Bills of lading in international trade and the actual, potential and perceived pitfalls associated therewith - An analysis from an international trade law perspective focusing particularly on the United Kingdom jurisdiction

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I. Introduction

Bills of lading have been known in many common practices in international trade: 1) the reliance on indemnity clause and discharge of goods without presentation of a bill of lading, 2) using bill of lading as a contract of carriage, 3) using bill of lading as a document title, 4) the issuance of bills of lading in parts. There established many international sea treaties in which the United Kingdom is a party. Many of those were created with the purpose to bring the sea laws of United Kingdom into compatibility with that of other countries. However, when international trade disputes were resolved under the jurisdiction of the United Kingdom, the Courts had interpreted the mentioned practices of bill of lading in a different way to protect equitable rights and interests of the involved parties and to prevent fraud related to using of bills of lading. With that in mind, this paper only focuses on cases in which contracts of carriage were made between an English party and an oversea party to emphasize the distinct aspects of English law which were not fully acknowledged by the oversea party. These aspects gave rise to a lot of dangers for carriers involved in the process of delivery and were usually caused by differences in sea laws between England and other countries, especially non-common law countries. These risks were often considered as actual pitfalls encountered by many carriers and other involved parties in international trade. However, they could be also viewed as potential and perceived pitfalls because as the circumstances of cases vary from one to another, judgments handed down by the Courts will also vary, depending on each Judge’s interpretation of equity and other principles in tort and contract laws.

With the introduction of new electronic bills of lading, international trading groups may expect many advantages, such as encryption of data by computer system, faster and more accurate exchanges of information of bills of lading in accelerating cross-border cooperation. However, it is also vulnerable to many challenges, such as frauds due to high-technology crimes. Several trading guidelines, such as the Incoterms 2010 drafted by International Chamber of Commerce, the Rules for Electronic Bills of Lading drafted by Committee Maritime International, and the SEADOCs drafted by Chase Manhattan Bank may predict a less dependence on the current laws regulating the operation of paper bills of lading and impose a new duty to update information on the part of the holders of the electronic bills of lading. However, carriage terms, date and location of loading and discharging of goods, and the principles of equity still remain with the same effects as of a paper bill of lading. Taking into account the well-established characteristics of
paper bills of lading, this paper only examined the risks in using the traditional paper bills of lading as basis for further inquiring into international trade in an era of high technologies.¹

II. Risk in delivery goods with a forged bill of lading or without a bill of lading

In Sormovskiy², the indemnity clause in the bill of lading stated that if the bill of lading was not in the discharge port in time, then the ship-owner could discharge the goods. However, Clarke J held that it would be unlawful for the ship-owner to deliver the goods without providing a bill of lading³. The reason is that the ship-owner is still liable to the holder of the bill of lading, even though the clause purported to protect the ship-owner and tell the ship-owner to discharge the goods without a bill of lading³. In a similar sense, forgery of bills of lading will also place an innocent carrier at legal risks. In Motis Exports Ltd v Dampskibsselskabet⁴, clause 5(3)(b) of the bill of lading stated that:⁵

Where the carriage called for commencement at the port of loading and/or finishes at the port of discharge, the carrier shall have no liability whatsoever for any loss or damage to the goods while in its actual or constructive possession before loading or after discharge over ship’s rail, or if applicable, on the ship’s ramp, howsoever caused.⁵

The Court of Appeal held that the clause was unable to serve as a shield for the carrier. According to Stuart-Smith LJ, delivering with a forged bill of lading is considered fraud because it is just a worthless document without any legal effect ‘in the eyes of the law’⁶. His Honor also provided remedies for ‘loss caused by negligence if the loss is of appropriate kind’.⁶

In the case of Bremen Max⁷, a ship-owner discharged a cargo in Bulgaria without a presentation of a bill of lading. This was done pursuant to the letter of indemnification issued by the charterers. The original bill of lading was designated with a consignee, HSH Nordbank AG in London to whom the goods was ordered to be delivered. The owner of the bill of lading was Stemcor UK Ltd who then threatened to claim against the owner for 11 million dollars on the ground of misdelivery and arrested the cargo in Australia. The owners then paid 11 million dollars of security money to release the cargo. Farenco, a charterer, sent the substitute security to Stem Co pursuant to clause 3 of the indemnification letter, and also requested Daebo, another charterer, to send security money to Stemco. After knowing that Daebo did not comply with the request, Farenco claimed an injunction to demand Daebo to pay the security money in compliance with the letter of indemnification. The Court agreed that the charterers had the obligation to provide security under the letter of indemnification, however, only on the condition that the owner will deliver the cargo to the destination specified in the letter of indemnification. The ship-owner had no difficulty in accepting the obligation, and

