

SOME TOPICAL ISSUES ON BILLS OF LADING

SCMA Tea Talk

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Introduction

- Bills of lading are an invention of merchants. Their functions and the laws applying to them have evolved over more than 500 years.
- Will bills as we know them still be relevant in 5, 10, 20 years ?
- Who knows – with the development of technology and the rise of electronic bills – perhaps not – one of their advantages is to reduce the scope for some of the problems and issues with which this talk is concerned.
- But for now the bill of lading remains a solution for merchants, even it continues to throw up challenging legal problems.

SWITCH BILLS

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A judicial view from 20 years ago

“No doubt this this provision for a second set of bills to come in existence was agreed for not unreasonable commercial motives, but it is a practice fraught with danger.....”

The Atlas [1996] 1 LLR 642, 643 per Longmore J.

A practitioner's view from 20 years ago

“..... even with their use tolerated, switch bills will continue for some time to provide many a legal conundrum to carriage lawyers”

Toh Kian Sing [1996] LCMLQ 416, 422

What are switch bills

- Not a term of art – overlaps with “split” or “second set” or “redocumentaion”
- One might think a bill is immutable; not so (eg common law right to change consignee: *The Lycaon* [1983] 2 LLR 548)
- Frequently for good or bad reasons bills are replaced
- Illustrates tension between
 - interests of charterers and carriers
 - Within charterers, between traders and operations/legal department

Why switch bills ?

- Splitting quantities between different receivers in different places
- To disguise true identity of
 - Shipper/consignee,
 - origin of cargo
 - Nature of cargo
 - place of shipment/destination
 - Date of shipment

(see *Toh Kian Sing* [1996] LMCLQ 416, *Williams* [2009] 15 JIML 394)

Basic legal principles

- Not themselves controversial
 - Contract function – contract can only be amended (or terminated) by agreement between all parties
 - Note however place of issue may affect applicability of Hague-Visby Rules under Art X(a)
 - Document of title. Issues where original (first) bills gives a party right to possession
 - Representations in the bill (shipper, nature of cargo, date of shipment, place of shipment etc). Misstatement may give rise to liability in deceit or negligent misstatement
 - Consider also effect where presented under L/C

What is the problem ?

- The scope for difficulties is reduced where
 - All facts correctly stated in bill
 - All parties agree or relevant charter provides express right to switch
 - First set of bills returned to carrier for “cancellation” before second set issued
- *Finmoon v Baltic* [2012] 2 LLR 388 – pure convenience - bills cancelled and reissued at disport

Contrast *The Atlas*

- No suggestion of fraud but numerous “danger” areas
 - Place of issue of bills different
 - Name of shipper changed (to disguise source)
 - Switch bills to be issued before first set surrendered
 - Head owners not bound by provision of sub-charter

AP Moller-Maersk v Sonaec Villas [2011] 1 LLR1

- Facts complex, but in essence an unpaid seller who resold goods to a second and then a third buyer returned bills to the carrier for re-issue of a second and third set
- The bills were straight bills with an English exclusive jurisdiction clause
- Unforeseen complications arose – for example when the first buyer sought to sue (in Benin) relying on a copy bill

Held

- Despite cancellation, the jurisdiction clause survived to enable the English court to consider its status
- With a straight bill title to sue was transferred to the named consignee on signature of the bill under COGSA 1992. But this did not affect the right of the shipper to redirect the goods
- By extension of this logic it also preserved the right of the shipper to agree with the carrier to cancel the bills

Other problems

- A provision in a sub-charter allowing or requiring the issue of switch bills will only be effective, for owners' bills, if the headowner has consented (or is bound) – see *The Atlas* [1996] 1 LLR 642, *The Daphne L* [2003] 3 SLR 556
- Similarly, if the terms of the switch bill are different from those of the subsequent bills, any claim in tort of bailment is likely to be governed by terms of the original bills: *The Atlas*
- The rights of third party sub-contractors (stevedores) to rely on protection under first bills arises under s.2 of the 1999 Rights of Third Parties Act

Switching the Identity of the Shipper

- A common reason but what is the effect on the contract(s) of carriage ?
- Is there a novation such that original shipper ceases to have liability, for example for shipment of dangerous goods ?
- Has the newly named shipper authorised his status as such ?

Application of the Hague-Visby Rules

- Relevant factors include place of issue of bills and port of shipment
- First bills mandate H/V Rules – will these apply even if second bills do not. Probably yes (see Toh Kian Sing) but there are differences between transshipment and “redocumentation”
- Second bills mandate H/V Rules but first do not ? Cannot logically be retrospective

Common issues in tanker trade

(with grateful acknowledgement to Bengt E. Nergaard's paper at ICMA 2015)

- Issue of one bill to cover two parcels loaded at different places
- Issue of one bill to cover blend of two parcels
- Actual (or partial or deemed) discharge and reloading
- Feeder shipments to/from storage vessel stationary/adrift on the high seas (eg off West Africa)

Questions over...

