

Bills of lading

Paul Aston

Holman Fenwick Willan, Singapore

*"I, indeed am the Lord of the world, but the law is Lord of the Sea"*¹

1. The evolution of the bill of lading

In the Medieval Ages shippers (usually the owners of the goods) as a rule accompanied their cargoes on the voyage to destination and [a] bill of lading served only as an invoice of the goods shipped. [A] [r]ecord of the goods loaded was kept by [the] ship's clerk in the 'Register', 'Book' or 'Writing'. All these names apparently describe a document which was kept by [the] ship's clerk with a copy given to the merchant as a receipt. Such rudimentary bills of lading was [sic] not transferrable, [sic] mainly, because merchant[s] travelled with their goods and while [the] original was in [the] possession of the shipowner the only one copy of bill, held by [the] merchant, was necessary. ... Dealing with masters of ships the 'Extrait du Statut de Sassari de 1316' says that the masters of ships which intended to leave the port of Torres with the goods of local merchants, shall give a sufficient written security (de dare suffitiente securitate) that the merchandise which they have promised to transport shall be shipped in entirety on their vessels. When this written security shall have been given to the merchant in [the] form of [a] 'police de chargement' (sa puliza) it would allow the ship to leave the port. In French translation 'police de chargement,' means Bill of Lading, so the record clearly mentioned a document which the shipper received from the master endorsing receipt and warranting shipment of the goods.

Later, in the sixteenth and seventeenth centuries, when larger ships ha[d] begun to carry varied cargoes belonging to several shippers this practice gradually came to naught when merchants ceased to travel with their goods and simply dispatched them to a consignee. From this stage [the] bill of lading began to exist as a separate and distinct document to provide a proof that the person demanding delivery of the goods at the port of destination was the person entitled to do so. Naturally, a copy of the register signed by the master or his mate on receipt of goods was such a document to pass a title and bind shipowner and consignee to the conditions of shipment.²

This quotation, based upon commentary penned by legal academic WP Bennett just over a century ago, provides a charming and historical backdrop to the evolution of the bill of lading ('B/L'). The B/L is one of the most ingenious inventions of

¹ The Emperor Antonius (138–161 AD/ACE).

² Law and Sea, *Bill of Lading: historical background and short overview* (www.lawandsea.net/COG/COG_Bill_of_Lading.html), drawing on WP Bennett, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (1914, Cambridge University Press).

commercial life. It may be compared to the invention of paper money, to which it has some similarities. It changed the way business was done and opened up many new commercial possibilities. Like paper money, its popularity has endured.

Initially, B/Ls originated in the fourteenth century as non-negotiable receipts for goods loaded, issued to a merchant who did not wish to travel with the goods. Later, it was found useful to note on the B/L some of the terms of the contract of carriage. In the eighteenth century, the B/L acquired its third function, that of a document of title to the goods.

A very important fourth function has also developed in modern times. The B/L is usually one of the critical documents that triggers payment under a letter of credit. An international 'sale of goods' is in truth a 'sale of documents'. For example, a buyer in China wants to import oil products from the Middle East and enters into a contract of sale with an English seller. The buyer wants to make sure that he does not pay until he is certain, firstly, that the seller will perform his obligations to arrange shipment of the correct goods and, secondly, that the goods are destined to reach his designated port in China. Likewise, the seller has no desire or intention of allowing the goods to leave England without some assurance of payment. This is, of course, where the letter of credit ('L/C') comes in, being established by the buyer's bank in favour of the seller. In order to trigger payment under the L/C, however, the seller must present through banking channels to the buyer's (or confirming) bank documents which conform (ie, those documents required in the credit). Of these, the B/L is a critical document because it evidences both the date of shipment and on which vessel the goods have been placed.

