

# COGSA 1982 IN CONTEXT OF SALE AND FINANCE

by  
Yuksel SAHIN-UWC 1999

## CHAPTER I

### INTRODUCTION

The Carriage of Goods by Sea Act 1924 replaces the Bill of Lading Act 1855 and effects two main changes in carriage rights of privity of contract; and the rule *Grant v Norway*<sup>1[1]</sup>. Before passage of the BLA the doctrine makes it impossible for the assignee of a bill of lading<sup>2[2]</sup> to sue on the contract evidenced in the bill if he is not a shipper. The contract of carriage as evidenced by the bill is not between the holder/assignee but between the carrier and shipper. The line of problems seems to have its roots in contract law going as far back as the 18<sup>th</sup> century when privity of contract rule was established that the rights in *The Tweedle v Atkinson*<sup>3[3]</sup> and series of earlier cases established that the rights under carriage contracts could not be assigned. Where goods were carried under a b/l it was possible to transfer property during the transit<sup>4[4]</sup> but there was no transfer of the rights to sue the carrier under the contract evidenced by the b/l. The COGSA 92 purports precisely to circumvent the difficulties with the rule of privity and, in so far as aims at that, it must be considered to improve the situation of those involved with the carriage process in a good number of instance. The problem is that it is not enough to give some one the right to sue another for loss. Instead, the main concern should be to provide the one who has sustained the loss with a cause of action.

The BLA 1855 attempted to rectify this position by providing in s. 1 by providing that :

‘Every consignee of goods named in a bill and every endorsee of a bill to whom property in the goods shall pass, on or by reason the said consignment or endorsement, shall vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself’

In other words the assignee of the bill has those rights of suit only on condition that the property in those goods had passed to him upon or by reason of the consignment or endorsement. Considering this section together with the s. 16 of Sale of Goods Act (1979)<sup>5[5]</sup> it can be seen that a part of bulk cargo cases are heavily prejudiced. Section 16 of SOGA provides that property in goods forming a part of a bulk cannot pass unless such goods become ascertained<sup>6[6]</sup>.

The BLA had no use if the document used was not a b/l but waybill or ship’s delivery order or where the seller reserves right of disposal or property passed not by virtue of the endorsement or the consignment, but before or subsequent to endorsement or consignment.

In *The Future Express*<sup>7[7]</sup> a bank named as consignee in a b/l and holding the bill as security had insufficient interest to sue the carrier who had delivered goods, covered by the bill, to a third party without the production of the bill. This type situations where b/l is ceased being document of title and gives no protection for banks holding a b/l as a security created great concern among banks financing international trade.

This work attempts to analyze issue like transfer of the b/l and arising from *The Future Express* and to make conclusion if COGSA 92 succeeds to establish satisfactory provision to tackle this problem. The remedies for a bank if b/l is transferred will be particularly emphasized.

Besides this problem we will try to identify which provisions are particularly designed to assist trade –special emphases will be given to CIF and FOB- contracts and finance;

Question sale of goods a float in context of CIF, problem lost of the goods during the transit under COGSA 92 is also discussed. Our discussion will include discussion of s.2/2 COGSA 92 which designed to solve problems of appropriation and problems similar to *The Delfini*<sup>8[8]</sup> case.

In order to discuss all points mentioned above we will gradually built a picture how this problems occurred under old BLA. This will be briefly discussed in chapter II. In chapter III is introduced COGSA 92. The problems related

---

<sup>1[1]</sup> (1851) 10 CB 665.

<sup>2[2]</sup> hereafter referred to as b/l.

<sup>3[3]</sup> (1861) 1 B & S 393.

<sup>4[4]</sup> *Lickbarrow v Mason* (1794) 5 TR 683.

<sup>5[5]</sup> hereafter refferd to as SOGA.

<sup>6[6]</sup> section 16 of SOGA ‘ Where there is contact for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained’.

<sup>7[7]</sup> (1992) 2 LLR 79; afd. (1993) 2 LLR 542 (CA).

<sup>8[8]</sup> *Enichem Anic SpA v Ampelos Shipping Co. (The Delfini)*, (1990) 1 LLR 252.

with a banks and specially *The Future Express* case and possible scenarios are analyzed in chapter IV, conclusion of out thesis is made in chapter V.

## CHAPTER TWO

### I – PROBLEMS EXCISTED UNDER BILL OF LADING ACT 1855

Most controversial area of the BLA 1855 was s.1. The problem in the BLA was linkage of the contract with the transfer of the property The consequence of this the buyer who is on risk does not have protection because he has not property.

#### A – Problem in Relation To Banks

The transfer of a b/l operates to transfer the transferors` property in the goods to the transferee if the transfer is made with this intention<sup>9[9]</sup> but no property is transferred in the absence of such intention. The transfer of a bill to by way of pledge or security transfers only `special property` or security interest in the goods while general property will remain unaffected by the transfer of the bill. Banks retain a b/l as a security for an advance under a documentary credit. Therefore section 1 of the BLA does not apply to banks financing sale under a commercial credit<sup>10[10]</sup>. Property in the BLA was defined as a general property and not a special property. The special property concept has been defined in *The Sewell v Burdick*<sup>11[11]</sup>. In this case shipowners sued the endorsees of a b/l for a freight, arguing that liabilities had been transferred to them under s.1 BLA. The endorsees were not party to the original contract of carriage, and had taken the b/l only as a security for a loan. The House of Lord held that endorsee who is a mere pledgee does not obtain the full or general property<sup>12[12]</sup> in the goods so as to be liable in an action by the shipowners for the freight. This decision was welcomed by the banks because they wanted to keep security but they did not want to be liable if party does not pay freight. So they do not want all contract, they only want a contract to recover their security. But same reasoning would prevent the transfer of rights of action also. Let say bank (B) lends money to (A) and gets a b/l from him. This b/l is a security for the bank. But bank does not want a contract because if (A) does not pay the freight bank could be liable to pay it, which is undesirable result for the bank. But then when bank wants to release security they could not find a contract and therefore have no contractual right. That was the reason why law had to find implied contract to give to bank that right. Only after finding an implied contract pledgee bank can sue the carrier in contract for freight, demurrage etc.. The effect of the decision of in *The Sewell v Burdick* was to prevent banks as pledgees from becoming automatically liable for b/l freight, but in another hand deprived them of any right to sue under the Act.

The implied contract is a useful mechanism to establish contract between consignee or endorsee and carrier in order to provide a protection of the contractual terms. The BLA only allowed to third party to enjoy full rights against the carrier on condition that the property in the goods has passed to him *upon or by reason of the consignment*. In *The Brandt v Liverpool* case the consignee or assignee having paid the freight was able to sue the carrier for damages for delay and in return of a reconditioning of the cargo, where a clean b/l was issued for defective cargo. The new contract implied by the CA was held to be on terms of the b/l. The consideration for new contract implied was provided by the payment by the receiver of the goods of any outstanding freight or other charges due under the original contract of carriage. After `creation` of the implied contract application of this technique gained momentum. In *The Dona Mari*<sup>13[13]</sup> delivery of cargo against a ship's delivery order was held to have the same effect as delivery against the b/l for which was exchanged. Similar result was reached where cargo had arrived the port of discharge in advance of documentation, a promise to hand over the bill when it arrived was held by the Court of Appeal to be as effective as actual presentation of b/l itself<sup>14[14]</sup>. The bravest decision was made when irrespective of the presentation of a b/l or delivery order; it was possible to imply a contract considering that it is fair to give

---

<sup>9[9]</sup> *The Licbarrow v Mason* (1787) 2TR 64

<sup>10[10]</sup> Reimbursement of the credit to the banks generally takes place when the buyer pays to the bank while these goods are on board the ship and confers on the banker, as holder, the constructive possession of the goods as well as a security title in them as a pledgee. If the buyer is able to reimburse the issuing banker on the arrival of the goods, the document of title –b/l- is surrendered to the buyer. This enablesthe buyer to collect the goods from the ship to deal with them in ordinary course of his business. But in a situation where the buyer fails to reimburse bank, the bank can release the goods represented in the bill.

<sup>11[11]</sup> (1884) 10 App. Cas. 74

<sup>12[12]</sup> In fact if the buyer becomes insolvent, the bank will obtain general property, because then it will realise its` security. Obtaining general property would not take a place by virtue of the b/l but instead by virtue of its own relationship with the buyer.

<sup>13[13]</sup> (1974) 1 WLR 341.

<sup>14[14]</sup> *The Elli 2* (1985) 1 LLR 107.

business reality to the transaction<sup>15[15]</sup>. But implied contract was not found in *The Aramis*<sup>16[16]</sup> because Court could not establish consideration considering that freight was pre-paid.

## **B – Endorsement After Delivery of the Goods : *The Delfini* Problem**

This problem arises when the goods are delivered first<sup>17[17]</sup> and then the b/l. It is a modern problem because speed of the transport has increased and the goods could arrive before documents. In majority case last receiver gets the goods under a letter of indemnity and buyer becomes owner of the goods because of actual delivery of the goods. The transfer of the b/l takes place after passage of the property to the buyer<sup>18[18]</sup>. This is a common practice in a CIF sales. The CIF buyer as final receiver finds that although the intention was to transfer the contract of carriage to him. But thereafter he finds out that he has not got a contract and therefore must rely on rights of tort. Such situation was as in the case *The Delfini*<sup>19[19]</sup> where was a short delivery of a crude oil sold on CIF terms, in circumstances under which the b/l had not been delivered to the buyer at the time the cargo is discharged. The shipping documents arrived 15 days after discharge and 8 days after payment had taken place. The court held that property had passed on discharge, thus rebutting<sup>20[20]</sup> s. 19/2 SOGA presumption that property is reserved where the b/l is issued at seller's order. As a result, property had not passed upon or by reason of endorsement and no contractual rights were transferred under BLA. In this case it was tried to argue that property passed to an endorsee under a contract in which the b/l is transferred. The CA rejected<sup>21[21]</sup> such a wide view<sup>22[22]</sup>, because it felt that, for the property to pass 'by reason of endorsement' the later should play essential part of passing the property. It need not to be the only but step causing property to pass. Thus if property passed before or independently of, consignment or endorsement s.1 of the BLA could not apply<sup>23[23]</sup>. In the same case was the discussion about transfer of the 'spent' b/l which was relevant in determination of whether property in the goods has passed or not to the transferee after discharge of the goods beforehand. Even where a b/l is transferred it must be still a document of title when it is endorsed and property thereby passed. Under the BLA it was impossible for the holder of the bill to have any right of action against the carrier where property passed prior to the endorsement and delivery. In relation to this problem in the first instance Mr. Justice Phillips held that:

'Property in the cargo discharged passed from Vanol (intermediate seller) International BV to the second plaintiffs and simultaneously from the second to the plaintiffs upon discharge. When *Delfini* sailed on completion of discharge the contract of carriage was discharged and the bill of lading ceased to be effective as a transferable document of title'<sup>24[24]</sup>.

The decision of Mr. Justice Phillips has been upheld by the CA although primarily on the grounds that property did not pass 'upon or by reason of endorsement', Mustill LJ said:

'... finally I should mention the continued status of the b/l after the goods have arrived at destination, and have been discharged from the ship. It quite clear....that when the goods have actually been delivered at destination to the person entitled to them, or placed in a position where the person entitled to immediate possession, the bill of lading is exhausted and will not operate at all to transfer the goods to any person who is either advanced money or has purchased the bill of lading'<sup>25[25]</sup>.

COGSA 92 solved this problem provided by s.2/4 that any lawful holder of a b/l may enforce the carriage contract irrespective of the passing of title to the goods.

## **C – BLA Applied Only to the Bill of Lading**

---

<sup>15[15]</sup> *The Captain Gregos (No 2)* (1990) 2 LLR 395, in this case shipowner made delivery against delivery order.

