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DOES THE BILL OF LADING TRULY AFFORD SECURITY?

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This article explores the effectiveness of bills of lading as security where there is misdelivery of cargo in circumstances where payment is not by letters of credit.

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I. Introduction

1 It is trite law that the shipowner, who issues bills of lading for cargo loaded on board a vessel, must deliver the cargo at the discharge port to the party that presents original bills of lading to take delivery of the cargo. If he does not, he is liable for misdelivery of the cargo. This position was reiterated recently in the case of *The Yue You 902*[1] when the shipowner had delivered the cargo to the buyer against a letter of indemnity issued by the seller of the cargo, who was also the voyage charterer. After taking delivery of the cargo, the buyer defaulted on payment to its bank. In this case, the buyer's bank had made payment to the seller on the basis of a banking facility provided to the buyer and, therefore, held the bills of lading. The bank enforced its rights as the holder of the original blank endorsed bills of lading against the shipowner and succeeded in its claim for misdelivery. Yet, not all holders of original bills of lading are as fortunate.

1 [2019] SGHC 106.

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II. The query

2 Consider a transaction where a seller has agreed to payment by telegraphic transfer against documents such as the bills of lading to be issued for the cargo. Presumably, the seller's rights are protected. The original bills of lading would only be released to the seller on shipping the cargo. The seller would then release the bills of lading in exchange for payment. If he does not receive payment, he would expect that the bill of lading would entitle him to delivery of the cargo at the discharge port.

3 In a climate where the market is in fluctuation or has collapsed, unlike financial institutions that offer trade finance facilities, a seller ("Seller") is hard-pressed to accept the terms dictated by his buyer. If the Seller does not accept the buyer's terms, the Seller cannot make a sale. He is at risk of holding on to a cargo in a saturated market with prices plummeting and, possibly, even continuing storage charges. The Seller accepts the terms proposed. The sale is on free on board ("FOB") terms. The Seller knows that his buyer ("Buyer A") will on sell the cargo to another buyer ("Buyer B") who will then sell it to the end receiver ("Buyer C"). The Seller is informed that Buyer B will arrange for the vessel and any insurance required for the cargo during the carriage. On the instructions of Buyer A, the Seller loads his cargo on board the vessel chartered by Buyer B. The shipowner hands the original bills of lading for the cargo loaded on board the vessel to the Seller on the instructions of the charterer, *ie*, Buyer B. The intention must be that the bills of lading would serve as security for the payment due. The bills of lading would be delivered from one buyer to the next in exchange for payment.

4 The Seller's nightmare begins when he receives the bills of lading and Buyer B is named as the shipper. The cargo has already been loaded and it is too late to discharge the cargo. The Seller does not want to lose the sale. He only needs payment for the cargo. The Seller has no alternative but to wait and press Buyer A for payment. He knows that if payment is by telegraphic

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transfer, Buyer C would need to pay Buyer B, who would in turn pay Buyer A so that he himself, *ie*, Seller, may be paid.

5 Days later, the Seller learns that the vessel has reached the discharge port and is shocked to hear that the cargo has been delivered by the ship owner against letter(s) of indemnity issued by the charterer, *ie*, Buyer B, and his buyer, *ie*, Buyer C. Yet, he, the Seller, who is holding the original bills of lading, has not received payment. The Seller could pursue a claim in contract, *in personam*, against his buyer. He learns that Buyer B has, in fact, already paid Buyer A but that Buyer A has not paid him and is not contactable. Buyer A has no other assets and has failed to pay the Seller the funds Buyer B paid.

6 Can the Seller enforce his rights, as the holder of the original bills of lading, against the carrier? The carrier has a strict liability where he delivers cargo without requiring the presentation of the original bills of lading. Surely, the original bills of lading must afford some security to the holder?

III. Security of the holder of the bills of lading

A. Bills of Lading Act

7 Pursuant to s 2(1) of the Bills of Lading Act[2] ("Act") the holder of a bill of lading can enforce his rights of suit against the carrier if he is a holder as defined in s 5(2) of the Act. Section 5(2) defines the "holder" to be one who is:[3]

> (a) the consignee of the goods by virtue of being identified in the bill; or
>
> (b) in possession of the bill as a result of the completion;
>
> > (i) by delivery of the bill of any indorsement of the bill; or

2 Cap 384, 1994 Rev Ed.
3 Bills of Lading Act (Cap 384, 1994 Rev Ed) s 5(2).

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(ii) in the case of a bearer bill, of any other transfer of the bill.

(c) even if no longer entitled to possession of the goods to which the bill relates, but has come into possession of the bill as a result of any transaction by virtue of which he would be a holder within (a) or (b).

