

**Bills of lading –
getting them
straight?**

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BILLS OF LADING – GETTING THEM STRAIGHT

1. INTRODUCTION

The decision of the House of Lords in February 2005 in *The Rafaela S'* held that a straight bill of lading falls within Article 1(b) of the Hague Rules and the Hague-Visby Rules (**The Rules**).¹ It has been noted that it is a matter of some surprise that some 80 years after the introduction of the Rules in 1924, the meaning of the phrase "a bill of lading or any similar document of title" in Article 1(b) remains controversial.²

The Singapore Court of Appeal in 2002 in *Voss v APL Co. Pte. Ltd*⁴ held that a named consignee in a straight bill of lading must present the original straight bill of lading for the carrier to be entitled delivery of the goods.

This paper considers these decisions and their impact on the application of straight bills of ladings and their use.

2. TYPES OF BILLS OF LADING AND THEIR FUNCTIONS

The types of bills of lading are:

- bearer
- order/negotiable/transferable
- non-negotiable/straight

A unique feature of a bill of lading is its versatility, as it can perform different functions at the same time and can change its nature having regard to the circumstances when used. It performs three separate but related functions. Its acts:

- as a receipt for the goods shipped;
- as evidence of the contract of carriage between the carrier and the shipper; and
- as a document entitling its holder to possession of the goods.

¹ [2005] 1LLR 347

² Article 1(b) in its relevant respects states:

"Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such documents relate to carriage of goods by sea..."

³ *The Rafaela S* [2003] 2 LLR 113 at 115

⁴ [2002] 2 LLR 707 at 721

The third function is sometimes referred to as its "transferability" (that is, of the document to transferees in succession by endorsement or delivery) or less correctly a "document of title".

An order bill of lading is made out "to order". The carrier undertakes to deliver the goods in accordance with the shipper's order, that order being given by endorsement on the original bill of lading to the person (the endorsee) to whom the delivery should be made. In these circumstances, the endorsee is able to pass on the right of possession by endorsing the bill of lading to a new holder of that document. Possession of the bill of lading is equivalent to possession of the goods because the carrier will then deliver the goods to an endorsee holding the original bill of lading. Accordingly, a bill of lading made out "to order" can be used to secure the payment of purchase price for the goods under the underlying contract of sale of the goods which can be sold by the shipper to the receiver whilst the goods are at sea. It is more accurate to describe an "order" bill of lading as transferable, rather than "negotiable", because the endorsee cannot get a better title to the goods than the transferor. The use of "negotiable" has been said to be "idiosyncratic but traditional"⁵.

A transferable bill of lading has been described in the following terms:

*A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol; and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods... It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.*⁶

A bill of lading which does not contain "to order" but rather a named consignee, in the consignee's box, is non-transferable beyond that consignee and is therefore "non-negotiable". It is referred to as a straight bill of lading.⁷

It therefore has similar functions to that of a sea waybill, which is also non-transferable but which also acts as a receipt for the goods as evidence of the contract of carriage between the carrier and the shipper.

A named consignee in a straight bill of lading must present the original straight bill of lading for the carrier to be entitled delivery of the goods. The endorsement on a straight bill of lading does not effect the transfer of constructive possession of the cargo to the named consignee. Production of the original bill of lading on delivery is required in order to effect the transfer of possession of the goods the carrier to the named consignee.

⁵ *The Rafaela S* [2003] 2 LLR 113 at 115

⁶ *Sanders v Maclean* (1883) 11Q.B.D 327 at 341

⁷ *C.P. Henderson & Co v The Comptoir D'Escompte de Paris (P.C)* (1873-74) L.R 5 PC 253 at 260

However, a named consignee in a sea waybill is not required to produce the original sea waybill to effect such delivery.

In the United States under the *Pomerene Act* 49 U.S.C §80110, the named consignee must have possession of original straight bill of lading to be entitled to demand possession of the goods from the carrier. However, that party need not produce the bill of lading to the carrier. There is authority in the United States⁸ for the proposition that a carrier is liable to the shipper for breach of contract, where a straight bill of lading contains a surrender clause⁹ (such a clause states that the original straight bill of lading is required to be surrendered in return for the goods), in circumstances where the carrier delivers the goods to the named consignee without presentation of the original document. In the United States, it is standard practice for bills of lading to contain such clauses. It is therefore common under United States law for the original straight bill of lading to be presented in return of the goods.

