

Bills of lading in the modern shipping environment: Problems and solutions

Saif Al Mobideen

s.almobideen@tamimi.com

The bill of lading is not only a contract of carriage but is a document of title and receipt.

This BOL has faced some considerable problems surrounding the parties' rights and liabilities. Various conventions and domestic laws have attempted to tackle these issues, however few have been successful, due to the rapid growth of the modern shipping environment .

Significantly, practical problems have arisen over the past few years attributable to the standard BOL requirement, to present the BOL at the discharging port in order to attain delivery of the cargo.

There is a growing number of cases where such documents, i.e. BOL, will reach the consignee at its destination after the cargo has arrived at its destination. The reason for this delay is the procedures at the banks as well as the relative slowness of the postal services, which can now take longer than the transport itself. For instance, carriage of bulk cargoes such as oil and gas on a short sea routes will usually be delivered in a shorter time frame than its related documents.

In such cases, the carrier has only limited choices prior to delivering the cargo. Firstly, if it insists on the presentation of the BOL, as it may be unaware of the identity of the current holder of the BOL, then the carrier may be obliged to keep the cargo onboard the ship if no storage facilities are available, whilst waiting for the presentation of the original BOL. This may lead to several flow on issues such as the responsibility for demurrage charges or damages that may be claimed by the carrier if it is a charterer, for the detention of the cargo. The shipowner may also risk losing its next charter. The carrier will undoubtedly be concerned about its schedule, especially in a liner trade. Furthermore, the cargo owner may be affected by the delay, since the goods are frequently subject to fluctuating prices.

Secondly, if the carrier is certain of the identity of the receiver of the cargo and delivers the goods without obtaining the original bill of lading, it may inadvertently mis-deliver the cargo (and even if delivery was in good faith) and the carrier will be held responsible for paying the full value of that cargo to the rightful owner. In many cases the carrier will not be able to defend itself in this situation and may jeopardise its P&I cover or right to limit his liability under the applicable regimes and conventions.

A third option for the carrier is to seek an indemnity from the shipper or the receiver before delivering the cargo without presentation of the bill of lading. The most secure indemnity for the carrier would be a bank guarantee, however it is up to the carrier to request a corporate guarantee/indemnity.

Some express provision has been set out to protect the carrier in such circumstances, for instance, the standard GAFTA 100 form in the grain trade, provides that "in the event of the shipping documents not being available on arrival of the vessel at destination, seller may provide other documents or an indemnity entitling Buyers to obtain delivery of the goods and payment shall be made by Buyers in exchange for same" .

A new solution has been introduced by the "United Nations Convention on Contracts for the International Carriage of Goods wholly or partly by Sea" (Rotterdam Rules). It provides for the use of electronic transport records, equivalent to its paper bill. The electronic equivalents, which are a series of electronic messages, in a form similar to e-mails, containing information or instructions relevant to the goods concerned and their carriage and delivery, has been outlined in Article 8, 9, 10 of the Convention. By virtue of Article 8 , the use of electronic documents has been made subject to the consent of the carrier and the shipper.

Even though the Convention contains provisions that attempt to deal with the technological developments, the security of information is still a matter of concern. Hence, the Convention has been criticised on how it can prevent hackers obtaining important information about the goods or carriage in the electronic network. It is true that the use of electronic documents provides a number of advantages (maybe the first one is time saving, as previously mentioned, the ship often arrives to the destination before the BOL) but on the other hand, if someone manages to get an electronic copy of BOL and delivery of the goods, it would have a devastating effect on all the interested individuals.

In order to overcome this two suggestions have been made to establish safe electronic transactions, which have been encompassed in the model proposed by CMI, Rules for Electronic Bills of Lading 1990 and Bill of Lading Electronic Registry Organisation (BOLERO).

Another recent problem has arisen in the modern shipping environment especially with gas tankers, where it is difficult for the master to state cargo shipped in apparent good order and condition, since he is unable to see the apparent order for this cargo or have the means of checking it. In such circumstances, this may affect some provisions of the BOL, as well as Article 3, rule 3 of the Hague/ Hague Visby Rules and Articles 15(1) & 16 (1, 2) of the Hamburg Rules, which require the carrier to sign the bill "shipped in apparent order and condition".

The Rotterdam Rules envisaged a new solution to tackle this issue. However, if the Rotterdam rules do not come into force, amendments should ideally be made to the aforesaid articles of the above mentioned conventions.

A further practical problem faces the BOL in the recent years, when the master chooses to add a "Weight / quantity unknown" clause in the bill. This clause gives the master a way to release himself from any liability which might arise from a shortage in the quantity or weight of the cargo; and allows the master to avoid guaranteeing the accuracy of the weight or quantity stated in the BOL. Accordingly, the consignee however, cannot strictly rely on the accuracy of the stated weight/ quantity.

Notwithstanding that, the above is not always effective in some jurisdictions, since in non-common law countries such a clause may not be recognised and the master may not be able to rely on it for exemption of liability. This clause works in some of the common law countries, for instance under the English law, the bill of lading is not necessarily prima facie evidence of the weight or quantity, but in some circumstances the plaintiff must present other evidence which indicates the quantity or weight shipped on board, such as tallies, mate's receipt surveyor's report and so forth.

However, the above clause may not always be recognised by the common law courts on some occasions, such as where there is a big discrepancy between the bill of lading figures and the real figures. For instance, it has been held in the case of "Sirina" 'where the discrepancy between cargo actually loaded and cargo alleged to have been loaded is so great that it must be obvious to any Master that the bill of lading quantity may, in my view, even if the bill is claused "weight etc. Unknown", give rise to the implication that the quantity loaded was not widely at odds with the bill of lading quantity' Phillips J .

The same concept has been stipulated in Article (259) of the UAE Maritime Law no 26 of 1981, which provides that "1. The carrier- or his representative may express reservations against the particulars given by the shipper- in connection with the marks on the goods, the number, quantity or weight, if he has serious reasons to doubt the accuracy thereof or if he does not have available to him the ordinary means of verifying the same. 2. The reasons for the reservation must be stated on the particulars on the bill of lading, together with the bases which are being relied on. 3. The shipper or person delivering the goods shall have the right to prove the accuracy of those particulars. 4. The shipper- shall be responsible to the carrier for any inaccuracy in the particulars provided by him concerning the goods and which have been written on the bill of lading. It shall not be permissible for the carrier to rely on any inaccuracy in the said particulars in the bill of lading as against any third party other than the consignor."

Accordingly, it is clear that such a right given to the master to use such a clause may be a grey area of law

open to acceptance, rejection or degrees of interpretation. One suggested solution is to concur internationally whether the "weight / quantity unknown" clause is admissible or not and/or in what circumstances and to what degree, in order to clarify the right of the master to use such a clause.

To sum up, the aforesaid problems and solutions have been raised in the modern shipping environment due to a growth of technology, diversity of the commodities in today's shipments and the faster pace of carriage as opposed to the past. The Rotterdam Rules along with the CMI Rules for Electronic Bills of Lading 1990 and BOLERO are attempting to some extent, to tackle these issues, the success of which is yet to be seen.

Footnotes:

1- GAFTA 100, line 100.

2- Rotterdam Rules, Article 1.18: 'Electronic transport record' means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage."

3- Article 8: Use and effect of electronic transport records

"Subject to the requirements set out in this Convention: (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document."

4- See "Sirina" [1998] 2 Ll. Rep 613