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RESEARCH PAPER

Bills of Lading: Consequences of Non-Presentation and Effects of Exclusion Clauses

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ABSTRACT

A shipping document called a bill of lading plays a significant role in maritime trade internationally for carriage of goods by sea. It is more than a receipt issued by a carrier in capacity as bailee of the goods received by the carrier for their carriage to destination. It is an evidence of a contract of carriage of goods as well as a contract of carriage of goods described in it. In the event of any dispute between the parties to a contract of carriage, i.e. the merchant or shipper (cargo interests) and a ship owner or carrier, the courts make full reliance on the stipulations in the relevant bill of lading. The stipulations in a bill of lading are construed in accordance with the contract made in and evident from the bill of lading. The authors through this article endeavor to highlight the opinions of the courts and the manners in which these stipulations are interpreted and applied in different cases. It also attempts to highlight the importance of a bill of lading in the international trade and business. It is expected that those dealing with the said document in different capacities will appreciate its significance and consequences arising from negligence or unawareness from the relevant laws applicable to the bills of lading. It is believed that this article will help in careful dealing with shipping business in a safe and efficient manner.

Introduction

A Bill of lading *(also referred to as (layd-ing)* has been defined and described in the Black's Law Dictionary as a documentary acknowledgment and receipt for the goods received by ship owner or the captain of a ship in capacity as agent of the carrier. It is said to be a contract of affreightment or an evidence of such a contract. The goods are bailed to the carrier for the purpose of their transportation to the destination described in the bill. It is also described as a document indicating the receipt of goods for shipment by the carrier or its agent and is issued by a person in the business of transporting goods by sea whether a ship owner or NVOCC (Non Vessel Operating Common Carrier) and includes a forwarder according to new legislations (Garner, 2004). A bill of lading has three major functions. Firstly, it is a receipt given by the carrier, its agent or the master of a ship admitting that the goods stated therein have been received for shipment by the carrier in his custody and control or its agent or loaded on board the ship. Secondly, it is the document which

contains the terms of the contract of carriage of the goods as agreed upon between the merchant, commonly termed as the "shipper" of the goods and the carrier (usually the ship-owner) and the master of the ship as the agent of the carrier or ship-owner. Thirdly, it is a 'document of title' to the goods which are described in the document. This aspect of the bill of lading makes it 'a negotiable document' which means that the goods described in the bill of lading may be dealt with by the owner of the goods while they are still on board ship in the custody of the carrier and upon high seas. Bills of lading are the contracts for the carriage of goods and differ from charter parties which are usually contracts for hire or services of ships or space within a ship, also termed 'slots'. As a consequence of a charter party usually referred to as 'governing charter party', requires the issuance of a bill of lading for the goods shipped on board for the purpose of transmission to the consignee or the party mentioned in the bill of lading or its assign, endorsee or the agent. The charter party forms a contract between a merchant or a shipper and a ship-owner or its agent for the carriage of goods to their destination (as in the case of a voyage charter) or hire or services of the ship for a specified period of time (termed as time charter). However, in all circumstances, the goods after loaded on board, the carrier, its agent or the master is duty bound to issue a bill of lading on demand by the merchant or the shipper of the goods. The relevant law provides that on receipt of the goods from the merchant or shipper for carriage by sea, the carrier is duty bound to issue bill of lading on shipper's demand. Such receipt shall include among other particulars; identification marks on goods or their coverings mentioned in the shipping documents at the time of booking; quantity of goods and their apparent good order and condition etc (The Carriage of Goods by Sea Act 1925, Article III (3)). When we talk about the forms of bill of lading, an 'order bill of lading', is the one given by a carrier or on its behalf by its agent with express written authority or the master, making the goods consigned and deliverable to a named person or its order or simply 'order of' (the named person); a 'straight bill of lading' is a bill of lading given by the carrier or its agent on carrier's behalf with express authority or by the master of the ship making goods consigned and deliverable to a person named in the B/L; and a third kind, a 'bearer' bill which will allow delivery of goods to be made on the bearer or whomsoever holds the bill lawfully. A bill may be called a 'bearer' bill of lading if it fulfills any one or more of the following conditions: First, if the bill explicitly declares it on its front page. Second, if the name of consignee is mentioned on its front page as bearer. Third, order bill without specifying the person to whom order. Fourth, order bill indorsed in blank by the person named in the order bill of lading (Tetley, 2008).

