Supply Chain Financing, Straight Bills of Lading and Standby Letters of Credit

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I. Straight Bills of Lading and What the *Carewins* Decision Corrected

The 2009 decision by the Hong Kong Court of Final Appeal in *Carewins Development (China) Ltd. v. Bright Fortune Shipping Ltd & Anor* (hereafter *Carewins*) relied on Hong Kong, British and Commonwealth court decisions to address two important issues concerning the legal status of straight bills of lading.[1] The first was whether a straight bill of lading is a document of title. If it is, as the Hong Kong Court of Final Appeal held in *Carewins*,[2] the ocean carrier that issued it has the duty described in *The Rafaela*, a unanimous 2005 decision by the House of Lords, "not to release the goods without production of the bill of lading, such duty arising as an incident of the instrument itself."[3]

The second issue pertains to a clause in the bill of lading that disclaimed the carrier's liability for misdelivery of the goods. The Court of Final Appeal of Hong Kong construed this clause against its drafter (*contra proferentum*) and found it insufficiently explicit to exempt the carrier from liability for its breach of the duty to require the presentation of the straight bill.[4]

These aspects required correction because two widely-quoted and relied-upon treatises in Great Britain and the British Commonwealth, *Benjamin's Sale of Goods* and *Carver on Bills of Lading*, contained Professor Guenter Treitel's assertion that a straight bill "was not a symbol of the goods because the carrier was entitled and bound to deliver the goods to the named consignee without production of the bill."[5]

Professor Treitel's assertion, however, does not reflect international maritime practices. In preparation for a first draft of the transport document

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[1] [2009] 5 H.K.C. 160 (H.K.F.A.R.).

[2] *Id.* at 161, ¶2.

[3] *Id.* at 162, ¶7 (citing JI Macwilliam Co.. v Mediterranean Shipping Co. SA (The Rafaela S), [2005] UKHL 11, 2 A.C. 423 (appeal taken from Eng.)).

[4] *Id.*

[5] *Id.* at 187.

provisions of UCP 500, the author interviewed French, German, Scandinavian, Latin American and United States carriers and freight forwarders and all regarded order, as well as straight, bills of lading as documents of title. They also called attention to the increased usage of sea waybills, especially in Scandinavian and inter-European shipments. As with rail, truck and air waybills and unlike straight bills of lading, sea waybills evidence receipt of the goods for carriage but are not documents of title. Accordingly, they do not have to be presented in order to obtain the delivery of the goods; mere identification of the consignee suffices to obtain delivery.

Eventually, courts familiar with these international practices, especially in Asian trade centers, abandoned the receipt characterization of the straight bill of lading. For example, a 2002 decision by the Singapore Court of Appeal[6] acknowledged Professor Treitel's views, but concluded that the delivery of a car to the named consignee of a straight bill of lading without requiring surrender of the bill of lading was unlawful and subjected the carrier who did not require the straight bill of lading to liability for damages. As pointed out by *Carewins,*[7] at the time the Singapore court was hearing the 2002 appeal, the lower court in *The Rafaela* had just decided against the carrier-issuer of a straight bill who delivered the cargo without requiring its surrender. The above-quoted language by the House of Lords in *The Rafaela* was, no doubt, a definitive step in the alignment of English case law with international straight bill of lading practice.

Carewins and *The Rafaela* may well provide the basis for the harmonization of English and Commonwealth law with international bill of lading law on the legal nature and status of straight bills as documents of title. A related and important aspect concerns the harmonization of laws and practices on the security interests of the consignor, consignee and secured creditors who rely on straight bills of lading as collateral for their respective advances or loans. This is particularly true with respect to the consignor and consignee's transfer, assignment or pledge of their respective rights in the straight bill of lading and goods covered by it to a secured lender.

This paper argues that the harmonization of international bills of lading law on the status of straight bills as documents of title and the adoption of U.C.C. Article 9 concepts by an increasing number of Latin American, European and Asian jurisdictions now allow straight bills of lading, in electronic or paper-based form, to function as reliable collateral in

[6] APL Co. v. Voss Peer, [2002] 4 S.L.R. 481, 2 Lloyd's Rep 707 (C.A.) (Sing.).
[7] *Carewins*, *supra* note 1, at 188, ¶90.

letters of credit and non-letter of credit transactions. Serving as documents of title, straight bills of lading can provide a safe means by which banks can finance the international shipping of goods and secure payment and reimbursement of commercial or standby letter of credit payments, especially in the context of what will be described in this article as "supply chain financing."

Part I of the paper briefly examines the relevant United States law and practice on the use of straight bills as collateral prior and subsequent to the enactment of Article 9 of the Uniform Commercial Code (U.C.C). The reason for focusing on United States secured transactions law and practice is that it has had vast experience with bills of lading as collateral and presently serves as a model for harmonization of this law. Yet, after examining the rights and defenses to claims based on freight forwarders' (or "contractual" carriers') straight bills of lading, Part II shows that these documents are not reliable collateral. As illustrated by *Carewins*, the carrier can prevent *in personam* actions by the holders of freight forwarders' straight bills of lading. In addition, Part III shows that *in rem* actions by the holders of freight forwarders' straight bills of lading are also an uncertain means with which to seek the attachment of the goods or their carrying vessel. In contrast, bills of lading issued by ship owners or fully-fledged ("actual" as contrasted with "contractual") carriers are effective tools with which to obtain those attachments.

Finally, Part IV addresses the future of straight bills of lading as reliable collateral. It argues that the law of letters of credit contained in Revised UCC Article 5 and of secured financing in Article 9 of the same code provides an additional safety element to further ensure that straight bills of lading serve as reliable collateral, especially for supply chain financing.