3. **DECISION OF HOUSE OF LORDS IN *THE RAFAELA S***

The House of Lords affirmed the decision of the English Court of Appeal, which itself overturned the decision of Langley J at first instance and that of the original arbitration panel, in finding that the straight bill of lading was to be viewed as a bill of lading within the meaning of Article 1(b) of the Rules.

The relevant facts are that 4 containers of printing machinery were damaged in the course of their carriage by sea from Felixstowe to Boston in January 1990. The relevant contracted carriage between the parties was evidenced by the carrier's bill of lading which included the following:

- The document was entitled "original BILL OF LADING" and had an assigned bill of lading number.
- In box (2) were the printed words "Consignee: (B/L not negotiable unless 'ORDER OF')" where the buyer's name and address were inserted. The words "order of" or their equivalent were not added. This made the document a straight bill of lading.
- In box (11) the number of original bills of lading were specified as 3.
- The form contained all the particulars of the goods and the carriage ordinarily found in the bill of lading.
- The form provided on its face that:

⁸ *Porky Products Inc. v Nippon Express USA (Illinois) Inc. & Ors*, 1F Supp 2d 227 (SDNY, 1997)

⁹ See Conlinebill 2000 from "one original bill of lading must be surrendered duly endorsed in exchange for the cargo or delivery order, whereupon all other Bills of Lading to be void". See the Austwheat Bill form "any one (of the original bills of lading) being accomplished the others shall be void". A bill of lading is "accomplished" when it is presented to the carrier for delivery at the port of discharge, that is, when it ceases to become capable of transferring rights to an endorsee. See *The Sormovskiy 3068* [1999] 2 LLR 266 at 272. *The Berge Sisar* [2002] 2 AC 205 at 226

IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.

The relevant dispute between the parties was as to whether the buyer was entitled to compensation under the package limitation under the Rules as enacted in the UK COGSA 1971 or as enacted in the United States COGSA 1936.

The question for determination by the House of Lords was whether a bill of lading which was not made out to order or bearer, but rather to a named consignee, namely a straight bill of lading, was "a bill of lading or similar document title" within the meaning of Article 1(b) of the Rules. The decision of their Lordships was unanimous, with Lord Bingham, Lord Steyn and Lord Rodger giving reasons, which reflected substantially the reasons of Rix LJ in the English Court of Appeal below in the same proceedings, with Lord Nicholls and Lord Brown giving concurring judgments.

In coming to their decision, their Lordships made the following findings:

- Before the adoption of the Rules the practice of issuing straight bills of lading was known, such documents being described and treated as bills of lading. It was a fair inference that the framers of the Rules would have been aware of the relatively widespread mercantile use of straight bills of lading at that time. If it had been intended to exclude straight bills of lading, special provisions to that effect would have been made. Instead the gateway to the application of the Rules was expressed in the wide and general terms of their existence of the bill of lading or any similar document of title.¹⁰
- The words under examination, "bill of lading or any similar document of title", were words of expansion as opposed to of restriction. They postulated a wide rather than a narrow meaning. The construction sought by the carrier of those words revealed a preoccupation with notions of domestic law regarding documents of title, which ought not to govern the interpretation of an international maritime convention. Rather, the Rules had to be construed by reference to "broad principles of general acceptance" appropriate to the international mercantile subject matter.¹¹ Further the French text of the Rules contained no reference to the English concept of "document of title". Rather, it focused on the right to possession of the goods vesting in the holder of the document.¹²
- The function of a straight bill of lading could not be equated with that of a sea waybill. In the hands of the named consignee, the straight bill of lading was his document of title. Alternatively a sea waybill was never a document of title. But for the fact that a straight bill of lading was only transferable to a named consignee

¹⁰ *The Rafaela S* [2005] 2 LLR 347 at 359

¹¹ *Stag Line v Foscolo Mango & Co* [1932] A.C. 328 at 350

¹² *The Rafaela S* [2005] 1 LLR 347 at 359

and not generally, a straight bill of lading shared all the principal characteristics of a bill of lading.¹³

