IMPLICATIONS OF THE BILL OF LADING USAGE IN THE PROCESS OF GOODS TRANSPORTATION BY SEA

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ABSTRACT

The article proposes an analysis of the most important document in the commercial transport of goods by sea i.e. the bill of lading. The multiple functions performed by this document are represented as follows: the bill of lading is a receipt for the goods delivered, it is the clear evidence regarding the terms covered by the contract of carriage and it is a document of title. By means of its functions, one obtains the analysis of the relationships between shipper/charterer-carrier-consignee and in some cases, endorsee, types of bill of lading and their probative value, the relationship between charter contract and the bill of lading and finally, the conditions to be met so that the bill should be considered a document of title.

Keywords: *bill of lading; receipt; evidence; document of title; contract of carriage;*

1. INTRODUCTION

The Bill of Lading is the most important document in the commercial transport of goods by sea [1]. The Bill of Lading plays an essential role in performing the contract of transport. A person wishing to ship a consignment of goods addresses a shipping company directly or more often via a forwarding agent of goods for booking the space on a ship [2]. He gets instructions from the carrier regarding the place and the time of delivery of the goods and in doing so, he is handed a receipt indicating the type and quantity of the goods delivered and the condition in which they were received by the carrier's agent [2]. Since that moment, the carrier normally has control of goods and is responsible for loading them aboard [2]. Meanwhile, the shipper will obtain a copy of the carrier's bill of lading form in which he will enter details regarding the type and quantity of the goods shipped together with any relevant marks and will specify the port of destination and the name of the consignee [2].

On this document, the carrier's agent will check the details concerning the goods by comparison with the copy at the moment of loading and if correct, he will acknowledge them [2]. After calculating the freight and entering it on the bill of lading, the master or his agent will sign the bill and release it to the shipper in return for the delivery of mates receipt (or his equivalent) and for the payment of advance freight when it is due [2]. Then, the shipper is free to dispatch the bill to the consignee or to a bank if the shipment represents the part of an international sales transaction involving documentary credit [2]. In any of the cases, the consignee may decide to sell the goods in transit, case in which he can endorse goods in favour of the purchaser. Eventually, the last consignee or endorsee of the bill will tender it at the port of discharge in return for the goods delivery [2]. The fact that the bills are being issued in multiple original sets increases the possibility of fraud. The carrier is only under the obligation to deliver the goods to the person who presents the bill and not to verify to what extent this person is the legal holder of the document. For this reason, the international banking rules require that goods are to be delivered only in return for the presentation of the whole set of bills of lading [3].

2. THE FUNCTIONS OF THE BILL OF LADING

Currently, there is no established definition of a bill of lading in the common law, nor existing legislation on bill of lading or carriage conditions in which the bill is used [4]. His essence is made up of multiple functions performed by it: the bill of lading is a receipt for the goods delivered; it is the clear evidence regarding the terms covered by the contract of carriage and it is a document of title [4]. To the three basic functions, the specialized literature adds the function of potentially transferable contract of carriage [5].

2.1 The Function of Receipt for the Shipped Goods

The bills of lading contain information on the nature, quantity and condition of the shipped goods. The consignor/shipper may demand the issuance of a bill of lading showing among other things the leading marks, the number, the quantity, the weight, as well as the apparent order and condition of the goods [6]. The carrier is not under an obligation to issue a bill of lading containing these specifications unless it is expressly requested by the consignor and even under these circumstances he can refuse it if he has seriously reasons to believe that the supplied information is not accurate or he does not have the possibility to check it [2]. In this situation, he may issue a special bill of lading by entering the phrase "said to contain" [7].

It is crucial for the shipper to obtain a clean bill of lading, absolute necessary for the documentary sale but the carrier is not under the obligation to issue an incorrect bill [7]. Due to the complications that would arise while checking the goods before shipment, this procedure takes place quite rarely, leaving the consignee and the endorsee unprotected by *Hague-Visby* Rules [7].

Frequently, the shipper and the carrier agree on issuing a clean bill of lading in return of the guarantee of compensation for all losses the carrier may suffer as a consequence of a subsequent action of the consignee or the endorsee [7]. Even though, such agreements are void if the carrier makes a statement he knows as false and the shipper and the carrier act to defraud the bank or the consignee [7].

The bill of lading is *prima facie* evidence of the receipt by the carrier of the goods as described, although proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith [6]. For this reason, carriers try to include in the bill of lading as few details as possible [7]. In the age of containerized cargo, carriers have very few options to make judgments of the external observable condition of the goods. In these situations, the statements only refer to the container and prove to be of limited value for the consignee [7].

In many of the cases, the need to avoid statements about the quantity led to the inclusion of the phrases “quantity and weight unknown” or container “said to contain” [8].When such phrases are used the bill does not contain statements on the goods and has no evidentiary value in this sense [8].