The commonest bills of lading in use are the ordinary 'order bills' which facilitate banking credits through Letters of Credit and modes of payment in a reliable and safe manner. Usually in such bills the 'bank' where the Letter of Credit has been opened, is mentioned in the consignee box as 'to the order of ABC bank" or 'to ABC bank or order'. The bank on fulfillment of necessary requirements and documentations indorses the bill to the receiver or his order or both. In case of endorsement to receiver without addition of the word 'order', the bill converts into a straight bill of lading losing its further negotiability. In case endorsement by the bank includes the word 'order', it maintains its characteristic as a negotiable instrument.

Bill of Lading and Way Bill-Distinction

A bill of lading is different from a 'waybill' in respect that the former is generally (if not straight or bearer B/L) a negotiable instrument and title to the goods described in it and its transfer by endorsement to a bona fide transferee for consideration amounts to the

transfer of goods. The latter is non-negotiable and non-transferrable nor endorsable. The goods described in a waybill are deliverable on the named consignee or the person mentioned in the document on identification. A way bill is a contract of carriage and a receipt of the goods described in it but it lacks the title to the goods and is non-negotiable and non-transferable by endorsement. Presentation of a sea waybill to the carrier, its agent or the master of the ship is not necessary for taking possession of the goods and only identification of the person named in the bill is sufficient (Carriage of Goods by Sea Act 1992, Article 1 (3)).

It is a well settled and known principle of law that under an ordinary bill of lading, an 'order bill' having characteristic of negotiability, the ship owner or carrier is obliged to deliver the goods at their destination upon presentation of the B/L in accord with the terms as described in the bill itself. If the cargo is delivered without presentation of the B/L (original) may be to the named consignee in the bill, the carrier will be answerable for such delivery and may be held liable for conversion in tort if it escapes it under the contract. Wright J held that delivering goods without production or presentation of B/L (original) may hold the carrier liable (Skibsaktieselskapet Thor Thoresens Linje v H Tyrer & Co, 1929).

The Privy Council in *SzeHai Tong Bank v Rambler Cycle Co., 1959;* held, such a delivery to be in breach of contract between the parties. Lord Denning in his speech in the House of Lords reiterated the statement of Wright J., went further and held that the contract necessarily requires the production of B/L (original) for taking delivery of goods with entitlement. He held the carrier liable on grounds that goods were not delivered in such a manner or to a person hence held liable.

Presentation of A Bill of Lading for Delivery of Goods

Bill of Lading-Key in the Hands of Rightful Owner of the Goods

Brown LJ in *Sanders Brothers v Maclean & Co*., 1883, allegorically describes a bill of lading as "a key in the hands of a rightful owner". He observed that: Goods in custody of a carrier cannot be physically delivered to a buyer while they are still in transit. However, during this period of transit they may be sold, assigned or transferred by endorsement on the bill of lading. A bill of lading symbolically represents the goods described in it. Thus endorsement in a bill of lading will amount to a constructive delivery of goods under law and property passes to the endorsee of the B/L in the same manner as in the case of actual delivery of goods. A person holding a B/L lawfully and rightfully has the right of delivery of goods from the carrier till the entire commodity described in the B/L has been delivered. A B/L in the hands of a lawful owner symbolically resembles key to the warehouse where goods are stowed.