- There was no policy reason advanced as to why the draftsmen of the Rules would have wanted to distinguish between a named consignee who received an order bill of lading and a named consignee who receive a straight bill of lading. There was no sensible commercial reason why the draftsmen would have wished to deny the CIF buyer named in a straight bill of lading the minimum standard of protection afforded to the CIF buyer named in an order bill of lading.¹⁴
- The terms of the *Carriage of Goods by Sea Act* 1992 could not alter the proper construction of Article 1(b) of the Rules, albeit that the former legislation treated straight bills of lading as sea waybills. Further, that legislation was enacted 3 years after the relevant contract of carriage came into existence and it specifically provided that it would not affect the Rules.¹⁵
- There was obiter dicta by Lord Bingham¹⁶ and Lord Steyn¹⁷ that presentation of a straight bill of lading was required for the delivery of the cargo, even where there was no express provision to that effect, as was decided by the Singapore Court of Appeal in *Voss Peer v APL Co. Pte Ltd.*¹⁸

4. **DECISION OF ENGLISH COURT OF APPEAL (RIX LJ) IN *THE RAFAELA S***

The reasons for judgment of Rix LJ make a significant contribution to the jurisprudence on this topic. This has been acknowledged in the House of Lords, by Lord Bingham where his Lordship says those reasons were "given in a comprehensive and erudite judgment",¹⁹ and by Lord Steyn where he refers to the analysis by Rix LJ as a "comprehensive judgement entirely convincing".²⁰

In its relevant respects, the reasons for judgment deal with the background to the Rules, the United States law prior to the Rules, the interpretation of authorities from the Rules, UK COGSA 1971, up to the *Carriage of Goods by Sea Act* 1992, from that legislation to date, the textbooks and conclusions.

¹³ *The Rafaela S* [2005] 1 LLR 347 at 359-360

¹⁴ *The Rafaela S* [2005] 1 LLR 347 at 360

¹⁵ *The Rafaela S* [2005] 1 LLR 347 at 360

¹⁶ *The Rafaela S* [2005] 1 LLR 347 at 354-355

¹⁷ *The Rafaela S* [2005] 1 LLR 347 at 359

¹⁸ [2002] 2LLR 707 at 722

¹⁹ *The Rafaela S* [2005] 1LLR 347 at 350

²⁰ *The Rafaela S* [2005] 1LLR 347 at 360

Specific reference should be made to the conclusions²¹, namely:

- A straight bill of lading, but otherwise in the form of any classic bill of lading, is a bill of lading within the meaning of the Rules.
- The effect of the attestation clause in the bill of lading is to be construed as applicable for the use of the bill in its negotiable form and also controls its use as a straight bill. If it had been otherwise intended, then it could very easily have said so, but it did not do so.
- A straight bill of lading which has been produced to obtain delivery was a document of title. There was no reason why a document which has to be produced to obtain possession of goods should not have been regarded in an international convention as a document of title, noting it had been so regarded by courts in France²², the Netherlands²³ and Singapore²⁴.
- If negotiability is not necessarily a requirement of a bill of lading within the meaning of the Rules, then a straight bill of lading is a similar document of title.
- A straight bill of lading is in principle a document of title in the absence of an express provision requiring its production to obtain delivery.

As a final comment, Rix LJ said that the use of hybrid forms of bill of lading has been an unfortunate development and has been subject of litigation in recent years in an area where this has not previously occurred. In practice his Lordship suggested that "serendipity often prevails" and that the bill of lading forms invite litigation which is best to avoid by a simple rule. Shipping companies should not use bills of lading forms if what they want to invite shippers to do is to enter into contracts in the form of sea waybills. Further, shippers should ensure that the boxes in these hybrid forms should be filled up in the way that best suits themselves.²⁵

5. **DECISION OF SINGAPORE COURT OF APPEAL IN VOSS V APL CO. PTE. LTD**

The issue for determination was whether a carrier was entitled to deliver cargo to a consignee without production of a straight bill of lading.²⁶ The Court of Appeal found that in respect of a straight bill of lading the carrier should only deliver the cargo against its presentation. The facts of this case were that the relevant bill of lading bore the name of

²¹ *The Rafaela S* [2003] 2LLR 113 at 142-144

²² *The MSC Magallanes*, Court of Appeal of Rennes, 16 May 2002

²³ *The Duke of Yare*, ARR –RechtB Rotterdam, 10 April 1997

²⁴ *Voss v APL Co Pte Ltd* [2002] 2 LLR 707

²⁵ *The Rafaela S* [2003] 2LLR 113 at p144.