<sup>16[16]</sup> (1989) 1 LLR 213.

<sup>17[17]</sup> Particularly in the oil trade, there is a long chain of sale contracts and comparatively short sea voyages.

<sup>18[18]</sup> GLASS, 'The b/l becomes irrelevant document between the buyer and seller, because the buyer already has got the goods and he has already paid for them. Therefore the buyer has property in the goods. Any transfer of the b/l has no effect between buyer and seller.', pg. 56.

<sup>19[19]</sup> (1990) 1 LLR 252.

<sup>20[20]</sup> In *The Delfini* the statutory presumption did not apply, since the b/l was not to order to subsequent seller and was at all times in their hands a bearer document.

<sup>21[21]</sup> At pg. 261.

<sup>22[22]</sup> see discussion of wide and narrow view TRIETEL, 'Passing of Property Under CIF Contracts and BLA' (1990) 106 LQR, pg. 2; TODD, Modern Bill of Lading, pg. 174; CARVER, para. 98.

<sup>23[23]</sup> BRADGE & WHITE, pg.191.

<sup>24[24]</sup> (1988) 2 LLR 599, 609.

<sup>25[25]</sup> (1990) 2 LLR 252, 269.

Section 1 makes it clear that the BLA is applicable to b/l. It was not clear whether BLA has application where shipped bill was used in a transaction. BLA certainly not apply non – negotiable sea waybills, ship's delivery orders<sup>26[26]</sup>.

#### **D – The Grant v Norway<sup>27[27]</sup> Rule**

It was decided that the master of a ship had no authority to sign a b/l for goods which had never been shipped. The consequence of this rule the carrier/shipowner was not liable to an endorsee who sues him on the contract where the bill incorrectly states that the goods had been loaded. Such reasoning has long been absolute, but the case had never been overruled, even though it had been distinguished. This was the approach taken in the *The Nea Tyhi*<sup>28[28]</sup> and *The Saudi Crown*<sup>29[29]</sup>. In both cases the shipowner attempted to extend *Grant v Norway* to cover even the situation where the goods described in the b/l were shipped, but where there was some other misrepresentation in the b/l. The court refused to extend *Grant v Norway* beyond its own facts.

This decision was criticized that it was contrary to principle of 'apparent authority'. This rule protects shipowners and charterers not masters personally. Cause of action against the master was based on principle 'breach of warranty of authority'. But suing the master on principle 'breach of warranty of authority was criticized by Reynolds who said that '...normally if somebody is known not to have authority to do something you cannot sue him for breach of warranty of authority..' <sup>30[30]</sup>.

## **II– OPTIONS FOR THE BASIS OF REFORM**

The Law Commission examined three possible options for reform. All these options were envisaged to improve the position of the holder of the b/l who suffers loss and yet who can not assert any remedy against the carrier. There were three options:

### **Option 1**

... the first involves enacting what is usually called the wide view of s.1 of BLA. It would enable the holder of the bill to sue if some stage of the property passed to him under the contract in pursuance of which he becomes the lawful holder. This solution would solve cases like *The Delfini* and *The Aliakmon* and would solve most bulk cases. However it would be of no avail where the buyer either never obtained a b/l or never obtained the property in the goods (in *The Aramis*<sup>31[31]</sup> the buyer obtained no property because no goods were delivered to him at all)<sup>32[32]</sup>.

### **Option 2**

'... to remove all reference to property in s.1 and to permit the lawful holder to sue and be sued if he was on risk in respect of the loss. As risk determines who will actually suffer the loss, it is argued it should determine who could sue. However, as under the present law pledgees would neither be able to sue or be sued on the b/l so that the pledgees wishing to realise his security would still rely on a *Brandt v Liverpool* contract. There would also be the possibility of multiple claims, from the owner and from those at risk, although theoretically similar problems can arise under the present law <sup>33[33]</sup>.

### **Option 3**

'The broadest option for reform would be simply to allow holder of a b/l to sue carrier in contract for loss or damage to the goods irrespective of whether property in the goods passes upon or by reason of the consignment or endorsement<sup>34[34]</sup>.'

## **CHAPTER THREE**

### **I – CARRIAGE OF GOODS BY SEA ACT 1992**

---

<sup>26[26]</sup> see BEATSON & COOPER, pg. 199.

<sup>27[27]</sup> (1851) 10 CB 665, 138 ER 263.

<sup>28[28]</sup> (1982) 1 LLR 606.

<sup>29[29]</sup> (1986) 1 LLR 261.

<sup>30[30]</sup> REYNOLDS, (1967) 83 LQR 189.

<sup>31[31]</sup> (1989) 1 LLR 213.

<sup>32[32]</sup> Report, para. 2.18.

<sup>33[33]</sup> Report, para. 2.19.

<sup>34[34]</sup> Report, para. 2.21, HOWARD, pg. 188.

## A - Introduction

The Carriage of Goods Act 1924 attempts to fill the gaps which were existed under BLA related to sale and finance. One example of that is where spent bill of lading is involved in such transaction. The goods were delivered and after that it was transferred to the transferee. This type of situations is tried to be solved by providing right of suit in contract against the carrier breaking connection passing of property and right of suit<sup>35[35]</sup>. Solving this problem was particularly important for a banks, other financial institutions and traders. Because it is always possible to have a situation where the goods being discharged beforehand and then the b/l is transferred to a third party. The clear devision of rights from liabilities will effectively protect a bank which is holding the bill as a security for a credit, from incurring liabilities under the contract of carriage until it seeks to enforce its securit by claiming delivery of the goods or instituting proceeding against the carrier.

COGSA 92 adopts 3th option to as a basis for reform. Section 2/1 of the Act provides that lawful<sup>36[36]</sup> holder of a b/l, sea waybill or delivery order shall have transferred to and vested in him all rights of the suit under the contract of carriage as he had been a party to that contract. The right to sue is separated from the passage of the property. The COGSA 92 makes radical changes to the rule governing actions against carriers by consignees and endorsees of the b/l. The mechanism adopted by the BLA 1855 was unsuitable for modern trade law. Impetus for reform may be said to have started with concern caused among some advisers to commodity traders by the Dutch case of *The Gosforth*<sup>37[37]</sup>. The case concerned a sub-sale of cirtus pulp pellets to 13 sub-buyers. In this claim against the intermediate buyer, he succeeded, because property had not yet passed to the sub-buyers, the bulk cargo having not been apportioned. The 13 sub-buyers were bound to experience a loss, despite them being no way interfered with the non-payment of the price to the initial seller. Because of the s.16 Sale of Goods Act 1979<sup>38[38]</sup> property can not pass unless and until such goods become ascertained. In practice such ascertainment would only take place after the consignment or endorsement of the b/l. Therefore passing of the property would be independently of the consignment or endorsement of the b/l. Passing of property in a undivided bulk cargo created numerous of problems under the old law.

## B – The Structure of the COGSA 92 in Dealing With the Problems Related to Trade and Finance

COGSA 92 solves<sup>39[39]</sup> nearly all the problems mentioned above. In this section we will deal the way that the new Act tries to solve the problems existed. The main section of the new Act is s.2.

### 1 - Transfer of Contractual Rights Under COGSA 92

#### a – In relation to the b/l

The s.2/1 provides transfer the right of suit under carriage contract against the carrier to the lawful holder of the b/l, a sea waybill or delivery order and continues until the document is transferred further. This provides statutory right to the lawful holder to sue carrier irrespectively whether he obtains title to the goods in the or not. Now it is a new technique which differs from previous BLA where right of suit was attached to the passing of the property to the consignee or endorsee. The transfer of the bill extinguishes rights in the shipper and intermediate holders<sup>40[40]</sup>. Reasoning for this is to be found in Law Commission Report<sup>41[41]</sup> where it was said that the b/l is a transferable document and if it is allowed to everybody to have rights carrier would face potential multiple claims, so it is better to defeat everybody's right except the lawful holder. So, as long as contractual rights are concerned only lawful holder would have them. This was the position in the BLA and Commission did not intend to change this line. They do not intend to affect rights in tort. The operation of s. 2/1 raises a practical problem which is specifically dealt with by the Act. The problem relates to the situation where, under a contract of sale, goods are shipped by a seller and eventually delivered to overseas buyr on presentation of the relevant b/l. On transfer of the b/l to the buyer, the seller will lose his right to sue on the contract carriage while, on delivery of the goods to the buyer, the b/l will cease be a document of title. But there is possibility that the goods can be damaged during the transit and subsequently rejected by the buyer. In this situation Act specifically confers title to sue in favour of the seller when he regains lawful possession of the bill, because the seller has already transferred the b/l and has no right of suit. Title to sue is given to the lawful holder of the b/l. The Act does not define concept of lawful holder. The Act only refers to person who becomes the lawful holder of the bill. The 'lawful holder' presumably means a person in possession

---

<sup>35[35]</sup> s. 2/2a.

<sup>36[36]</sup> *The Aegean Sea* (1998) 2 LLR 39 `to be lawful holder, acceptance of bill is required and the good faith of the holder, which means honesty and not only honesty and not only observence of reasonable commercial standart` pg. 59-61.

<sup>37[37]</sup> REYNOLDS, pg. 436.

<sup>38[38]</sup> hereafter referred to as SOGA.

<sup>39[39]</sup> see BEATSON & COOPERT, summary of the main recomendations of the Law Commision pg. 200.

<sup>40[40]</sup> s. 2/5.

<sup>41[41]</sup> Report, para. 2.34.

of the document who took possession in a good faith<sup>42[42]</sup> <sup>43[43]</sup> not obtained by fraud or violence and who is either the named consignee<sup>44[44]</sup>, or is in possession by virtue of its being delivered to him in order to complete a transfer of it after endorsement<sup>45[45]</sup> or as a result of its being a bearer bill delivered to him<sup>46[46]</sup>. The lawful holder of the b/l has `rights of suit under contract of carriage`<sup>47[47]</sup> contained in the b/l. Thus, when a person hands over the b/l, even if it occurs much later than the transfer of the property (and lacks any casual connection with it), the rights of suit under the contract of carriage are transferred to and vested in the recipient and the rights of the previous holder are thereby extinguished<sup>48[48]</sup>.

#### b – In relation to waybills

The waybills consignee is given right to sue as well as the original shipper<sup>49[49]</sup> and person identified under the ships delivery order.

### 2 – Effect of the COGSA 92 on the Problem Where the b/l is Endorsed After Delivery

This problem relates to *The Delfini* situation where question arose whether contractual rights could be transferred to the person who become the holder of the bill after delivery of the goods and thus after the bill ceased to be transferable document of title. Under the new law the b/l holder would be able to sue the carrier in contract<sup>50[50]</sup>. But we must noted that the b/l endorsee in *The Delfini* would not be able to transfer the b/l to the other person. The b/l was ceased to be a document of title<sup>51[51]</sup> when it has been transferred. This transfer would not provide any contractual right to a new endorsee unless it happens `in pursuance of any contractual arrangements made before the time when such a right of possession ceased to attach to possession of the bill` (s. 2/2a). This proviso is intended to prevent the b/l being a commercial value for goods which are lost or not exist<sup>52[52]</sup>. This could be particularly important in CIF chain sales that we are going to deal next.

### 3 – The Goods Are Lost During the Transit

#### a- a- Goods which cease to exist

Section 5/4 provides that :

`without prejudice to section 2/2 and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which document relates

- a) a) cease to exist after the issue of the document; or
  - b) b) cannot be identified (whether because they are mixed with other goods or for any other reason);
- and references in this Act to the goods to which a document relates shall be construed accordingly.