II. The Development of United States Law and Practice Concerning Straight Bills of Lading as Collateral

The dichotomy of negotiable and straight bills of lading appeared first in the Federal Bill of Lading (Pomerene Act) of 1916.[8] This statute

[8] The Federal Bill of Lading (Pomerene) Act of 1916, ch. 415, Pub. L. No. 239, 39 Stat. 538 (1916) (currently codified in 49 U.S.C. §§ 80101 – 80116). This statute governs bills of lading issued by any common carrier for the transportation of goods in any territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in a State to a place in another State, or from a place in the same State through another State or foreign country. 39 Stat. at 538–39, §1.

governs generically all of the bills of lading used in interstate commerce in the United States.[9] As noted by a state appellate court, the primary purpose of this statute was:

> [T]o confer complete negotiability on certain types of bills (order bills) and to change the rule referred to, in so far as it applied to order bills. Negotiability was not conferred on order bills in express terms but the implication of negotiability is obvious when the entire act is considered.[10]

This particular feature distinguished United States negotiable bills of lading from their English, Commonwealth and civil law counterparts and did this until many of these countries adopted a version of the Hague Convention that contained the same rule.[11] The Pomerene Act version of negotiability thus sanctioned a negotiable bill of lading that was not only a document of title, but also a fully "abstract" or "independent" undertaking. Possession of such a bill of lading in the hands of a *bona fide* purchaser or lender such as the bank that issued or negotiated a letter of credit and its documents assured them of the carrier's liability to deliver the goods shipped or their market value, even if the consignor had not actually shipped the goods described in the bill of lading. For what mattered as the carrier's abstract obligation was the description of the goods in the bill of lading and not the equities of underlying transactions. It is for this reason that the author noted in another publication that with the early 20th century enactment of the Uniform Bills of Lading and Pomerene Acts, bills of lading subject to United States law were the most desirable anywhere in the trading and finance world.[12] Together with the scarcity of manufactured products and of carrying vessels in Europe following World War I, the quality of United States issued ocean bills of lading made it possible for United States banks and ocean carriers to become the most prominent participants in

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[9] *Id.*

[10] Chesapeake & O. R. Co. v. State Nat'l Bank of Mayville, 138 S.W.2d 511, 513 (Ky. 1939).

[11] Boris Kozolchyk, *Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective*, 23 J. OF MAR. L. & COM. 161, 173–77, 185–90 (1992).

[12] *See id.* at 173–75 ("With the early 20th century enactment of the Uniform Bill of Ladings and Pomerene Acts in the United States, American-issued bills of lading attained the highest level of abstraction available at that time . . . [the right to claim the value of the described goods] instilled trust in the written statements by carriers and encouraged consignees to deal with distant and unknown sellers.").

international trade and particularly in the issuance, confirmation and negotiation of letters of credit.[13]

In addition to bolstering the negotiability of "order" or "bearer" bills of lading, the Pomerene Act was the first to confer a restricted negotiability status to straight bills of lading. In § 2, it defined a straight bill as: "A bill in which it is stated that the goods are consigned or destined to a specified person . . . ."[14] This bill was deemed a document of title that lacked the necessary "order" or "bearer" clause to be fully negotiable, but which nonetheless could be transferred or negotiated in a restricted sense. Indeed, § 109 of the Pomerene Act provided for its transfer by delivery and for a restricted version of negotiation. Under the heading "Transfer of Bill by Delivery; negotiation of straight bill", this section provided that:

> A bill may be transferred by the holder by delivery, accompanied by an agreement, express or implied, to transfer title to the bill or to the goods represented thereby. A straight bill of lading cannot be negotiated free from existing equities, and the endorsement of such a bill gives the transferee no additional right.

§ 112 in turn added that a person to whom a bill has been transferred, but not negotiated, acquired — as against the transferor — title to the goods, but subject to the terms of any previous agreement with the transferor. Thus, if the bill was a straight bill, the transferee acquired the right to notify the carrier of the transfer and become "the direct obligee of whatever obligations the carrier owed to the transferor of the bill *immediately before the notification*."[15] This meant that the transferees' claim to such a carrier obligation could be defeated by "garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor."[16] The fact that the enforcement of these rights *in rem* depended upon the time creditors claimed their liens and notified the carrier of the creation of their security interest closely resembled the role of the creditor-assignee's notification to the account-debtor of his status as an assignee in the law of assignment of

[13] *See* Wilbert Ward, AMERICAN COMMERCIAL CREDITS, at 7 (1922, The Ronald Press, Nabu Public Domain Reprints. The author is indebted to Professor James E. Byrne for having made this copy available).
[14] The Federal Bill of Lading (Pomerene) Act of 1916, 39 Stat. at 539, §2.
[15] 39 Stat. at 543, §32, ¶ 1 (emphasis added).
[16] *Id.* §32, ¶ 2.

contract rights.[17] Not surprisingly, some United States courts equated the status of the transferee of a straight bill to that of an assignee of the transferor's contractual rights against the carrier.[18]

The empowerment of the straight bill of lading as a document of title capable of being transferred or assigned, albeit subject to underlying equities and notification, was soon reflected in practices designed to utilize the possessory rights of the holders of these bills as collateral for loans extended mostly by banks and factoring enterprises. For example, in one such a practice, the shipper was both the consignor and consignee of the cargo who according to a federal court decision retained "ownership and control of the shipment until it reached its destination, and even there before delivery had been made and possession parted with."[19] In that case, the shipper in Iowa no longer trusted his broker-factor in Philadelphia to pay for the cargo of poultry before reselling it. The shipper would have preferred an order bill of lading issued to his own order, but the rail carrier said that he could not issue such a negotiable bill for a cargo of chicken.[20] The shipper then accepted a straight bill of lading in which he as consignor was also the consignee.[21] This scheme enabled him to retain possession of the cargo at destination until the unnamed consignee would pay for it.[22]

As in *Carewins* and *The Rafaela* (although some 70 years earlier), the Circuit Court of Appeals for the Eighth Circuit held the carrier liable for allowing the broker-factor (as a notify party) to obtain possession of the cargo without surrendering the straight bill.[23] However, from a secured transactions law and practice standpoint what mattered most in this case

[17] *See* JAMES E. BYRNE, NEGOTIABILITY, THE DOCTRINE AND ITS APPLICATION IN US COMMERCIAL LAW 1–11 (14th ed. 2005) (providing an illuminating discussion of the differences between the law of transfers and assignments and that of negotiation in the United States; and especially addressing the insight provided by the decision in American Bridge Co. of New York v. City of Boston, 88 N.E. 1089 (Mass. 1909) into why contract law is inadequate to address certain "transfer" issues from buyers of promises that want streamlined or supercharged rights).

[18] *See, e.g.*, Quality Shingle Co. v. Old Or. Lumber & Shingle Co., 187 P. 705, 706 (Wash. 1920) ("[T]he language of [The Federal Bill of Lading (Pomerene) Act of 1916] plainly places the assignee of a straight bill of lading in all respects in the shoes of his assignor.").