² [1994] 2 Lloyd’s Rep 266.
³ Ibid 274.
⁴ 43[2000] 1 Lloyd’s Rep 211.
⁵ Indira Carr, above 1 183-185.
⁶ 43[2000] 1 Lloyd’s Rep 211, [216].
hence, the charterers had breached their obligations in the letter of indemnification even though the owners had already paid the security to have the cargo released.8

The circumstances in which the discharges of goods without presentation of a bill of lading vary from case to case, and so do the judgments handed down by the Courts. On one hand, ‘a ship-owner who delivers goods without presentation of a bill of lading does so at his own peril’9, as Lord Denning stated in Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd. As such, when bill of lading is lost, according to the judgment given by the Court in Houda, ‘tendering a sufficient indemnity the loss of the bill of lading is not to be set up as a defense’10. On the other hand, the Court may recognize the effect of a letter of indemnification on the discharge of goods without a bill of lading, as implied in the case of Bremen Max7. However, it is noticeable that the Court handed down judgments on the ground of equity to support the healthy flow of international trading process and to protect the rights of the purchasers as well as to impose appropriate liabilities on involved parties. 11

III. Risk in indemnity clause in the bill of lading

The application of Himalaya principle in international trade often purported to protect the rights of third party, and in many cases, incorporated with Hague-Visby rules in indemnifying the carrier from all liabilities in loading or discharging of goods. These indemnity clauses have become useful, especially in indemnifying damages caused by stevedore activities passed to carriers as a part of carriage contract with the stevedore on the basis of ratification by and passing of consideration from the stevedore, as indicated in the case of Midland Silicones Ltd. v. Scruttons12 by Viscount Simonds and Rigoletto13 by Rix L.J.14

However, English Courts has the tradition to interpret indemnity clauses with discretion and with the intention to recover loss suffered by purchasers. In the case of Jenkinson and Co Ltd v Percy Dalton Ltd15, the cargo contained leaking orange juice, and the plaintiff provided a bill of lading consisting of an indemnity clause to appeal for exemption from liabilities for the alleged loss suffered by the purchaser. Morris LJ considered the presentation of the bill of lading in this case as false and satisfied with all requirements of tort of deceit16. Pearce LJ, though did not consider either the defendant or the plaintiff were absolutely wrong, determined that there would be an ‘inherent peril’17 in the indemnity clause of the bill of lading if

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9 [1959] 2 Lloyd’s Rep 11, [120].
10 [1994] 2 Lloyd’s Rep 541, [558].
11 Indira Carr, above 1184.
16 Ibid 9.
applied with ‘reckless and laxity’. According to His Honor, if the trust of the purchasers in the carriers is damaged by issuing a bill of lading consisting an effective indemnity clause, then there will be more disadvantages associated with the issuance of the bill than the convenience to load or discharge the goods. Hence, the indemnity clause cannot be used to defend for a false presentation and so became unenforceable to exempt the plaintiff from paying for the loss and damages caused by such presentation. However, contingent on the interpretation of the Court, judgments handed down may vary in different circumstances, taking into account the benefits of the purchasers and shippers and whether or not the damages caused by the carriers are of appropriateness to receive remedies.

IV. Risk in interpreting bill of lading as contract of carriage

It has been a common practice in international trade by many countries that the bill of lading could be used as a contract of carriage. For example, article I(b) of the rules of Hague-Visby 1968 expressed that:

Contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

In the case of Brandt v Liverpool, on his voyage from Buenos Aires to Liverpool, the ship-owner expelled most of the bags of zinc ashes at Buenos Aires due to the facts that the bags were watered in rain and the ship crews' fear of possible damages to the ship caused by heat and moistures. This was the main reasons for the delay of three months and an extra cost of 748 pounds to dry the bags and deliver them to Liverpool. The bank claimed for loss due to the extra cost and delay caused by the carrier. Even though, the bank was not directly endorsed with the bill of lading, the Court ordered the carrier to pay the extra cost of 748 pounds. The reasoning in the judgments of the Court was that since the carrier accepted to deliver the goods in good condition and order stipulated in the bills of lading presented by the carrier, it means that the contract had been formed under the bill of lading between the bank and the ship-owner. Furthermore, taking into account the liabilities owed to the bank by the carrier, it was a decision built upon an equitable basis by the Court in rebutting the effects of the delay exception clause included in the bill of lading.

