, an assignment of the rights under a contract is restricted to the benefit of that contract, with no ability to pass on the burden of the contract also. To pass on the burden as well as the benefit of a contract also would require a novation, which would effectively extinguish the liabilities of the former contracting party and create a new contract in place of the old one. The scheme under the COGSA 92 and MLAA 94 does not fit well with this, as a person who is seeking to enforce the rights under the bill of lading will undoubtedly fall within the scope of taking action under it, which then triggers the liabilities.¹⁶⁶

Dicey and Morris discuss the problem of finding a uniformly applicable rule to determine the most suitable *lex causae* to govern issues relating to assignment, putting forward three alternative positions. The first approach is to give a dominant role to the law under which the right that is being assigned was created, an approach labelled the 'proper law of the underlying obligation'.¹⁶⁷ This approach treats the issue as fundamentally contractual and where the right assigned is contractual, as it is for a bill of lading, the relevant contract is that which created the obligation in the first place. This would mean the correct law to govern whether an assignment had occurred would be the proper law of the contract of affreightment (the same result as if the issue was characterised as being contractual). The second possible approach is to regard the transaction between the assignor and assignee as the most significant relationship and use the law governing it to determine the effect of the purported assignment.¹⁶⁸ The third possible approach is to consider the issue as more closely related to property, and thus favour use of the *lex situs*.¹⁶⁹

I would argue that under the third approach, to regard the issue as related to property would seem to completely overlook the changes that have been made by the MLAA 94, which specifically severed the link between property and rights under a bill of lading. The second approach, however, while suitable for a chose in action such as a debt,¹⁷⁰ might also be of relevance in the case of a bill of lading, especially given the changes made under COGSA 92 and the MLAA 94. Although it is the benefit of the underlying contractual right against a carrier that is the principal concern to the holder of a bill of lading, the statutory scheme is concerned with implementing the transfer of those rights between holders of the bill, a position that seems to fit more comfortably with the second approach discussed above.

The argument in favour of using the 'proper law of the underlying obligation' approach stems from the view that the law under which a contractual right was created should also determine its transferability, especially where the parties have chosen the law to govern this, and where they could legitimately expect this law to govern all aspects of the transaction.¹⁷¹ This approach has a 'conceptual neatness'¹⁷² that is particularly attractive in the case of bills of lading, where there is virtually always a choice of law to govern the bill, and where certainty and commercial

¹⁶⁴ *Sing* above n 136, 285.

¹⁶⁵ *Carver on BOLs* above n 2, 249.

¹⁶⁶ Section 3 COGSA 92 and s 13B MLAA 94.

¹⁶⁷ *Dicey and Morris 13th ed*, above n 1, vol. 2, 979.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ The transfer of a debt is the standard example used when discussing the common law theory of the transfer of a chose in action: see *Cheshire and North 13th ed* above n 132, 956-958; *Dicey and Morris 13th ed*, above n 132, vol. 2, 978-979.

¹⁷¹ *Ibid.*

¹⁷² See *Sing* above n 136, 285, who seems to favour this approach.

convenience are essential concerns. While Sing is clearly correct that the approach is neat, I believe that when reference is made to the effect of the statute, which is focussed on the transfer of rights between holders of the bill of lading rather than the rights under the contract of affreightment, it is apparent that looking at the underlying contract of affreightment shifts the focus away from the transfer. This approach would seem to go against the scheme set out in the COGSA 92 and the MLAA 94, and would appear to be a practically neat solution rather than a conceptually neat one. Having raised this issue, there does not appear to be any clear way to resolve it, since the transfer of the bill of lading clearly does not fit within the concept of an assignment, as discussed above.

Bearing in mind this uncertainty I will now examine the implications of the court considering the issue to be properly characterised as a contractual issue under the bill of lading. The consequence of using this approach is that the issue will be governed by the proper law of the contract, which is discussed in the section below.

