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RELEASE OF THE CARGO WITHOUT THE PRESENTATION OF ORIGINAL BILL OF LADING

A bill of lading is a document issued by a carrier (or their agent) to acknowledge receipt of cargo for shipment. Although in England, the term once related only to carriage by sea, a bill of lading may be used for any type of carriage of goods. A bill of lading must be transferable and serves three main functions:

- It's a conclusive receipt

i.e. an acknowledgment that the goods have been loaded;

- It contains or evidences the terms of the contract of carriage; and
- It serves as a document of title to the goods.

As much as it is the most important document for shipment of goods from one place to the other, it has

become very common for the cargo interest or their agents to demand the release of cargo without submission of the original bill of lading.

At the outset, the answer to whether the cargo can be released without the presentation of the OBL is a big NO! as this involves a lot of risk both for the carrier and the cargo interest since the reasons for the non-presentation are enormous. In spite of this being wrongful there are some carriers and P&I that do release the cargo, subject to certain exclusions and exemptions.

P&I releasing the cargo without presentation of OBL

In general P & I club exclude cover for release of cargo without production of Original Bill of Lading by incorporating an exclusion in their policy. However, certain P&I clubs include an omnibus clause in



“Although no one can go back and make a brand new start, anyone can start from now and make a brand new ending”

-Carl Bard



their Rules which do permit some flexibility by allowing the members to provide cover in some circumstances. At the same time with respect to commercial insurers providing P&I cover, this flexibility is not available to override any specific exclusions provided in the policy wordings.

P&I will be involved in such cases under various roles and various circumstances. When P&I represents the carrier, if the Principals or their agents have released the cargo without the OBL the shipper would be the claiming party. On receiving the claim from the shipper P&I club would reject the claim on the ground that there was no personal negligence. Similarly, when P&I represents the cargo interest, the carrier may have released the cargo without the OBL yet P&I would continue to reject the claim as the fault is off the carrier.

Thus, certain P&I clubs provide a wider cover with respect to release of cargo with Bill of Lading subject to certain specific exclusions already mentioned in the Insurance policy.

Carrier/Shipping Line releasing cargo without the presentation of OBL

When it comes to the carrier, they deny taking responsibility of the cargo that is to be discharged without the presentation of the Bill of lading as it causes a lot of trouble for the shipping line/ carrier eventually.

Although the above is what the carrier mostly follows, there are some cases where the carrier releases the cargo without the Bill of Lading for the following reasons:

- To maintain a cordial and business relationship with the customer.

- To reduce the unavailability of the containers.
- To avoid the destruction cost that would eventually fall on the Carrier in case the consignee has not taken delivery.
- The time and cost the carrier/ shipping line has to invest in claiming the detention and demurrage charges.

The carrier/ shipping line accept a document called the Letter of Indemnity in which the party including the consignee, delivery agent or any other accepts to indemnify the consignor in case of any consequence that arise in the future.

Letter of Indemnity

It is common in a lot of trades, whether bulk or oil, to accept a Letter of Indemnity ("LOI") for non-production of bills of lading. A letter of indemnity (LOI) is a document which the shipper/ consignee indemnifies the shipping company against the implications of claims that may arise from the issue of a clean Bill of Lading when either the goods were not loaded in accordance with the description in the Bill of Lading or when the original document is not available.

It is absolutely essential that Members get the wording of the LOI right and ensure that proper procedures are in place to demonstrate compliance with the LOI. Members must also actively weigh up the counter party risk of accepting an LOI. An LOI is only as secure as the party providing it.

When this occurs, the carrier invariably agrees to deliver the cargo in consideration of receiving a Letter of Indemnity (LOI) from their charterer/ receiver. In many cases, a delivery of cargo in this way will proceed without incident.

However, whilst the practice is familiar, familiarity can sometimes lead to complacency.