There were many cases in which the bill of lading did not contain terms and conditions that were agreed by both parties. In Ardennes, the Court held that the oral agreement between the shipper and the ship-owner was valid, and the bill of lading could not serve as a contract between the two parties. In this case, the

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18 Indira Carr, above 1 178-179.  
19 Peter G. Pamel, above 14 12.  
20 (1924) 1 K.B. 575.  
22 [1951] 1 KB 55.
ship's agent promised the shipper to sail straight to London and arrive on a specific date, however the vessel halted at Antwerp and then arrived London three days later than the agreed date. The ship-owner trusted on a clause in the bill of lading stipulating that the ship-owner can have the autonomy in choosing and varying the ship's journey. However, the Court only considered the bill of lading as an evidence of the terms of the contract, but not the contract itself.\(^{23}\) This viewed was applied and further elaborated by the Court in the case of \textit{Cho Yang Shipping Co Ltd v Coral}\(^{24}\) that all the terms of the shipping contract agreed upon by parties may not be contained in the bill of lading, and so the bill could only serve as the receipt for the shipping service provided by the ship-owner.\(^{25}\) As such, other aspects of the relationship between parties, including their oral agreements, are needed to be taken in to account to ascertain the liabilities of each party in related to the actual agreement between them.\(^{26}\)

It is observable from these cases that the Court did not apply a fixed principle in determining whether or not a bill of lading could serve as a contract of carriage. In either ways of constructive reasoning, the Court often provided the rationales of the equitable rights and interests in protecting the purchasers. Hence, it would be safer for carriers to be aware of these traditional aspects of English law when engaging in international trade.

V. \textbf{Risks in using bill of lading as document of title}

In other jurisdictions, such as the United States, Singapore, Holland, and France, straight bills of lading are often considered as a similar document of title. The United Kingdom has significant business connections with many countries which applied the rules of both Hague-Visby and The United Nations Commission on International Trade Law to the using of straight bills of lading in which carriers delivers goods to a specified and assigned consignee. English law does not recognize the consignee's right to privity of contract, but still adopted some features of Hague-Visby rules in conferring upon the consignee other implied and expressed rights under section 1 of the \textit{Bills of Lading Act 1855}\(^{27}\) and sections 2 and 3 of \textit{Carriage of Goods by Sea Act 1992}\(^{28}\). This was illustrated in the recent case of \textit{Angeliki B}\(^{29}\) in which the Court held that as the lawful endorsee of the bill of lading, the claimant had the right to sue the vessel owner under sections 2 and 5 of the \textit{Carriage of Goods by Sea Act 1992}\(^{30} \textit{31}\).

\(^{23}\) Ibid 59.
\(^{25}\) Ibid 643.
\(^{26}\) Indira Carr, above 1 181-182.
\(^{27}\) \textit{Bills of Lading Act} (1855) s 1.
\(^{29}\) [2011] EWHC 892.
However, English Courts often hesitated to recognize a straight bill of lading as a document of title. Under English law, as related to the rights of the holder of bill of lading, possession of goods is more appropriate than ownership. This was clarified by Bowen LJ in Sanders v Mclean\textsuperscript{32} that:\textsuperscript{33}

\begin{quote}
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 recognized as its symbol, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. 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.\textsuperscript{32, 33}
\end{quote}