6.1.3.3 A Contractual Issue Under the Bill of Lading¹⁷³

In the event that a court chooses to characterise the issue as relating to the transfer of rights in the terms discussed above, or does not regard the transfer issue as significant, the issue of rights under a bill of lading seems to fall into the category of a contractual issue. This is not an entirely unproblematic approach, however, as the transferee of a bill of lading stands in a contractual relationship with the carrier only if the MLAA 94 applies so as to effect a statutory transfer of rights in the contract of affreightment that is evidenced by the bill of lading.¹⁷⁴ It is also possible, however, that a buyer under a bill of lading who could not bring themselves within the provisions of the MLAA 94 (or the old s 13) might be able to bring a suit as a third party beneficiary under the *Contracts (Privity) Act 1982* (NZ). Provided the claimant was able to bring himself within s 4 by being ‘a person, designated by name, description, or reference to a class’ they would be able to claim the benefit of the contract with s 8 allowing them to enforce it against the carrier. This approach has never been tested in a case but it remains a theoretically viable option for someone outside the MLAA 94, provided they fit within s 4.¹⁷⁵

The correct method of establishing the *lex causae* to govern most questions arising in relation to a contract is by the use of the proper law of the contract.¹⁷⁶ The proper law of the contract is ‘the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection’.¹⁷⁷ The proper law of a contract must consist of a single legal system, so that it is not possible to have an ‘internationalised’ contract, made without reference to a legal system.¹⁷⁸ This does not mean that one law must govern all issues under the contract, as the correct approach is for a court to determine what is the law to govern the particular question raised.¹⁷⁹ The case of *Vita Food Products Inc v Unus Shipping Co Ltd*¹⁸⁰ sets out the correct process for assessing the proper law of a contract, looking first for an express choice of law, then an implied choice and finally objectively assessing the law with the closest and most real connection. In this case the question is whether there has been a statutory assignment of rights under the bill of lading to create a contractual relationship between the transferee of the bill of lading and the carrier. It is not necessary to conduct an in-depth analysis of how to ascertain the proper law for a contract, but is sufficient to say that in the case of bills of lading, virtually all will contain an express choice of law.

The problem that arises in the case of rights of suit under a bill of lading is that if the court were simply to apply the proper law concept it would be presupposing the existence of a contract between the carrier and the transferee, when

¹⁷³ See n 161 for the reason for using the 11th edition of both *Dicey and Morris* and *Cheshire and North* in this section.

¹⁷⁴ *Sing* above n 136, 283.

¹⁷⁵ *Girvin* above n 110, 341.

¹⁷⁶ PM North and JJ Fawcett *Cheshire and North's Private International Law* (11th ed, 1987), 448 (*Cheshire and North 11th ed*).

¹⁷⁷ Rule 180 in *Dicey and Morris 11th ed* above n 161, vol. 2, 1161-1162.

¹⁷⁸ *Cheshire and North 11th ed* above n 161, 448.

¹⁷⁹ *Ibid*.

¹⁸⁰ [1939] AC 277.

the court's enquiry is to determine precisely this fact by establishing whether there has been a statutory transfer of contractual rights by the MLAA 94. Sing suggests two ways in which this apparent 'logical circularity' can be avoided.¹⁸¹ The first is to focus on the contract of affreightment between the shipper and the carrier that is evidenced by the bill of lading so the issue then becomes an assessment of who are the contractual parties after the indorsement. As discussed above, referring to the contract of affreightment tends to shift the focus away from the actual transfer in the statutory scheme, and should therefore be treated with caution. Another possible approach is to extend the notion of the putative proper law of the contract to cover the issue of the existence of the contract between the holder of the bill of lading and the carrier.¹⁸² This solution also appears unsatisfactory upon further examination, as the original contract of affreightment is not always a straightforward contract between the carrier and the shipper, making it conceptually awkward to simply extend it to govern the formation of a different relationship far removed from its original intention.

The practical result of using either of these approaches is the same, so that 'the whole conflict of law inquiry resolves into a straightforward survey of the bill of lading for any indicia of choice of [the] proper law.'¹⁸³ Given the difficulties discussed in simply ignoring the transfer in favour of going straight to the contract of affreightment, it seems that there is no simple method for a Court to characterise the transfer of right of suit under a bill of lading. Essentially, it appears that the transfer of a bill of lading is now somewhat *sui generis* so that it will not sit comfortably within a category focussed primarily upon the transfer (assignment) nor within a category that ignores the transfer in favour of the underlying instrument creating the right (contract).