Delivery under a Straight Bill of Lading

Whether delivery under a straight bill of lading required production of an original bill of lading or not was an issue in *Carewins Development (China) Ltd v Bright Fortune Ltd., 2009.* The goods were delivered to the named consignee under the straight bill of lading. The Carrier was alleged for non delivery by the cargo interests in the proceedings against the carrier. The decision of the Court of First Instance in Hong Kong was for the Carriers

against their liability for non delivery of goods without production of the B/L (original). The relevant B/L was a 'Straight B/L". The judgment of Stone J. having full regard to the presentation rule as a condition for delivery relieved the carriers from their liability for no delivery on the grounds of exclusion of liability clause, clause 2(b) in the bill of lading. The Court (of First Instance) also held that no deliver took place after goods were discharged from the ship; hence prohibition in Hague/Hague-Visby Rules against such clause did not apply. The decision of the court conflicted with an earlier decision of Mr. Justice Waung in the "*Brij*" in 2001 and resulted in a state of confusion. The cargo interests preferred appeal against the judgment in the Hong Kong Court of Appeal.

Presentation of Straight Bill of Lading for Delivery of Goods

The Court of Appeal upheld the first part of the decision affirming the presentation rule applied to straight bill of lading in the same manner as it applies to the 'order bills'. However, the Court of Appeal overruled the court of first instant judgment relieving the carriers from their liability for non delivery under an exclusion clause in the bill of lading. The Appeal court held that the exclusion clause in the bill of lading was ambiguous in the context and failed to provide the relief given to the carriers by the court below. The Carriers appealed against the decision of the Court of Appeal in the Hong Kong Court of Final Appeal which upheld the judgment of the Court of Appeal.

Stone J., in reaching his decision in the Court of First Instance, relied upon the Singaporean case, *Voss v APL Co. Pte Ltd*., 2002 and an Obiter of House of Lords in the "*Rafaela S*", 2003. Stone J affirmed the comments of Lord Bingham to the extent of the production of a B/L (original) for obtaining delivery of the goods even though such was not required by any express provision in the bill.

The two issues before the Hong Kong Final Court of Appeal were; first, whether production of the bill of lading for delivery in case of a straight bill of lading was necessary for delivery of goods and; second, in case, the production of B/L was necessary for delivery of goods, whether carrier may argue to benefit from the exclusion clause in the B/L for non delivery on its being or not being negligent.

The leading judgment in the Hong Kong Final Court of Appeal comprising of five judges was given by Mr. Justice Ribeiro PJ with all other judges agreed. The case provides a remarkable clarity relating to the law of delivery of goods under straight Bs/L. It further discussed in detail on issues of benefitting from exclusion clauses in the contracts of carriage of goods by sea embodied in the relevant Bs/L. Justice Ribeiro as well as Stone J. relied on the *"Rafaela S" supra*. Justice Ribeiro in his judgment made reference to the major functions of a B/L which were pointed out by Lord Steyn in his judgment namely; a receipt for the goods on board; a contract of carriage or its evidence; and a title to goods. The functions of a B/L as enumerated therein were considered as the most important and central aspect of its use in the international trade and shipping industry.

Justice Ribeiro dismissed the argument of the Carriers that production of B/L was formal in the case of a straight B/L. The said argument was based on the decision of Waung J. in the *"Brij" supra,* where it was stated that straight B/L being non-negotiable containing express stipulations to make delivery of goods to a consignee named therein.

Title to Goods not Affected by Non-Negotiability

Justice Ribeiro was not satisfied with statement that B/L having characteristic of title to goods would depend upon its negotiability. A bill of lading, whether an 'order' bill or a 'straight' bill, whether negotiable or not is undoubtedly represents as title to the goods described in the document and is necessarily required to be presented for delivery of the goods. He rather was of the view that merchant/shipper's right to have a B/L with a force as a symbolic key to the warehouse is of essence and significance and he acknowledged that the carrier despite having information as to whom the delivery is to be made was not in a position to assume whether the said person was rightfully entitled to possession of the goods in the circumstance. Entitlement and having right to possess the goods were differentiated as mere entitlement may not be sufficient without having right to possession for taking delivery of the goods. He went saying further that a B/L would still be necessary for taking delivery of goods in all cases despite absence of an attestation clause, unless otherwise expressly exempted. In this regard Justice Ribeiro rejected the decision in the *"Brij" supra.*

Exclusion Clause-Effects

Turning to the effects of the B/L clauses excluding liability of carrier, the court observed that at the first step it is necessary to establish that at what point of time whether before or after the completion of discharge, the alleged non delivery took place. Because if non delivery took place before the completion of discharge the carrier loses the benefits of exclusion clause under Hague Rules or Hague Visby Rules (Article III Rule 8). However, the Court of Final Appeal established that non delivery occurred after discharge, leaving the argument opened for the Appellants (Carrier).