- B/L or shipment date – note difference between Congenbill 1994 (“Place and date of issue”) and 2007 (Box added for “date shipped”)
- Port of loading – common practice of floating storage “Mother ships”
- Cargo quantity
- Identity of shipper

Illegality Issues

- The fraud or illegality (eg evasion of export/import bans or duties) often associated with switch bills may have additional consequences
- LOI given to carrier may be unenforceable (*Brown Jenkinson v Percy Dalton* [1957] 2 QB 621) – only intention to deceive is required, not dishonesty: see also *The Saga Explorer* [2013] 1 Lloyd’s Rep. 401 on deception in bills
- Contract of carriage might conceivably be unenforceable (see “structured to deceive” cases *Alexander v Rayson* [1936] 1 KB 169, *Mitsubishi v Alfafouzos* [1988] 1 Lloyd’s Rep. 191)

Other issues (2)

- If particulars in second bills are false
 - carrier and (possibly) shipper potentially liable in deceit
 - Possibly conspiracy liability where collusion by carrier and shipper to deceive subsequent holder: see eg *The Dolphina* [2012] 1 LLR 304

MIS(DELIVERY) AND LOIs

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The basic rule on delivery other than against B/L

- The carrier is required to deliver only against a genuine bill of lading
- Takes risk of forged bills: *Motis* [2001] 1 LLR 211
- Almost certainly applies to straight as well as negotiable bills: *Rafaela S* [2005] 2 AC 423
- Very frequently delivery is made against one or more LOIs
- Where there is “misdelivery” either to the “wrong” party or without a bill, a number of legal relationships need consideration

Delivery

- In modern times the time of delivery may be elusive, with the distinction between discharge and delivery potentially important when cargo is discharged ashore but not directly to cargo interests
 - Delivery to shore terminal, even when coupled with delivery order, may not be delivery
 - Terms of bailment to terminal must reflect carrier's obligations: *East West* [2003] 1LLR 239
 - Key test is divesting of ability to control physical dealing with goods: *Jag Ravi* [2012] 1 LLR 637

Delivery (continued)

- Even if goods remain with terminal, a carrier may convert them if delivery up to bill of lading holder is not made: *MSC Amsterdam* [2007] EWHC 944
- Providing PIN codes for release was not delivery in *Glencore v MSC* [2015] EWHC 1989
- There was not conversion or misdelivery where discharge into warehouse created a lien in favour of the warehouse operators of lien: *Bao Yue* [2015] EWHC 2288
- Practical issues – the carrier may think he has retained control on discharge – but may not in fact have done – complex issues as to whether person to whom goods discharged is agent of carrier, consignee, both or neither.

Remedies - Bill of lading holder against carrier

- Breach of contract of carriage
 - Title to sue – satisfy requirements of COGSA 2(1). Problems with indorsement may prevent this on *Dolphina* [2012] 1 LLR 304 approach
 - Note even if bill obtained (eg by Bank) after misdelivery, it is not spent for this purpose: *East West*
 - Exclusion clauses construed strictly – will rarely protect against misdelivery: *MSC Amsterdam*
- Possible tort claim, at least if bill gives right to possession at the time of the misdelivery
- Potential issues on quantification of loss (Bank may have different measure from goods owner)
- Duty to mitigate (eg to seek to recover goods) ?

Action against party who is in possession

- Can carrier sue ?
- Can true owner sue ?
- Issues of local law ?

Issues under LOIs

- Delivery against LOIs very common – as are problems
- Absent a contract term the carrier cannot be compelled to deliver against LOI
- Standard form of Club wordings
 - Addressed to contracting counterparty and/or owner
 - Recites ownership and/or right to sell cargo
 - Grants indemnity in consideration of delivering to X
 - Undertakes to forward bills etc
 - Undertakes to put up security if claim against carrier

Issues with LOIs

- Who can enforce ? Issues of
 - Construction
 - Entitlement under 1999 Act

Laemthong Glory [2005] 1 LLR 608, *Jag Ravi*

- Remedy – damages or specific performance: *Bremen Max* [2009] 1 LLR 81
- Liability conditional on delivery being made to the right person; carrier must identify the party: *Bremen Max*

Further Issues

- Where beneficiary of LOI knows that the delivery requested is wrongful, LOI unlikely to be enforceable: *Bremen Max*
- False statements in LOI (eg as to title to goods or existence of bills) made give rise to claims in deceit by Bank or buyer *Freja Scandic* [2002] EWHC 79
- May also be liability for negligent misstatement, at least to buyer; Bank paying under letter of credit unlikely to be able to claim in negligence: *DBS Bank* [2008] SGHC 53

PROBLEM CARGOES AND
VOYAGES –
FRUSTRATED PARTIES,
FRUSTRATED CONTRACTS ?