In order to decide how the issue of the transfer should be characterised, since if it does not fit exactly into the existing categories, it is necessary to decide the question by analogy to the existing categories. In this case, by looking at the outcome of each approach, it may be possible to find common ground that would provide an answer. For example, if assignment was the correct characterisation (disregarding for the moment its obvious problems), and the approach taken was to look at the law regulating the transfer, the alternative to simply looking at the contract of affreightment would be to look at the contract for sale of the goods represented by the bill of lading which will most likely regulate the relationship. Whether a court would be happy in referring to the contract for sale, which could contain a different proper law to that in the bill of lading, to determine whether rights have passed in relation to a completely different contract, with different parties, is a question that it would have to decide for itself. Having considered the situation, I believe that a more appropriate, although far from perfect, course is that suggested by Sing where the most appropriate analogy is to the contract of affreightment. Despite the fact that this risks shifting the focus of the inquiry away from the transfer in favour of the contract, I believe it is as a whole the better option.

In this case, if New Zealand law is the proper law of the contract, then the MLAA 94 will apply to effect a statutory transfer of the rights (and liabilities) under the bill of lading to the transferee of that bill. However, if a foreign law is chosen as the proper law, then a New Zealand court would have no scope to apply the MLAA 94 to effect such a statutory transfer, as that statute would have no role.

6.1.4 The Application of Conflict of Laws Theory: a Conclusion

The intention of the discussion above was to illuminate the problem of applying conflict of laws theory to the statutory transfer of contractual rights under the new provisions of the MLAA 94. It has shown that in the absence of the clear language required to give a statute a mandatory character, and given the lack of principle or precedent to support such an approach, it is unlikely that a court would interpret the MLAA 94 as having such an effect. For this reason, a New Zealand court could not apply the MLAA 94 except where New Zealand law was the *lex causae* governing the dispute. This same conclusion must also be reached by an English court, in seeking to apply the

¹⁸¹ *Sing* above n 136, 283.

¹⁸² *Ibid*, 285.

¹⁸³ *Ibid*, 284.

COGSA 92 to bills of lading.¹⁸⁴ A further conclusion that can be drawn is that while the litigational and commercial contractual convenience of the reforms made by the MLAA 94 may explain the tendency to look straight to the statute and ignore conflict of laws issues, it cannot ultimately justify indifference to these issues. The correct approach for a court to take when faced with the question of a transferee of a bill of lading seeking to enforce a contractual right by virtue of the MLAA 94 is to undertake the process outlined above in order to assess whether the statute is applicable. Following the reasoning above, if New Zealand law is not the proper law governing the contract of affreightment then the statutory transfer of the contract offered by the MLAA 94 is unlikely to apply, and there would be no right for the transferee of a bill of lading to bring an action in contract, unless the proper law of the contract contained an equivalent statutory transfer. A party unable to avail itself of the statute would be forced to found an action outside of contract, in much the same way as before the statute was amended.

For this reason, it is important to note the possibility of an implied *Brandt v Liverpool* contract¹⁸⁵ in relation to application of the MLAA. In England, there is the suggestion that while a *Brandt v Liverpool* contract was a useful device under the *Bills of Lading Act 1855*, since the passage of the COGSA 92, it has been supplanted.¹⁸⁶ This conclusion would mean that the statutory provisions were effectively the only means of transferring rights of suit. While a *Brandt v Liverpool* contract has a somewhat uncertain scope of application in New Zealand, I do not believe it can be entirely dismissed. Given the uncertainty discussed above, it would seem premature to write it off completely as it could be relevant to the New Zealand situation under the MLAA 94. Another possibility, also discussed above is the possibility of using the *Contracts (Privity) Act 1982* (NZ). While this is untested, it remains a theoretical possibility for a holder of the bill of lading who can bring themselves within s 4.¹⁸⁷

Referring the conclusion reached back to the decision in *The Seven Pioneer*¹⁸⁸ it is apparent that the court, by applying the proper law contained in the bill of lading, was probably taking the correct approach, despite its complete lack of reference to the provisions of the *Mercantile Law Act 1908* (NZ) or conflict of laws theory.