In this sense, a bill of lading is just a symbol of transferring what and to whom have been agreed upon, and any later transferee cannot not have a better title than the prior holder of the bills of lading or the transferor, as clarified by Lord Campbell in the case of Gurney v Behrend\textsuperscript{34}. As such, the shipper cannot have his authority and rights taken away by any transferee, or in other words, the bill of lading does not give a transferee any title of goods to deliver the goods against the authority of the shipper. At this point, the ownership of goods is determined by the contract of sale, as considered by Lord Bramwell in Sewell v Burdick\textsuperscript{35}. Hence, the level of control over the goods of a contract by a transferee or consignee is only constructive possession in the ‘creation of a bailment at will’\textsuperscript{36}. It would be digressing to dig into the history of English law to criticize the notion of constructive possession as it subverted the ownership capacity of bills of lading in international trade\textsuperscript{37}. The principles in these cases could be seen as risks that any consignee doing business with an English partner needs to comprehend.\textsuperscript{38, 39}

\section*{VI. Risk in transferring bills of lading in part}

Bills of lading are usually provided in a set of individual sixes or threes to provide convenience and flexibility for the goods to be delivered on time. If a transferor only transfers the bills of lading in part, even though it is possible to transfer in this way, it would give rise to the situation in which the perils of misuse and misperception on part of the transferee are imminent. This issue was further clarified by Lord Blackburn in the case of Glyn Mills v West and Ease India\textsuperscript{40} that two persons who hold different parts of the same set of bills of lading may misperceive that they had gained the same rights and interests in the goods, indicating frauds on part of the consignor\textsuperscript{40}. His Honor recognized the rights and liabilities of the holder of a part of the bills of lading to deliver the goods upon prior agreement, however a part of the bills of lading does not entitle the holder the rights and interests of holding the whole original set of bills of lading\textsuperscript{40}. As such, an

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\textsuperscript{32} (1883) 11 QBD 327, [341].
\textsuperscript{33} Indira Carr, above 1 181-182.
\textsuperscript{34} 918540 3 E&B 262, [271].
\textsuperscript{35} (1884) 10 App Cas 74.
\textsuperscript{37} Ibid 142-143.
\textsuperscript{38} Ibid 142-148.
\textsuperscript{39} Indira Carr, above 1 181-183.
\textsuperscript{40} (1882) 7 App Cas 591, [604], [605].
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assignee should contact and inform the ship-owner upon the accomplishment of assignment to avoid misdelivery. A bill of lading normally includes a clause stipulating that once the assignment is accomplished by the holder of a part of the original set of bills of lading, the other unendorsed parts will become void. Therefore, the practice of issuing bills of lading in part may impose the risk of misdelivery upon the presentation of an unendorsed bill of lading. It would be safer for an assignee to inform the ship-owner the accomplishment of assignment because English authorities were inclined to protect the innocence of the ship-owner in the case of no notice given by the assignee. It was expressed in Glyn Mills v West and Ease India on the equitable ground that it was not the duty of the ship-owner to assume any assignment accomplished in any case of changing title without prior notice.41

Assuming that each consignee is issued with a part of the original set of bills of lading, the central legal issue here is to determine which consignee will have the acquiring priority to the goods in a carriage contract. In Barber v Mayerstein, three bills of lading were issued, and only two bills of lading were endorsed by consignees. However, one consignee acquired the unendorsed bill of lading by fraud and finished the assignment by using that bill before other holders of the endorsed bills of lading could proceed shipments. The property was shipped to the destination specified in the bill of lading by the holder of the unendorsed bill of lading. It was contended by the defendant that it was a matter of competition among consignees to accomplish the bill of lading’s assignment. Lord Westbury held that the party who was first provided with a bill of lading will get the acquiring priority to the goods in the carriage contract on the ground that all conducting related to the two remained bills would become subsidiaries and could not be valid without the party who was first provided with a bill of lading. As such, when dispute arises among consignees, there is a risk for any consignee to accomplish assignment without being firstly provided with a bill of lading. In the case of Sanders v Maclean, only two bills of lading in a set of threes was tendered to the buyer by the seller, and for this reason, the buyer rejected the tender. Bowen LJ determined credits and trusts rather than the fear of fraud as basis for commercial transaction. As such, the Court rebutted the right of the buyer to reject the tender of the two bills of lading. For this reason, this case implied a risk for any buyer who wanted to obtain the original set of bills of lading but then refused to accept the tender when not being provided with the original set of bills of lading.46

It could be viewed as a good defense for ship-owners to have their rights protected if no notice of assignment accomplished was given. It is well established that a holder of a bill of lading can demand the goods to be delivered to himself or herself. On one hand, the issuing of bills of lading in a set of sixes or

41 Indira Carr, above 1 195-196.  
42 (1870) LR 4 HL 317.  
43 Ibid 281.  
44 (1883) 11 QBD 327, 341-342.  
threes may accelerate the process of delivery. However, on the other hand, the shipper needs to acknowledge the risks of misdelivery upon the presentation of an unendorsed bill of lading. In such cases, the English Courts found it equitable not to impose such a duty of presumption on the ship-owner without a prior notice of assignment accomplished.