The relevant clause in the bill of lading providing exclusion of liability relied upon by the Appellants (carrier) was clause 2(b) which absolves the carrier from any liability arising from loss or non delivery or damage to goods by negligence or otherwise by the carrier.

The Appellants (carrier) argued in a manner to widen the scope of the exclusion clause in the wider terms excluding any or all the possible claims against non delivery. The Court held that effect of an exclusion or exemption clause was dependent upon its construction. The court reaching on this point relied upon 'Lord Wilberforce in *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co Ltd*., 1983. In the said case the issue of effectiveness of an exception clause in a bill of lading which limits liability of the carrier was dealt with by the court. The Court held that the relevant clause requires to be construed according to the terms of the contract. It went further that if any liability is to be excluded mutually with free consent of the parties, it must expressed clearly and without any ambiguity. The exclusion clause be construed '*contra proferentem'.* The words must be used and interpreted in their literal, natural and plain meanings.

The Court also made reference to Lord Wilberforce in *Suisse Atlantique,* where it was held that intents of the parties to contracts to be deduced from the words and phrases employed in the agreements in their literal meanings including their commercial purpose in consideration (Suisse Atlantique Societe d' Armement Maritime SA v. NV Rotterdamsche Kolen Centrale, 1967).

The Court went further on the point of clarity of words and meanings to be deduced by referring to Lord Diplock in *Photo Production Ltd v Securicor, 1980,* where the court was of the view that clear words were those giving only one meaning. The Court also observed that in circumstances where production of the B/L is considered essential against delivery of goods, such an exclusion or exemption clause would provide the carrier to escape its liability with knowledge of violating the primary purpose of the contract.

Thus the Final Court of Appeal held that (exclusion clause) 2(b) in the relevant B/L was liable to multiple meaning and need to be construed as an operational clause instead of an exclusion clause without destroying fundamental duties of production rule of the B/L. The Court on these grounds held that several situations may be covered by non delivery including those not disregarding consciously the presentation rule.

In the light of discussion above and observations of the courts, it may be concluded that; a straight B/L resembles a sea waybill rather than a traditional B/L with characteristics of negotiability and transferability by endorsement; its production/presentation is necessary for receiving the goods; despite absence of the characteristics of negotiability and transferability by endorsement, it maintains the characteristics as a 'title to goods'; despite resembling with a waybill, it belongs to its original family of bills of lading; a carrier delivering goods against a straight B/L without its presentation may become liable under tort or contract or both; any clause or clauses absolving the carrier of liability inserted in the B/L must be unambiguous and clear to give relief to the carriers.

The modern contracts of carriage include not limited to Bs/L and a waybill, but also include ship's delivery order D/O) and other documents prepared and transmitted electronically in accordance with 'The Carriage of Goods by Sea Act 1992 U.K.

The Exclusion Clauses-Effects & Interpretations (Pakistan)

The effect of "Exclusion Clauses" in a B/L was an issue before the Supreme Court of Pakistan in the *East and West Steamship Co., 1968.* The Court observed that though the facts in the case are not seriously disputed, but they give rise to questions of general importance for operation of ships in Pakistani ports.

