



## Insight Article

# **Straight bills of lading - Not so straightforward**

There have been several court cases questioning the status and functions of a straight bill of lading. A straight bill of lading is generally accepted to be one that makes the goods deliverable to a named consignee and either contains no words importing transferability or contains words negating transferability (such as "non-transferable").<sup>1</sup> Accordingly, it is not a transferable or negotiable<sup>2</sup> document of title, which can be used to transfer the right to possession of the goods covered by the document. Bills of lading that are made out "to order" are, by endorsement, negotiable documents of title. Bearer bills of lading are negotiable without endorsement.

Straight bills are thought to be akin to sea waybills, <sup>3</sup> which are used to avoid the problems arising from late arrival of documentation, in trades involving short sea voyages and where the shipper does not intend to transfer the title to the goods during the carriage.

The status and functions of a straight bill of lading have major implications for two significant issues: delivery and package limitation.

As far as delivery is concerned, the commonly held view is that, whilst delivery under a negotiable bill of lading should only be against production of the original bill, such production may not be necessary under a straight (non-negotiable) bill of lading, i.e., delivery need only be made to the properly identified named consignee. However, that view is over-simplistic and indeed dangerous. If care is not taken, the carrier risks facing claims for misdelivery.

As regards package limitation, the commonly held view is that under a straight bill of lading a carrier may be able to rely on a lower contractual package limit than that stipulated in the Hague/Hague-Visby Rules (the Rules) because they are not normally thought to be compulsorily applicable to straight bills. However, recent case law suggests that this view is also over-simplistic and that carriers face increasing difficulty avoiding compulsory application of a higher package limit under the Rules.

#### P&I cover and delivery under straight bills

P&I cover does not include liabilities arising out of delivery of cargo under a negotiable bill of lading without production of that bill by the person to whom delivery is made. <sup>4</sup> The P&I Clubs seem to have taken the view that only documents which by mercantile custom are negotiable instruments trigger the operation of the exclusion in the Pooling Agreement with regard to liability for misdelivery mirrored in Rule 34(1)(i). Based on this understanding, liability for misdelivery under a straight bill of lading is not automatically excluded by virtue of Rule 34(1)(i) in those cases where straight bills are not treated as negotiable instruments. <sup>5</sup>

#### The English courts

Two recent English cases, the *HAPPY RANGER* <sup>6</sup> and the *RAFAELA S*, <sup>7</sup> primarily concerned disputes on the application of the Hague-Visby Rules, and most importantly the package limitation thereunder.

Whilst the status of the bill in the *HAPPY RANGER* did not determine the application of the Rules and therefore the package limitation (for reasons we do not propose to go into here), <sup>8</sup> the courts' comments nevertheless serve to indicate their thinking had the point been decisive. In the *RAFAELA S* the point was more decisive. In simple terms, the point was that, if the bill of lading was a "bill of lading or any similar document of title" <sup>9</sup> then the Rules, including the package limitation provisions thereunder, would have applied. In both cases it was recognised that there was no definition of the phrase and that there was no binding authority on its interpretation. It was equally accepted, however, that there was an overwhelming burden of judicial and other sources, including textbooks, which included the characteristic of transferability within the established definition of a "bill of lading or similar document of title". The main question therefore was whether the bill of lading in each case was a negotiable bill.

1. Benjamin's Sale of Goods, 4th Ed. See also footnote 5.
2. In strictly legal terms, transferability is one of the attributes of negotiability, viz. transferability by endorsement (where necessary) and delivery. However, as "negotiable" is a more commonly used term, and for the sake of simplicity, this article uses "negotiable", even if referring to the attribute of transferability alone.
3. Sea waybills are not documents of title. Delivery under them has to be made to the named consignee irrespective of production of an original sea waybill, and not to the holder of the waybill as such.
4. Rule 34(1)(i) of Assuranceforeningen Gard's 2002 Statutes and Rules.
5. It should be noted that in some jurisdictions a bill of lading made out to a named consignee will be deemed to be a negotiable document unless the words "not to order" are added. This may be the result of mercantile custom, case law or statute (as is the case in Norway).
6. [2001] 2 Lloyd's Rep. 530 and [2002] 2 Lloyd's Rep. 357.
7. [2002] 2 Lloyd's Rep. 403.
8. A general commentary on the case can be found in the article "The case of the damaged reactor - The HAPPY RANGER" in Gard News issue No. 168.
9. See Article 1(b) of the Hague-Visby Rules and Section 1 (4) of the Carriage of Goods by Sea Act 1971.