Article 8 of the *Haga-Visby Rules* stresses that “any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect”.

In Mata K case it was held that the operation of Article 8 of the *Haga-Visby* Rules is limited to contractual provisions which remove or reduce the liability of the carrier failing to fulfil his obligations under Article 3 (1) and (2) [2]. The inclusion of the provision “weight unknown” has not the effect of relieving the carrier of such liability or lessening it and means only that the provisions of Article 3 (4) are not applicable [2]. It’s not the most desirable conclusion because it is inconsistent with the object of the Article 3 (3) [2].

In the opinion of some authors, the bill should contain a clause to the effect that statements as to the quantity and condition of shipped goods must be conclusive evidence of the facts stated as against the shipper and then no other evidence will be admissible to contradict such statements even where a claim has been brought by the consignor and even though the consignor can prove that the goods have not been loaded [2]. Such clauses are rarely used at the moment [2].

2.2 The Function of Evidence of the Contract of Carriage

As it was established in consecrated cases, *Crooks vs. Allan* (1879), *Sewell vs. Burdick* (1884) or *The Ardennes* (1951), the bill of lading is not a contract of carriage but it is an excellent proof of its existence [2].The contract is normally concluded orally long before the bill of lading is issued and its terms are inferred from the announcements of the carrier about navigation and from negotiations with loading brokers before the goods are shipped [2].

Where the terms of the bill of lading do not reflect the terms agreed orally, evidence as to the agreement orally concluded may be submitted by the shipper [4]. External evidences are admissible to contradict not only the terms of the bill of lading but even the terms of the sea waybills and delivery orders [9].

Between the carrier and the third endorsees, the bill of lading may constitute a contract of carriage and not mere evidence of its existence [9]. Indeed, once endorsed for value to a third party acting in good faith, the bill of lading becomes conclusive evidence of the terms of the contract of carriage [2].

Where the consignor of the goods is also the ship charterer, the master will issue the bill of lading [2]. In such cases the bill will operate mere as a receipt for the shipped goods and will not function as evidence of the contract of carriage. The terms of the contract of carriage between the ship owner and the charterer are to be found exclusively in the charter party [2].

In cases where the bill of lading conflicts with the terms of the charter party, the later will prevail [9]. If the charterer will subsequently endorse the bill to a bona fides purchaser, the bill of lading will be conclusive evidence of the contract of carriage so far the endorsee is concerned [2]. The terms of the bill of lading shall prevail over the charter except to the extent that the terms of the charter are actually incorporated by reference into the bill of lading [9].

In German law, the bill of lading is a document that evidences the contract of carriage. In the absence of other indications such as a detailed contract of carriage it is presumed that the bill of lading sets fully and accurately the terms of the contract [7]. In German law it is established the fact that while between the shipper and the carrier contractual provisions of the contract of carriage remain determinative even if a bill of lading is issued, the relationship between the carrier and third party (consignee) is governed by the terms of the bill of lading [7].

2.3 The Function of Document of Title (Negotiable Instrument)

As document of title, the bill of lading was not subject to international conventions until the *Rotterdam Rules* [7]. Furthermore, there is not a universally accepted definition of a document of title not even in national legislations. There, where the statutes refer to a document of title, the expression is used inconsistently depending on the specific purpose of the respective statute [7]. In reality, this function came from the impossibility of the merchants to deliver merchandise – due to long periods of time – which triggered the custom to treat bill as a symbol for the cargo [4].

Since *Lickbarrow vs. Mason* case in 1791 the courts has acknowledged the custom of merchants that the endorsing of the bill of lading transfers not only possessory rights but also the ownership of goods if this was the intention of the parties at the moment of the endorsing the bill [5]. Nevertheless, not every bill of lading will be document of title [2]. A bill will only operate in such quality only if it is drafted as a order bill i.e. a bill under which the carrier agrees to deliver the cargo at their destination to a named consignee or “to his order” or “assigns” [2].

Where the bill of lading contains provisions only for the delivery to a named consignee, it is known as a straight bill or a sea waybill and it lacks the negotiable quality required to qualify it a document of title [2]. The jurisprudence has established that fact completely in the cases of *Lickbarrow v. Mason* (1793), *The Rafaela S.* [2002] and *The Chitral* [2000] [10].

In Rafaela S. the arbitrators decided that “the document of title was the antithesis of a document which could evidence the title of only one person; it was general not specific to one person; it was a document by which goods could be transferred by endorsement and delivery of the document itself; a straight consigned bill was not such a document”.[11]

A different opinion was held later on the same case with the following argumentation: “Whatever the history of the phrase in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore.