Section 5/4 refers to `goods which cease to exist after the issue of the document`. It seems to follow that, in general no rights can be acquired by virtue of the COGSA 92 in respect of the goods which have already ceased to exist before the issue of the document. As a result if this provision lawful holder of the b/l<sup>53[53]</sup> related to this goods could not acquire any rights or be a subject to liabilities under s.3/1. But this provision does not prevent carrier's liability in tort. If loss occurred because of the carrier's breach of the contract of carriage then he could be liable. The words in s.5/4 `cease to exist` must be interpreted that the goods are not available for the purposes of the performance of the contract. Analogies taken from the common law doctrine of frustration, the doctrine of constructive total loss in insurance law and the interpretation of the word `perished` in s.6 and 7 of the SOGA 1979<sup>54[54]</sup>.

---

<sup>42[42]</sup>s. 5/2; GLASS, `good faith in COGSA 92 does not mean exactly the same as in the SOGA in a sense that it does not mean that he must have a valid title. Because obviously COGSA is separating the right to sue under the contract from questions of property.` , pg. 71.

<sup>43[43]</sup> GLASS, pg. 89a.

<sup>44[44]</sup> s. 5/3.

<sup>45[45]</sup> s. 5/2b.

<sup>46[46]</sup> s.5/2b; BOOLS, pg. 93.

<sup>47[47]</sup> COGSA 92 s. 5/1.

<sup>48[48]</sup> s. 2/5.

<sup>49[49]</sup> Report, para. 5.23.

<sup>50[50]</sup> s.2/2a.

<sup>51[51]</sup> WILSON, `The b/l is no longer document of title in a sense of entitling its holder to possession of the goods`, pg. 141.

<sup>52[52]</sup> Report, para. 2.43.

<sup>53[53]</sup> s. 2/1.

<sup>54[54]</sup> BENJAMIN, para. 18-101.

Section 5/4 is operating `without prejudice to section 2/2 and section 4 above`. So far the reference to section 4 is concerned, the meaning is clear. That section can apply even though the goods have `ceased to exist` before the issue of the document. Reference to s.2/2 is ambiguous. Section 2/2 provides for acquisition of contractual rights by the holder of a `spent` b/l; and in this context it might well be thought desirable to provide that the holder should be able to acquire rights even though the goods had ceased to exist before he became holder. But it is hard to see why the holder of a `spent` bill should be in a more favourable position than the holder of one that was not `spent` where the goods had ceased to exist before the bill was issued<sup>55[55]</sup>.

#### b- Situation in a chain sale

Basic principle of the CIF contracts that buyer can not reject the documents simply because the goods<sup>56[56]</sup> have been lost before the time of tender<sup>57[57]</sup> even the seller knows<sup>58[58]</sup> of the loss at the time of a tender<sup>59[59]</sup> and buyer is bound to pay price<sup>60[60]</sup>. In *The Groom v Barber* case the buyer argued that the goods should have been unconditionally appropriated so as the property passed before the loss. This argument was rejected by Atkin J in stating:

`the seller must be in a position to pass property by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading until moment of tender.<sup>61[61]</sup>`

He justifies his decision by argument that it would be mean that the shipper of goods in bulk or intermediate seller would not be to enforce CIF contract. Because there is possible case where shipper ships goods in bulk and during the voyage goods are lost therefore shipper could not enforce a contract on CIF terms. If we look to *The Stock v Inglis*<sup>62[62]</sup> we can find same situation: the b/l was not transferred until after the loss. So it can not be a case the goods being unconditionally appropriated before the loss<sup>63[63]</sup>. But controversy here about whether with unascertained goods whether they should have been appropriated before loss. In other words, the question is whether the seller is entitled to appropriate the goods which have already been lost, or must the appropriation have been made before the loss. BENJAMIN says that the goods should have been appropriated<sup>64[64]</sup> before the loss therefore the seller has no right to appropriate goods already lost at sea at the time the contract is made<sup>65[65]</sup>.

The counter argument was alleged by Feltham<sup>66[66]</sup> that it is appropriation is not necessary. He says that `In the case of goods damaged at sea it seems that the seller of goods CIF may effectively appropriate to his contract goods damaged at sea before the date when the contract was made so as to pass the risk of such damage to the buyer as from the date of shipment<sup>67[67]</sup>. While neither in *Mash & Murel`'s* case nor in the *Margarine Union* case does not appear that the seller knew of the damage to the goods at the time of appropriation, it is submitted that such knowledge does not<sup>68[68]</sup> make a material difference.<sup>69[69]</sup>`

In his opinion `as long as at the time of the contract of sale the seller does not know about the loss there is no reason why he can not tender the documents for goods lost even in that time`.

All point of CIF contracts is to be able to seller to sell the goods during a voyage whether he knows that the good have been lost or not. Therefore actual existence of the goods should not be important. So in CIF sale, the seller can made a contract and appropriate the goods which he did not know at the time he made a contract were already lost because he is doing is tendering the documents in relation of the goods. Appropriation of the goods before buyers acceptance or tender of the document gives opportunity to the seller to speculate. If the goods are lost during the transit the seller can appropriate another set of the goods and recover on his insurance (falling market scenario) or he can declare loss of the goods and get money from the buyer<sup>70[70]</sup>. BENJAMIN argues that it is unfair<sup>71[71]</sup>. The problem is on the side of the seller, because very often he is going to be part of the chain sale. When the seller is in the `chain sale` he is forced to accept appropriation made by somebody down to the chain. It could be unfair to the seller to make appropriation he may not have this opportunity. The intermediate seller passes the b/l which comes down from the `chain`. Interesting question arises what would be the situation of the ultimate buyer

---

<sup>55[55]</sup> Ibid., para. 18-101.

<sup>56[56]</sup> We are talking about the goods appropriated to the contract of sale.

<sup>57[57]</sup> *The Groom Ltd. & Barber* (1915) 1 KB 316.

<sup>58[58]</sup> *Margarine Union G. m. b. H. v Cambay Prince Steamship Ltd.* (1969) 1 QB 219.

<sup>59[59]</sup> *The Manbre Saccharine Co Ltd v Corn Products Co Ltd* (1919) 1KB 198.

<sup>60[60]</sup> The position is the same under Vienna Convention art. 67 and art. 68.

<sup>61[61]</sup> (1915) 1 KB 316, 324.

<sup>62[62]</sup> (1884) 12 QBD 564.

<sup>63[63]</sup> GLASS, pg. 124-125.

<sup>64[64]</sup> BENJAMIN, para. 18-072.

<sup>65[65]</sup> BENJAMIN refers to *Couturier v Hastie* (1856) 5 HLC 673, case.

<sup>66[66]</sup> FELTHAM, 1975 JBL 273, 278.

<sup>67[67]</sup> *Mash & Murel Ltd. v Joseph I Emanuel* (1961) 2 LLR 326.

<sup>68[68]</sup> This refer to situation where the contract of sale is signed before the loss.

<sup>69[69]</sup> FELTHAM, pg. 278.

<sup>70[70]</sup> Discussion in the *Olympia Oil and Cake Co. and Produce Brokers Co.* (1915) 1 KB 233; (1916) 1 AC 314.

<sup>71[71]</sup> BENJAMIN, para. 18-073.

where in 'chain sales' the goods are lost during the transit and intermediate seller sells goods to him. This b/l actually not longer gives right of possession in the goods because they are not exist. Therefore there is no longer property in the goods capable being transferred. This is an area of uncertainty to answer how the s. 2/2a presumably would fit with an idea of appropriation of lost goods after contract is made. In this situation the b/l is ceased its function as document of title, ceases to provide right to delivery<sup>72[72]</sup>. But s. 2/2a in COGSA 92 gives a right in a contract even though the goods have been lost. Section 2/2a deals with situation where the buyer is buying the goods under the previous contract under a previous arrangements<sup>73[73]</sup> made and before the b/l is ceased to be a document of title. So if the seller is 'locked' into a chain contract he has previous CIF contract. So when the b/l comes to the subsequent buyer this b/l is still able to transfer contract of carriage under the s.2/2a. This is particularly valuable in the sale of the goods because it would enable under CIF contract to operate even in the *Delfini* type situations. This analysis presumably supports FELTHAM's idea who argued in favour of appropriation after loss so long as at the time of contracting did not know the loss.

But if the seller is not a seller in a 'chain sale' and the goods are lost, subsequent buyer going to have difficulty. The seller can not pass any right to the subsequent buyer because the goods are not exist and contract of sale is void<sup>74[74]</sup> and there is no previous contract in the meaning of the s.2/2a. Under this scenario the buyer has right to reject the b/l which is not going to give him anything in terms of transfer of carriage. If the seller does not know that goods have already been lost he should be able to appropriate those goods to the contract. Would then the COGSA 92 prevent the seller from transferring the b/l because the goods are not exist? As answer to this question it could be possible to say that this situation falls within s. 5/4. Because according to s. 5/4 nothing effects transfer of the b/l after loss. The point here is that the COGSA 92 envisages a case where s. 6 of SOGA does not apply but it is not very clear. Another situation which the COGSA 92 is not clear is situation where the goods are lost during the transit and the seller in order to satisfy his buyer wants to obtain new set of the goods. The goods had been lost before the seller made an arrangement to sell them and any b/l would already have ceased to function as a document under s.2/a. So that is another area of difficulty.

The second situation in which contractual rights against the carrier can be transferred to the holder of a spent b/l is specified in s. 2/2b. Section 2/2b deals with situation like where under CIF contract b/l is transferred and a buyer has contractual right. But if a buyer rejects the b/l because defectiveness in the goods and sends a b/l to the seller, the seller now has contractual rights back again him to be able to sue the carrier. Transferor does not affect, he gets this right through operation of s. 2/2b.

#### 5 – *Grant v Norway*<sup>75[75]</sup> finally goes, does it?

This problem relates to statement about shipped goods and false statement in a b/l. In that case, the master of a ship signed a b/l for the goods which were never shipped and the endorsees of the bill advanced money on the so represented to have been shipped. The plaintiffs, who had taken the b/l as security against a pledge, sued the shipowners in tort. It was held that shipowner is not liable. The decision has long been regarded as out of line with other agency authorities<sup>76[76]</sup>, and its effect was significantly to reduce the value of a b/l in the hands of an endorsee. The carrier was held not liable for the reason that the master had no actual or apparent authority to sign the bill for goods which were not shipped. So, according to *Grant v Norway* statement in the b/l is only prima facie evidence even in the hands of transferee. In attempt to circumvent this decision BLA s.3 was enacted:

'Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been on board: Provided that the master or other person so signing may exonerate himself in such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.'

This section was presumably intended to reverse the result of *Grant v Norway* when the b/l had been transferred to a consignee or endorsee. By signing the b/l the master or loading broker warrants that he has the authority to sign it where in actual fact he does not have this authority. It provided 'conclusive evidence of ... shipment against the master or other person signing the same', but it was interpreted, in *V/O Rasnoimport v Guthrie & Co. Ltd.*<sup>77[77]</sup> as

<sup>72[72]</sup> Under BLA it is possible to say that the b/l does nothing therefore the buyer gets no contract and he has no contract to sue the carrier and would have no right in tort because the property has not passed.

<sup>73[73]</sup> BENJAMIN, s. 2/2a '...contractual or other arrangements..' refer to the reason or cause of the transfer, and which must have arisen before the b/l is spent, para. 18-078.

<sup>74[74]</sup> SOGA, s. 6 'Where there is a contract for sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void'.

<sup>75[75]</sup> (1851) 10 CB 665.