Carriage Covers the Contract not the Time Schedule

The facts of the case are that a consignment was carried by sea which after being discharged from the ship partly sustained damage by rain water. The cargo was discharged into a lighter hired by the sea carrier (ship owner) where the goods sustained damage by rain water. The cargo interest brought the suit against the carrier and others for recovery of their claim. The single question before the Court was that whether the ship owners are completely protected under terms of the B/L. The bills of lading in the clause paramount, was made subjected to the provisions of the Carriage of Goods by Sea Act 1925 and its schedules thereto applicable to the contract contained in the bills of lading. The stipulations absolving the carrier of its liability made the carrier absolutely free of any liability arising after the goods were clear of the ship's tackle. It also absolved the carrier from liability for damage resulting from discharging at outer anchorage into lighters as well as any shortage due to any reason including pilferage. The discharging at anchorage being shipper's choice and totally at his risk was a part of the stipulations in the B/L.

The Supreme Court (Pakistan) noted that Article I (e) of Hague Rules was construed in the *Pyrene Co. Ltd., 1954,* where Devlin J. observed that the rights and liabilities under the rules (Hague Rules) attach to a freighting agreement or its part but not cover a period of time as fallaciously supposed. He supported his view by section 2 of the Carriage of Goods by Sea Act 1924 which is applicable to the rules but not applicable to the period of time for the purpose and in connection with the 'carriage of goods by sea. He mentioned further in this respect that the rules themselves provide and cover the contract and not the time schedule, e.g. the rule to exercising due diligence for making the ship fit and seaworthy and also to properly man and equip it are not limited to any time schedule but applicable for all times of operation and during the entire contract of carriage. The Supreme Court thus concluded that the responsibility of carriage of goods is not limited to the period starting from loading and ending when they were unloaded or off the tackle from the ship.

Intent of Contract Prevails on Exception Clauses

For the Exception clause in the bills of lading exempting absolutely the carrier's liability beyond the ship's tackle the Supreme Court of Pakistan made reference to and relied upon Privy Council judgment in *SzeHai Tong Bank Ltd.* where a similar exception clause was inserted. Lord Denning in his speech observed that:

1. Under the exception clause absolving the shipping company (carrier) from their responsibility to deliver the goods to a person who the carrier had the knowledge being not having entitlement to receive them amounts to as they had given the goods away to some passer-by or had burnt them or thrown them into the sea.

2. It was not the intention of the parties to the contract.

3. An implied limitation applied to the clause cutting down its extreme width. If such limitations are not applied it would run counter to the main object and intent of the contract.

4. One of the main terms of the contract seems to be the delivery of the goods in a safe and proper manner by the shipping company to the 'order' or 'assigns' against presentation of the B/L. The exception clause if construed widely and without limiting it, would setback entirely the purpose of the contract without making the shipping company liable for delivering goods at its own will to any person entitled or not to receive the goods.

5. The exception clause must therefore be express and limited to its object and be construed in a manner keeping in mind the main commercial purpose and will deduced from the contract.

The (Supreme) Court concluded from the above mentioned observations that one of the objects and intents of the contract was that the shipping company would unload the goods carried 'carefully and properly' as laid down in Article III rule 2 of the Hague Rules incorporated in the Carriage of Goods by Sea Act (COGSA) 1925.

Exceptions Do Not Exempt the Ship owner from Any Liability for Negligence

The (Supreme) Court with respect to the words "shall properly and carefully ….discharge the goods carried" relied upon the interpretation of Lord Morton in *G.H. Renton & Co. Ltd., 1957,* meaning that the carrier must perform the duty of carrying and discharging agreed upon it by the freighting agreement properly and carefully. The Court, based on the above interpretation, observed that the ordinary unloading of goods should be accompanied by the normal duties to avoid negligence. It is the responsibility of the carrier to see that the cargo is being discharged into a safe and suitable place and if into a lighter, it was seaworthy in the ordinary sense i.e. it was structurally fit for reception and carriage of particular goods.

