Insight Article

The missing bill of lading

Unfortunately for the shipowner, the bill in question, rather like the White Rabbit in Alice in Wonderland, is often late and sometimes never makes it to the party at all. This was confirmed by the Master in the case of the "SAGONA" 1, when he advised the court that in his 14 years of sailing as a Master, he had never seen a bill of lading! The case of the missing bill has led to various practices designed to enable the shipowner to deliver the cargo, all of which, for one reason or another, are largely unsatisfactory from the shipowner's point of view.

The background to this difficult and perennial problem is the pivotal role of the negotiable bill of lading in international trade arising from its use, developed by custom, as a document of title. In effect, possession of the negotiable bill of lading amounts to constructive possession of the goods represented by that bill of lading, thereby enabling it to be used, inter alia, to sell the goods on (sometimes several times) while they are still in transit.

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The negotiable bill of lading is therefore fundamental to international trade. The shipowner is under an obligation to deliver the cargo to the person entitled to it. In the face of the various endorsements (or even one endorsement) on a bill of lading, he is presented with a dilemma as to whether the party claiming delivery is, in fact, so entitled. Recognising the shipowner's problem, the English courts have devised principles designed to enable him to deliver the cargo safely. The most important of these is that, where a bill of lading has been issued, the shipowner is not obliged to surrender possession of the goods to any person except on production of the bill of lading 2 . The shipowner will therefore be afforded protection if he delivers to the person presenting the original bill of lading. Moreover, if a set of three bills of lading is issued, the shipowner is safe if he delivers against the first original of the set presented to him 3 .

The above rule is, however, subject to the overriding proviso that the owner or Master is not aware of any other competing claim of ownership of the cargo. If the shipowner is so aware, he should not deliver without first investigating the entitlement of the person presenting the bill of lading. If he has no notice of such claims and there is no other indication to him that the holder is not so entitled, he will be safe in delivering to the person presenting the bill and will be protected from subsequent claims even when they are made by the true owner of the goods.

The sound commercial sense of this rule, and the protection thereby provided to the shipowner, is one reason why delivery without production of the negotiable bill of lading is excluded from the P&I cover provided by this Association and all the other P&I Clubs within the International Group. The exclusion of cover is contained in Rule 34.1.b(i) of the Association's Rules, which provides that the cover otherwise available under Rule 34.1 does not include:

"(i) liabilities, costs and expenses arising out of delivery of cargo under a negotiable bill of lading without production of that bill of lading by the person to whom delivery is made except where cargo has been carried on the Ship under the terms of a non-negotiable bill of lading, waybill or other non-negotiable document, and has been properly delivered as required by that document, notwithstanding that the Member may be liable under the terms of a negotiable bill of lading issued by or on behalf of a party other than the Member providing for carriage in part upon the Ship and in part upon another ship".

The conflict between theory and practice

The theory is that the rule devised by the courts should enable the owner to overcome the problem of the trading of the bill of lading without undue risk to him. In reality, however, the position is much more complicated due to the fact that the vessel often arrives at the discharge port before the bill of lading. This is particularly the case where the voyage takes only a few days. The consignee purporting to have entitlement to the goods then requests delivery of the goods even though he is unable to present the relevant bill of lading. The shipowner is often placed under considerable commercial pressure to deliver the cargo, even though the consequences of misdelivering the cargo, as described below, are very serious.

The consequences to shipowners of delivering cargo without production of the bill of lading

Under the terms of the contract contained in or evidenced by the bill of lading, the shipowner is obliged to deliver to the person entitled to possession thereunder, namely, the shipper himself or the named consignee, or, if the bill of lading is made to order, to the endorsee holder of the bill. By delivering the goods to someone who does not have the bill of lading the owner will be exposed to a claim for breach of contract by whoever is entitled to possession of the cargo.

• [1984] 1 LLR 198.

• See the
"STETTIN"
[1889] 14 PD 142

• See
Glyn Mills & Co. v. East and West India Dock Co.
[1882] 7 A.C. 596.

Where there is such a breach of contract resulting in misdelivery the courts may decide that, on a true construction of the terms in the bills of lading, the shipowner may not rely upon the exclusion clauses contained in that bill of lading. In addition, the carrier may also be sued separately for misdelivery under the tort of conversion, in which case, the shipowner may be unable to call upon any contractual exclusion clause which, under the bill of lading, would otherwise have protected him from liability.

Furthermore, and perhaps most importantly for the shipowner, if delivery is made without production of the bill of lading the shipowner will be deprived of his P&I cover for any claim arising as a consequence of the same by reason of the operation of the exclusion in Rule 34.1.b(i) described above.

In view of the serious consequences if he delivers the goods without production of the bill of lading, what is the shipowner to do in practice?