<sup>76[76]</sup> *Lloyd v Grace Smith & Co. (1912) AC 716*

<sup>77[77]</sup> (1966) 1 LLR 1, In this case the endorsees of the b/l issued by port agents of the shipowner claimed that the statement the quantity of goods loaded was inaccurate. The question was whether the shipowners were liable for the inaccurate statement issued and signed by their agent.

excluding the shipowner from liability. The conclusive evidence clause therefore works only against the master or where applicable, the loading broker, and is therefore only of value in an action against him. Even against the master or loading broker the section provides no cause of action, only conclusive evidence<sup>78[78]</sup>. But it was not made much use because it depends upon carrier himself signing the bill.

The section 3 of BLA provided conclusive evidence only against the master. Although there is some relief provided in art. III/4 of Hague/Visby Rules it may not assist where the shipper is the claimant. Article III/4 sets out an estoppel against the carrier in that the carrier can not deny any statement made in the bill about the receipt of the goods. This applies, however only where the b/l is transferred to a third party. The s. 4 of COGSA 92 makes a b/l signed by the master conclusive evidence against the carrier<sup>79[79]</sup> of receipt for shipment or actual shipment. The Act creates statutory estoppel for the benefit of the holder of the b/l. This must however, be considered in the context of s. 5/5. Section 5/5 states that the Act is to be applied without prejudice to the Hague/Visby Rules. Hence art. III/4 may not be derogated from. Article III/4 provides that, in the absence of transfer, the b/l will only be a prima facie (as against conclusive) evidence of receipt of goods for shipment. This means that the estoppel in s. 4 applies only where the b/l has been properly transferred.

COGSA 92 s. 2/1 makes a statement that transferee would have a contract of carriage 'transferred to and vested in (transferee/endorsee)...as if he had been a party of the contract'. But if the carrier has not received any goods there would be no contract of carriage<sup>80[80]</sup> by sea (between seller and shipper) into existence and therefore COGSA would not apply because nothing could be transferred to the endorsee/consignee under s.2. Consequently, if the goods were never shipped there would be no cause of action and there will normally be neither a contract nor bailment action against the master, and loading broker may not become a bailee even if the goods are shipped. The effect of the s. 4 is to preclude the carrier from denying the fact of the shipment and legislative intention appears to have been to give to the endorsee/consignee a cause of action against the carrier on the hypothetical contract of carriage, which would come into existence, if goods had been shipped, even though no such contract may exist in fact. This may amount to basing a cause of action on what is in substance an estoppel is regarded as a statutory exception to the general rule that estoppel does not give cause of action.

To the question regarded overruling the *Grant v Norway* rule Law Commission said<sup>81[81]</sup> that they will overrule it through s. 4, but there is still a problem. A b/l is a conclusive evidence in favour of a lawful holder of the bill. It could be difficult to establish liability for breach of contract if there is no contract (if the goods are not shipped) and this bill which is null is still b/l<sup>82[82]</sup>. There is a possibility to have liability based on misrepresentation, but in a cases like *Heskell v Continental Express* s. 4 would have no use<sup>83[83]</sup>. Because normally no such contract (of carriage) is concluded until the goods are loaded or accepted for loading.<sup>84[84]</sup> If there is no goods shipped there would be no contract of carriage and therefore s. 4 –which applies only if the contract of carriage is in existence- would not apply to assist the seller. In other words where no goods at all are shipped there would be no cause of action transferred under s. 1 and s. 2 of the COGSA 92<sup>85[85]</sup>. It might be different if there is a pre-booking contract or a part shipment. Because then we can say there is a contract of carriage.

BENJAMIN argues<sup>86[86]</sup> that the situation would be different where the shipper was claiming damages for non-delivery at the destination. But such a claim would face difficulty that an estoppel by representation does not give a rise to a cause of action. To overcome this difficulty, the shipper would have to show that the contract had been established otherwise than by shipment. If it could be established, the shipper might have a claim based on estoppel

---

<sup>78[78]</sup> TODD, pg. 258.

<sup>79[79]</sup> Purpose of this section is to make the carrier liable to an endorsee and to a consignee named in the bill to whom the b/l has been transferred.

<sup>80[80]</sup> *Heskell v Continental Express* (1950) 1 All ER 1033, by mistake the goods were never shipped and by mistake ships agent issued a b/l which said the goods had been shipped. Held, ships agent is not liable and one of the reason was this: the contract of carriage is concluded when the goods are put on board of the ship. Therefore if carrier did not get any goods there is no contract and consequently endorsee/consignee has not a claim for breach of contract against the carrier because there is no contract. Comp. with *Rasnoimport V/O v Guthrie* (1966) 1 LLR 1, there was a partial shipment of the goods. Endorsees of the bill sued ship agent for breach of warranty of authority and they were successful because had the bill been signed by the shipowner the estoppel would have supported a cause of action in contract against him for short delivery of the goods.

<sup>81[81]</sup> Report, para.4.2.

<sup>82[82]</sup> Similar problem arises under art. 5/3 of Hamburg Rules where the goods are treated lost if they are not delivered in a certain period so therefore the b/l is null (or exhausted )but would be happened with the b/l if the b/l is pledged to the bank? Is the same result as in the *Future Express* to say bank would get nothing first instace judgement pg.96.

<sup>83[83]</sup> DEBATTISTA, 'The B/L as a Receipt-Missing Oil in Unknown Quantities' (1986) LMCLQ 468, 471 argues otherwise by saying that even if the goods are not delivered there is a contract `..this is neither what Devlin F said, nor logically true, as the contract to carry the goods will often be made before the goods are loaded; BOOLS, pg. 143.

<sup>84[84]</sup> (1950) 1 All ER 1033, 1037.

<sup>85[85]</sup> TODD, pg. 260.

<sup>86[86]</sup> BENJAMIN, para.18-020.

at common law, even where he was not a person who could rely on the statutory estoppel contained in s. 4 COGSA 92.

## CHAPTER FOUR

In this chapter we will discuss possible scenarios where delivery of the b/l is made after discharge of the goods. The problem here is when property is passing the b/l is no longer passing the property in the pledge<sup>87[87]</sup> to the bank. Therefore possibility is as in the *Future Express* probability is that the bank can not have remedy<sup>88[88]</sup> in tort because no property passes<sup>89[89]</sup> unless we base some remedy on representation in the b/l. This remedy can be based on property/contractual right<sup>90[90]</sup> or representation in the b/l<sup>91[91]</sup>. A b/l will often form an integral part in an underlying international sales transaction since in providing finance; through for example a documentary credit; a bank will seek to secure its interest through the bill as a document of title<sup>92[92]</sup>. The b/l is not strictly a negotiable instrument when for instance compared with the bill of exchange<sup>93[93]</sup>. A bona fide transferee of a b/l can not acquire better title to the goods covered in the bill than the transferor (the 'nemo dat quod non habet' rule)<sup>94[94]</sup>. An actual or constructive possession<sup>95[95]</sup> of the goods remain with the carrier<sup>96[96]</sup> as they are under the custody<sup>97[97]</sup> whilst at sea. The b/l is said to represent the goods as during the transit. Transfer<sup>98[98]</sup> of the b/l does not necessarily pass property but it can transfer symbolic possession of the goods, operating as 'key to the warehouse'<sup>99[99]</sup>. Passage of the property depends on the intention of the parties<sup>100[100]</sup>. This remains its importance in a case where one other party goes bankrupt and other claims protection. This claim can only be successful if he has property in the goods. It is common for the b/l to transfer special property<sup>101[101]</sup> for example where it is tendered by a seller to a bank under a documentary credit, after the general property has passed to the buyer. Special property of the bank gives a legal title to the goods as pledgee. If the buyer fails to reimburse, banks' special property has an implied right of sale<sup>102[102]</sup>. The rights of transferee bank who receives the b/l will be analyzed under four scenarios in context of *The Future Express*.

### I – THE GOODS ARE DELIVERED TO A PERSON WHO HAS PROPERTY AND THEN THE BILL OF LADING IS TRANSFERRED TO BANK WHO KNOWS ABOUT DELIVERY

---

<sup>87[87]</sup> *Official Assignee of Madras v Mercantile Bank of India* (1935) AC 53, 60 'a pledge of the bill can operate as a pledge of the goods'.

<sup>88[88]</sup> For non-delivery or damage of the goods.

<sup>89[89]</sup> *The Aliakmon* rule: plaintiff must be in possession of the goods when loss occurred.

<sup>90[90]</sup> UNAN, pg. 8 : contractual rights.

<sup>91[91]</sup> GLASS, pg. 2a, 59a-61a.

<sup>92[92]</sup> *Lickbarrow v Mason* (1794) 5 Term Rep 683; Factors Act s.1(4); SOGA s. 61(1).

<sup>93[93]</sup> DAY & GRIFFIN, pg. 19; UNAN, pg.13; *The Future Express* (1993) 2 LLR 542, pg. 547 col. 1 (CA).

<sup>94[94]</sup> GLASS, this rule is a subject to exceptions 'But unlike other documents which may be used in the context of an international sale the b/l has distinct advantage of enabling a buyer to acquire greater rights than those may have been possessed by the seller. The buyer could get a conclusive evidence whereas the shipper has only a prima facie evidence against the carrier. The other situation is s.25 of the SOGA where buyer in possession who may not have a b/l, who may not himself have a good title may transfer a good title to his buyer through the transfer of the b/l provided that second buyer is in good faith'. Therefore an interesting question relating whether the holder can have better rights than a previous holder in a situation where A waives a breach and then indorses to B and whether B is bound by this waive, must be concluded that B is not bound by this waive' pg. 135. See BEATSON & COOPER, pg. 199; TODD, pg. 78 f.n. 84; WINFIELD & JOLOWICZ, pg. 606.

<sup>95[95]</sup> BOOLS, 'A term 'constructive possession' denotes any relationship to the goods that law recognised as equivalent to custody and not in connection with b/l which gives legal possession to a person who does not himself have custody of the goods but they are held by another on his behalf (for instance where the b/l is with an agent and agent has constructive possession, see GLASS, pg. 56)' pg. 180, fn 51.

<sup>96[96]</sup> *Barclays Bank, Ltd. v Custom & Excise* (1963) 1 LLR 81, pg. 88-89 'when the goods are shipped, shipper has constructive possession of the goods, the carrier being his bailee'.

<sup>97[97]</sup> A term 'custody' is being used to refer to the physical control of the goods.

<sup>98[98]</sup> BOOLS, The consignor will obtain constructive possession but transferee obtains symbolic possession of the goods. The consignor's and carrier's control of the goods does not prevent the transferee from having symbolic possession because of the role played by intention. pg. 183; SASSOON, 'in effect, transfer of the b/l, accompanied by the policy of insurance, operates as constructive delivery of the goods' para. 3.

<sup>99[99]</sup> *The Sanders Bross v Maclean* (1883) 11 QBD 327; Report, para. 2.34/iii; GLASS, pg. 71.

<sup>100[100]</sup> Operation of COGSA 92 does not depend of passage of the property.

<sup>101[101]</sup> A pledgee's 'special property' is wider than a lien with a power to sale *The Odessa* (1916) AC 145

<sup>102[102]</sup> *Ex Parte Hubbard* (1886) 17 QBD 690, 698 and 701; *In Re Morrit, ex parte Official Receiver* (1886) 18 QBD 222, 223 and *Deverges v Sandeman Clark & Co* (1902) 1 Ch. 579, 593; BOOLS, pg. 56

This is a situation where problem in relation to transfer of the b/l which might not be helped by COGSA 92. The problem arises because the b/l might not pass proprietary right to the bank and this must be examined in the light of COGSA 92. The rights of the bank against the shipowner will depend upon whether b/l is exhausted or not, does a bank has a title or not.

-  
-

## A – Position Regarding to Title

Document of title in common law sometimes is reinforcing transfer of the property between the seller and the buyer or reinforcing the creation of the proprietary right –pledge- in the bank.

