

THE BILLS OF LADING ISSUED UNDER A CHARTERPARTY

Atty. Yuksel SAHIN^[1]

Introduction

The bills of lading being a document of title is a negotiable instrument and holds tremendous importance in international trade transactions. In practice, there arises a question in determining rights of parties that holds the bill. This problem becomes more sophisticated when a bill of lading is issued pursuant to a charterparty. Then in one hand we have the bills of lading contract on the other charterparty contract, each of them introduces its own terms. Complexity of this situation is a self-evidenced. It is crucial to identify which document is a governing document between the parties. Depending on that identification we would be able to identify rights and obligations of the parties. Being such a complex transaction it might be difficult to decide what rights parties have against each other. The primary practical consequence in decision who is the carrier concerns about arrest of the carrying ship. This underlying point may not expressly be mentioned in the cases and expressly may be a reason, nevertheless have important consequences. If it is decided that the contract is between the shipowner and the bills of lading holder that gives to the bills of lading holder to arrest carrying vessel to obtain security for his claim arising out loss or damage of the carried goods. On the other hand if it is decided that the carrier was the charterer there would be no right for arrest the carrying ship. So consequence of the approach which says the shipowner is the carrier, as generally, the bills of lading holder obtains security for the claim for loss or damage of the goods on the carrying ship. This article will try to introduce a historical evolution and rules in identification of the carrier and his rights. It would be difficult to understand current position if we do not classify each position with reference to context of transaction for which the bill is produced. It is possible to analyse situation in four primary categories. Our analyse will run from the basic one to more complicated and controversial one.

Basic Position

This position casts no difficulty in determination of the rights of the parties. It is to say that where shipowner being the carrier produces the bills of lading and gives to the shipper. In this position no charterparty is involved and it is contact of affreightment between the shipowner and the shipper. The shipper can be either CIF seller or FOB buyer, it is not changing a position. The shipper can receive from the shipowner either shipped bills or receive for shipment bill. These both have a different implications regarding being or not being binding upon the carrier. The latter one is not binding on the carrier because for example even dock authorities or warehouse keepers have an authority to issue a received for shipment bill. But this situation in no case indicates shipment of the goods itself therefore under the UK law they are not treating as a binding on the carrier. Only in some exceptional situations these bills can be treated as binding on the carrier. In a P&O carriage for example, P&O have its own warehouse and by issuance of a "received for shipment bill" would be binding on the P&O as a carrier.

Basic position shows that having the bills of lading issued between shipowner and carrier it would be the only and source of the contract of carriage. This article is not concern with further complications relating to transfer of the bills of lading to the third party.

But if there was a charterparty and bills of lading is issued this would be a mere receipt for the goods received on board.

Second Position

This would be appropriate to explain a situation where the ship is chartered (time or voyage) to the charterer. In this situation we have a relation between charterer and shipowner. The charterer uses this ship as a general ship and under contract of carriage charterer issues the bills of lading to the cargo owner. Our emphasise here is that the charter does not use the ship to carry its own goods but to give a service to different customers). The question is if the bills of lading issued for a goods under on a chartered ship if the bills of lading is held by someone other then the carterer (i.e. consignee or endorsee who is not the charterer) who are the parties to the contract of carriage evidenced by the bill? In order to answer this question it must be decided who is the carrier. In other words it must be decided whom is the bills of lading holder contracting with, the shiopwner or with the charterer^[2]?

Starting point here is *Sandeman v Scurr*^[3] case. The bills of lading holder in this case did not know who that ship was chartered and this was one of the key features in this case. The goods were damaged and claim was brought

^[1] Barrister with Istanbul Bar since 1991.

^[2] *The Rewia* (1991) 2LLR 325 and *The Manchester Trust v Furness* (1895) 2 QB 539, The bills of lading signed "for" or "by" the master is a contract between the bills of lading holder and the shipowner, because the master is the servant of the owner and would have a usual normal authority to bind the shipowner to the bill. The bills of lading holder is entitled to assume that the master has the normal usual to sign bill to bind shipowner. It is called "apparent authority" of the master to bind shipowner with the bills of lading contract.

^[3] (1866) LR, 2QB 86.

against the shipowner for amount of the damages. Fundamentally two questions were asked who signed the bills of lading and answer was that the bills of lading was signed on behalf of the master. Next question was whose agent is the master? The judge in this case said that except the charter by demise the master of a ship which is chartered is the employee of the shipowner and he is not an employee of the charterer therefore he can have only an authority to bind the shipowner. Therefore the bills of lading "signed by/or on behalf of the master" for the goods which are carried on the ship will evidenced the contract with the shipowner with the bills of lading holder^{4[4]}. In a case where there is a demise charter the master is acting on behalf of the charterer^{5[5]}. Another point, which we should consider, is how the bill is signed. This question is primarily to find who is the carrier. The signature put on the bills of lading by the master is a *prima facie* evidence that the carrier is a shipowner. There could be situations where form of the signature is outside of the scope of *Sandeman v Scurr*. In reality it is a common practice for a shipowner who run commercial line and by chartering another ship to supplement their fleet. People in the commercial world who use the line would know nothing about that. They would think they are serviced by this line; and unless it is clear to the contrary the contract should be regarded as being made between the line and the bills of lading holder. In a current English law practice the bills of lading holder would not be able to argue that he thought that he is contracting with the charterer giving priority to the bills of lading which is charterer's bill. This would be irrelevant under English law. In *The Rewia* court held that proper reading of the signature "signed for the master" would mean that the master is an employee of the shipowner and therefore he is a carrier. This decision is recent confirmation of the previous authorities. The Courts would have taken a different approach if in the bills of lading is clearly indicated that who is the carrier. In other words, if bill of lading indicates who is the carrier and the bill is signed "for the master" this bill would be a charterer bill^{6[6]} and charterer would be the carrier^{7[7]}. We can reach overall conclusion that only signature which indicates who the bill is signed for, would not necessary indicate who is the carrier priority must be given to construction of the bills of lading under underlying authorities. We are in an opinion that this current position in English law is challengeable in principle on basis of undisclosed principle in agency law and the cargo owner should be able to sue both the shipowner and the charterer. Therefore in a position where the clause says that the carrier is a charterer it should be possible to argue that the shipowner is the agent of the shipowner and shipowner's liability can be based on undisclosed principle.