Options available to the shipowner when the bill is missing at the discharge port
(a) The shipowner can wait for the bill of lading to arrive

This is the safest option for the shipowner. However, this is not usually practicable or economically viable. The shipowner will not know how long the ship may have to wait and it will be contrary to his business interests to have the ship tied up in this way, particularly if he is unable to claim that delay from the consignee or the charterer. The effect of delay on the shipowner is examined below, under a voyage charter first and secondly a time charter.

(i) The shipowner's position under a voyage charterparty. In the absence of a clear provision in the charterparty, under a voyage charterparty the shipowner is under no obligation to deliver the goods to a party who is unable to produce a bill of lading. However, if the shipowner decides to wait for the bill of lading, who bears the risk of the time lost to him in consequence? There is little authority on the subject, but it is suggested that laytime or demurrage will run continuously unless there is default on the shipowner's part which causes delay or unless the running of laytime or demurrage is prevented by a clearly worded exception clause. This interpretation

follows, by analogy, the cases relating to the shipowners' exercise of a lien for non-payment of freight
4 .

• See the
"BORAL GAS"
[1988] 1 LLR 342.

• See
Carlberg v. Wemyss
[1950] S.C. 616 wich confirms that a shipowner may be precluded from claiming demurrage/damages for delay when there are other means available to him to protect his position and discharge the cargo. See also Section 493 of the English Merchant Shipping Act 1894 wich gives a shipowner a statutory right to discharge and warehouse the cargo into the United Kingdom after the expiration of 72 hours.

• See the
"HOUDA"
[1994] 2 LLR 551.

This construction is, however, subject to the overriding principle that a shipowner cannot delay his vessel unreasonably. If, therefore, when exercising the lien, the shipowner is able to discharge his cargo safely (such as into safe storage or even to the consignee but to his order and under his control) but retains control of the cargo pending delivery of the bill of lading, it is suggested that he should do so. If he unreasonably fails to do so, he may be precluded from claiming damages for any subsequent delay or demurrage 5 . If therefore, the same rules and principles apply when the shipowner delays discharge pending arrival of the ship, shipowners are advised to always consider whether the cargo can be safely discharged. If it can, and the shipowner unreasonably refuses to do so, he may not be able to recover any subsequent delay as damages or demurrage.

(ii) The shipowner's position under a time charter. Generally, hire is payable continuously during the period of the time charter, unless the charterers are able to either bring themselves within the off-hire clause or show that the delay resulted from a breach of contract on the part of the shipowner which has deprived them of the use of the vessel entitling them to claim their damages from the hire. In fact, it has been held by the Court of Appeal that a refusal on the part of a shipowner to deliver cargo without presentation of bills of lading was not a breach of contract and that hire was therefore payable in full during the period of delay. 6

Whether the shipowner is obliged to deliver against an indemnity if the bill of lading is not available is discussed in more detail in section (c) below, but the general position is that the shipowner is not obliged to deliver the cargo against an offer of a letter of indemnity. It should be remembered that while the practice of delivering cargoes against an indemnity has been developed (mainly by charterers/traders), this does not mean that the Master is obliged to follow this practice 6 .

If, however, the delay in waiting for the bill appears to be so unreasonable, especially in circumstances where it appears that the bill of lading has been lost rather than simply that the vessel arrives before it does, it may be unreasonable for hire to continue to be paid and in such circumstances, the shipowner should apply to the court for directions as to discharge and/or delivery.

(b) Delivery against one original bill of lading retained on board

When it is anticipated that the vessel may arrive before the bill of lading, the practice has evolved whereby the bill of lading is issued in a set of three originals, and the shipowner agrees that one of the set is to be retained on board, for delivery to the consignee or notify party on arrival at the discharge port. The Master then delivers the document to that party and this is re-presented to him and delivery made against it. This option has been particularly prevalent in the oil trade. However, notwithstanding the common practice, it is strongly discouraged by the International Group of P&I Clubs, as the protection afforded to a shipowner by the common law principle that he may safely deliver to a bill of lading holder where he has no adverse notice of claims is seriously prejudiced where two of the three original negotiable bills in the set are in circulation. This is because there is a clear risk that the other originals may have been traded during the course of the voyage and the bill of lading which remains on board does not therefore reflect the true ownership of the cargo. Moreover, the fact that the Master has retained the bill of lading against which he will be making delivery must give rise to an inference that he is aware that the holder of that bill is not necessarily the true owner of the cargo. Having notice of possible competing claims, the shipowner or Master is then obliged to make enquiries to assure himself that the consignee does, in fact, have the right to take delivery.

These difficulties have led to guidelines being issued by the International Group of P&I Clubs to assist shipowners when they are asked to follow this practice. Reference is made to Gard Circular No. 2/90. This advises Members to resist requests to carry one of a set of original bills of lading on board. If, notwithstanding this recommendation, Members are under pressure to do so, the Association recommends that the following wording be endorsed on all of the original bills of lading: "One original bill of lading retained on board against which delivery of cargo may properly be made on instructions received from shippers/charterers."