[19] *See* Estherville Produce Co. v. Chicago R.I. & P.R. Co., 57 F.2d 50, 52 (8th Cir. 1932).

[20] *Id.* at 51.

[21] *Id.*

[22] *Id.* at 52 ("It is to be kept in mind that, in this straight bill of lading the produce company was named both as consignor and consignee, thus, in any view, retaining ownership and control of the shipment until it reached its destination, and even there before delivery had been made and possession parted with.").

[23] *Id.* at 52–53.

was the principle that an ownership or security interest in the same collateral represented by a straight bill of lading could be retained by the consignor and could also be transferred to another or could be held by the same consignor whether as an owner of the goods or as a secured creditor.

The significance of the consignor's ability to transfer or assign his rights in the bill of lading to another party, including to oneself as a consignee-creditor or to an arm's length secured creditor for enabling straight bills of lading to serve as reliable collateral became apparent in *George F. Hinrichs* (hereafter *Hinrichs*) v. *Standard Trust & Savings Bank*, (hereafter *Standard Bank*), a decision rendered by the Circuit Court of Appeals for the Second Circuit in 1922, only six years after the enactment of the Pomerene Act.[24] In that decision, Grant, a Chicago wholesaler of butter, eggs and poultry, shipped a carload of eggs by rail consigned to *Hinrichs*. Grant obtained from *Standard Bank* a sight draft payable to its order and drawn against *Hinrichs*. This draft was accompanied by the straight bill of lading procured by Grant that covered the shipment of eggs consigned to *Hinrichs*. *Standard Bank*, acting as a lender to Grant, credited his account with the amount of the draft drawn against *Hinrichs* and forwarded the bill of lading accompanied by a sight draft and an invoice for the amount he owed to *Standard Bank's* correspondent bank in New York.[25] The latter's function was to present these documents to *Hinrichs* and demand his payment against the release of the straight bill of lading. During the late nineteenth and early twentieth centuries, the presentation of a sight draft accompanied by the straight bill of lading had become the standard procedure for "documentary collection" transactions in the United States, Europe and other major trading centers until eventually it was largely replaced by the commercial letter of credit.[26]

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[24] 279 F. 382, 384–86 (2d Cir. 1922).
[25] *Id.* at 383–84.
[26] *See id.* at 388–89.

> In Williston on Sales, Sec. 289, that writer, discussing the practice of a shipper's attaching the draft to a bill of lading, whether he has the draft discounted or not, and their being then sent forward and presented to the party to whom the merchandise is forwarded, says: 'So common has this practice become that the mere fact that a bill of lading and a draft are attached together indicates that the shipper intends to make the delivery of the goods conditional upon the payment of the draft. This rule is accordingly enacted in the Sales of Goods Act and the English provision is copied in the American Sales Act (subdivision 4 of section 20). The authorities collected in the note show that the courts have fully recognized the meaning and validity of the mercantile custom.'

In this case, *Hinrich* as consignee refused to pay for the eggs but nonetheless somehow (in a manner not explained by the court) received the goods from the carrier and sold them to a third party, collected their price, deducted from it an amount it claimed that Grant owed him and forwarded the remainder to Grant. When sued by *Standard Bank* for the value of the shipment represented in the straight bill of lading, he claimed that he should not have had to pay twice for the same eggs.[27]

The Circuit Court of Appeals for the Second Circuit referred to the above-transcribed sections of the Pomerene Act to set forth two principles that define the rights of a holder of a straight bill in the cargo: First, the straight bill may be transferred by its holder by delivery, accompanied by an agreement "express or implied to transfer the title to the bill or to the goods represented thereby" but subject to existing equities.[28] And second, the transferee acquires thereby, "as against the transferor the title to the goods, subject to the terms of any agreement with the transferor (and in the case of straight bill, the transferee) . . . the right to notify the carrier of the transfer to him of such bill and thereby become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification."[29]

The court pointed out that *Standard Bank* as transferee or assignee of the straight bill of lading had not notified the carrier as the Pomerene Act required.[30] Under these circumstances, the question was whether *Hinrichs* as Grant's consignee-factor of the shipment was legally entitled to sell the cargo after he had another type of notice that the bill of lading had been transferred to *Standard Bank*. The court relied on "mercantile law" as the source for the following rule:

> Where A, the shipper, takes a bill of lading and names himself as consignee, he retains title to the goods. If he names B as consignee, the title to the goods is in B. But in both cases he has an effective hold upon the goods, for in the latter case he has a right of possession analogous to a lien, which he can exercise prior to the delivery of the goods to B by the carrier.[31]

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[27] *Id.* at 384.
[28] *Id.* at 385–86.
[29] *Id.* at 385 (parenthesis added).
[30] *Id.*
[31] *Id.* at 386.

The court acknowledged that "the vital question is as to the right of Standard Trusts & Savings Bank, which acquired the straight bill of lading from the shippers by having discounted it."[32] It also acknowledged that the bank took the rights of the shippers subject to equities and therefore did not acquire the legal title to the eggs. That title as indicated by the bill belonged to the consignee *Hinrichs*. However, evidence also showed that the consignee was in fact holder of a merely naked title, the eggs having been consigned to him to sell for the consignor, who remained the beneficial or equitable title holder.

The court concluded that if the consignee *Hinrichs*, after having notice that the consignor had parted with its interest and transferred its rights to the bank, sold the eggs and paid the proceeds over to the consignor, it was liable to the bank which had succeeded in whatever rights the consignor possessed and of which it received notice. The right of the bank as a secured creditor, then was not impaired by whatever took place after this notice between the consignor and the consignee.[33]

After reviewing the large number of cases involving the above-described practices, the court quoted Williston on Sales for the proposition that the discount of the documentary drafts had become so common that the mere fact that a bill of lading and a draft are attached together evidenced that the shipper intended to make the delivery of the goods conditional upon payment of the draft. Accordingly, when *Hinrichs* ignored such a notice he acted at his peril.[34] *Certiorari* was denied by the United States Supreme Court and the Shepard's citator indicates that this case remained the law of the land having been cited without reservation in almost a dozen federal and state decisions until the advent of the U.C.C. in 1952 and its progressive enactment by all of the fifty states. [35]