#### Negotiable or non-negotiable?

In the HAPPY RANGER the Commercial Court decided (although the point was not decisive) that the bill was a straight bill, principally because the consignee box showed only a named consignee and did not contain the words "to order" or others similar. The Court of Appeal disagreed. The face of the bill contained, in another body of text, the printed words "consignee or to his or their assigns" and these were the only words on the face of the bill indicating negotiability or otherwise. Since those words are accepted to mean "to order", that made the bill a negotiable document of title, falling within the definition of a "bill of lading or any similar document of title". The Hague-Visby Rules therefore applied.

In the RAFAELA S, heard by the Commercial Court, deciding the status of the bill seemed much easier. This was despite the fact that, as with many carriers' standard form bills in use today, the form used was designed for various circumstances, including when the bill was to be negotiable and when it was to be non-negotiable. The consignee box in the bill contained the printed words "B/L not negotiable unless 'order of'". In the bill that was issued the words "order of", or others of similar effect, did not appear in the consignee box. Accordingly, the court agreed that the bill was non-negotiable, and as such fell outside the definition of a "bill of lading or similar document of title". The Hague-Visby Rules therefore did not apply.

#### Package limitation

In the HAPPY RANGER, the apparent straight bill was ultimately determined to be a negotiable bill. This had the potential to make a huge impact, had the case not been decided on another point. With the Hague-Visby Rules applied, the compulsory package limitation was approximately USD 2 million, rather than the contractual GBP 100 sterling.

One wonders whether, having already made their decision, the Court of Appeal judges in the HAPPY RANGER wished to demonstrate a dislike of carriers seeking to rely on a very low package limitation, particularly when the party faced with a large loss was a consignee. This is perhaps most apparent in the Court of Appeal's comments on whether a straight bill could in fact be a "bill of lading or similar document of title" within the context of the Rules, despite the good deal of authority to the contrary. The Court of Appeal noted that "the point was not an easy one" and that "it would be unwise to assume that the statements in textbooks are correct".

### Delivery

It is unclear whether the comments in the HAPPY RANGER on whether a straight bill was a "bill of lading or similar document of title" were only made in the context of the application of the Rules, as opposed to the carrier's delivery obligations. The Court of Appeal referred to the RAFAELA S, but did not question the comment made by the judge in that case that "MSC [the carrier] were obliged to deliver cargo to and only to the consignees" and "nor does MSC need the protection of delivering only in exchange for the bill of lading as it would with a transferable bill... I also agree... that delivery against the bill of lading was not necessary". In saying all this, there remains a question mark as to whether delivery under a straight bill requires production of an original bill.

### The Singapore courts

In another recent case, Voss Peer v. APL Co Pte Ltd, 10 the Singapore Court of Appeal held that a carrier was not entitled to deliver goods carried under a straight bill of lading without production of the original bill by the named consignee. It concluded that a straight bill of lading was different from a sea waybill, the presentation of which is not a pre-requisite to delivery by the carrier.

The case concerned a dispute on the carrier's delivery obligations. The goods had been delivered to the consignee without production of the original bill of lading, which was accepted to be a straight bill. Delivery, against identification papers and other documents, including a commercial invoice and a cable purporting to show remittance to the shipper, was made to the consignee. Shortly after delivery, the shipper requested the carrier not to release the cargo without production of the bill. The shipper had retained all original bills because the buyer/consignee had not yet paid in full, and when he failed to do so, the shipper sued the carrier.

The bill of lading was of similar form to that in the RAFAELA S, at least in so far as the consignee box was concerned. The central argument was whether the carrier was obliged to deliver only against an original bill of lading, regardless of it being a straight bill.