The b/l transfers constructive possession but only when there is an intention to pass a possessory right. Transfer of a b/l may operate to transfer a constructive possession of the goods even though the property in the goods has already passed from transferor to transferee<sup>103[103]</sup>. This was one the problem which, was examined in *The Future Express* case. The difficulties appeared to be in that case through weaknesses of the BLA. Under the said, rights of suit were linked with the passing of property. This obstacle thus prohibited many successful actions against the carrier. The cargo receiver wishing to sue the carrier for loss or damage found himself in a very vulnerable position.

### 1 – Facts of *The Future Express*

The case ultimately concerned the rights of an issuing bank under a letter of credit against a shipowner who discharged the goods without requiring the surrender of the b/l. A contract of C&F sale white wheat from Australia was entered into between Dalali (D) and Tradax (T) which provided that (T) was to be paid by irrevocable letter of credit (The ultimate buyer was the Yemeni Ministry of Supply and Trade but the contract was concluded through a Mr. Dalali). The Bank opened the letter of credit and it was confirmed by UBS. The goods were shipped by (T)'s seller and the b/l was issued to the order of the Bank ('to the order of the Yemen Bank or their assign'). Until the time of delivery, the sellers (T) reserved the right of disposal on the goods by retaining the b/l where (D) appearing as notify party. Normal procedure was expected to proceed and Bank expected to receive 'shipped bill' as pledge in exchange for financing deal. D requested that T delay presenting the documents to the Bank and (T) agreed. The terms of the letter of credit were accordingly altered to allow for the documents to be tendered later. (T) however then gave the shipowner an indemnity, under which the shipowner delivered to (D) without production of the b/l. The Bank learned that the goods had already been discharged and dispersed before the b/l was presented by the seller. Nonetheless, the Bank paid out on the letter of credit. (D) defaulted in paying the Bank. The bank in an attempt to recoup its losses, took the view that enforcing any judgement against its client would be futile they thus choose to sue the ship owner<sup>104[104]</sup> by saying that he was liable for delivery otherwise than against production of the b/l and alleging conversion of the Bank's special property in the goods.

### 2 – The Issues and Judgement

The Court of first instance held that the bank had no rights of suit. Judge Diamond Q.C. identified four main issues:

a -Had the plaintiffs had any title to sue the defendants for non delivery?

aa - Pledge

The bank argued that the application for the credit indicated that it was intended that the bank was to become pledgee of the goods.

Judge Diamond agreed that the application showed intention between (D) and the bank to create a pledge at some stage<sup>105[105]</sup> but he found a ground to reject this argument because in the application for the opening of the letter of credit, it was the intention of (D) and that the bank was to become a pledgee of the goods at the stage of receiving the b/l. A strong factor pointing to this was the right of the bank to seize and sell the goods to obtain full settlement, as specified in (D)'s application to the bank. At the moment when the application for the letter of credit was made, the intention of the parties was that the Bank to become a pledgee and was to have right to retain the goods until security was provided and if it was not, to sell the goods and reimburse itself out of the proceeds<sup>106[106]</sup>. The scheme of the contract between the bank and (D) was not followed as contemplated. The bank did not obtain possession

---

<sup>103[103]</sup> *Ilyssia Compania Naviera SA v Ahmed Abdul-Quawi Bamaodah (The Elli 2)* (1985) 1 LLR 107

<sup>104[104]</sup> An action by the bank against the seller was brought in Switzerland.

<sup>105[105]</sup> (1992) 2 LLR 79, 89

<sup>106[106]</sup> *Kum v Wah Tat Bank Ltd.* (1971) 1 LLR 439, 447.

of the b/l before discharge and therefore intention to create a security interest can not arise and pledge could not be created. Judge Diamond held that:

‘While the contract between (D) and the bank demonstrates an intention that on receipt of the b/l the bank would become a pledgee of the goods, it is nevertheless clear in my judgement that the bank never become a pledgee or acquired any security rights over the goods. There are 2 reasons, the first...<sup>107[107]</sup>

property and possession have already passed and there could not be a pledge (lack of constructive possession). He said:

‘...it is nevertheless clear in my judgement that the bank never in fact become a pledgee or acquired any security rights over the goods. There are two main reasons for this; first being an arrangement was concluded between (D) and (T) whereby the property in and possession of the goods passed from (T) to (D) long before the bank obtained possession of the b/l or acquired either actual or constructive possession of the goods...<sup>108[108]</sup>

second reason is that pledge can not be created because bank knew the situation that the goods has been discharged and therefore it could not be intended to create a pledge. He explained it by saying:

‘...the second, at the time when the b/l were negotiated to the bank in March 1986 it was known to (T) as transferors and the bank as transferees that the goods had long since been discharged and dispersed and it can not therefore have been intended by either party that a transfer of the bills should operate as a transfer of constructive possession of the goods. For both reasons I conclude that the bank has no title to sue the owners for misdelivery of the goods’

What Judge Diamond is have in mind that there was no intention to create a pledge because the goods were already discharged and the property has passed to somebody else (D). The bank were aware that there is no intention to create a pledge because they knew that the goods had been already discharged and it could not have been intended that a transfer of the bill should operate as a transfer of constructive possession of the goods. Thus the bank never in fact become a pledgee or acquired any security rights over the goods. Therefore mere transfer of the b/l to the transferee does not transfer possessory right<sup>109[109]</sup>. It would be depend what property right was intended to pass. In other words if the seller wants to create pledge he must intend to pass property. Thus it is right to say that intention is important to create a pledge. But seller still needs to transfer the b/l because pledgee must have possession of the goods and only way he can do it is to transfer the b/l which is document of title. The seller can not simply say to the bank that he intends to make him pledgee there ‘...*must be the intention of the parties the parties that the transfer of the bill should pass a possessory title to the goods*<sup>110[110]</sup>’ and ‘*transfer of the b/l does not pass constructive possession of goods to the transferee unless it is the intention of the parties to the transfer that this should occur*<sup>111[111]</sup>’. In this case was held that the b/l was no longer symbol of the goods because they had already been discharged and therefore could not be any intention to create a pledge. Judge Diamond seems to suggest that the b/l is not a symbol of the goods unless it is giving some sort of legal interest and can not have an effect as a constructive possession<sup>112[112]</sup>.

If the bank did not know that the goods had been discharged they still could rely on security of the b/l and Judge Diamond is very reluctant to see how security is lost. He pointed out that in that case security is lost because the bank knew the circumstances. Diamond is worrying about security and examines possibility to establish it. He concludes that:

‘...the transfer of the bill of lading is capable of transferring constructive possession of the goods without need to employ such inexact metaphor as the key of the warehouse<sup>113[113]</sup>’.

In other word he is saying that use of concept of symbol of the goods is inexact metaphor

But CA rejected this reasoning they said that the b/l was simply incapable in that stage to create a pledge. The CA reached this conclusion by examining ability to create a charge over the goods in a documentary sales and situation of unpaid seller in a CIF and C&F sales. Lloyd L.J. said:

‘(1) (T) and (D) agreed before the were shipped (‘by the time of shipment’) that property in the wheat was to pass to (D) without production of the bills of lading being tendered to a bank and

---

<sup>107[107]</sup> *Future Express*, (1992) 2 LLR 79, 93.

<sup>108[108]</sup> *Future Express* (1992) 2LLR 79, 93.

<sup>109[109]</sup> GLASS, ‘The b/l seems as a symbol of the goods and providing constructive possession which unables possession to be transferred in order to support the pledge’. pg. 7g, 43a; BOOLS, pg. 115.

<sup>110[110]</sup> *Future Express*, (1992) 2 LLR 79, 94.

<sup>111[111]</sup> *Ibid.*, pg. 95

<sup>112[112]</sup> Outcome of Diamond J. is : The lawful holder of the b/l could have right to claim the goods from the shipowner provided that the lawful holder have a some legal interest in the goods.

<sup>113[113]</sup> *Future Express* (1992) 2 LLR 79, 95.

(2) that property in fact passed to (D) shortly before delivery of the wheat at Hodeidah. How can it be said in those circumstances that (T) as sellers, were still objectively, in a position to give a charge over the wheat or the documents of title? The ability to give such a charge, which is the condition upon which the whole system of commercial credits depends, .....(T) disabled themselves..from giving charge over the goods<sup>114[114]</sup>

`It is elementary that the buyer under a normal CIF and C&F contracts is not in a position to pledge the goods or documents of title to the bank, since the seller normally reserves the right of disposal until he is paid. Thus the bank security depends, not on the contract between the buyer and his bank..<sup>115[115]</sup>

The question related whether an `intention` is important to create a pledge over the goods. Effect was never given to this intention, for two reasons. First was explained as in *Ross T Smyth & Co. v Bailey Son & Co*<sup>116[116]</sup> ability of the seller to pledge the goods:

`the bank`s security depends not on the contract between the buyer and his bank, but on the ability of the seller to pledge the documents on behalf or with his consent`

On the facts (T) reserved a right of disposal in the goods until they were satisfied that the documents complied with the letter of credit, which occurred around 27 April 1985, shortly before discharge commenced. Also (T) agreed to with (D) that property was to pass to (D) without production of the b/l<sup>117[117]</sup>. The property passed to the (D) on discharge and delivery<sup>118[118]</sup> of the goods at Hodeidah to (D).

In effect that the CA trying to say was that the goods are off the ship and b/l is no longer a symbol of the goods and they have already been placed in the warehouse of (D) who was entitled to receive them and the seller is no longer in position to give a charge over the goods. B/l are not `negotiable` in a true sense, in that a transferee can not take a better title than his transferor had; the bank therefore obtained no security interest in the goods because property had passed to (D) long before the bank obtained possession of the bills.

Secondly, at the time the bills negotiated, in March 1986, both (T) as transferor and the bank as transferee actually knew that the goods had been discharged, so there could be no intention by either party, that the transfer of the bills would effect a transfer of constructive possession of the goods necessary to create a pledge.

#### bb – Attornment

The bank`s alternative argument was that the b/l constituted in attornment by shipowners to the bank as consignee, perfected when the bank gained possession of the bill. The effect of the attornment was to effect a change in identity of the bailor. Whereas the bank become bailor of the goods and had a right of suit against the bailees for non-delivery in April 1986 even if there was no pledge created. The bank relied on the b/l constituting attornment in advance<sup>119[119]</sup>. At first instance, Judge Diamond pointed out that `the concept of attornment plays no part in the discussion to be found in classic authorities<sup>120[120]</sup> on the status in English law of b/l as a document of title of the goods`. His Lordship went on:

`if the representation is to be analyzed in terms of the attornment, then an attornment can only arise because the owners have authorized the shippers of the goods and every party who may become the holder of the bill prior to the bank to give an undertaking (i.e. attornment) in these terms to the bank on behalf of the owner<sup>121[121]</sup>.

On the facts, he found that there was no intention on the part of the shipper of the goods to attorn to the bank on behalf of the carriers. With regard to the possibility of attornment in advance he said that:

---

<sup>114[114]</sup> *Future Express* (1993) 2 LLR 542, 548.

<sup>115[115]</sup> *Future Express* (1993) 2 LLR 542, 547.

<sup>116[116]</sup> (1940) 67 Ll. L. Rep. 147 at pg. 156.

<sup>117[117]</sup> It is not necessarily to transfer b/l in order to transfer property, and that what precisely happened in *Future Express*. They decided not use the b/l but just simply to provide an indemnity and seller (T) was agreed that buyer (D) should have a property. This problem links the idea of property and b/l, but apparently this linkage is not stable.

<sup>118[118]</sup> DEBATTISTA, `For the bank`s pledge to be made ineffective, the goods must have delivered, without presentation of the b/l, to the person entitled to their delivery, rather than simply discharged. Thus where goods were discharged into a warehouse at the shipowner`s order, the b/l was still capable of being pledged after discharge of the goods into the warehouse as it was in *Meyestain v Barber and Barclays Bank Ltd. v Customs and excise Comrs.*` pg. 48, fn. 2.