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[32] *Id.*
[33] *Id.* at 389–90.
[34] *Id.*
[35] *Hinrichs*, 279 F. 382, *cert. denied* 258 U.S. 629 (1922). The following federal and state cases cited *Hinrichs* for support. Austin Nichols & Co. v. S.S. Isla De Panay, 292 F. 723, 731 (2d Cir. 1923); Yakima Trust Co. v. Taub (*In re* Taub), 4 F.2d 993, 995 (2d Cir. 1924); Sugarland Indus. v. Old Colony Trust Co., 6 F.2d 203, 207 (5th Cir. 1925); Estherville Produce Co. v. Chicago R. I. & P. R. Co., 57 F.2d 50, 52 (8th Cir. 1932); G. A. C. Commercial Corp. v. Wilson, 271 F. Supp. 242, 246 (S.D.N.Y. 1967); Kasden v. The New York, New Heaven, & Hartford R.R. Co., 133 A. 573, 575 (Conn. 1926); Chesapeake & Or. Co. v. State Nat'l Bank of Maysville, 133 S.W.2d 511, 515 (Ky. 1939); Pa. R.R. Co. v. Edson Bros., 92 Pa. Super. 496, 498 (1927); E. Tex. Motor Freight Lines v. W. H. Hutchinson & Son, Inc., 241 S.W.2d 759, 765 (Tex. Civ. App.1949); Mumford v. Hartford Accident & Indem. Co., 228 P. 206, 210 (Utah 1924).

Revised Articles 1, 7 and 9 of the U.C.C. made reliance on bills of lading as collateral easier and more certain. Article 1 defined bills of lading generically as documents of title.[36] In turn, Article 7 defines the term "document" as a "document of title" or as a transportation receipt document of the type described in Section 7-201(b) (Person That May Issue a Warehouse Receipt; Storage Under Bond)[37] and listed both negotiable and non-negotiable bills of lading as documents of title.[38] Revised Article 9 defined collateral as "the property subject to a security interest or agricultural lien" including, among other, "accounts, chattel paper, payment intangibles, and promissory notes . . . ."[39] An Article 9 chattel paper is one that enables a secured creditor to rely both on the *in personam* liability of a negotiable instrument such as a promissory note and the accompanying and often attached *in rem* liability in the goods.

From its inception, Article 9 formulated what by now has become an important principle of the law of secured transactions: title to the collateral is immaterial.[40] By doing this, the U.C.C. eliminated the need for ambiguous and often counter-intuitive distinctions between legal and equitable title and who holds which; is it the "historical" owner of the goods, the secured creditor or the secured debtor, or all of these parties? This was a distinction relied on by the *Hinrich* court among others.[41] Finally, Article 9 provided a filing alternative to the notice to the carrier required from the secured creditor who relied on a bill of lading as collateral. As a result of this alternative, notice to third parties (creditors as well as *bona fide* purchasers) is available by a filing in an easily accessible, inexpensive and specially-designed registry for notices of security interests in personal property.[42]

Where the security interest was in a negotiable document and it concerned goods in the possession of the carrier-bailee who issued the negotiable documents covering the goods, the security interest in the goods could be perfected by perfecting a security interest in the negotiable document as just described. This security interest has priority over any security interest in the goods that becomes perfected by "any other methods

[36] *See* U.C.C. § 1-201(6) (General Definitions) (2010).
[37] *See id.* § 9-102(a)(30) (Definitions and Index of Definitions).
[38] *See id.* § 7-104 (Negotiable and Nonnegotiable Document of Title).
[39] *See id.* § 9-102(a)(12) (Definitions and Index of Definitions).
[40] *See id.* § 9-202 (Title to Collateral Immaterial) (stating the present formulation of the principle).
[41] *See id.*
[42] *See id.* § 9-501 (Filing Office).

during that time."[43] Where the security interest is in goods covered by a non-negotiable document such as a straight bill, and the goods are in the possession of the carrier who issued the non-negotiable document, the security interest in these goods is perfected by: (1) issuing a document in the name of the secured party, *i.e.*, the straight bill of lading; (2) the carrier-bailee's receipt of the notification of the secured party's interest or (and this is an important "or"); (3) by the secured creditor filing as to the goods.[44]

U.C.C. § 9-110 (Security Interests Arising Under Article 2 or 2A) also recognizes a security interest arising under U.C.C. § 2-505 (Seller's Shipment Under Reservation) and protects the consignor until the consignee receives possession of the goods. U.C.C. Article 2 on Sales also strengthens the role of the non-negotiable bill of lading as collateral. § 2-505(1)(b) provides for the preferential right of the consignor to the goods shipped under a non-negotiable bill of lading as against the consignee and his creditors.[45] And § 2-505(1)(a) adds that a negotiable bill of lading issued to the name of the consignor reserves possession of the goods as security.[46]

III. Rights and Defenses to Claims Based on Freight Forwarders' Straight Bills of Lading

The reliability of straight bills of lading as collateral decreases significantly when issued by transportation intermediaries known as freight forwarders or "contractual" carriers. As intermediaries between the ship-owners and the shippers, freight forwarders may rent or purchase shipping space from the ship-owners through charter party agreements. In the United States and a few other countries, freight forwarders can also act as common carriers and, as such, publish tariffs, issue bills of lading in accordance with these tariffs and make themselves available for the transportation of goods of the public at large, rather than just for select clients. These freight

[43] *See id.* § 9-312(c)(1); § 9-312(c)(2) [Goods covered by negotiable document.].
[44] *See* U.C.C. § 9-312(d) [Goods covered by nonnegotiable document.]
[45] *Id.* § 2-505(1)(b) (Seller's Shipment Under Reservation) ("(1)Where the seller has identified goods to the contract by or before shipment: . . . (b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security . . . .").
[46] *Id.* § 2-505(1)(a) (Seller's Shipment Under Reservation) ("(1) Where the seller has identified goods to the contract by or before shipment: (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods.").

forwarders are known as Non Vessel Owning or Operating Common Carriers (NVOCCs for short).[47]

All of the bills of lading issued by the freight forwarders have one aspect in common: the *in personam* and *in rem* rights they can confer upon their holders are "derivative", *i.e.*, the rights of the holders of bills of lading issued by freight forwarders are derived from the charter party entered into between the owner or operator of the vessel (on behalf of the owner) and the freight forwarder as a charterer. More often than not, this derivation is indicated by expressions such as "per charter party" or "subject to charter party." The derivative nature of these documents can deprive their holders of *in rem* rights against the vessel or the cargo or can subject these rights to major pre-existing liability of the freight forwarder charterer to the ship-owner, such as for charges as major as those for "demurrage."[48] It can also subject their holder, such as a bank that relied on them as collateral, to *in personam* defenses that can equally preclude its claim against the carrier.