Unfortunately, the numerous decisions relied on by the parties, which included the HAPPY RANGER and the RAFAELA S, were deemed to be of limited use as they did

not deal sufficiently with the specific point in question. With no decisive case law available to assist, the Court of Appeal turned to the text books and eventually concluded that the function of negotiability of a bill of lading was distinct from the function of a document of title and that a straight bill could therefore be distinguished from a sea waybill, which clearly did not require production for delivery.

As a result, the Court of Appeal agreed with the High Court and found the carrier liable for misdelivery. It followed the above logic, distinguishing straight bills and sea waybills and the functions of negotiability and of a document of title. The decision states that "clear words must be present to imply that the parties intended the instrument to be treated, in all respects, as if it were a sea waybill and that its presentation by the named consignee is not necessary. Indeed, if the parties wanted to have a sea waybill they could have quite easily adopted that format. They would not have issued a bill of lading with three originals. By issuing the instrument as a BL, it must mean that they wished to retain all the other features of a BL, other than the characteristic of transferability".

The court also took account of other factors, noting that a rule that a straight bill requires presentation would be simple to apply and would avoid shipowners having to decide whether the bill is a straight or an order bill - thereby avoiding litigation such as the HAPPY RANGER. Further, the court's view was that, if there were only two categories of documents - negotiable bills of lading and sea waybills - that would be overly restrictive for an unpaid seller who wished to use a non-negotiable bill while retaining security for his payment.

As a result, there should be no distinction between delivery under a negotiable bill of lading and a straight bill. In both cases, the carrier should deliver only against the original bill of lading. However, if the bill is a straight bill the consignee should also identify himself as the person named as the consignee in the bill.

The Singapore courts can be commended for a detailed review of authorities in the Voss Peer case.<sup>11</sup> As a result of the decision, and until further legal developments take place, carriers trading to Singapore should exercise caution and deliver cargo carried under straight bills only against presentation of an original.

English law revisited?

Although the Singapore decision is not binding in English law, the Voss Peer case is likely to be cited in future English cases in support of the view that delivery under a straight bill of lading can only be done against presentation of an original.

The Voss Peer case also appears to bolster the comments made by the English Court of Appeal in the HAPPY RANGER that a straight bill can function as a document of title and could therefore fall within the definition of a "bill of lading or similar document of title", thus making the Rules and their package limitation provisions compulsorily applicable.

Other jurisdictions

It is worth noting that in the US the problem is dealt with by statute. The US Pomerene Act governs bills of lading for transport within the US and for transport

from the US to another country. According to the Act, bills of lading consigned not "to order" but to a stated person/entity are non-negotiable. A common carrier (a carrier offering to the public to carry goods for hire) must state "non-negotiable" or "not negotiable" on a non-negotiable bill of lading. Under the Act a common carrier may deliver the goods covered by a non-negotiable bill of lading to the named consignee without surrender of the original bill, unless he has notice from the shipper or another party claiming to have title to the goods demanding that the goods not be delivered to the named consignee. Because a 1997 federal appellate court decision said that "there is ample authority...for the proposition that all bills of lading are documents of title" and that "a non-negotiable bill of lading...is by definition a document of title",<sup>12</sup> a fair conclusion is that US COGSA applies to such a bill of lading.

1. [2002] 3 SLR 176 and Civil Appeal No. 18 of 2002.
2. At the time of going to press it is not known if the case will be appealed to the Supreme Court, but it seems unlikely.
3. Although some still may argue that a non-negotiable bill of lading may not in all circumstances be a document of title.

On the other hand, in at least one decision the Chinese courts have stated that the original bill of lading is needed to take delivery even in the case of a straight bill, as the bill of lading is the document against which the carrier undertakes to deliver goods in accordance with Article 71 of the Chinese Maritime Code, and there is no difference between straight bills and order bills in this respect. However, decisions given by the Chinese courts are notoriously unpredictable, so it can not be said with certainty that this is the position under Chinese law. However, it can be said with certainty that when in doubt as to how to proceed, which includes unpredictable jurisdictions, the best precaution would be to deliver only against production of an original bill of lading.

Gard services will be happy to provide further guidance to members upon request.

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**Gard News is published quarterly by Gard Services AS, Arendal, Norway.**