Risk Factors Involved in Non-Presentation of OBL

It is quite evident by now that there is risk associated with delivery of cargo with the Letter of Indemnity and not the original Bill of Lading. The below listed are some of the basic risks that are involved in the same:

1. Mis-delivery of Cargo:

It is well understood a bill of lading, amongst other functions, acts as a "key" to the warehouse which, when available at the discharge port, is presented to the Master in order to release the cargo to the "bearer" of the bill of lading. Where such a "key" is not available at the discharge port, it must be remembered that an LOI will not absolve the carrier from liability if the cargo is delivered to the wrong party.

2. Insurance Cover:

It is well understood that liabilities arising as a consequence of mis-delivery are not covered under all P&I Club rules unless the Directors of the club in question otherwise agree. The LOI is designed to try to alleviate such risk, so far as it can, but it must be understood that an LOI effectively substitutes an Owner's P&I cover for mis-delivery claims and there are certain insurance policies that do not cover the claims arising out of non- presentation on BL.

3. Creditworthiness of the Party:

This is one of the most important factors while delivering cargo with letter of indemnity. In some cases, the party that presents the letter of indemnity may not be related or connected to the cargo or the shipment in actual. In

other cases, the parties may represent themselves as the agent of the cargo interest, but they could be deceitful and later the carrier may be held liable by the actual cargo interest. In some cases, the consignee may have failed to pay the shipper the value for the cargo which could also lead to non- receipt of the Bill of lading. So, the carrier/ shipping line must always ensure to check the creditworthiness of the party claiming the cargo with the letter of indemnity.

Reasons for non- presentation of BL:

- Consignee has not received the Bills of Lading from the shipper in spite of cargo on board.
- Consignee has only received an electronic copy or the telex message.
- Consignee has not paid the buyer yet for the cargo bought and has existing dues.
- Consignee or agents have misplaced the documents or the Bill of Lading.
- The party representing the consignee or the cargo interest may be fraudulent and not acting in good faith.

Conclusion:

The practice of delivery of cargo without presentation of original bills of lading is very familiar, and is here to stay as long as shipping exists. Delivery of cargo without presentation of an original bill of lading, although not recommended, is a reality of international trade and if the parties act cautiously then no one would suffer a loss in the business. It is therefore important to remember the risks involved in such operations and to act cautiously in order to minimise risks to shipowning interests.

Supreme Court's Ruling on the Contractual Terms of a Bill of Lading



Citation:

The article is based on the Supreme Court of India Judgment for Civil Appeal No's 10800-10801 of 2018 with M/s Caravel Shipping Services Pvt Ltd as the Appellant and M/s Premier Sea Foods Exim Pvt. Ltd as the Respondent.

Facts of the Case:

The appeal comes to light in reference to the Bill of Lading dated 25.10.2008 as per which the Respondent is the shipper and the Appellant is the carrier who facilitates transport for the subject shipment. The respondent filed a suit (O.S No 9 of 2009) before the Sub-Judge's Court in Kochi to recover a sum of Rs. 26, 53,593 citing Bill of Lading as evidence to the suit.

Proceedings before the other Courts

After the suit was filed, an Interlocutory Application (I.A No. 486 of 2009) was filed by the Appellant under section 8 of the Arbitration and Conciliation Act of 1996 in

which it was pointed out that an arbitration clause was included to the printed terms of the Bill of lading and also pointed out Section 11 that gives the party the Authority to appoint an Arbitrator in accordance to clause 25.

The sub-Court Kochi dismissed the I.A stating that the printed terms annexed to the Bill of Lading would not be binding upon the parties as no cause of action arose in Chennai. After which an Original Petition was filed before the High Court under article 227 of the Constitution of India and this time again the petition was dismissed by the Judge thus agreeing with the decision of the learned Sub-Judge. A review filed was also dismissed on the 14.06.2018.

Statement of Issues:

Whether the parties are bound by the terms and conditions expressly mentioned on the Bill of Lading.

Appellant Counsel's Argument

Ms. Liz Mathew, Counsel for the Appellant argued that the terms of the bill of lading are expressly stated and both the parties are bound by the same. She cited section 7(5) of the Arbitration Act to be read with the Judgement in M.R. Engineers and Contractors Private Limited vs Som Datt Builders Limited as per which if the arbitration clause is a part of the contract and in writing, it has to be considered as one contract and not different parts. She also contended that though the Madras High Court referred to the Kerala proceeding, the Hon'ble High Court still ordered the parties to arbitrate on the matter.