VII. Related aspects in international laws

Bills of lading have been considered as an effective protection for seaway carriers of goods. The common practice of many international trade groups benefited much from bills of lading in the sense that it is incorporated with clauses which release the carriers from satisfying strict liabilities owed to the shippers and purchasers. This practice became prevalent and consequently caused a lot of damages to involved parties due to negligence, fraud, deceit, and misdelivery. There have been significant efforts to restrict unhealthy effects of bill of lading and protect the rights of carriers by different international trade groups. The Hague-Visby rules were prepared by the Committee Maritime International to bring seaway trading practices of different countries, such as Europe, the United Kingdom, and Japan, in line together. The Maritime Liability Act of Canada adopted the Hague-Visby rules to give legal effects to both international and domestic discharging and loading of goods. The United States incorporated some features of the early Hague 1924 rules to create its own version of Carriage of Goods by Sea Act to govern goods’ dispatches from and to the United States. The United Nation Commission drafted the less popular Hamburg rules which are only effective for and applied by partners trading with Canada, including the United Kingdom. 47

VIII. Related aspects in the United Kingdom’s laws and some conclusion remarks

The United Kingdom passed the Carriage of Goods by Sea Act 1971 that adopted the Hague-Visby rules and gave effects to the using of bills of lading both domestically and internationally with all countries contracting in Hague-Visby agreement 48. However, English Courts often interpreted bills of lading differently and invalidated indemnity clauses incorporated with Hague-Visby Rules that exempt the liabilities of carriers, as applied by Colman J in The Gurara River 49. The transfer of rights and the rights of suit were often removed by indemnity clauses in bills of lading to lessen the liabilities of the carriers. Even though, any holder of a bill of lading has the right to sue and transfer this right to the next holder under section 2 of the Carriage of Goods by Sea Act 1992 50, the Act did not allow the contractual rights to be passed with the passing of the goods. This principle might prevent he holder of an endorsed bill of lading to sue the ship-owner for late delivery after property is delivered, as applied by the Court in The Delfin 51. This often resulted in liabilities in tort if at the time when the tort happened, the plaintiff became the legal owner of the property,

47 Peter G. Pamet, above 14 5-8.
48 W. Tetley, above 31.
51 [1990] 1 Lloyd’s Rep 239.
as implied in the *Cambay Prince*\(^5\). However, it is different under a special contract between the ship-owner and the consignor on the consignee’s behalf. In such case, a contract can still be enforced by the consignor even after the delivery of the goods to the transferee, as applied by the Court in the case of *Dunlop v Lambert*\(^5\). It is important to note that the right to sue is only valid within the time specified in the bill of lading, and the chatterers cannot sue on the consignee’s behalf after the contractual rights had flowed to the consignee, as held by the Court in *The Albazero*\(^5\). At times, where there has been sufficient considerations flowed from the purchaser in the co-operation with the carrier, the Court tended to recognize an implied contract, though unwilling, to approve delivery without a presentation of a bill of lading as pursuant to an indemnification letter, as demonstrated in *Captain Gregos*\(^5\).\(^6\)

Most importantly, English Courts did not recognize a bill of lading as a document of title or contract of carriage, but only as an evidence of the broader terms and conditions agreed between the shipper and the carrier. In such cases, English Courts seemed to hand down judgments on an equitable ground that not only imposed liabilities on the carriers but also protected the rights of the purchasers. This principle was also applied by the Court when decided to consider the discharge of goods without a bill of lading or with a forged bill of lading as frauds on the basis that the carrier is still liable to the holder of the bill of lading and that a forged bill of lading is nothing more than a worthless document. In the cases of misdelivery due to representation of an unendorsed bill of lading, the Courts tended to protect the ship-owner on the ground that it is not the duty of the ship-owner to presume the assignment accomplished without any prior notice.

\(^6\) (1839) 7 ER 825.