A. Defenses Against *In Personam* Actions

As an example of a defense available to the carrier against an *in personam* action by the holders of freight forwarders' straight bills of lading, consider the following facts in *Carewins*. The Court of Final Appeal found that the defendant, a freight forwarder and a "contractual" carrier (hereafter BF), issued two sets of bills of lading to the shipper-respondent *Carewins*. Both sets named *Carewins* as the shipper and its buyer as the consignee and also as the notify party (hereafter AFI). Once in Los Angeles, the containers were handled by freight forwarders (hereafter TUG) who acted as agents for BF in the discharge and delivery of the containers to AFI.

Shortly after this delivery, the goods were seized by US Marshalls executing a United States federal court order that resulted from infringement of trademark proceedings brought by Burberry Ltd, a fashion

[47]*See* Don Hofstrand, Transportation Terms, Co-director, Ag Marketing Resource Center, Transportation Terms (Oct. 2006), www.agmrc.org/business_development/getting_prepared/valueadded_agriculture/glossaries_of_terms/transportation_terms.cfm; www.somatrans.mu/glossary/N/; www.asmara.com/terminology.htm (describing the various services provided by NVOCCs).
[48] *See, e.g.*, Mineral v. Commonwealth Oil Ref. Co. (*In re* Commonwealth Oil Ref. Co.), 734 F.2d 1079 (5th Cir. 1928) (illustrating the importance of demurrage charges and their allocation per charter party stipulations).

house, against AFI.[49] Burberry's action against AFI was later settled out of court and the goods disposed of on terms which were not revealed at the trial. The Court also deemed established the fact that AFI never paid *Carewins* for the goods it had shipped.[50]

The Court did not determine why the consignee did not pay the shipper, nor the terms of the settlement between Burberry and AFI and whether they also involved *Carewins* as an unnamed defendant. The fact that AFI paid nothing for the goods it obtained from the BF would support the allegation that *Carewins* and AFI were part of the same legal entity that conspired to infringe Burberry's trademark. If true, this allegation would explain *Carewins*' lack of interest in obtaining payment from the consignee for the goods delivered to him without the latter's tender of his straight bill of lading. It would also explain why *Carewins* seemed willing to delegate the task of demanding the presentation of the straight bill of lading in exchange for presumably the payment of cash on delivery, not to the customarily trusted intermediaries such as a collecting bank or a bank that issued a letter of credit on behalf of AFI, but to a freight forwarder.

If BF were to provide *prima facie* evidence of such a conspiracy and of its own innocence with respect to it, it would have a valid defense against a holder of the straight bill of lading issued to *Carewins* as well as against his transferees or assignees. The aforementioned set of facts shows that contractual equities or violations of the law that took place between the consignor and consignee of the freight forwarder's straight bill of lading would be available to the carrier as defenses in an *in personam* action.

B. Defenses Against *In Rem* Actions

As is well known to international maritime traders and experienced bankers, an ocean bill of lading issued by a ship owner or shipping company-carrier is easier to enforce against the carrier, his ship and the cargo than the one issued by a freight forwarder. An old principle of the law of bills of lading of French origin suggests the explanation for this ease: "the vessel is bound to the merchandise and the merchandise is bound to the vessel" (*Le batel est obligé a la merchandise, et la merchandise au batel*).[51] The procedural meaning of this principle is that the consignee or other cargo claimant in possession of a negotiable or straight bill of lading issued

[49] *See Carewins, supra* note 1, at 166, ¶ 12.
[50] *Id.* at 166, ¶ 13.
[51] GRANT GILMORE & CHARLES LUND BLACK JR., THE LAW OF ADMIRALTY 187 (2d ed. 1975) (citing the French commentator Cleirac).

by an owner or by the master of the vessel on behalf of its owner could seize, arrest, or attach the vessel to reimburse himself for damage or loss suffered by his cargo — for ownership of the vessel, whether "legal" or "beneficial," provides the legal basis for an *in rem* action. In contrast, if the cargo claimant had a receipt type of document issued, say, by the ship's mate or held a freight forwarder's bill of lading issued by a charterer of the vessel, his rights against the vessel and the cargo would depend upon how much of a beneficial ownership interest such a contractual carrier would have when operating the vessel. This is not an easy determination and one that often varies from country to country.

Indeed, *in rem* actions do not tend to provide a reliable means of enforcing bills of lading. In 1990, during the drafting of UCP 500, the author surveyed maritime lawyers of various representative countries and jurisdictions on the enforceability of freight forwarders' bills of lading to obtain the attachment of the cargo or the seizure of the vessel, and alternatively, whether the insurance policies they carried to pay for damages or losses suffered by the cargo were sufficient to cover these losses. The survey lead to the conclusion that the right to claim possession of the goods from the carrier or to attach his vessel in an *in rem* action was regarded generally as belonging only to the freight forwarder who chartered or bought space in the vessel as the holder of the actual carrier's bill of lading. Only rarely were these rights recognized as belonging to the holder of the bills issued by the freight forwarder. Thus, the derivative rights of the holder of the forwarder's bill of lading were as uncertain in the surveyed countries and jurisdictions as was the adequacy of the freight forwarders' insurance coverage.[52]

The author is not familiar with the amount of present insurance coverage among representative freight forwarders' bills of lading, and it may well have increased since my 1990 survey.[53] Neither has the author been able to ascertain how much of the *in rem* liability law surveyed in the early nineteen nineties has changed in the intervening years. Yet, there are other contemporary indications that the derivative rights of the holders of

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[52] *See* Boris Kozolchyk, *The Unwarranted Comeback of the FIATA Bill of Lading*, DCInsight Vol. 11 No.2 Apr.-June 2005, at n.13, *reprinted in* 2006 ANNUAL SURVEY OF CREDIT LAW & PRACTICE 135–44 (James E. Byrne & Christopher S. Byrnes eds., 2006).