The broader conclusion that can be drawn from the conflictual analysis above is that despite the fact that the MLAA 94 was intended, like the COGSA 92 in England, to resolve the serious problem in international trade of determining when the transferee of a bill of lading can bring an action in contract against a carrier, this can not justify a court in ignoring the application of well developed conflict of laws theory. It is now necessary to turn to the question of whether the concerns of commercial certainty and convenience in relation to rights of suit under bills of lading are so important and overwhelming that they can justify further reform in this area, to alleviate the uncertainty discussed.

7. The Transfer of Rights of Suit under a Bill of Lading: Towards an International Solution

The preceding discussion of the function of bills of lading has attempted to illustrate how the development of the law relating to bills of lading has been affected by the functional requirements of the document caused by the changing needs of international trade. However, before turning to consider whether this history can justify a broader approach toward the problem of transferring rights of suit under a bill of lading, a brief return to the theory of conflict of laws is necessary, specifically to an assessment of how 'conflicts' can be avoided.

¹⁸⁴ Ibid, 285.

¹⁸⁵ Discussed above n 102 and related text in relation to the problems with the *Bills of Lading Act 1855*.

¹⁸⁶ *Sing* above n 136, 285.

¹⁸⁷ See n 175 and related discussion.

¹⁸⁸ *The Seven Pioneer* above n 1.

7.1 Avoiding Conflicts under Conflict of Laws Theory

It might seem axiomatic that a subject such as conflict of laws, which has developed for over a century to generate rules and theories governing multitudes of complicated legal scenarios, would contain equally complex methods of avoiding conflicts. However, the subject of conflict avoidance is treated relatively simply by the main commentators. There are two approaches towards legal problems that enable an issue to avoid conflict of laws theory. The first, and most common, route is through the harmonisation of the rules of private international law, so that the result in a case does not depend on the country of trial.¹⁸⁹ While this approach is the generally preferred option, as it is far less intrusive upon the legal systems concerned and therefore much easier in practice, there is a second approach, which is of particular relevance in this case. The problems of conflict of laws can similarly be avoided through the unification of the internal law for example via an international convention. This sort of approach cannot be used in areas such as family law and succession, which are heavily influenced by the social climate in the respective countries, and thus has no great prospect of success generally.¹⁹⁰ However, it is more feasible for less socially influenced areas like contract, and in areas such as carriage it has been commented that 'unity is imperative and possible'.¹⁹¹ An excellent example drawn from carriage of goods is the Hague-Visby Rules, which regulate the substantive liabilities of parties to a bill of lading governed by the Rules. The reasons that unification is significantly more effective and favourable in relation to an area like carriage by sea is that commercial concerns such as cost, convenience and certainty are more easily accommodated by unification than other, less quantifiable issues.

In addition, 'the regulation of trade and commerce has constituted a transcultural phenomenon since time immemorial',¹⁹² with the *lex mercatoria* and the *lex maritima*¹⁹³ two examples of this. However, this process was overtaken to a large extent by the national codifications of law during the 19th century, which, by achieving national harmonisation, deprived world trade of the ability to develop international harmonisation and unification.¹⁹⁴ This starting point is the reason why attempts to avoid conflict of laws have focussed on harmonisation of substantive laws rather than the harmonisation of the rules of private international law, which would be unable to meet the special needs of trade and commerce.¹⁹⁵ Accordingly, '[o]nly a truly standardised law (i.e. uniform substantive law) will bring about the expected and needed level of predictability in the legal environment in which the transaction will be conducted.'¹⁹⁶

Choosing to follow an approach that favours substantive unification rather than merely harmonising the conflict of law rules requires consideration of whether the issue of rights of suit under bills of lading is an issue of sufficient importance to support such an approach. There appear to be sound reasons of commercial certainty and convenience that favour unification of substantive law as opposed to harmonisation of conflict of laws in the context of international trade.¹⁹⁷

¹⁸⁹ *Cheshire and North 13th ed* above n 132, 11.

¹⁹⁰ *Ibid.*, 10.