²⁶ *Voss v APL Co Pte Ltd* [2002] 2 LLR 707

the buyer in the box entitled "Consignee" without the words "to order". The bill also provided for a set of 3 originals issued by the carrier and that, upon surrender of any one negotiable bill of lading properly endorsed, all others stood void. The carrier released the goods to the consignee without production of any of the 3 sets of the bills of lading and the carrier was found to be liable in conversion. The Court of Appeal found as follows:²⁷

- The issues was to be resolved on the basis of contract law and the intention of the parties.
- Some confusion in this area of law could perhaps have been caused by a misunderstanding of the UK *Carriage of Goods by Sea Act* 1992, which required a bill of lading to be transferable, before it was a bill of lading for the purposes of that legislation. That legislation was concerned with the rights of suit in respect of carriage of goods by sea and did not deal with the question of whether the presentation of a straight bill was necessary to obtain delivery.
- A bill of lading which is devoid of the characteristics of negotiability, although similar in effect to that of a sea waybill, is not the same. In the case of a straight bill of lading where the characteristic of transferability is absent, there is no reason why it should be inferred that the parties had intended to do away with the other main characteristic, that is, delivery upon presentation.
- Clear words must be present to imply that the parties intended the document to be treated in all respects as if it were a sea waybill and its presentation by the named consignee was not necessary. By the issue of the document as a bill of lading it must mean that the parties wished to retain all the features of the bill of lading other than the characteristic of transferability.
- The option to use a sea waybill or a bill of lading as the contract of carriage was with the parties. If they chose to adopt the format of a bill of lading, the Court should not be astute to convert that arrangement into something they did not want to have in the first place.
- There is much to commend the rule that, even in respect of a straight bill of lading, presentation of it is a prerequisite to obtaining delivery. It has the advantage of being simple to apply and it is certain. References was made to the following words of Mr Justice Clarke in *The Sormovskiy 3068*:

*It makes commercial sense to have a simple rule that in the absence of an express term of the contract the master must only deliver the cargo to the holder the bill of lading who presents it to him. In that way both the shipowners and the persons in truth entitled to possession of the cargo are protected by the term of the contract.*²⁸

- The carrier's submission that, as long as the shipping document was non-negotiable in its face, presentation of the original bill of lading was unnecessary for delivery,

²⁷ *Voss v APL Co Pte Ltd* [2002]2 11r 707 at pp 721-722

²⁸ [1994] 2LLR 266 at 274.

should be rejected. That approach was overly restrictive for an unpaid seller who wished to use a non-negotiable bill of lading while retaining his security for payment.

- To hold that bill of lading was not the same as a sea waybill had the advantage of providing such a seller or, in the case of documentary credit, the bank, with some security against default by the buyer, and the buyer, some assurance that the seller has shipped the cargo before he was required to make payment. It gave both the buyer and the seller, where they, for their own reasons, wanted only a straight bill of lading to be issued, a fair measure of protection. In contrast the sea waybill was only a contract of carriage whereby the carrier undertook to deliver the cargo to the person identified by the shipper as entitled to take delivery of the cargo. The sea waybill was a receipt and not a document of title and, unlike a bill of lading, could not be used as security to obtain financing.
- To adopt the rule, that presentation of a straight bill of lading is a prerequisite to obtaining delivery, also avoided the undesirable consequences of the shipper's rights of suit under the original contract of carriage surviving any transfer of the document to the consignee.

6. **PRACTICAL IMPLICATIONS OF THE DECISIONS IN *THE RAFAELA S* AND *VOSS V APL CO. PTE. LTD***

- A bill of lading named as such and made out to a named consignee with the words "to order" omitted or deleted and requiring production on delivery is a "bill of lading or other similar document of title." It will be governed by the Rules provided Article 10 applies.²⁹
- In the Australian COGSA 1991 as modified by Schedule 1A (the Australian COGSA 1991) the reference to "bill of lading or similar document of title" has, in the definition of "contract of carriage", been replaced by "sea carriage document" which is given an extended meaning, including a bill of lading that is not negotiable and an non-negotiable document.³⁰
- A straight bill of lading is only a document of title for the purposes of the Rules where they apply. The shipper cannot require the carrier to deliver the goods to a party other than the named consignee. Therefore, a straight bill of lading is not suited as security for commercial credit unless the bank is the named consignee. Further, a CIF seller should not provide a straight bill of lading as a document of title unless it is stated in the sale contract that the seller can do this, noting it is

²⁹ Note the difference between Article 10 in the UK COGSA 1971 and in the Australian COGSA 1991 as modified by Schedule 1A.