[53] In 1990, the average coverage of individual and associations of freight forwarders' insurance policies did not exceed $40,000 per average cargo. This was not a very reassuring coverage for cargo whose average price exceeded $200,000. (This information was obtained through interviews with freight forwarders, shippers, and consignees during the years the author was at the ICC (the summer of 1990). The countries were France, Belgium, Sweden, and the United States.)

these bills remain uncertain and conflicting from one country or jurisdiction to another. For example, consider the differences in the law and practice concerning claims against vessels for damaged or lost cargo picked up in ports such as Hong Kong and Singapore. As described by Ian Koh, currently the head of the Shipping & International Trade Practice and a partner in the Litigation & Dispute Resolution Group at the Singapore law firm of WongPartnership, and formerly a shipping partner at Drew Napier, an active maritime law practitioner and litigator in that region:[54]

> [T]he ownership of the offending vessel may change shortly after the (occurrence of the cargo) loss. If a writ in rem is not issued before the change of ownership and if there are no sister ships to the offending ship, then a claimant may find itself without a remedy in rem if he has no opportunity to arrest the vessel as security for his claim. In a one ship company situation, the consequences can be dire.[55]

Further, consider the situation of bills of lading issued as a result of a demise or bare boat charter parties. In Singapore, the general rule is that if the offending ship is under a demise charter where the charterer hires his own crew and operates the vessel with them at the time the damage occurred, then that ship is free from arrest for the cargo claim.[56] Yet, Ian Koh also points out that under English and Hong Kong law, arrest or seizure of such a chartered vessel may still be available.[57] In addition, key concepts such as beneficial ownership of the vessel as contrasted with its

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[54] *See* Ian Koh (ian.koh@wongpartnership.com), Former Shipping Partner at Drew Napier, Current Issues in Our Admiralty/Shipping Practice, at ¶ 5, http://www.drewnapier.com/publications/D_npub-4.pdf [hereinafter Current Issues in Our Admiralty/Shipping Practice].

[55] *Id.* (parenthesis added).

[56] *Id.* ¶ 19. Mr. Koh explains that determining whether the contractual carrier is a demise charterer is especially important under Singapore Law because of the peculiarities of Singapore's High Court (Admiralty Jurisdiction) Act which confers admiralty jurisdiction on the Singapore court. *Id.* ¶ 18 (quoting High Court (Admiralty Jurisdiction) Act, *infra* note 49, §4(4)(a)(b)(i)(ii)). Thus, if the contractual carrier is the beneficial owner of the vessel carrying the cargo at the time it was damaged, then the cargo claimant can arrest the offending ship to secure his claim. Alternatively, he can also arrest other ships beneficially owned by the contractual carrier. If the contractual carrier is a demise charterer of the offending ship, then the offending ship cannot be arrested for the cargo claim. Only the ships beneficially owned by the demise charterer can be arrested. *Id.* ¶ 19.

[57] *Id.* ¶ 6. A perhaps determinant consideration is who signed the bill of lading and for whom or on whose behalf, the owner of the vessel or the charterer. *See id.* ¶ 7 (citing Wilston SS Co. v. Andrew Weir & Co. (1925) 22 Lloyd's Rep. 521; Cascade Shipping Inc. v. Eka Jaya Agencies (Pte) Ltd [1993] 1 S.L.R. 980 (Sing.)).

legal ownership are only indirectly and vaguely defined. For example, Section 4(4) of Singapore's High Court (Admiralty Jurisdiction) Act governs the availability of *in rem* actions and forms of ownership as follows:

> In the case of any such claim as is mentioned in section 3 (1) (*d*) to (*q*), where —
> (a) the claim arises in connection with a ship; and
> (b) the person who would be liable on the claim in an action in personam (referred to in this subsection as the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
> an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against —
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of that ship under a charter by demise; or
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.[58]

IV. The Present and Future of Straight Paper Based and Electronic Bills of Lading as Collateral

A. Security in Commercial Letter of Credit and Supply Chain Financing

When one takes into account the above-discussed judicial and statutory clarifications on the legal nature of the straight bill of lading as a document of title, especially when issued by ship owners and fully-fledged (not contractual) carriers, it becomes apparent that they can serve as safe and useful collateral especially when secured creditors wish to limit the negotiation of the bills of lading by restricting their transfer only to designated parties.

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[58] The High Court (Admiralty Jurisdiction) Act, (2000), Chap. 123, 4 S.L.R. 156, § 4(4)(a)(b)(i)(ii) (Mode of exercise of admiralty jurisdiction), *available at* http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Reved-123&date=latest&method=part [hereinafter the High Court (Admiralty Jurisdiction) Act].

Yet, bills of lading, whether negotiable or straight, have lost their appeal as collateral for many letter of credit bankers.[59] They only wish to act as paymasters of their issued or confirmed letters of credit and not as trade financiers. In addition, they find it too costly and risky to engage in a careful examination of the strict compliance of bills of lading which are increasingly populated by ambiguous "boxes", "data fields", "notations", signatures, authentications, disclaimers and so on. Thus, they have migrated to a form of financing known as "supply chain financing."[60] In this form of financing, "B" the banker provides cash payments to suppliers of goods in the distribution "chain" by purchasing or discounting the suppliers' accounts receivable. Assume, for example, that "H", a Honduran cooperative of fishermen, has a steady clientele for its lobsters among the United States importer-distributors of lobsters ("I"). If B purchases H's accounts (usually payable on a 30 to 90-day basis) it will give H cash on a "non-recourse" basis and will assume the commercial risk of I's non-payment. If B discounts H's accounts, it will often do it on a "recourse" on the transferor of the account, *i.e.*, H will remain responsible for paying for the face amount of the accounts to B if I fails to pay for it. Thus, either in a purchase or discount transaction, H does not have to wait 30, 60, 90 or more days to use most of the amount owed by I.

To secure repayment of what it advanced or paid to H, B files for a security interest in H's lobster inventory and accounts receivable owed by I so that they serve as collateral. This security interest will be recorded in the Honduran registry of secured transactions and will protect B against all claims secured and unsecured on that collateral provided that the filing is entitled to the requisite legal priority.[61] Concomitantly, B or its correspondent in the United States ("C") extends a line of credit to I that will facilitate its payment of the accounts receivable owed to H. This line of

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[59] *See* Kozolchyk, *supra* note 52 (discussing a series of ICC Banking Commission Opinions that did away with UCP 500 dichotomy between FIATA multimodal transport bill of lading and port-to-port bill of lading and actual carrier v. contractual carrier, thereby eroding bill of lading holders' protections, namely the ability of the applicant and issuing bank to recover against carriers and freight forwarders on cargo claims and to subject vessels to arrests and attachments); Kozolchyk, *supra* note 11, at 161–62, 240–41.