¹⁹¹ *Ibid.*

¹⁹² Alexander von Ziegler 'Peculiarities of the Harmonisation and Unification of International Law of Trade and Commerce' in Jurgen Basedow et al (eds) *Private Law in the International Arena* (TMC Asser Press, The Hague, 2000), 877 (Ziegler).

¹⁹³ *Ibid.*, 878.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*, 879.

¹⁹⁷ Paul Myburgh 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea' (2000) 31 *VUWLR* 355, 379-380 (*Uniformity or Unilateralism*).

7.2 The Case for International Harmonisation of the Transfer of Rights of Suit

7.2.1 Historical Support for Change to the Transfer of Rights of Suit

As discussed in relation to the receipt function of the bill of lading, which is both the simplest and the oldest function that a bill has, the original task that a bill was required to fill has changed substantially over the centuries since it first appeared. The development and sophistication of international trade created the need for a document that could not only just describe the goods being shipped but also ascertain who, other than the shipper, could rightfully claim the goods at their destination, the bill of lading developed into such an indicium of title. With the further development of the bill of lading in the 18th century and the addition of the contractual function, further development occurred, so that the bill of lading became a document capable of transferring rights to the transferee of that bill. The common law approach towards this was statutory, originally by the provisions of the *Bills of Lading Act 1855* in England, and in New Zealand by the *Mercantile Law Act 1908* (NZ). The key point to note is that the appropriate scale for resolving the problem was considered to be at the national level, with each country using their own rules to decide when a transferee had obtained contractual rights under the bill of lading. The result of this approach was that the issue of whether a contractual right of suit had been transferred to a party to a dispute was dependent upon which law governed the transaction, an issue that should have been decided in accordance with conflict of laws theory.¹⁹⁸

More recently, however, with the passage of the COGSA 92 in England and the MLAA 94, the New Zealand equivalent, there appears to be a trend towards substantive unification in the approach taken by countries towards the transfer of rights of suit under bills of lading. As discussed earlier, the 'lawful holder' approach toward transfer of rights of suit under the COGSA 92 was to some extent driven by the concerns of international harmonisation or unification, and it then acted as a further catalyst for change in other jurisdictions that also reflected the concerns of unification. I believe that this informal trend towards unification should be developed more formally to achieve unification at an international level, something that is presently occurring through the process undertaken by UNCITRAL and the CMI, which is discussed below.

The historical development of the bill of lading as a functional instrument in international trade supports this argument. The receipt function of a bill of lading in the hands of a transferee provides an important example of a situation where the problem that had been dealt with by domestic law was considered to be something that was more properly dealt with on an international scale. The concern for commercial certainty and convenience that prompted the provisions of the Hague-Visby Rules that regulate the evidentiary status of a bill of lading as a receipt¹⁹⁹ must surely also bolster the argument that the issue of rights of suit is sufficient commercially important to justify a solution at the international, rather than merely the national scale. It appears anomalous that an issue relating to the evidentiary status of a bill of lading in the hands of a transferee can justify resolution at the international level, while the issue of determining the nature of the right held by the transferee, and whether she has been validly transferred the contractual rights must surely be of the same, if not greater importance to demand solution at the international level.

Turning away from the historical issues under the bill of lading, there are other functional aspects of the law relating to bills of lading that support the argument for an international resolution of the issue of rights of suit.

¹⁹⁸ See the discussion under the heading: 6. The Conflict of Laws Problem of Rights of Suit Under Bills of Lading.

¹⁹⁹ See above n 17 and related text.

7.2.2 The Interdisciplinary Function of a Bill of Lading as Favouring Harmonisation

The argument in favour of harmonisation of the transfer of rights of suit under a bill of lading in the field of international trade law is affected by the interdisciplinary function of a bill. There are four legal dimensions to most international trade cases: the international sale of goods; the contract(s) of carriage; the financing of the sale; and the transport insurance contract. The transport insurance contract falls outside the scope of this work, and will not be considered further, however, the other three dimensions have all been mentioned previously, in relation to the function of the bill of lading as a document of title.