8 The Act, which in Singapore gives effect to the provisions of the English Carriage of Goods by Sea Act 1992[4] ("COGSA 92"), statutorily recognises rights of suit of the lawful holder of the bill of lading. Prior to the application of the COGSA 92, rights of suit could not be transferred unless rights of property were also transferred. As a result, difficulties arose, for example, where risk passed first to the buyer. This area of the law was considered in detail most recently in *The Yue You 902* on the issue of whether the plaintiff had acquired a right of suit pursuant to s 2(2)(*a*) of the Bills of Lading Act. OCBC had acquired the blank endorsed bill of lading upon payment to the sellers. Although the cargo had already been completely discharged by the time payment was made, OCBC had title to sue by virtue of being a holder, as defined in s 5(2)(*b*), of the blank endorsed bills of lading. It was found that the bills of lading were not spent by the time OCBC became the holders as delivery against a letter of indemnity to a person not entitled to delivery, as he did not present the bill of lading, does not cause the bill to be spent. Where the requirements are met, happily, the holder of the bill of lading can proceed to enforce his rights against the carrier.

9 Despite the amendments in the law, and more than two decades later, the plight of some holders of bills of lading has not improved. What if the bill of lading is not issued by the owners of the vessel but instead by the demise charterers of the vessel?

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B. Whose bill of lading: the demise charterers'?

10 In 2004, the High Court (Admiralty Jurisdiction) (Amendment) Act[5] was amended to allow arrest of a vessel under a demise charter provided the demise charter has not been terminated before the issue of the writ. A claim for misdelivery would be brought pursuant to s 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act.[6]

11 The cargo interest who comes into possession of the bill of lading would usually not know if there is a demise charterer, unless the owners or the demise charterers themselves disclose the information. Save for a few specific registries, a demise charter need not be registered. It is not of concern or even in issue unless the cargo is damaged or there is misdelivery and/or one of the parties in the chain who is entitled to payment is yet to or cannot receive it. In that event, the cargo interest may carry out a search on the carrier only to find that the carrier does not own any vessels. The cargo interest would not be able to invoke the admiralty jurisdiction to arrest the vessel to obtain security for its claim under the bills of lading.

12 In the event that the cargo interest is aware that the vessel is under a demise charter, then it would be possible to arrest the vessel to enforce the holder's rights under the bill of lading. However, the claim must be commenced prior to the termination of the demise charter. This issue was considered in *The Chem Orchid*.[7] Although it did not relate to misdelivery of cargo, the same principles apply when faced with bills of lading issued by the demise charterer. In *The Chem Orchid*, Steven Chong J allowed the appeal of the claimants whose writs had been struck out at first instance. The issue of whether the bareboat charter had been terminated prior to the issue of the writs against the vessel was considered in detail. In doing so, it was necessary to consider, first, what was required in order for

5 Act 2 of 2004.
6 Cap 123, 2001 Rev Ed.
7 [2015] 2 SLR 1020.

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the charter to be terminated. Chong J held that, by the nature of a bareboat charter, it was necessary that there be physical redelivery of the vessel.[8] As a result, in this case, a notice that the charter was terminated was insufficient.[9] As part of the physical redelivery on termination or expiry of any charter, a change of the crew to the owners' crew would have been significant. On the facts of the case, only the benefit of the charterparty, *ie*, the charterhire, was assigned. The right of termination was not. As a result, it was held that the charterparty had not been terminated by the assignees, who did not have the right to terminate.[10]

13 The claimant takes a risk in commencing action against a vessel that was under demise/bareboat charter. When it boils down to whether the writs were issued prior to the termination of the demise/bareboat charter, save for the managers and/or agents of the vessel who might know better, or when the information regarding termination is publicly available, all other claimants can only hope that they have a valid claim against the vessel. Given the value of the cargo/the claim, the risk may well be worth taking where there is nothing to suggest otherwise.

C. Whose bill of lading: the freight forwarders'?

14 Yet another circumstance to consider is where the bill of lading is issued by a freight forwarder. This is typical where multi-modal transportation of the cargo is required.

15 The freight forwarder's role was considered in the case of *Abani Trading Pte Ltd v BNP Paribas*.[11] In this case, the plaintiff was the sub-seller of a consignment of metal bars. The letter of credit the plaintiff applied for from the defendant's bank provided that a "forwarder" bill of lading was not acceptable for negotiation. It also provided the latest shipment date as 30 December 2008. The bill of lading issued by the freight forwarder dated

8 *The Chem Orchid* [2015] 2 SLR 1020 at [88]–[91].
9 *The Chem Orchid* [2015] 2 SLR 1020 at [98].
10 *The Chem Orchid* [2015] 2 SLR 1020 at [130].
11 [2014] 3 SLR 909.

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30 December 2008 was negotiated for payment, which was deducted from the plaintiff's account with the defendant. It was subsequently found that another set of bills of lading had been issued dated 2 January 2009. As a result of the breach, the plaintiff had to settle with its buyer by reducing the sale price by US$64,431.53. The plaintiff sought to recover this loss from its bank on the basis that the bank ought not to have paid on forwarder bills of lading. George Wei JC held that, on the facts, as the freight forwarder had signed the bill of lading as an agent of the carrier and as the carrier was specifically identified on the face of the bill of lading, the precise arrangement between the parties would determine whether the freight forwarder had signed the bill of lading in its capacity as a freight forwarder or as agent for the carrier.[12]

16 If the freight forwarder does not own any vessels, then the bills of lading, issued by the freight forwarder, do not afford security for the claim.