[60] *See generally* Kitt Carswell, *Supply Chain Financing: A new way for trade banks to strengthen customer relationships* (CGI Group Inc., White Paper, 2007), *available at* http://www.cgi.com/files/white-papers/cgi_whpr_74_supply_chain_financec_e.pdf.

[61] *See* Decreto No. 182 de 2009, [the Honduran Law of Secured Transactions], [Article 50], La Gaceta, Diario Oficial de la República de Honduras, Jueves 28 de 2010 (Hond.). This law was the first in Latin America to successfully implement both the OAS Inter-American Model Law on Secured Transactions of 2002 and the 2009 Model Registry Regulations.

credit will be secured by I's inventory of lobsters, as well as with accounts receivable owed to I by restaurants, or (if I is a chain of restaurants) by I's own accounts receivable (including the credit card receipts of its consumers).

B. A Possible Use of Commercial or Standby Letters of Credit

Notice that, in the simple purchase or discount of the respective set of accounts receivable, H and I saved themselves the costs of issuing, advising, confirming, negotiating and paying letters of credit. Yet, unless B is the same bank in Honduras and the United States it will have to enter into a (contractual) correspondent or line of credit relationship with its foreign correspondent. It is very likely that the need for supply chain financing will grow as developed nations continue to consume increasingly large amounts of raw materials and vegetables (among other products) from developing nations. It would not be unusual, then, if importers in developed nations would pressure their banks to facilitate their imports by purchasing accounts receivable and documents of title from such producers-exporters and their banks. Yet, the banks of the producers-exporters who do not have correspondent banking relationships with the importers' banks may well be persuaded to sell their accounts and documents of title if the banks of producers-exporters have the latter's firm assurance of purchase and that assurance is issued in advance of the tender of the specified accounts and/ or of the documents of title, as is customary with commercial and standby letters of credit.[62]

The firmness and "abstraction" or independence from the equities and defenses stemming from underlying transactions, which are typical with commercial and standby letters of credit, would be an essential pre-requisite for the reassurances of certain payment or reimbursement needed between or among these supply chain financing "strangers." It is true that the banks that participate in a supply chain financing relationship could stipulate in their individual agreements that courts should interpret their contractual undertakings to each other as abstract and "final" undertakings. Yet, many countries enforce such undertakings only if they are sanctioned by treaty,

[62] The situation would not be much different from that which took place during the Second World War with respect to highly scarce Spanish and French wines in the United States and Latin America. As described to the author by a Spanish banker, his bank used to receive "dozens of letters of credit" each day issued by banks in the United States and Latin America that would be payable against the presentation of invoices and shipping documents documenting the shipment of Spanish wines at prices with "approximate" ranges and with certain generic designations and certificates of quality.

statutory or customary laws.[63] In addition, the international customary law of letters of credit contains tried and tested binding rules on the time and manner in which correspondent banks pay and reimburse each other. Finally, a standby letter of credit known as “financial” can be paid in a very expeditious fashion when the examination of its documents is limited to checking that the exact or literal *haec verba* text of documents, especially certifications, specified in the letter of credit has been submitted by the beneficiary of the letter of credit. This diminishes not only the time of the issuing or confirming bank’s examination of the document but also reduces significantly the cost and risk of such an examination.

C. The U.C.C. Article 5 and Article 9: "Financial" Letters of Credit and Supply Chain Financing

The combination of the law of letters of credit contained in Article 5 of the U.C.C. and of secured financing law in Article 9 of the same code with the International Standby Practices (ISP98), rules endorsed by the International Chamber of Commerce,[64] provides a safe, viable and cost-effective means to finance supply chain transactions by means of standby letters of credit and the appropriate filings of security interests in inventory, accounts receivable and their proceeds. UCC Article 9-inspired substantive

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[63] *See* the United Nations Commission on International Trade Law [UNCITRAL], *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*, ¶¶ 3, 17, U.N. Doc. A/CN.9/431 (July 4, 1996), *available at* http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf; *See also* Boris Kozolchyk, *Bank Guarantees and Letters of Credit: Time for a Return to the Fold*, 11 U. PA. J. INT'L BUS. L. 1, 14–15, 25–26 (1989), *available at* http://www.law.upenn.edu/journals/jil/articles/volume11/issue1/Kozolchyk11U.Pa.J.Int'lBus.L.1(1989).pdf.

> The widespread use of the term bank guarantee did not assure uniformity of legal treatment. To begin with, serious differences in substantive law on whether guarantees were abstract or causal obligations existed among jurisdictions involved. These differences were known to the draftsmen of the URCG who preferred to leave the determination of abstraction to courts or arbitral tribunals. . . . Most jurisdictions, however, lacked statutory rules on abstract guarantees. Instead, code and statutory rules on guarantees were essentially causal. In addition, courts in some of the most influential jurisdictions did not sanction abstract bank guarantees for internal trade until the mid-1970s or early 1980s. European banks, therefore, had to rely on contractual and customary law as the basis for enforcing bank guarantees, and hope that courts would remain sensitive to the need to enforce such a guarantee.

[64] *See generally* International Chamber of Commerce, *The International Standby Practices (ISP98)*, ICC Publication No. 590 (Jan. 1, 1999).

laws of secured transactions provide an effective filing and notice system, while "financial" standby letters of credit provide reliable assurances of payment and reimbursements between or among the banks financing these transactions. Indeed, the following hypothetical transaction illustrating the commercial utility of straight bills of lading serving as collateral could take place under the aegis of U.C.C. Article 9 and Guatemala's and Honduras' secured transactions laws:

> As part of his line of credit with bank "IB", Importer "I" in the United States procures the issuance of a financial standby letter of credit in favor of exporter "H" in Honduras. As confirmed by a confirming bank CB in Honduras, this letter of credit is made payable at sight against the presentation of, among other documents, one or more electronic invoices (accounts receivable) issued by H but conveyed as security to either CB or to IB or both. By conveying H's accounts to CB or IB, they would become "owners" of these accounts. As noted earlier, this ownership is not a requirement of secured transactions law; but to avoid the inclusion of the accounts receivable in the estate of the bankrupt, U.S. law requires that there be evidence of ownership of the accounts by a purchaser who buys them outright and without recourse on the seller.[65] This conveyance would be accompanied by the issuance of straight bills of lading consigned to IB. A straight bill of lading is the most advisable because anybody who possesses one original of the negotiable bill of lading may claim delivery and defeat the bank's security interest in the document of title under UCC § 9-331 and § 7-502 and counterpart provisions in UCC Article 9-influenced statutory law.
>
> From the moment IB issued its standby letter of credit, it would file a security interest in the United States in I's inventory and accounts derived from the above-mentioned sales to I's customers. Similarly, CB would file a security interest in H's inventory of lobsters and in its accounts receivable and proceeds in Honduras.
>
> Upon determining the facial, *haec-verba* compliance of the documents submitted by H, CB would pay H the value of its

[65] *See* 11 U.S.C. § 541 (Property of the estate) (2007) [United States Bankruptcy Code].

> purchased or discounted accounts. H would then forward the invoices and straight bill of lading to IB. In some jurisdictions this could be done presently in an electronic manner; in others it will be possible to do so in the near future. As discussed earlier, unlike a negotiable bill of lading, the straight bill enables IB as its consignee to be the only claimant of the goods from the carrier, provided it presents such a straight bill of lading. This feature precludes anyone else from claiming the goods from the carrier. If the straight bill of lading consigned to IB is in electronic format, it would obviously arrive sooner at the counters of IB and would enable an earlier reimbursement and continuous credit extension. [66]

Thanks to the work of the National Law Center for Inter-American Free Trade (NLCIFT), including that of its project coordinator Dr. Marek Dubovec, research attorney Cristina Castaneda, software engineer Thomas Ose and the financial support of the Millennium Challenge Corporation, and in collaboration with the Millennium Challenge Account – Honduras and the Tegucigalpa Chamber of Industry and Commerce officials and technicians, Honduras has become the model for other developing nation registries in Latin America, Africa and Asia.[67] Given his involvement with the design of the Honduran registry and his dual common and civil law expertise in secured transactions law, the author asked Dr. Dubovec to comment on the feasibility of the above-described transaction. The following are his comments:

> In Honduras and the United States, there are three options for the banks (IB and CB) to obtain a security interest in the goods: 1) taking possession of negotiable bills of lading or filing against the bill of lading; 2) being named on the straight bill of lading as the consignee, transferee or assignee; and 3) filing against the goods. If the IB in either country utilized any of these three options, it would perfect a security interest in the goods such as under UCC § 9-312 and § 9-313

[66] For text of the Guatemalan and Honduran secured transaction laws that make possible the use of electronic documents of title, *See* National Law Center for Inter-American Free Trade, Interam[SM]Database, http://natlaw.com/interam/ (last visited Mar. 21, 2011).

[67] Dr. Dubovec is a former graduate student and presently a colleague at the NLCIFT where he is the coordinator of secured transactions projects. Dr. Dubovec also teaches a course on UCC Article 9 at the James E. Rogers College of Law at the University of Arizona.

and Articles 33 and 34 of the Honduran Law on Secured Transactions. The first option (taking possession of the negotiable bill of lading) has the risks you pointed out, *i.e.*, anybody who possesses one original of the negotiable bill of lading may claim delivery and defeat the bank's security interest in the document of title under UCC § 9-331 and § 7-502. In addition, the security interest will remain temporarily perfected only for 20 days after delivery under § 9-312. The problem with this option is the time limit imposed on the security interest – it starts out when the document naming the bank as the consignee is issued and terminates 20 days after delivery. It does not protect the creditor (IB) prior to the issuance of the document and following the expiration of the 20-day period.

The second option (being named as the consignee on a straight bill of lading) would protect the bank, as you pointed out, against deceptive delivery to a third party. In addition to ensuring the security of delivery, the bank would also have a perfected security interest. However, once the goods are released, the straight bill of lading ceases to have any effects and the creditor has the same problem as faced by the person who took possession of the negotiable bill of lading. The security interest will remain temporarily perfected for 20 days under § 9-312. The problem with this option is the time limit imposed on the security interest – it starts out when the document naming the bank as the consignee is issued and terminates 20 days after delivery. It does not protect the creditor (the issuing bank) prior to the issuance of the document and following the expiration of the 20-day period. The second option provides the same protection as regards the security interest and its priority as the negotiable bill of lading. The option seems to be superior to the negotiable bill of lading with respect to security of delivery.

The third option (filing as to the goods or inventory and accounts which in many jurisdictions automatically attaches to proceeds) would combine with the others to provide a more complete and longer-term protection for the secured creditor. As soon as the importer walks into the bank's office and requests the issuance of a letter of credit, the bank should request an authorization under UCC § 9-509 to file a

> financing statement against the importer that would include his inventory and accounts. The collateral should be described as inventory and accounts. Only then should the issuance of the letter of credit alone or in combination with a line of credit be approved. The bank can thus obtain priority and protection against third party claims long before the goods are loaded on board the vessel and a bill of lading issued. If, subsequently, a negotiable bill of lading were issued and negotiated to a third party, the third party's claim would have priority over the previously-perfected security interest of the bank under UCC § 7-503. However, if the bank makes sure that only a straight bill of lading is issued, nobody can defeat the bank's security interest. The bank's security interest will be perfected for 5 years or until expiration of the registration, not merely for 20 days.

V. Conclusions and Recommendations

Carewins and *The Rafaela* have made it possible to deal with straight bills of lading as documents of title in English and Commonwealth laws and also as reliable collateral, except when issued by some freight forwarders. Articles 1, 5, 7 and 9 of the U.C.C. and their counterparts in an increasing number of Latin American countries, as well as UCP600 and ISP98, now make it possible for banks to rely on: (1) paper-based or electronic straight bills of lading, accounts receivable and goods and proceeds thereof covered by them as collateral for supply chain financing; and (2) the more certain enforcement of irrevocable and abstract forms of promises of payment and reimbursements between or among the participating banks. The time is approaching when banks that engage in supply chain financing should avail themselves of these joint capabilities. The statutory and treaty basis for such capability exists. The International Chamber of Commerce should consider the promulgation of best practice customary rules involving the use of standby financial letters of credit in supply chain financing worldwide.