Is it a ‘similar’ document of title? If I am right to consider that negotiability is not a necessary requirement of a ‘bill of lading’ within the meaning of the Rules, then plainly it is. But I also think that the good sense of regarding a straight bill whose production is required for delivery of the goods as a document of title in turn supports the answer to the prior question of whether a straight bill is a ‘bill of lading’”.[12]

The jurisprudence has in fact established that straight bills of lading are negotiable instruments *only for the purpose of Haga Visby Rules*, not in common law [3;13].

Another question raised in connection with the previous is whether a straight bill of lading must be produced in order to obtain delivery if such a document is a document of title. In jurisprudence was decided: “.... It would seem that *Peer Voss v APL Co Pte Ltd* [2002] 2 Lloyd’s Rep 707, Singapore Court of Appeal, concluded that it was (at any rate if it is issued in traditional form in three originals).That was also the view of the Law Commission. It is unnecessary to decide the point, but in my judgment it is. It seems to me to be undesirable to have a different rule for different kinds of bills of lading – which I think was the view of Butt J in The Stettin as well. It is true, as Benjamin states, that in the case of a negotiable bill the carrier needs to have the bill produced in order to be able to police the question of who is entitled to delivery. Yet an analogous problem arises with a straight bill. A shipper needs the carrier to assist him in policing his security in the retention of the bill. He is entitled to redirect the consignment on notice to the carrier, and, although notice is required, a rule of production of the bill is the only safe way, for the carrier as well as the shipper, to police such new instructions. In any event, if proof of identity is necessary, as in practice it is, what is wrong with the bill itself as a leading form of proof? That is of course an inconvenient rule where the carriage is very short, as in cross-Channel shipments, and that is why sea waybills are used in such trades. But it is clear that straight bills are used in intercontinental carriage and therefore the inconvenience argument fades” [12].

The vast majority of the juridical opinion favours the view that the consignee named in a straight bill of lading is entitled to delivery of the goods only on the production or presentation of the bill to the carrier [13].The requirement is based on an express or implied term in the bill to that effect [13].

Such a straight bill of lading is not desirable as security for commercial credit and nor can the holder of the bill transfer a good title whilst goods are in transit [2]. By contrast an order bill is a transferable document while a spent bill is not. [13] Likewise, a bearer bill of lading is a negotiable document that can be transferred from one party to another by mere delivery of the document. Due to the risks associated with such documents, they are seldom used in international commerce [14].

The negotiable/non-negotiable character is one that can be construed. Any transferable document may be deprived of its transferable character by the insertion of the words “not negotiable” [13]. The same effect is obtained by failing to insert into a straight bill of lading the words “Order of” [13].

In *Kum vs. Wah Tat Bank Ltd* [1971] or *The Future Express* [1993] it was held that the term “negotiable” when used in relation to a bill of lading means simply, transferable. The transferee of the bill shall acquire only the title transferred by the transferor [10]. It also implies for the holder of the instrument the right to sue in its own name [14].

The bill of lading as document of title performs a tripartite role in relation to the contract of carriage, with the sale of goods in transit and launching of the financial credit [2].

Endorsement and delivery of the bill will normally transfer the ownership of the goods referred to the endorsee if the following requirements are met: the bill must be transferable on its face (order bill expressly deliverable to the order or assigns of the consignee); the goods must be in transit at the time of endorsement; the bill must come from a person with a valid title; the endorsement must be accompanied by the intention to transfer the ownership of the goods [2].

The transfer of goods between two branches of the same company located in different countries or the endorsement with the intent to pledge as a temporary security for a loan does not amount with the intention to transfer the ownership [2].

The function related to the contract of carriage has the following implications: the holder of the bill controls the goods during the transit; a lawful holder by virtue of s2(1) Carriage of Goods by Sea Act 1992 has the right to sue, under the contract of carriage, as if he had been one of the parties of the contract; the holder is entitled of delivery of goods at the port of destination on presentation of the bill of lading [2].

The national legislations differ in the treatment of the bill of lading as a document of title. While in UK the bills of lading are regulated by the common law, precisely by the law of chattels, in Germany they are under the incidence of the Law of Exchange and in USA they are governed by the Federal Bill of Lading Act 1994 relating to the legislation on financial instruments [7].

3. CONCLUSIONS

The bill of lading is the most important document regarding the transport of goods by sea. Nethertheless, there is no universally accepted definition of it and no legislative consecration in international conventions untill the Rotterdam Rules.

The bill of lading is *prima facie* evidence of the receipt by the carrier of the goods as described. His evidentiary value as receipt is extremly important for the carrier who has very little options to escape liability. The bill of lading is not the contract of carriage but it is an excellent proof of its existence. In some cases such those between carrier and third endorsees it becomes conclusive evidence of the terms of the contract of carriage. Last but not least, it performs the function of a document of title. Many problems arising from the use of bills are resolved by case law although many more, such as the evidentiary value for the goods receipt by the carrier, still need more clarifications.

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