D. Bill of lading in **The Star Quest**

17 Misdelivery in the context of terminal bills of lading was considered in *The Star Quest*.[13] The claimants were sellers of bunkers to two subsidiaries of OW Bunkers A/S. The bunkers were loaded onto bunker barges for delivery to various buyers. The owners and/or demise charterers of the bunker barges were the defendants. The claimants sought to recover from the defendants the value of the bunkers that were delivered without production of any of the Vopak terminal bills of lading issued at the time of loading, which they alleged constituted breaches of contract, breaches of bailment and conversion. In response, the defences raised were that (a) "[the bills of lading issued] were mere receipts for the quantity of bunkers received by the Vessels"[14] [and] which did not form contracts of carriage between the claimants and the defendants; (b) in accordance

12 *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909 at [40].
13 [2016] 3 SLR 1280.
14 *The Star Quest* [2016] 3 SLR 1280 at [13(a)].

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with the sale and purchase contract, "title to and possession of the bunkers had passed to the Buyers upon loading [of the bunkers]";[15] and (c) it was a custom of the local bunker industry to deliver bunkers "without production of any bill of lading".[16] Additionally, in respect of some of the claims, the defendants raised that the claimants were estopped from denying the local bunker industry custom of delivery without production of bills of lading due to the previous course of dealings.[17] In others, it was contended that the terminal bills of lading were not signed by the master and were, therefore, signed without authority.[18]

18 Chong J dismissed the appeals by the claimants/sellers of the bunkers and allowed the defendants unconditional leave to defend the claims in contract, bailment and conversion, as did the Registrar at first instance. Chong J held that on the express terms of the terminal bills of lading and on the facts of the case, they did not operate as documents of title required for the delivery of the cargoes of bunkers.

IV. Damaged cargo rather than misdelivery

19 In the example considered above, the Seller has in his possession straight bills of lading, which are non-negotiable and do not allow title to the goods to be transferred to any other party. As a result, the Seller finds himself in the unfortunate position where he has not received payment but has lost both possession and control of the cargo that was shipped. Worse still, the original bills of lading he holds do not afford him any rights of suit against the carrier, since the Seller is not the shipper named on the bills of lading even if he is in possession of them. It would seem that the Seller and, in fact, any cargo interest that cannot rely on bills of lading has no alternative but to pursue a claim in tort or in bailment against the carrier *in personam*, unlike a situation where the cargo is damaged.

15 *The Star Quest* [2016] 3 SLR 1280 at [13(b)].
16 *The Star Quest* [2016] 3 SLR 1280 at [13(c)].
17 *The Star Quest* [2016] 3 SLR 1280 at [13(d)].
18 *The Star Quest* [2016] 3 SLR 1280 at [13(e)].

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20 If the cargo was damaged, generally, the cargo interest would be able to enforce its rights against the carrier pursuant to s 3(1)(*g*) of the High Court (Admiralty Jurisdiction) Act. This was the basis on which the claimant in *Wilmar Trading Pte Ltd v Heroic Warrior Inc*[19] ("*Wilmar Trading*") recently succeeded.

21 In *Wilmar Trading*, a cargo of palm oil was loaded at Kuala Tanjung, Indonesia, to be discharged at Jeddah and Adabiyah. The claimant, who was an FOB buyer, nominated the *Bum Chin*. Parties had envisaged the issuance of bills of lading to the claimant in Singapore, on transhipment. However, due to an incident on board the vessel, part of the cargo was damaged prior to the issuance of any bills of lading to the claimant. Belinda Ang Saw Ean J held that there was no contract of carriage between the shipowner and the claimant who was the voyage charterer pursuant to a sub-time charter. The claimant succeeded in its claim in the tort of negligence. The defendant had relied on the case of *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd*[20] ("*Aliakmon*") and contended that the claimant had no title to sue in negligence.[21] Ang J found the argument to be moot following the Court of Appeal's decision in the case of *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd*,[22] which rejected *Aliakmon* to hold that the legal requirement of proving ownership of or a possessory interest in the cargo in order to bring a claim in negligence for loss flowing from the damage no longer applied in Singapore.[23]

V. Conclusion

22 The above is just a snapshot of some of the problems which plague a bill of lading holder in enforcing its claim against

19 [2019] SGHC 143.
20 [1986] AC 785.
21 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [35].
22 [2018] 2 SLR 588.
23 *Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2019] SGHC 143 at [36], citing *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd* [2018] 2 SLR 588 at [35].

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a carrier for misdelivery. Unlike the bank in *The Yue You 902*, the road to recover against the carrier for misdelivery is not always a smooth one.

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