<sup>119[119]</sup> *Future Express* (1992) 2LLR 79, 94.

<sup>120[120]</sup> It was reference to the cases *Lickbarrow v Mason* (1794) 5 TR 683; *Meyestain v Barber* (1866) LR 2 CP 38; *Sanders v Maclean* (1883) 11 QBD 327; *Sewell v Burdick* (1884) 10 App Cas 74

<sup>121[121]</sup> *Future Express* (1992) 2LLR 79, 94.

I should add that while I have assumed for the purpose of this analysis that, if an attornment can be established. The transferee may sue the carrier for breach of the relationship of bailment and attornment cannot sensibly be employed to bypass the conditions upon which, according to the Bill of lading Act, 1855 or other relevant legislation, a consignee or endorsee is entitled to sue on the contract contained or evidenced by the bill. If the 'attornment in advance' theory were to be adopted at any rate in its broad form, then any consignee or endorsee of the bill could, merely by proving he was lawful holder, make a demand on the carrier for delivery up the goods, if the demand was not complied with at all or if there was a short delivery or a delivery of damaged goods, sue the carrier for breach of his duty as bailee to deliver the goods at the port of discharge in the same good order as when shipped. If this were held to be law then as was said in *The Captain Gregos (No2)* there would be no need for the 1855 act...<sup>122[122]</sup>

This submission was rejected by Judge Diamond QC he said that:

The main reason why in the present case it is, impossible for the bank to rely on any attornment is that, it was known in March 1986 to the (T) as transferors of the bills and to the bank as transferees that the goods had previously been discharged and dispersed. It is impossible...to conclude that there was in March any intention on the part of (T) to attorn on behalf of the owners of the bank<sup>123[123]</sup>.

Judge Diamond explains that in this case an attornment did not add anything because if the attornment on behalf of the carrier was being made by the shipper the knew it was not true. The bank knew that there no attornment was being made because the bank knew that the goods had already been discharged.

Judge Diamond's views were approved by the CA and Lloyd LJ speaking on behalf the court,said

As I understand it, Professor Goode is drawing an analogy between the rights and obligations created by the issue of transfer of a bill of lading, and the rights and obligations created by attornment. It is not suggested that the concept of attornment adds anything by way of substance to the rights of the consignee or endorsee<sup>124[124]</sup>.

Mere possession of the bill, in English law, does not therefore, give the transferee of it right to delivery of the goods<sup>125[125]</sup>.

b - Did the defendants act wrongfully by not delivering the goods on demand?

Plaintiffs submitted that delivery to (D) was wrongful therefore shipowners were in breach of their duty as bailees in refusing in April or June, 1986 to comply with the bank's demand for the delivery up of the cargo or payment. In their opinion this constituted a breach by the owners of their duty as bailees and/or gave rise to liability in conversion. For the owners was argued that the bank has no right of action unless the had become the transferee or or assignee of the right of (T). Judge Diamond view that the b/l was not exhausted as document of title, because the goods were not delivered to a person who was entitled under the b/l. He said:

mere delivery of the goods against indemnity to a person who was rightfully entitled to them had surrendered the bill of lading exhausts that bill as a document of title. I would be reluctant to hold that a bill of lading becomes exhausted as a document of title once the carrier delivered the goods against an indemnity to a person authorize to receive delivery<sup>126[126]</sup>.

Diamond J. seems to suggest that as long as the b/l is not exhausted delivery to person who is not entitled is misdelivery of the goods. Nevertheless that the b/l was not exhausted by delivery of the goods to (D) he sought that there is no liability on part of the shipowner for misdelivery because the plaintiff had no title to sue.

The CA did not deal with problem of exhaustion as such and with the idea of wrongfulness but they repeat the same point that the b/l now is no longer capable of creating a pledge. The CA held that:

...(T) disabled themselves on the facts....giving a charge over the goods or documents of title<sup>127[127]</sup>.

Thus in *Future Express* the seller delayed the tender of documents beyond the date on which goods were delivered without representation of a b/l made out to the order of the issuing bank. Consequently, that bank had no effective pledge over the goods and could therefore bring NO an action in tort against the carrier for misdelivery.

---

<sup>122[122]</sup> Ibid, pg. 96.

<sup>123[123]</sup> Ibid., pg. 95.

<sup>124[124]</sup> (1993) 2LLR 542, 550.

<sup>125[125]</sup> BOOLS, pg. 156.

<sup>126[126]</sup> (1992) 2 LLR 79, 99.

<sup>127[127]</sup> (1993) 2 LLR 542, 548.

c – Were the b/l exhausted as document of title when the plaintiffs demanded delivery in April and did defendants act wrongfully by not delivering the goods on demand?

#### aa - Arguments

Defendant argued that b/l was not exhausted as document of title. He submitted that unless and until the goods were delivered against presentation of one of the original bills. He relied on *Glyn Mills v The East and West India Dock Co.* rule<sup>128[128]</sup> and the reasoning of Diplock LJ in *Barclays Bank Ltd. v Custom & Excise*<sup>129[129]</sup>. Plaintiffs argued that b/l become exhausted as a documents of title when either is known that the goods are not longer in the hands of the consignee or when such a period of time elapsed to assume that goods are no longer in the hands of consignee. Delivery of the goods against letter of indemnity provided by the seller and they relied on cases *Meyerstein v Barber*<sup>130[130]</sup>; *London Joint Stock Bank v British Amsterdam Maritime Agency*<sup>131[131]</sup> and *The Delfini*.

#### bb– Judgement

Judge Diamond Q.C. said that

‘I would be reluctant to hold that a b/l becomes exhausted as a document of title once the carrier has delivered the goods against the an indemnity to a person authorized to receive delivery... to hold that a b/l becomes spent when goods are delivered against an indemnity would greatly detract from value of b/l as document of title of the goods, would diminish their value to bankers and other persons who have to rely on them as security and would facilitate fraud<sup>132[132]</sup>’

In other words he thinks that a ‘spent’ bill can continue to operate as a document of title and will have the result of protecting banks and other persons who part with money on the good faith of the documents<sup>133[133]</sup>. Otherwise banks would be unprotected even if they had taken precaution of obtaining all the bills in set<sup>134[134]</sup> because property could already have passed to a buyer who had taken delivery without production of the b/l. Whether bank has insurable interest will be considered further below.

It is clear that merely because the goods have arrived to destination does not mean that b/l is spent<sup>135[135]</sup>. Another reason why b/l was not exhausted and held to be valid he explained by applying test in *Meyerstein v Barber* where Lord Hatherley (pg. 329/330) stated that ‘simply because goods are discharged does not mean that the b/l ceased to perform symbol of the goods function or is exhausted. There must be ‘complete delivery’ to the consignee before the b/l would be exhausted’ and he continued his speech:

‘In the case of goods which are at sea being transmitted from one country to another you can not deliver actual possession of them, therefore the b/l is considered to be a symbol of the goods, and its delivery to be a delivery of them. When they have arrived at the dock, until they are delivered to some person who has right to hold them the b/l remains the only symbol that can be dealt with by way of assignment. As soon as delivery is made ... then those symbols replace the symbol which before existed. Until that time b/l are effective representations of the ownership of the goods, and their force does not become extinguished until possession ..had been taken on the part of the person having a right to demand it

What Lord Hartherley had in mind is, unless the goods are not delivered to the person entitled to them the seller have a right as against the carrier to instruct him e.g. by endorsing it to deliver the goods to someone other than

---

<sup>128[128]</sup> (1882) 7 App Cas 591, carrier is entitled to deliver the goods to the person who presents the b/l unless carrier has noticed assignment of another party of the bill.

<sup>129[129]</sup> (1963) 1 LLR 81.

<sup>130[130]</sup> (1870) LR 4 HL 317; (1866) LR 2 CP 38.

<sup>131[131]</sup> (1910) 16 Com Cas 102.

<sup>132[132]</sup> (1992) 2 LLR 79, 99.

<sup>133[133]</sup> BENJAMIN, para. 18-046 decision was criticized and was said that it would prejudiced the rights of the person who deals with actual goods. Therefore ‘on balance, that better view is that ‘spent’ bill should not be regarded as document of title’.

<sup>134[134]</sup> *Future Express* (1992) 2 LLR, pg. 99-100.

<sup>135[135]</sup> *Barclays Bank Ltd. v Customs & Excise* (1963) 1 LLR 81: in this case ship arrived, goods were put into the warehouse, but the goods are still in control of the shipowner. The b/l was transferred later. The receiver of transferors tried to claim the goods. They can not because the b/l has passed interest to the transferee and was still capable giving rights to the transferee.

the buyer<sup>136[136]</sup>. Thus the b/l is still capable to be pledged after discharge but before delivery because `...owner of the goods may change his purpose...`<sup>137[137]</sup>.

Diamond J in first instance thought that, delivery to (D) against an indemnity rather than the bank did not exhaust the bill. Since under the terms of the b/l neither the seller nor the buyer had any right to claim the goods without having first deleted<sup>138[138]</sup> the name of the bank as consignee<sup>139[139]</sup>, therefore the delivery of the goods to (D) had to be regarded as a wrongful act done without sufficient legal excuse as under the terms the b/l goods were not deliverable either to (T) or (D).

However as the bank had no title to sue the shipowners either as a pledgee or by reason of an attornment, the bank's claim failed and was dismissed.

d – Was the claim time barred under the Hague-Visby Rules?

It was not barred. We will not deal with this problem because it is not relevant to our discussion.

### 3 – Case Comment

*The Future Express* made the point that the transfer of the bill does nothing unless there is also intention to pass a possessory right: the buyer under CIF contract was not in position to pledge the goods or document of title to the bank, since the seller reserved the right of disposal and bank was not entitled to sue. It was quite clear that the seller can not have intended to pass the special property in the goods when transferring the b/l to the plaintiffs, since they knew that property and right to possession should pass independently of the b/l. Nevertheless, the constructive possession is not sufficient `possessory title` to enable the holder to sue in negligence. He must have an immediate right or actual possession of the goods and power to sell the goods if the loan is not satisfied<sup>140[140]</sup>. But it is a right which is capable of being created unless the possession of the goods are transferred. The right generally speaking is not effective unless possession is transferred. It is quite confusing because if there is an intention to pass a possessory right seller can do so because b/l was ceased to represent the goods therefore there is no goods anymore. The b/l is a document of title so long as the goods represented by the b/l are in existence<sup>141[141]</sup>. The bill can not transfer the right to possession by the time the document was transferred.

The knowledge of the bank as to whether delivery and disbursement of the goods had occurred before the transfer of the b/l could have potentially barred its claim. The bank was aware of the fact that the b/l which was transferred in their favour could not fulfil the main functions required of such an instrument i.e., there was no possibility to acquire good title nor to claim for the delivery of the goods at the port of discharge since the undertaking of the carrier incorporated in the b/l to deliver at the port of discharge had been rendered impossible as a result of the mis-delivery. Hence it seems much more logical to consider that the b/l was exhausted<sup>142[142]</sup>. Otherwise, one would be forced to contend that the transfer of the b/l served only to vest the bank with the right of suit for damages.