³⁰ See Article 1(b) and (g) of the Australian COGSA 1991

considered to be a sea waybill and not a bill of lading under the UK Carriage of Goods by Sea Act 1992 (see section 1(1), 1(2) and 1(3)).³¹

- If a straight bill of lading requires that it is to be produced so that the consignee can obtain delivery, then the carrier can only do so against production of that document. Where the straight bill of lading is either silent or ambiguous on this requirement, then the carrier should still require production of the document, particularly where the document has been issued in 3 originals.
- Carriers which issue straight bills of lading in short sea trades, where the ship arrives at the port of discharge/place of delivery before the shipping documents, should only deliver against letters of indemnity where the consignee cannot produce the original straight bill of lading. Alternatively, they should issue sea waybills.

7. **POST SCRIPT – APPLICATION OF AUSTRALIAN LEGISLATION TO STRAIGHT BILLS OF LADING**

The effect of Article 10 Rule 7 of the Australian COGSA 1991 does not apply to non-negotiable sea carriage documents which include a straight bill of lading.³²

Accordingly, a straight bill of lading (or a sea waybill) for goods is governed by Australian COGSA only if the parties so agree.

Sea-Carriage Documents Acts (the Acts)³³

It is not clear whether these Acts apply to straight bills of lading. A straight bill of lading is not capable of transfer either by endorsement or by delivery without endorsement. Therefore, it cannot be treated as a bill of lading as defined nor can it be treated as a sea waybill, which is defined as being a document "other than a bill of lading" that names the consignee.³⁴

The Acts define a "lawful holder" of a bill of lading to include a person who "has come into possession of the bill, in good faith, as the consignee of the goods, by virtue of being identified in the bill." The Acts also effects the transfer of rights and liabilities to "each successive lawful holder of the bill".³⁵ Query how this applies to a straight bill of lading

³¹ "Rights of suit in respect of carriage of goods by sea" *The Law Commission and the Scottish Law Commission* (Law Com.No.196) at 20 and 31-36

³² Article 10 Rule 7 says"

These Rules apply to a sea carriage document issued under a charterparty only if the sea carriage document is a negotiable sea carriage document, and only while the document regulates the relationship between the holder of it and the carrier of the relevant goods.

³³ In NSW the legislation is *Sea-Carriage Documents Act 1997* (NSW).

³⁴ See definitions of "bill of lading" and "sea waybill" in Section 5 of the *Sea-Carriage Documents Act 1997* (NSW)

³⁵ See Section 5 of the *Sea-Carriage Documents Act 1997* (NSW)

where there is only one "lawful holder" other than the shipper, that is the named consignee, being the party to whom the carrier is obliged to deliver the goods. Davies & Dickey³⁶ suggest 3 solutions, namely:

1. A "purposive" reading glosses over the definitional difficulties and interprets the legislation to be effective to transfer rights and liabilities to the named consignee under a straight bill of lading when the original document is transferred to that party.
2. Regard the named consignee under the straight bill of lading as the original contracting party, who contracted through the agency of the shipper.³⁷
3. Rely upon the *Brandt v Liverpool*³⁸ contract "device", by which the common law implies a contract between the holder and the carrier on the same terms as the bill of lading, if the holder gives the carrier some consideration in return for delivery of the goods. Therefore, if the named consignee under the straight bill of lading does not acquire rights and liabilities under the contract by the operation of the Acts, it may do so by presentation of the bill of lading to the carrier for delivery of the goods.

Accordingly, if neither Australian COGSA 1991 or the Acts apply to a straight bill of lading for goods on a chartered ship where the consignee is not the charterer, it has been suggested that the shipping document can contain whatever terms and conditions the carrier wishes and the consignee may be unable to sue the carrier.³⁹

³⁶ *Shipping Law* (3rd Edition) 2004 at 249-250

³⁷ See *The Berge Sisar* [2002] 2 AC 205 at 220 and *The Albazero* [1977] AC 774 at 786

³⁸ [1924] 1KB 575

³⁹ Davies & Dickey, *Shipping Law* (3rd Edition) 2004 at 258