2. Types of bill of lading

There are four types of B/L:

- A negotiable B/L will be consigned "to the order of ..." the shipper or a named party. This may be transferred by delivery and indorsement.
- A bearer B/L will be consigned "to bearer" and may be transferred by simple delivery.
- A straight B/L will be consigned to a named consignee and is not transferable; only the named consignee can acquire rights under it. Under the UK Carriage of Goods by Sea Act 1992 (CoGSA or 'the 1992 Act'), a straight bill falls within the definition of a 'waybill'. The two documents are, however, distinct. For example, a straight bill of lading must be produced in order to obtain delivery of the goods, and is subject to the compulsory application of the Hague-Visby Rules.
- A sea waybill. Sea Waybills are used in lieu of a B/L for straight consignments whenever a letter of credit or similar banking arrangement is not involved in the sale of goods. They are used when cargo will not be traded/sold during transport. They are suitable for regular shipments between related companies which do not require settlements through banks or third parties. They are also used when payment of goods is made under an open account or there is a high degree of trust between the importer and exporter, such that a negotiable transport document is not required under a letter of credit.

Possession of an appropriate B/L will transfer the symbolic possession of the goods. A transferable bill of lading has been described as “the key which, in the hands of the rightful owner, intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be”.³ The shipowner has a responsibility to deliver the goods to their true owner. If he delivers to the wrong person, he may be liable to the true owner for the full value of the goods. He will also lose protection and indemnity ('P&I') insurance cover. The shipowner is not, however, privy to the various sale contracts. Presentation of the original B/L allows him to ascertain the true owner. This may be contrasted with the position in respect of a sea waybill, where the true owner only needs to show proof of identity and does not need to present the original sea waybill.⁴

3. The bill of lading as a receipt

3.1 Introduction

A B/L is used in the vast majority of international trade transactions. The B/L:

- evidences shipment of the goods;
- enables the goods to be traded afloat;
- triggers payment for the goods under sale contracts and credit support agreements; and
- enables delivery of the goods to be effected.

Most B/Ls are what are known as 'shipped' B/Ls. This basically means that the B/L will be evidence of the cargo at the time of loading. The date inserted in the B/L will therefore be considered to be the date of shipment and this may have important implications. For example, the value of the cargo in the contract of sale will usually be based on the market value of the cargo on the date shown in the B/L. Where 'received for shipment' B/Ls are issued, these will usually either be returned to the carrier and replaced by 'shipped' B/Ls or be made shipped B/Ls by inserting the name of the carrying ship and the date of shipment.

The consequences of inaccuracy can be severe. It is very important that the B/L is signed and dated accurately to record the actual date on which the cargo was loaded. If the B/L is ante/post-dated, there are serious consequences for the company, which may be exposed to claims from cargo interests. P&I cover may not be available for such claims as the P&I rules exclude cover for claims in certain circumstances where the B/L is ante/post-dated. Charterers and/or shippers may try to persuade the ship's master to accept a letter of indemnity or similar undertaking in return for issuing ante/post-dated B/Ls. Such requests should be resisted due to the risks involved in accepting such letters or undertakings.⁵

³ *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327.

⁴ *APL Co Pte Ltd v Voss Peer* [2002] 4 SLR 481.

⁵ See 9 below.

3.2 The function of the bill of lading as a receipt

This function was recognised by the common law, and modified by the Hague Rules and the Hague-Visby Rules.⁶ The B/L is a receipt as to:

- the quantity loaded;
- the apparent order and condition of the goods; and
- the identifying marks (sometimes called 'leading marks').

The B/L can itself be the contract of carriage, mere evidence of the contract of carriage, or of no contractual significance. As between shipper and carrier, where the shipper is also the charterer, the B/L is not of contractual significance as the charterparty is the contract of carriage. Where the shipper is not the charterer, the B/L is evidence of the contract of carriage, but is not itself the contract because the contract would have been entered into before the B/L is issued. Where the contract of carriage has been concluded before the B/L is issued, the carrier cannot unilaterally alter the terms of the contract by introducing contradictory terms in the B/L. When and how the contract of carriage is entered into depends on the circumstances of each case.