### 4- The Situation Under COGSA 92 Where The Bank Knows About Delivery

Under the old law where the carrier by sea has delivered the goods to the buyer, he gets the property in the goods. The b/l is ceased to be a document of title and is not capable of giving any rights in the goods because the goods are in possession of the buyer. COGSA 92 suppose to give remedy to the situations like in this case. It was said:

`As for the future, the position of a lawful holder of a bill of lading has been transformed by the Carriage of Goods by Sea Act, 1924<sup>143[143]</sup>`.`

`They (the bank) can not rely on Carriage of Goods By Sea Act 1924, since the Act is not retrospective. So they can not sue in contract. Their sole cause of action, if any, is in tort for conversion, by reason of the failure of the defendants to deliver on demand in April, 1986<sup>144[144]</sup>`.`

Actually the CA is not saying there would be a remedy in the COGSA 92, they just not dealing with it. And this is just a hint that the things might be different. So they are not saying would be different but they are saying they not dealing with COGSA 92 and they are recognizing position of a lawful holder has changed and there is potential

---

<sup>136[136]</sup> *Mitchell v Ede* (1840) 11 A and E 888 at pg. 933 `the seller has authority to change consignee on the face of b/l before it has been transferred. This is the case even where the buyer appears to be consignee on the face of the b/l.

<sup>137[137]</sup> *Ibid.*, at pg. 903; BENJAMIN, para. 18-011 and 18-012.

<sup>138[138]</sup> abstract from *Mitchel v Ede*.

<sup>139[139]</sup> *Future Express* (1992) 2 LLR 79, 99.

<sup>140[140]</sup> GLASS, pg.43.

<sup>141[141]</sup> It was clear in *The Grant v Norway* that it can not take effect as a document of title in respect of never shipped or when goods are consumed, dispersed or delivered (*The Delfini*).

<sup>142[142]</sup> UNAN, pg. 8.

<sup>143[143]</sup> (1993) 2 LLR 542, 546.

<sup>144[144]</sup> (1993) 2 LLR pg. 546.

cause of action in contract. Because under COGSA 92 the holder of the b/l gets the right even though the b/l is transferred after cease being a document of title<sup>145[145]</sup>. The holder of the spent bill gets rights in contract provided that some arrangements are made before hand with the seller<sup>146[146]</sup> and before the bill was spent<sup>147[147]</sup>. So would the COGSA 92 change anything? The CA might have assumed that the b/l still could transfer contractual rights because of the effect of s. 2/2a. It is difficult see how it would work. This assumption could be made on the basis that s.2/2a transfers contractual relations by endorsement of the bill between parties so therefore endorsee is expected to cover his losses based on the contract in the b/l. It is difficult to find explanation in favour of this argument because the bank knew that the goods had been discharged beforehand. Therefore, promise contained in the b/l is wholly fictional and arguably could have no effect against the carrier and additionally the reliance on promise contained in the b/l must also be shown to be reasonable<sup>148[148]</sup>. The promise contained in the b/l effectively is undertaking by the shipowner to deliver the goods and if the bank knows<sup>149[149]</sup> that the goods are already delivered and there can not be such a promise. Another reason why s. 2/2a might not apply is based on fact that shipowner of the *Future Express* made delivery to the buyer effectively under the instruction of the owner of the goods. The seller was owner of the goods at the time of delivery and in that point shipowner arguably is not committing to any breach of the contract and only at later stage the b/l was transferred to the bank. In a sense the bank is suing for misdelivery of the goods which is amounting to the breach of the contract. But is there any breach of the contract against the bank? There is not. The shipowner is obliged to obey the seller and is entitled to deliver to the buyer accordingly to the contract with the seller. All point is that the bank knew about delivery and the bank can not claim for delivery to somebody else who is not in breach of the contract of carriage. The bank could not say that it relies on representation in the b/l because its knowledge about delivery and 'seller's defect of title' at the time of payment against the b/l would prevent it. This analysis suggests that even under COGSA 92 the bank would have no remedy against the shipowner. The bank appears that can not have action in tort as well because the property in the goods has passed to the buyer upon delivery of the goods.

We can consider two possibilities:

a- a- Cause of action based upon estoppel

Estoppel is a representation of the fact but not a promise as itself<sup>150[150]</sup> and therefore does not provide cause of action. Simply because facts are true it does not mean that someone could have cause of action based on it. There must be a liability based on the contract. Estoppel is an imply promise to deliver by preventing the shipowner from denying that he has the goods on behalf of the holder of the b/l<sup>151[151]</sup>. It is possible to say that the goods were given to the shipowner so, he can not deny that he got them therefore the holder of the b/l is entitled the goods back. The lawful holder of the b/l can establish cause of action based on those facts. But if it is thought in the context of endorsee who is receiving the b/l we can say that the shipowner is estopped from denying that he had received the goods. But this itself does not give to the endorsee right to sue the shipowner for breach of the contract. All it means that the shipowner is the shipper and shipowner is bailee of the shipper and does not necessarily has a contract with the lawful holder of the bill.

b- b- Cause of action based upon misrepresentation

If the statement that goods held by shipowner on behalf of owner can be treated as a statement of fact which is relied on then there is an action based on the misrepresentation. There would be a claim for recovery what has been lost.

## II – TRANSFER OF THE B/L AFTER GOODS BEEN DISCHARGED BUT STILL IN POSSESSION OF THE SHIPOWNER

---

<sup>145[145]</sup> s. 2/2.

<sup>146[146]</sup> Report, para. 2.44 `...indorsement of a b/l after delivery will be effective to transfer contractual rights where the indorsement was effected in pursuance of contractual or other arrangements made before delivery...`

<sup>147[147]</sup> BENJAMIN, para. 18-078.

<sup>148[148]</sup> *Simmonds v Rose* (1893) 10 TLR 125, This case was concern about the statement regarding to total weight of the goods to which the b/l related. This was a qualification which is a part of the representation contained in the b/l, therefore we should have no doubt applying this rule to reliance to any qualification forming representation in the b/l.

<sup>149[149]</sup> This covers those circumstances which bank should reasonably have known about

<sup>150[150]</sup> DEBATTISTA, 1986 LMCLQ 468.

<sup>151[151]</sup> GLASS, pg. 22a.

The question in this type of situation is whether the b/l could, after the goods had been unloaded<sup>152[152]</sup> but prior to delivery, still operate as document of title to create a pledge<sup>153[153]</sup> with the bank. This was the issue in *Barclays Bank Ltd. v Commissioners and Excise*<sup>154[154]</sup> where the buyer of a consignment of goods shipped from Rotterdam CIF Cardiff deposited the b/l with the plaintiff bank some time after arrival of the goods at their destination in order to secure an advance which the bank had made on an overdraft. The defendant there recovered a judgement against the buyer for arrears of purchase tax and attempted to seize and take possession of the goods which had remained in a dockside warehouse into which they were placed by the shipowners. Upon representation of the b/l by the bank the shipowner issued delivery orders to warehouse against which delivery of the goods could be obtained. The defendant unsuccessfully alleged that the contract of carriage was performed and soon as that happened, and the b/l was in the hands of the person entitled to the property and possession of the goods, and was in a form which would entitle him to claim delivery from the shipowner, it ceased to be a document of title by delivery and endorsement of which the property in the goods could be transferred. Diplock LJ found that:

‘Such a contract is not discharged by performance until the shipowner has actually surrendered possession (that is, has divested himself of all powers to control any physical dealing in the goods) to the person entitled under the terms of the contract to obtain possession of them’.<sup>155[155]</sup>

In this situation the b/l is still reflecting the goods<sup>156[156]</sup> and is able to create a pledge provided the contract of carriage is undischarged<sup>157[157]</sup>, and goods remain in the possession of shipowners or their agent. His Lordship explained it by saying:

‘So long as the contract is not discharged, the b/l, in my view remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred’<sup>158[158]</sup>.

Therefore where the goods had been only discharged but not been delivered to the person entitled to them they are in constructive possession of the shipowner and are being held in the physical possession of the warehouse on their behalf and to their order. In the normal case, the b/l retains its transferability until the contract of carriage of which it is evidence, or which it contains, is performed. It is not necessarily performed merely because the goods have arrived at the destination and have there been discharged from the ship. The b/l remains in force even in this situations where the goods have been deposited to the warehouse to the order of the carrier and not the order of the consignee<sup>159[159]</sup>.

### III – THE GOODS ARE DELIVERED TO A PERSON WITHOUT PROPERTY AND THEN THE B/L IS TRANSFERRED TO THE BANK

Situation where the goods are being delivered to wrongful person and the b/l is transferred from the holder to fresh holder question arises whether a fresh holder still has a right to sue in conversion even though the goods have been already delivered or not. After delivery of the goods without production of the b/l ends the b/l’s capacity being symbol of the goods because there is no transfer of proprietary rights have taken place<sup>160[160]</sup>. In other words question arises what would be proprietary effect of the transfer of the b/l other than the buyer. This person could be either a bank or an agent. It is common practice for the b/l to be transferred to a bank as a security for loan who finances sale. Question related to this problem was examined in *The Bristol & West of England Bank v Midland Railway*<sup>161[161]</sup> case where Canadian shipper had sold goods to a buyer in Bristol named Clark. Having shipped the goods, the shippers drew bill of exchange with the b/l attached, to a Canadian bank. That bank sent the documents to the City Bank in London with a hypothecation note authorizing the City Bank, if the bill of exchange was not accepted by Clark should dishonor the bill of exchange on maturity. The goods had been discharged by the ship, and were being held by defendants in their warehouse. They were wrongfully delivered to a man named Clark. At the time of the misdelivery the bills of lading were held by the City Bank under a valid pledge. The documents were subsequently transferred to the plaintiff bank. It was argued that the plaintiffs could not sue in conversion, since the goods had already misdelivered before the plaintiff’s title accrued. The right of action of the transferee against the shipowner/carrier who deliver the goods to third party without production of the b/l was held to be depend upon whether he had property in the goods. Lindley LJ said:

---

<sup>152[152]</sup> Discharge of the contract of carriage.

<sup>153[153]</sup> The purpose of the pledge is to prevent the buyer from taking possession of the bank’s security by claiming delivery of the goods from the carrier.

<sup>154[154]</sup> (1963) 1 LLR 81.

<sup>155[155]</sup> *ibid.*, pg. 89.

<sup>156[156]</sup> In a sense that the b/l remains a document of title.

<sup>157[157]</sup> Contract of carriage is not discharged until delivery is made to the lawful owner.

<sup>158[158]</sup> (1963) 1 LLR 81, 89.

<sup>159[159]</sup> BENJAMIN, para. 18-010A.

<sup>160[160]</sup> GLASS, pg. 5.

<sup>161[161]</sup> (1891) 2 QB 653.

`If the plaintiffs had as assignees the same title to those goods that the [pledgees] had, they were owners of the goods and could sue, in trover or detinue at common law, quite apart from Bills of Lading Act 1855, anybody who wrongfully withheld those goods<sup>162[162]</sup> .

This argument was rejected.

The problem in this type situations is to decide what would be an effect of transfer of the b/l where the goods had been delivered to wrong person and the b/l is no longer symbol of the goods and would a lawful holder of the bill cause of action against shipowner for misdelivery of that goods. If we look to shipowner position it can be said that he was in breach of contract with the shipowner/carrier and he is liable in conversion against the holder of the bill. The shipowner/carrier must have checked position with the original seller regarding delivery without production of the b/l to party demanding delivery.

The position concerning transferees right to sue in conversion will fully depend upon whether he has a proprietary right against shipowner/carrier. It was held that a transferee has a proprietary right against the shipowner/carrier.

So in brief we can describe position in the English law that if the shipowner commits wrongful act, *i.e.* delivery without production of the b/l, the property is still on the seller and if the seller subsequently transfers the b/l to third party this b/l is capable of transferring proprietary rights. Therefore transferee has right of action based on property against the shipowner. This approach was affirmed in the *Future Express* where both Diamond and the CA seem to think that the b/l is still operating as a document of title.