It is believed that this endorsement will give notice to any party purchasing the cargo against an incomplete set of bills of lading that delivery may be made in exchange for one original bill of lading retained on board and, as such, should reduce the risks of the practice. However, it should be remembered that a Member who agrees to follow this procedure will be in danger of prejudicing his P&I cover. It cannot be stressed too highly that the practice should therefore be resisted.

(c) Delivery against an indemnity

(i) Is the shipowner compelled to accept an indemnity? The primary point to note is that the shipowner is not, without very clear wording in the contract, compelled to deliver cargo against an indemnity for non production of the original negotiable bill of lading. Whilst certain trades (the oil trade in particular) have developed the practice of delivering without original bills against an indemnity this does not change the general position as set out above.

In the "HOUDA"6 the Court of Appeal had to consider whether a time charter was in any way different as regards delivery against an indemnity than a voyage charter or bill of lading. The charterers argued that the presence of an indemnity in a time charter (whether express or implied) together with their ability and indeed, entitlement, to give employment instructions, meant that a shipowner was compelled to follow their orders as to delivery without production of the negotiable bills. The Court of Appeal rejected this as a matter of general principle, affirming what had been generally understood to be the case prior to the first instance decision of Mr Justice Phillips, namely that the mere combination of the charterer's right to give orders as to employment and the shipowner's right to an indemnity did not, of itself, allow charterers to compel a shipowner to follow orders in this regard. This is on the basis that whilst the shipowner may have a right to an indemnity, he is not compelled to take it up. This is also on the basis that in common law, charterers, having given orders to issue a negotiable bill thereby giving rise to an obligation on the shipowner to deliver on production of that bill, and a liability on the shipowner to a third party, could not legitimately/lawfully change that order.

(ii) When is a shipowner compelled to deliver the cargo against an indemnity? The clearest case where the shipowner will be compelled to accept an indemnity is where the charterers obtain an order of a competent court to this effect, which will usually be in cases where the bills have been lost.

The shipowner may also be obliged to deliver the goods against an indemnity where he has positively agreed to deliver the goods against the same in the contract with charterers. This must be a positive obligation however, rather than simply a right to an indemnity. The distinction between the two is illustrated in the following sample clauses: *"charterers hereby indemnify owners ...[for]...complying with their orders (including delivery of cargo without presentation of bills)..." gives the right to an indemnity6. "Should bills...not arrive...owners agree to release the entire cargo without presentation of original bills against delivery by charterers of... indemnity..."* gives rise to an obligation on the shipowner to deliver the cargo in exchange for an indemnity 7 .

Even where there is positive agreement by the shipowner to accept an indemnity a word of caution should be sounded: if it is clear to the shipowner that the party to whom the charterers request the cargo be delivered is not the holder of the bill/the party entitled to delivery of the cargo, the shipowner is still not compelled to deliver the cargo and accept the indemnity. This appears to be on the basis that the agreement may be void for illegality at the time performance is required on the basis of a potential fraud 8 .

(iii) The position if an indemnity is accepted by the shipowner. Notwithstanding the dangers inherent to owners in agreeing to deliver cargo without production of the bill of lading against an indemnity, the fact remains that it is a widespread practice. What then can the shipowner do to minimise his risk? The practicalities of the procedure and the Association's guidelines were discussed in detail in Gard News No. 112. Therefore, we do not propose in this article to deal with the finer points of the indemnity to be given, other than to stress the following points (all of which are discussed in detail in Gard News 112):

1. an indemnity is only as good as the financial strength of the person giving the indemnity to meet his obligations under it;

2. the indemnity should cover the full potential liability which would include not only the value of the cargo but also cover interest and costs and any other damages as a result;

3. the indemnity must be drafted so as not to become time barred;

4. the indemnity should include a relevant law and jurisdiction clause in case the need arises to enforce it.

In issue No. 112 of Gard News it was also pointed out that although the practice was to be resisted, if a letter of indemnity was to be given which was legally binding and which afforded the shipowner some protection, it should be in the wording recommended by the International Group of P&I Clubs. This wording joins both the consignee making the request and a bank in the undertaking. The joining of a bank in the undertaking is of great significance as the security is only as sound as the solvency of the party granting it. It is therefore vital to ensure that a first class bank should make a commitment in common with the party making the request for delivery.