The first person to receive the B/L is the shipper, he who loaded the cargo. The shipper, because he loaded the goods, should have some knowledge both of the quantity loaded and their condition. Therefore, in a dispute between the shipper and the carrier, the statements in the B/L are only *prima facie* evidence of the quality and condition of the goods loaded. This means the carrier is free to bring evidence to contradict the B/L and the shipper can retaliate with evidence to uphold it.

Where the B/L is negotiated to a subsequent holder, however, it becomes conclusive evidence of the quality and condition stated. As between a third-party B/L holder and the carrier, the B/L constitutes the contract of carriage between them. The terms of the B/L are the only contractual terms which govern the relationship between the carrier and a third-party holder of the B/L. At common law, this happens by means of an estoppel: the holder has to prove detrimental reliance on the statement in the B/L. Under the Hague-Visby Rules, the statements are automatically considered conclusive evidence against the carrier, once the bill is transferred to a third party in good faith.⁷

It should be noted that the carrier does not certify the quality of the goods, but only their "apparent order and condition". The carrier is only bound to note on the bill defects that would be apparent on superficial inspection of the goods by a reasonable ship's master, relying on his general knowledge of carriage of goods. Thus, if bags of rice are loaded wet, stained or torn, that should be noted on the bill. If, however, the rice inside the bag is mouldy or discoloured, or simply not the type of rice described in the bill of lading, that is not something which the carrier would be expected to discover and note on the bill. The master is not meant to adopt or usurp the role of the quality inspector.

⁶ More is said about the rules at 9 and 10.1 below.

⁷ Article III.4.

4. The bill of lading as a contract of carriage

Discussion now turns briefly to the function of the B/L as evidence of the contract of carriage. It should be noted first that the B/L is not called “the contract of carriage”, but only “evidence of the contract of carriage”. This is a matter of timing. The bill is only issued when loading is complete. As mentioned above, however, the arrangement to load – in law, the contract – must inevitably come before that, as one does not load one’s goods on a ship and only then open negotiations for a contract of carriage. Usually there is little evidence of the negotiations and terms agreed before shipment; the B/L, although issued later, is then the best evidence of what was agreed.

Charterparty bills of lading can be compared to train tickets containing a statement on the back saying “for full terms and conditions please ask for a leaflet at the ticket office”. The full terms are not included in the bill, but the holder is referred to another document in which they are set out – the charterparty. Often, but not always, the B/L contains some of the terms: typically, a clause paramount incorporating the Hague-Visby Rules. For the full terms, however, it is necessary to refer to the charterparty.

5. Incorporation by reference

Bills of lading rarely expressly include a choice of law clause. Most commonly, and assuming a sufficiently wide incorporation clause, the law and jurisdiction provisions of the charterparty will therefore apply. Arbitration clauses are very common for disputes arising in connection with charterparties and B/Ls.

A few points must be noted about charterparty bills:

- Only parts of the charterparty relevant to loading, carriage and discharge of the goods will be incorporated. Thus, if a time charter is incorporated, the clauses relating to payment of hire and bunkers, for example, will not be incorporated.
- A charterparty arbitration clause will not be incorporated unless the B/L specifically refers to it.
- If the shipper is also the charterer, the B/L has no contractual effect as between the carrier and the shipper. Their contract remains the charterparty. The B/L will, however, acquire contractual effect between the carrier and the subsequent holder of the bill.
- Full terms are not stated in the B/L. Instead, the B/L incorporates the terms of a charterparty (which is usually identified by date). Therefore, it is generally good practice to ask for a copy of the charterparty. Problems can arise where there is doubt over which charterparty is incorporated and over which charterparty terms are incorporated. This is a question of construction of the incorporation clause, but some presumptions apply. Which charterparty is incorporated? Issues arise where there are several charterparties in a chain and where either no date is inserted on the face of B/L, or where multiple charterparties have the same date. The first presumption is that it is the head charterparty which is incorporated.⁸ This is

8 *The San Nicholas* [1976] 1 Lloyd's Rep 8.

because the shipowner is a party to that charterparty. Where, however, the charterparty chain includes a voyage charterparty underneath a time charterparty, the voyage charterparty is incorporated.⁹ This is because the voyage charterparty covers the specific voyage to which the B/L relates.