What issues

Common problems and issues

- Reasonable despatch
 - When is a contract frustrated
 - Post contractual obligations
 - Practical issues
-
- Problem with the vessel – damage, disabled or stranded
 - Problem with cargo – perishable or in breach of applicable local law
 - Problem with local authorities – vessel detained or arrested

Reasonable despatch/delay

- Often overlooked as a common law not Hague-Rules concept
- Overlaps with other issues – eg damage caused by delay from unseaworthiness, including pure economic loss – *The Subro Valour* [1995] 1 LLR 509
- Implied term to proceed with reasonable despatch

How does it relate to?

- Art III r.2 obligations
- The Art IV r.2 defences generally which relate in terms to Hague Rules obligations – left open in *The Devon* [2012] EWHC 3747
- Deviation ?
- Deliberate slow steaming – is a breach not covered by Art IV r.2 (a) *The Pearl* [2012] 2 LLR 533
- But other delays may be if in management of vessel (*Aquacharm* [1982] 1 LLR) and not question of employment (*Hill Harmony*)

Frustration (1)

- Modern concept – difficult to reconcile with older cases
- Older cases concerned with related issues
- insurance on freight and whether carrier is entitled to abandon voyage after a casualty (eg *The Bessie Morris*) (CA) [1892] 2 QB 652; *Kulukundis v Norwich Union Fire Insurance Society Ltd* [1937] 1 KB 1);
- Abandonment of voyage – no liability to cargo if excepted perils (eg perils of seas, negligent navigation etc) operate

Frustration (2) – key features of modern law

- Due to supervening effect
- Not catered for by contract
- Not due to one party's fault (by fault for example in navigation may be excepted peril under contract)
- Frustrates commercial purpose/effecting radically different set of obligations
- Happens automatically

The Fjord Wind [1999] 1 LLR 307

- Finding of unseaworthiness so frustration dicta obiter though masterly
- Identifies traditional rules that carrier has right but not obligation, where vessel disabled, to effect tow or tranship
- Breakdown of engine – leading to prospect of very prolonged voyage for cargo of soya beans
- Tension with modern law principles
- Held was frustration due to combination of prolonged or voyage and risk or cargo damage

The Sea Angel [2007] 2 LLR 517

- case on timecharter of short duration – delays

“Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as “the contemplation of the parties”, the application of the doctrine can often be a difficult one. In such circumstances, the test of “radically different” is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.. What the “radically different” test, however, does not in itself tell us is that the doctrine is one of justice”

- Multifactorial test ! Is this anything more than a new word to describe traditional concepts

The Kyla [2013] 1LLR 565

- Time charter case but looked at old law on abandonment of voyage
- Flaux J.

“67. In my judgment, the earlier cases are indeed capable of being subsumed within the modern doctrine of frustration. They should not be treated as establishing some inflexible rulethe charterparty will be frustrated, but rather as applications of a principle that if a vessel is what Scott LJ in *Kulukundis* and Singleton LJ in *Blane Steamships* describe as a “commercial loss” the charterparty will generally be frustrated, just as it would be if the vessel were physically lost. As the judgment of Rix LJ in *The Sea Angel* demonstrates, the tendency in the modern law of frustration has been to move away from deciding the issue through the application of inflexible [rules] of any kind, dependent upon one factor (there delay, here cost versus value) to what he describes as the “multi-factorial approach”.

Consequences of Frustration

- The Law Reform (Frustrated Contracts) Act 1943 does not apply to contracts for carriage of goods by sea (see s.2(5))
- Thus common law position pertains with limited rights for one party to obtain repayment of money paid or the other to obtain payment for part performance.

Problems with inability to discharge

- Where cargo interests refuse to (or are not permitted to) take delivery, this may repudiate or frustrate the contract
- In any event the carrier has the right to discharge cargo at nearest convenient place – query how long carrier must wait before doing so
- Practical alternative is court intervention – powers of sale (or discharge if jurisdiction can be exercised: *Five Ocean v Cingler* [2015] SGHC 311, *Bug 5 Shipping* [2015] EWHC 2250.
- Practical issues with cargo that has lost its identity and/or has a “negative” value – set cement, unfrozen fish - effect on contract - cost of discharging/dealing with cargo

Rights post termination

- Is bailment on bill of lading terms ?
- Where charterers' bills post termination bailment may be on those terms: *AES Express* [1990] 20 NSWLR 57
- Obligations to take care
- Correlative right to remuneration : *Kos* [2012] 2 LLR 292
- Need to consider in most cases (not in *The Kos*) rights under charter and B/L
- Issue on whether carrier's right is to expenses or reasonable remuneration

THANK YOU !
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