Respondent Counsel's Argument

The learned counsel for the respondent, Mr. P.A Noor Muhammed argued that as per section 7(4) of the Arbitration Act, an arbitration agreement is required that has to be signed by both the parties and that his client had not signed the bill of lading, hence they are not bound by the arbitration clause.

Court's Judgement on the matter:

1. The Hon'ble Supreme Court stated that clause 1(e) of the Bill of Lading defines the term Merchant including the shipper, consignor or consignee thus clearly and expressly stating that all the parties are bound by the terms, conditions and exception of the bill of lading.

2. The arbitration clause as per clause 25 of the Bill of Lading is very much part of the BL and should be considered

as a part of the contract. The Court stated that on perusal of the facts and documents, it is proven that the Respondent has expressly agreed to be bound by the Bill of Lading.

3. The Court further mentioned that Respondent himself had relied on the bill of lading as a contract to claim cause of action in the case to recover the outstanding but he denies accepting the bill of lading as a contract when it comes to the arbitration clause and urges the Court to rely on the Arbitration Act. The court mentioned that this type of reasoning is not acceptable.

4. The Hon'ble Court referred to Jugal Kishore Rameshwardas vs Mrs. Goolbai Hormusji in which it was indicated that an arbitration agreement must be in writing and need not be signed; going by this the Court stated that the arbitration agreement should be in writing is the only pre-requisite, signature by both parties is not a mandate.

5. The Hon'ble Court pronounced that the arbitration clause forms a part of the contract and that the Court has not gone into the Multimodal Transport of Goods Act, 1993 for validation of the BL as it would not make any difference to the case.

Final Verdict:

The Court ordered the appeal to be allowed and the previous judgements to be set aside as the Court concluded that the arbitration clause is a part of the BL and both the parties are bound by the clauses in the BL which serves as a contract.



HOT NEWS

20 TIPS FOR A POSITIVE NEW YEAR

1. Stay Positive. You can listen to the cynics and doubters and believe that success is impossible or you can trust that with faith and an optimistic attitude all things are possible.
2. Take a daily "Thank You Walk." You can't be stressed and thankful at the same time. Feel blessed and you won't be stressed.
3. Eat more foods that grow on trees and plants and less foods manufactured in plants.
4. Talk to yourself instead of listen to yourself. Instead of listening to your complaints, fears and doubts, talk to yourself with words of truth and encouragement.
5. Post a sign that says "No Energy Vampires Allowed." Gandhi said, "I will not let anyone walk through my mind with their dirty feet."
6. Be a Positive Team Member. Being positive doesn't just make you better, it makes everyone around you better.
7. Don't chase success. Decide to make a difference and success will find you.
8. Get more sleep. You can't replace sleep with a double latte.
9. Don't waste your precious energy on gossip, energy vampires, issues of the past, negative thoughts or things you cannot control.
10. Look for opportunities to Love, Serve and Care. You don't have to be great to serve but you have to serve to be great.
11. Live your purpose. Remember why you do what you do. We don't get burned out because of what we do. We get burned out because we forget why we do it.
12. Remember, there's no such thing as an overnight success. Love the process and you'll love what the process produces.
13. Trust that everything happens for a reason and expect good things to come out of challenging experiences.
14. Implement the No Complaining Rule. If you are complaining, you're not leading.
15. Read more books than you did in 2018.
16. Don't seek happiness. Instead live with love, passion and purpose and happiness will find you.
17. Focus on "Get to" vs "Have to." Each day focus on what you get to do, not what you have to do. Life is a gift not an obligation.
18. The next time you "fail" remember that it's not meant to define you. It's meant to refine you.
19. Smile and laugh more. They are natural anti-depressants.
20. Enjoy the ride. You only have one ride through life so make the most of it and enjoy it.

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