Briefly, the negotiability of the bill of lading, which enables it to be used as a transferable document of title, means it can be used in three ways: to claim delivery of the goods; to transfer the ownership of the goods during transit by an indorsement of the bill; and as security for a debt to enable the financing of the sale (often by means of a letter of credit). The role of the bill of lading has developed in this way due to its flexibility and the interlocking of these different legal relationships. The interdisciplinary function of the bill of lading means that harmonisation of the law relating to it is an essential part of any broader goals of international unification.²⁰⁰ While the bill of lading is known primarily as documentation of the contract of carriage and the receipt of the goods, it also takes on the function of proof of delivery in accordance with the law relating to the sale of goods.²⁰¹ This sort of sales transaction can be repeated a number of times during the time the goods are in transit, in a series of purchases, known as string sales.²⁰² In addition, the bill of lading in the documentary credit relationship has the function of triggering payment by the bank while acting as security for this financing.²⁰³ The centrality of the bill of lading to all these transactions provides special support for the broader importance of harmonisation in this sphere.

One example of the importance that the transfer of rights of suit under a bill of lading has for an area outside the traditional contract of carriage function is in relation to financing by banks. The role of the bill of lading in the documentary credit transaction that frequently finances is a key to the functioning of the whole system.²⁰⁴ It acts as the trigger for the various parties to such a transaction to fulfil their obligations, while at the same time acting as security for each by virtue of the rights it give to the actual goods.²⁰⁵ However, the position of financing banks under English law prior to the passage of COGSA 92 has been described as 'dire'.²⁰⁶ The decision by the House of Lords in the case of *Sewell v Burdick*²⁰⁷ held that where a bank acquired a bill of lading as a pledgee it obtained only a special security interest in the goods, and therefore did not fall within the category of a person to whom property passed for the purpose of the *Bills of Lading Act 1855*. A bank therefore did not benefit from the statutory transfer of the rights under the contract.²⁰⁸ A number of devices were used in attempts to overcome this and other defects of the *Bills of Lading Act 1855*, including phrasing claims in tort and the use of implied *Brandt v Liverpool* contracts, which are outlined earlier. However, a tort claim often ran into problems in relation to the decision in *The Aliakmon*²⁰⁹ where the House of Lords required a claimant to be owner or have a possessory interest in the goods before a claim could be successful. Implied contract solutions were also somewhat unpredictable with different approaches by the courts making their application uncertain. The result of all this was 'a regime under which it was virtually impossible to ascertain whether cargo receivers were entitled to sue the carrier and, if so, on what basis and on what terms, [which] was of no real benefit to either party.'²¹⁰

The need for a comprehensive solution to clarify the matter was therefore obviously a matter of some concern, particularly to financial institutions. This need was met, in New Zealand and England, by the introduction of the

²⁰⁰ Ziegler above n 192, 880.

²⁰¹ Ibid, 881.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Todd above n 62, 396.

²⁰⁵ Ibid, 15.

²⁰⁶ John Bassindale 'Legal Analysis' [1992] 10 *JIBL* 414 (Bassindale).

²⁰⁷ *Sewell v Burdick* above n 89.

²⁰⁸ Bassindale above n 206, 414.

²⁰⁹ *The Aliakmon* above n 92.

²¹⁰ Bassindale above n 206, 415.

provisions of the COGSA 92, which was adopted almost verbatim by the MLAA 94 in New Zealand. Using a domestic approach to solve a problem such as this directly conflicts with the concerns discussed above. Because of the multi-functional nature of the bill of lading and its role in linking the interdependent transactions of international trade the appropriate scale to resolve such issues must be international. The importance of the interdisciplinary function of the bill of lading should therefore support the case for an international remedy to the issue of the transfer of rights of suit under bills of lading. A further problem with the often-disparate domestic responses to an issue such as this is the potential effect on the harmonisation of substantive liabilities under The Hague and Hague-Visby Rules, which will be considered below.