This current position in English law was criticized by Curwen<sup>163[163]</sup> he argues that this conclusion is wrong. Because what really happening is, once the shipowner commits the wrongful act by delivering the goods to a third party without producing a b/l, he commits tort at that point. When seller transfers the b/l he is really assigns a right of action in tort and it is not possible to assign right in tort. In cases where the shipowner commits a wrongful act the seller still has the property in the goods. If a seller transfers a b/l in that stage it is an assignment in tort. The tort has already been committed that is conversion of the goods by the shipowner when he misdelivers the goods. He reaches the conclusion that the seller can not assign right of action in tort and therefore there is a problem. In order to give proper remedy to the somebody in this situation this person must have right under the law of the tort and law under the contract. Under the contract law transferee has only personal remedy but not proprietary remedy because the seller can not assign tort to the transferee. Having only personal right the transferee can not trace the goods down a line. In a situation where buyer gets the goods wrongfully off the ship what means that shipowner commits the conversion. The transferee of the b/l which represents the goods wrongfully delivered can not sue the carrier and further down a line because transferee would not have a proprietary right.

If we apply Curwen analysis to COGSA 92 we can reach a conclusion that transferee would have a contractual rights against the shipowner for misdelivery or failure to delivery upon request provided that transfer of the b/l was made in accordance to prior arrangement. But this right as we can see is a personal right, the transferee would not get proprietary right to sue other people to got the goods in conversion.

Curwen analysis can be criticized on the point that property passes<sup>164[164]</sup> to the transferee with transfer of the b/l and therefore proprietary rights are transferred as well. Thus transferee's proprietary rights are based upon this property.

#### **IV – GOODS ARE DELIVERED TO A PERSON WHO HAS PROPERTY AND THEN THE B/L IS TRANSFERRED TO A PERSON WHO DOES NOT KNOW THAT THERE HAS BEEN A DELIVERY**

In this scenario the question is whether a bank going to obtain any proprietary or personal rights against carrier as holder of the b/l. This is an interesting question which has left unanswered in the *Future Express*. Answer of this question will depend upon if the b/l is transferred under a previous arrangement or not. If we can establish previous arrangement accordingly transfer is made we can say that the bank has cause of action based on s. 2/2a. Therefore if the bank get himself in the s.2/2a promise for delivery in the b/l is still being made, the promise is still realistic because bank does not know the goods had been already delivered. So as long as banks are in s.2/2a there is no difficulty for COGSA 92 giving them cause of action in contract.

It is difficult to analyze a situation where the bank is out of the s. 2/2a (for instance there is no previous arrangement). The bank's situation seems to be hopeless in acquiring any cause of action against the carrier. Because after delivery of the goods to the person with property status of the b/l is not clear. Diamond J. in a first instance in *Future Express* talked about whether the b/l is exhausted. He reaches the conclusion that the b/l is still continue being a document of title because the goods are not delivered to a person whom suppose to be delivered under the terms of the b/l. But the CA seems to suggest although they did not talk about the exhaustion that in this circumstances the b/l is not doing anything in terms of creating a proprietary right, in other words, the b/l is exhausted

---

<sup>162[162]</sup> *Ibid.*, at pg. 661.

<sup>163[163]</sup> CURWEN, Nicholas, 'An Unacknowledged Defect in Bills of Lading', 1985 JBL pg. 373.

<sup>164[164]</sup> GLASS, pg. 61b.

for everybody because the goods are delivered to somebody with property. So, in a sense the CA does not think that the b/l is capable of creating a pledge. The bank's situation might not be hopeless, because being a lawful holder of the bill the bank should be able to rely on a statement made in the b/l<sup>165[165]</sup>. Therefore argue for some sort remedies/cause of action can be based representation in the b/l<sup>166[166]</sup>. Where the carrier –who is in possession of the goods- in the ordinary course of business delivers the goods to the unpaid buyer with the owner's consent, last one becomes an owner of the goods<sup>167[167]</sup>. The bank who gets the b/l in that stage clearly has no security and under 1855 BLA could not claim non-delivery or damages of the goods. COGSA 92 tries to improve position of the bank. Now the new act suppose to give a remedy to the bank for non-delivery. This remedy is based upon representation which means that the carrier is in possession of the goods and in a sense he is estopped from denying his acceptance and from pleading that there was no contract upon which the shipper can sue<sup>168[168]</sup>. In other words s.2/2a COGSA 92 reinforces idea of estoppel and could give cause of action<sup>169[169]</sup> against the shipowner. Because representation in the b/l where carrier says that:

- a. a. `the goods would be delivered to the first person who produces valid b/l`
- b. b. `I have the goods as a carrier`

Presentation in the b/l could amount to a `contractual promise`. For transferee to argue that a particular statement to a contractual promise (that the goods had been shipped or that they would be delivered) he would have to show that a reasonable man<sup>170[170]</sup> in his position would have thought that the carrier was intending to warrant the truth of the statement or promising to deliver the goods as described. By issuing the bill of lading, the carrier is not only representing that the goods had been loaded, but also that he had accepted the shipper's offer to contract<sup>171[171]</sup> and the statements in the b/l are warrant the truth of the statement therefore are contractual terms<sup>172[172]</sup>. The lawful holder of the bill might be able to plead that, under COGSA 92, s.2/1 that contract was transferred to him. The contract referred in s.2/1 is not a carriage contract made with the shipper but that contract contained in the b/l<sup>173[173]</sup>. Therefore any wrongful delivery can be regarded as a breach of the contract arising from `contractual promise` made in the b/l by the carrier to the lawful holder of the b/l. But effect of the breach of the `contractual promise` can arise not in a situation where the goods are delivered to somebody else. Delivery to a third party might not effect a lawful holder's right. Therefore it would right to say that `contractual promise` is not broken until demand for delivery is fail.

## CHAPTER FIVE

### CONCLUSION

All things considered, one might be said that the solution in the COGSA is acceptable. But there is still areas of uncertainty. This however are a defects that could easily be solved by clarifying, either by juridical decision or amendment of the Act. As a general new Act produces a result which is generally acceptable to interested parties, specially third parties. New Act permits third parties to enforce contracts of carriage of goods by sea. It will be good for a banks that they can sue on contract contained in the b/l being a lawful holder of the b/l; but to make them liable only if they seek delivery of any goods. This split between right and liability was made to preserve the position of banks holding shipping documents as security, who would now rank as lawful holder holders in situation where they were not affected by the BLA. That Act operated on basis of property in the goods, and banks were in general unaffected by it because they do not have general property in the goods represented by the documents. By new Act they could rank as lawful holder but they would not be liable on the contract of carriage if they seek delivery. It will be good for liner shipowners by reason of fact that the reform puts sea waybills and EDI on a statutory footing. Indeed. It will be to the benefit international merchants where the b/l can be transferred after delivery of the goods. Section 2/2 provides that the b/l is capable of transferring contractual right against the carrier, since this all done

---

<sup>165[165]</sup> TODD, pg 129.

<sup>166[166]</sup> UNAN, pg.8 `the bank is deprived its security interest but it has not lost any proprietary right since it acquired none. Therefore its claim could only be based upon non-performance of a contractual rights.

<sup>167[167]</sup> situation in the Factors Act s.2 and exception of the rule *nema dat quod non habet*; WINFIELD & JOLOWICZ, pg. 607.

<sup>168[168]</sup> BOOLS, 144.

<sup>169[169]</sup> *Combe v Combe* (1951) 2 KB 215 `estoppel can not be used as a case of action however, so that in the absence of a contractual cause of action`; GLASS, pg. 8ha.

<sup>170[170]</sup> The test a `reasonable man would interpreted it` was used in *The Skip* (1935) P 134.

<sup>171[171]</sup> BOOLS, pg. 144.

<sup>172[172]</sup> BOOLS, pg. 136.

<sup>173[173]</sup> BOOLS, pg. 145.

before the b/l is 'spent' or 'exhausted' the transfer is not rendered ineffective. The intention is presumably to prevent transmission of the contractual rights after the b/l ceased to be a document of title. But there is still not very clear when this is. One of the main purposes of Act was to remove *Grant v Norway* rule. But despite willingness of the Law Commission analysis suggest that this rule in some circumstances could be still in force. It is regrettable. But we think that if there is any problem related to this rule it would be in minimum.

#### CARRIAGE OF GOODS BY SEA ACT 1992

An Act to replace the Bill of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents. [16<sup>th</sup> July 1992]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. 1. (1) This Act applies to the following documents, that is to say:

- (a) (a) any bill of lading;
- (b) (b) any sea waybill; and
- (c) (c) any ship's delivery order.

(2) References to this Act to a bill of lading:

- (a) (a) do not include references to a document which is capable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but
- (b) (b) subject to that, do include references to a received for shipment bill of lading.

(3) References to this Act to sea waybill are references to any document which is not a bill of lading but:

- (a) (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
- (b) (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with the contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which:

- (a) (a) is given under or for the purpose of a contract for the carriage by the sea of the goods to which documents relates, or for goods which include those goods; and
- (b) (b) is an undertaking by the carrier to a person identified in the document to deliver the goods which the documents relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to :

- (a) (a) the issue of a document to which this Act applies;
- (b) (b) the indorsement, delivery or other transfer of such a document; or
- (c) (c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may:

- (a) (a) make such modifications of the following provisions of this Act as the secretary of State considers appropriate in connection with the application of this Act to any case mentioned in this subsection; and
  - (b) (b) contain supplemental, incidental, consequential and transitional provision;
- and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

#### BIBLIYOGRAPHY

##### Books

- BENJAMIN - Sale of Goods, 5<sup>th</sup> ed., 1997.
- BOOLS D. Michael - The Bill of Lading, 1997.
- CHUAH Jason - International Trade Law, 2<sup>nd</sup> ed., 1998.
- DAY D. M., GRIFFIN B. - The Law of International Trade, 2<sup>nd</sup> ed., 1993.
- DEBATTISTA Charles - The Sale of Goods Carried by Sea, 2<sup>nd</sup> ed., 1998.
- SASSOON M. David - CIF and FOB Contracts, 1995.

- TODD Paul - Modern Bills of Lading, 2<sup>nd</sup> ed., 1990.
- TOOD, Paul 1998. - Bills of Lading and Bankers' Documentary Credit, 3th ed.
- WILSON F. John - Carriage of Goods by Sea, 3th ed. 1998.

### Articles

- BEATSON J., & J. J. COOPER - 'Right of Suit in Respect of Carriage of Goods By Sea', 1991 LMCLQ, 196.
- BRADGATE R., & WHITE MLR, 188. - 'The Carriage of Goods by Sea Act 1992' (1993) 56 .
- CURWEN N., JBL, 373. - 'An Acknowledged Defect in Bills of Lading', (1995) .  
Damaged at Sea', (1975) JBL, 273.
- FELTHAM J. D., - 'The Appropriation to a CIF Contract of Goods Lost or
- HOWARD T., - 'The Carriage of Goods by Sea Act 1992', (1993) JMLC, 181.
- POWLES D. G., - 'An Overview of the Implications of the Carriage of Goods by Sea Act 1992', (1993) JBL, 61.
- REYNOLDS F. M. B., - 'The Carriage of Goods by Sea Act 1992' (1993) LMCLQ, 436.
- REYNOLDS F. M. B., - 'Further Thoughts on the Carriage of Goods by Sea Act 1992 (UK), (1994) 25 JMLC, 143.
- TREITEL G. H., - 'Passing of Property Under CIF Contracts and the Bills of Lading Act 1855', (1991) LMCLQ, 1.
- UNAN S., - 'Difficulties Encountered by Banks in Securing Their Interest Through the Bill of Lading as a Document of Title', (1998) March/April, Deniz Hukuku Dergisi/Istanbul, 13.
- WHITE F. & BRADGATE R., - 'No Protection for Banks Against Fraud and Folly- *The Future Express*' (1994) LMCLQ, 350.
- WILSON F. J., - 'A Flexible Contract of Carriage- the Third Definition (1996) LMCLQ, 187.
-