This area still gives rise to disputes that may find their way to court. In a recent case,¹⁰ the B/L stated on its face, “Freight payable as per CHARTER-PARTY dated 11/04/13” and included the following term on its reverse:

All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.

The charterparty referred to on the face of the B/L was a time charterparty and included, so far as material, the following clauses:

17. Bimco Arbitration Clause to apply – as per Clause 93 – with English Law and arbitration in London...Any dispute arising out of this Charter Party and from the issuing of Bill of Lading shall be referred to arbitration in London and English law to apply.

A further provision stated that all B/Ls issued under the charterparty were to incorporate the arbitration clause and English law. Arbitration was commenced under both the charterparty and the arbitration clause. Despite this, the Chinese cargo interests instituted proceedings in People's Republic of China. The claimant sought to restrain the defendant from litigating matters under the B/L otherwise than in the London arbitration. The claimant also sought an interim injunction, which was granted by Blair J on April 24 2015. Blair J granted permission to serve the defendant out of the jurisdiction and by way of alternative service. The defendant opposed the continuation of the injunction on three grounds. The first and the third points are the only ones that are relevant for present purposes. The first point raised arguments concerning the incorporation of the charterparty and the arbitration clause contained therein. The third point contended that there were strong reasons not to grant the order as a matter of discretion, even if the arbitration clause were to be treated as incorporated and the court did otherwise have jurisdiction.

The claimant accepted that the B/L referred to the incorporation of the charterparty dated April 11 2013 and that it incorporated all terms and conditions of the charterparty “dated as overleaf”, including the law and arbitration clause. It submitted, however, that it was arguable that, on a true construction, the reference to a charterparty dated April 11 2013 should not be read as referring to the time charterparty of that date but to a voyage charterparty of November 28 2013, which was not referred to expressly anywhere in the B/L. In support of that contention, the claimant referred to the fact that the B/L referred to freight being payable as per the specified charterparty, whereas a time charterparty such as the April 11 2013 charterparty provided for the payment of hire rather than freight. The claimant relied upon an authority,¹¹ in which the Court of Appeal had held that, where

9 *The Nanfri* [1979] AC 757.

10 *Southport Success SA v Tsingshan Holding Group Co Ltd* [2015] EWHC 1974 Comm.

11 *The SLS Everest* [1981] 2 Lloyd's Rep 389.

reference to a charterparty in a B/L was left blank, it was readily to be inferred that a voyage charterparty was intended to be incorporated. The court in that case said, however, that it was clear that there was no bar to the court finding that a time charterparty was incorporated by reference in, for example, a B/L. In a more recent case,¹² Mr Jonathan Hirst QC, sitting as a judge of the High Court, stated as follows:

The bills of lading expressly provided that all terms and conditions, liberties and exceptions of the Charter Party dated September 28 2005 ‘including the Law and Arbitration Clause’ were incorporated. The charterparty was a time charter rather than a voyage charter, so hire rather than freight would be payable. There can be no doubt that the parties intended the terms of the time charterparty (to which the sellers Capezzana were party) to be incorporated in the bill of lading contracts. The express reference to the arbitration clause would be sufficient to incorporate a charter party arbitration clause, even if it required a degree of manipulation ...

In the court's judgment in the present case, the reference to the charterparty of April 11 2013 was entirely clear and unambiguous. There was nothing impermissible or necessarily irreconcilable about the incorporation of the terms of a time charter and the court saw no reason to doubt that the time charterparty of April 11 2013 was incorporated as per the express terms of the B/L.

This case is salutary in that it shows the potential for disputes on matters of incorporation by reference.

This is an extract from the chapter ‘Bills of lading’ by Paul Aston in Oil and Gas Trading: A Practical Guide, published by Globe Law and Business.

12 *The Duden* [2009] 1 Lloyd's Rep 145.