7.2.3 Avoiding the Triumph of Procedure over Substance

It would surely be more beneficial to financial institutions, which play a vital role in international trade, to be subject to the same system of transferring rights as well as the same substantive rights and liabilities under The Hague and Hague-Visby Rules. The Hague and Hague-Visby Rules govern the substantive rights and liabilities of the parties to a bill of lading, and are seen as one of the more successful attempts at unification within international trade law.²¹¹ The Hague Rules of 1924 and the later Hague-Visby Rules were seen as necessary to limit the contractual freedom that was prevalent in the 19th century, and which was being used predominantly by carriers to impose broad exemption clauses in bills of lading.²¹² While the inequality of bargaining power and concerns for the welfare of the shipper would probably not be a sufficient justification for legislative intervention, it was not usually the shipper who suffered from the harsh terms, but rather the transferee of the bill, who had no say in the terms.²¹³ The result of this was that bills of lading began to become worthless documents, causing problems for banks that used them as security, and seriously eroding the negotiability and usefulness of the bill.²¹⁴

The relevance of the substantive harmonisation here is that in order for the Hague or Hague-Visby Rules to apply, the issue must be a contractual one under the bill of lading (although as discussed this is far from clear cut). Where the transfer of rights of suit under a bill of lading is governed by the *lex causae* of the bill of lading, there is no guarantee that the rights of suit will be transferred according to the scheme set out in the MLAA 1994, and thus there can be no guarantee that the harmonised substantive liabilities will apply. The effect of this upon a bank holding the bill of lading as security is discussed above, however, possible drawbacks exist for the carrier also. If, for example, the transferee of a bill of lading was forced to bring a claim in tort, because it was impossible to establish a right of suit as discussed, the carrier would be unable to invoke the benefit of the exclusions and time-bars in the contract of carriage.²¹⁵ This position, which amounts to an unacceptable frustration of the harmonisation of substantive liabilities under the bill of lading by the procedure of conflict of laws, is the present state of the law as regards rights of suit under bills of lading, as set out earlier.²¹⁶ The solution to this problem can be found through the harmonisation of the transfer of rights under bills of lading, so that the procedural requirements of conflict of laws cannot undo the benefits of the unification of the substantive rights under bills of lading.

Having presented an argument in favour of international harmonisation of the law relating to the transfer of rights of suit under bills of lading, it is appropriate to consider the steps presently being taken at an international level to achieve this goal, particularly via the United Nations Committee on International Trade Law (UNCITRAL) and the Comité Maritime International (CMI) who have developed the Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea] (The Draft Instrument).

²¹¹ *Todd* above n 62, 500-501.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.* *Todd* also notes the justification advanced by Lord Goff to the effect that ship owners effectively wielded a monopoly power that needed to be controlled – see 501-502 for an excerpt from the article.

²¹⁵ *Bassindale* above n 206, 415.

²¹⁶ See the discussion above under the heading: The application of conflict of laws theory: a conclusion.

8. The Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]²¹⁷

The development of the Draft Instrument by the CMI was begun in 1996, and the preparatory work was completed by 11 December 2001, with the submission of the CMI Draft Instrument on Transport Law to the Secretariat of UNCITRAL.²¹⁸ The work on the Draft Instrument has been continued by the Working Group on Transport Law (Working Group) set up by UNCITRAL.²¹⁹

Under the Draft Instrument considered in Vienna in October 2003, Chapter 12 (Transfer of Rights – Articles 59-62) and Chapter 13 (*Rights of Suit* – Articles 63-65) dealt with the transfer of rights of suit under a bill of lading. Article 59 stated that a holder of a ‘negotiable transport document’, which was defined to include bills of lading, might transfer the rights therein by passing that document to another person. This approach was strongly supported by the Working Group as promoting harmonisation and accommodating negotiable electronic records.²²⁰ The other articles in that chapter functioned to create a highly detailed and comprehensive code to govern how rights might be transferred. Article 59 tied to Article 63, which stated that, subject to Articles 64 and 65, rights under the contract might only be asserted by the shipper, consignee or any other person to whom they have been transferred. The scheme effectively corresponded to an approach very similar to the ‘lawful holder’ rule that has been discussed earlier, but was designed to be implemented at an international level. This description of these provisions, while necessarily brief, hopefully provides the general picture of the Draft Instrument in relation to transfer of rights.²²¹