An additional note of warning is also given in that, under English law, an indemnity which is given in perpetration of a fraud or an illegal or immoral act will be void and unenforceable for being contrary to public policy 8 . An example of this includes an indemnity given to the shipowner in exchange for his agreement to issue clean bills of lading notwithstanding his knowledge that the cargo represented by the bills of lading was, in fact, damaged. Although the letter of indemnity given for delivering cargo without production of the original bills of lading is in a different category and is unlikely to be regarded as an illegal act or contrary to public policy, there may still be consequences for the owner if he knowingly misdelivers the cargo in exchange for an indemnity. The indemnity will not be enforceable, even if it does have the rare distinction of being countersigned by a bank.

The above summarises the options available to a shipowner when faced with the problem of a consignee demanding delivery without production of the relevant bills of lading. While certain safeguards can be incorporated into the various options to maximise the protection for shipowners, none of these can be made failsafe. This is of course discouraging in the light of modern shipping practices and improved communications. It may be better therefore, rather than to react to the situation at the discharge port when the matter is already a problem for the shipowner, to consider carefully whether there is any need at all for a negotiable bill of lading to be issued. If it is not necessary, shipowners should consider whether other carriage documents (such as these described below) could be better utilised to avoid the potential problem identified above. Documents other than negotiable bills of lading (a) Use of a non negotiable bill of lading.

It is generally considered that the potential problems identified above are reduced significantly when the bill of lading is made non-negotiable. The Association's Rule 34.1.b(i) does not exclude cover for claims arising from delivery of cargo without production of a non-negotiable bill of lading, provided delivery has been made to

the person entitled to take delivery.

• See the
"DELFINI"
[1990] 2 LLR 252

• *See Brown Jenkinson v. Percy Dalton*
[1957] 2 QB 621

• See
Mitchel v. Ede
[1840] 11 Ad. & El. 888

The obvious question then is, what is to be regarded as a non-negotiable bill of lading? This is not easy to answer as different jurisdictions apply different definitions. Generally, however, this can be described as any bill of lading which does not constitute a document of title, possession of which can be regarded as equivalent to possession of the goods.It is generally considered that a waybill and a "straight" bill of lading, i.e., one which names the consignee and obliges the owner to deliver to that person, are also non-negotiable bills of lading. However, it should be noted that in some jurisdictions such documents are regarded in the same way as negotiable bills of lading. Moreover, under English law at least, even though a consignee has been named in the bill of lading, this may not necessarily be the shipper's final instructions to the shipowner. In fact, the shipper is entitled to alter his instructions to the shipowner with regard to delivery before the goods are delivered or decide instead to retain the bill of lading because, for example, he has not been paid9. However, once the bill of lading has been received by the named consignee, the shipper may not alter his instructions as his control over the possession of the goods is gone.It should be stressed that where "straight" bills of lading or sea waybills are regarded as negotiable documents liability for misdelivery claims will be excluded under the Association's Rule 34.1.b(i). It can be seen therefore, that the best protection for the shipowner in these circumstances is for the delivery to take place only on presentation of the bill of lading.In view of the above, Members are advised to always act with extreme caution and to seek the Club's/its local correspondents' advice if they are asked to deliver the goods without production of the bill of lading.(b) Electronic Data Interchange
Reference is made to early schemes such as the "Seadocs" project which, for various reasons, failed to get off the ground. Recently, however, a new scheme called "Bolero" has been developed. This is intended to be a paperless scheme whereby the information usually recorded on a bill of lading is transmitted to a central registry by electronic transmission and notice is given to that registry whenever the bill of lading is negotiated. This information is acknowledged and the new electronic record is then held for the benefit of the buyer. At the moment, full details of the scheme have not been made generally available, although it is believed that a trial scheme will be coming on line shortly.Delivery in ports where delivery is to the customs authority
Finally, we must comment on the situation in certain jurisdictions where according to the local law the carrier is required to deliver the cargo not to the bill of lading holder, but to a public authority, usually the customs authority or perhaps a bonded warehouse. Variations on this cargo delivery system exist in many jurisdictions, including Argentina, Brazil and Chile. Thus, in those jurisdictions, although the cargo is to be carried under a bill of lading, it is not necessary or even possible for the carrier to deliver against that bill of lading. Although the position is not always clear, most such jurisdictions provide that delivery of the goods takes place by handing them over to an authority to whom, by law, the cargo has to be delivered. We should advise, however, that as the cargo is being delivered without production of the bill of lading, the matter will fall within the exclusion of cover under Rule 34.1.b(i). Accordingly, the Member delivering cargo in those jurisdictions should always seek the advice of the Association or its local correspondents in order to avoid misdelivery claims.Conclusion
It is hoped the above provides some useful information on the problems of delivering cargo without production of the original bill of lading. It is further hoped that it will enable Members to make an informed decision as to their options and what they can/cannot be obliged to do when presented with a demand to deliver goods without the original bill of lading being presented. However, as no

two cases are the same, at the end of the day the best (and shortest) advice is, of course, to contact the Association whenever such a request is made (whether at the time of negotiating the contract of carriage or later, at the discharge port).

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