The Court while continuing on the exception clauses in the B/L made reference to the 'Carver" on *Carriage of Goods by Sea,* 9th Edition, for the terms "at shipper's risk" or "at charterer's risk". The reference reveals that such terms in the B/L do not except the ship owner from any liability for negligence, but do not prevent him from relying on a specific exception in the contract relieving the ship owner from such a liability. The Court relied upon various English authorities namely:

In *The Galileo, 1915,* a leading case on the question in which the exception clause, ship owner's (carrier) negligence in discharging the goods carried and liability arising thereof was before the court. The bill of lading contained a clause that the goods to be transshipped 'at ship's expense and shipper's risk'. The goods were placed on a lighter during transshipment which was not ensured for fitness to carry the particular goods. The lighter took water and sank consequently damaging the machinery loaded thereon. Bargrave Deane J. held the ship owners liable for the damage on the ground of negligence on part of the ship owners in placing the machinery in an unseaworthy lighter and that the words "at shipper's risk" did not cover their (carrier's) negligence. The Court of Appeal affirmed the decision on the ground that the exception did not cover a breach of fundamental obligation in respect of seaworthiness. The House of Lords too, affirmed the decision on the ground that exception did not exempt the ship owners from liability for negligence in placing the machinery in an unseaworthy lighter. It ought to be mentioned here that the lighter was hired/employed by the ship owners. Lord Shaw in his speech compared the negligent act of placing the goods in an unseaworthy lighter similar to discharging the goods into the sea or placing them in bottom of the dock in carrying out the obligation of transshipment.

The second case referred to was of *Sevensons v. Cliffe, 1932,* where a similar question arose regarding "charterer's risk". Wright J. relying on standing English authorities observed that the words "at charterer's risk" alone without being supported by any other exception in the charter party, do not exonerate the ship owner from losses occurring from breach of warranty of seaworthiness. In support of his opinion he referred to various English authorities including the *Galileo*, supra Mersey Shipping and Transport Co. v. Rea Ltd., 1925). He held further that such words (at charterer's risk) would not definitely apply to damage occurring after a deviation. The words in themselves have limited application to losses and damage without any negligence on part of the ship owners or their servants.

Exception Limits Liability not Duty

The (Supreme) Court also referred to the observations made in *Price& Co. v. Union Lighterage Co., 1904* supra. In the instant case (*Price & Co.)*, the Court referred to *Grill v. General Iron Screw Collier Co., 1866,* where the B/L contained an exception clause "accidents of whatever nature or kind whatsoever" was held not to cover a collision resulting from master and crew negligence. The Court (in *Price& Co. v. Union Lighterage Co.*) observed further that; the exception limits the liability, not the duty; any exemption generally stated but not directly relating to the negligence despite its words being capable to include loss by the servants of the carrier must be interpreted as to limit the liability of the carrier in capacity as assurer, and not to relieve it from the duty to exercise reasonable skill and care; if a carrier intends benefit from an exception against its servants' negligence in duty of using reasonable skill and care in a contract of affreightment, it must do so in plain words which are explicit and free from any ambiguity, and not in a general manner. The Supreme Court thus held that the exception clauses do not exonerate the ship owners from their liability for negligence.

Conclusion

Bill of lading is the most significant document among shipping documents customarily used in international trade by sea. It equates the goods described in it and bailed to the carrier or its agent for carriage to their destination. In case of any dispute between the parties, the courts and arbitrations resolve the issues in accordance with terms, conditions and exceptions inserted in the documents or referred by it. A bill of lading in most of the cases contains the contract of carriage of goods itself and evidences a contract in others. It is required to be produced or presented at the time of claiming delivery of goods bailed to a carrier. A carrier or its agent releasing goods even in good faith to a claimant or consignee without presentation of the original bill of lading may fall in serious complexities making him liable for conversion of the goods. Similarly, Exclusion Clauses in a bill of lading need to be designed and interpreted carefully. Such clauses must be construed strictly in accord with principles of interpretation of commercial contracts. The interpretation of Exclusion or Exception clauses absolving a carrier from any liability under a contract, though expressly made, may have adverse effects in contrast to the benefits expected from such insertions. These clauses no matter, made in whatever manner stand subservient to the laws of carriage of goods and should not be relied by a carrier blindly but carefully read with the contract.

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