Despite the positive steps that had been taken towards harmonising the approach to the transfer of rights of suit under a bill of lading, at the 17th session in New York in 2006, the Working Group concluded that the Transfer of Rights was a topic of sufficient complexity that it should be considered for future discussion at a later date, potentially independently of the Draft Instrument.²²² In addition, the Working Group intends to further consider the Rights of Suit issue at its eighteenth session in Vienna from 6 to 17 November 2006.²²³

It is to be hoped that, notwithstanding the complexity of the issues, the Working Group continues to favour harmonisation of the law relating to the transfer of rights of suit. By unifying the law in relation to transfer of rights of suit, the Draft Instrument can remove the uncertainty discussed above, which is inherent when the issue is governed by internal laws that should be subject to conflict of laws theory. While this is the case, it is possible for the substantive unification that has been developed over time for bills of lading to be overthrown by the procedural requirements of conflict of laws, creating a degree of commercial uncertainty. Such uncertainty can, and should, be remedied. The Draft Instrument can therefore provide a way forward that will reflect the need for certainty and completeness in the law relating to transferring bills of lading without simply ignoring the implications of conflict of laws.

9. Conclusion

The goal of this article was to show that the changes made to the statutory scheme for transferring rights of suit in New Zealand have broad implications in relation to conflict of laws theory that have not fully been explored.

²¹⁷ UNCITRAL *Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]* Doc A/CN.9/WG.III/WP.32 (2003) (*Draft Instrument*).

²¹⁸ Comité Maritime International *Draft Instrument on Carriage of Goods [wholly or partly] [by Sea]* (2003) <http://www.comitemaritime.org/draft/draft.html> (at 15 June 2004 – copy on file with author).

²¹⁹ *Ibid.* The 17th session of the Working Group on Transport Law took place in New York from 3-13 April 2006.

²²⁰ *Draft Instrument* above n 217, 59.

²²¹ The relevant Chapters in the most recent version of the Draft Instrument (Doc A/CN.9/WG.III/WP.56) are Chapter 12 (Articles 61-63) and Chapter 14 (Articles 67-68).

²²² UNCITRAL *Report of Working Group III (Transport Law) on the work of its seventeenth session* Doc A/CN.9/594 (2006), 22.

²²³ *Ibid.*, 59.

By examining the development of bills of lading I have attempted to show that their pivotal and interdisciplinary role in international trade has evolved from their flexibility, so that they have been able to respond to the changing needs of international trade and its regulation. Drawing upon this, I discussed the general problems of transferring rights of suit under bills of lading, and the more specific conflictual problems that arise when the solution to the general problem is made at a national, rather than an international level. I believe the proper resolution of the conflictual problems discussed can only be satisfactorily found at an international level. The transnational character of maritime law has meant that it is considered somewhat apart from domestic law, and that international uniformity is particularly important.²²⁴ In the case of the transfer of rights under bills of lading the problem is such that merely harmonising conflict of laws rules is insufficient, and has the potential to lead to the exact sort of uncertainty and gaps in the law that the new regime was supposed to remedy.

For this reason, I have advanced an argument in favour of an international solution as the most appropriate remedy. As I have said above, both the nature of the bill of lading and the nature of the problem point towards this solution, but perhaps most importantly it is the need to avoid undoing the substantive unification that has been achieved in the area thus far by the procedural requirements imposed by conflict of laws. Ultimately, this article favours the approach which was being taken by UNCITRAL and the CMI in the Draft Instrument up to early 2006.

If the procedure previously set out in the Draft Instrument were adopted, it would deal with the transfer of rights of suit at the same level and with the same consideration as the substantive rights and liabilities. I believe that developing an international solution to what is, and has always been, an international problem fits better logically than the piecemeal national solutions currently offered. To regulate substantive rights without considering how to transfer those rights risks having the substantive unification overthrown by a side wind. The approach developed by the Draft Instrument will cater for the need for certainty and convenience in international trade without unfairly sacrificing conflict of laws theory, a result that could be described as the proverbial 'win-win' situation. I therefore hope that UNCITRAL and the CMI recognise that, notwithstanding that it may be complex, the issue must be resolved, preferably in conjunction with the substantive harmonisation currently being undertaken.

²²⁴ *Uniformity or Unilateralism* above n 197, 357.