We can address to the main question, "which contract would be the governing contract where the bills of lading holder is not the charterer"? The classic example for this situation is to be found in *The Calcutta SS Co. v Andrew Weir*^{8[8]} where the ship was chartered from the shipowner and was put as a general ship for the charterer's business. Later the bill of lading was issued to the one of the shippers. In the course of voyage the charterer lent some money to one of the shippers and took the bills of lading as a security for that loan. It was obvious from the given facts that the contract of carriage was between the shipowner and charterer. The real purpose of taking out this charterparty was to put the ship as a general ship and make money. This intention is perfectly justifiable in the commercial world. Therefore it would be correct to give a legal effect to the intention of the parties and treat the bill of lading contract as a governing document.

Third Position

On this position we have a similar triangular relation which is explained above. The shipowner's charter his ship to the charterer who is a shipper of the goods carried in the chartered ship. The shipper/charterer might be a CIF (or C&F) seller shipping the goods under a charterparty. When he gets bills of lading there is no contract based on the bills of lading because the contract is solely contained in the bills of lading. The bills of lading are operate as receipts for the goods shipped but not to constitute the contract of carriage. Therefore bills of lading issued is not binding on the shipowner^{9[9]}. The reason why the bills of lading are issued is to enable CIF buyer to receive the goods shipped. This is a current position under Turkish law as well^{10[10]}. If the charterer/shipper

^{4[4]} This decision was challenged many times mainly for two reasons. First, because the shipowner become bankrupt therefore is no point to sue him and second one is that the bills of lading holder sues wrong person (charterer) and his action against the shipowner is time barred.

^{5[5]} *Baumwoll v Furness* (1893) AC 8.

^{6[6]} *The Hector* (1998) 2 LLR 287.

^{7[7]} For example such an express clause can be found in a P&O's bill where it says "in witness whereof this waybill is signed for P&O Nedloyd, as Carrier".

^{8[8]} (1910) 1 KB 759.

^{9[9]} *Rodocanachi v Milburn* (1886) 18 QBD 67.

^{10[10]} TEKIL Fahiman, "Deniz Hukuku", Istanbul 1998, pg. 245. But Turkish law practice has rather different approach to the question of incorporation of the charterparty terms (including arbitration clause). If the bills of lading contain an incorporation words which say "the bills of lading is valid only with the charterparty" setting aside that the clause is very unusual, the court of appeal took view that these words are specific enough to incorporate the arbitration clause in the charterparty. The court of appeal has ruled that the consignee of the bills of lading shall be bound by the conditions in the bills of lading. Turkish Commercial code s. 1110/1 says that "the (contractual) relation between the carrier and the consignee is to be SET (not governed!) by the bills of lading".

transfers the bills of lading in that point of time bills of lading become the source of the contract and would govern relation between the shipowner and him (transferee).

The situation where the facts are slightly different the same reasoning will apply to decide which document is a governing document. In FOB contracts a buyer in order to receive his goods, he (the FOB buyer) concludes the charterparty with the shipowner. The bills of lading are issued to the shipper who is not buyer but the seller of the goods. The shipper in this position is the seller under FOB contract. The seller gets the bills of lading that later he transfers to the buyer. The buyer, in exchange of the bills of lading gets the goods of the ship at the port of destination. All point of the charterparty was to hire the ship and to make this ship available to the buyers goods. This situation is slightly different from the previous situation. There the charterer was the shipper whereas here the charterer is the transferee of the bill. So here we have situation where a shipper is a seller in a same time and we have a buyer who is transferee of the bill and got a charterparty with the shipowner. The question is which of these contracts are governing document? According to *The President India v Metcalfe Shipping Co. Ltd*^{11[11]} in this type of cases the charterparty is a governing document. In that case the shipowner was held to be able to rely on an arbitration clause in the charterparty. The way the Court took the decision appears to be that they consider the charterparty essential contract to carry the buyers goods. The intention behind that to issue the bills of lading, as far as the buyer is concern, was to operate as a receipt. The fact that the bills of lading transferred to him makes no difference. The FOB buyer who is chartering the ship will naturally see the charterparty as a governing document. Because the charterparty is a contract to carry the goods which are coming to him and it is natural for to treat this contract as a paramount contract not the bills of lading contract.

Fourth Position

This is a situation where there is a charterparty between the shipowner and charterer. Latest one concludes another contract with the sub-charterer and issues the bills of lading for the goods carried under the sub-charter. This position is common in a CIF chain sales where CIF seller sells the goods to the subsequent buyer. Really what is happening one person makes initial arrangement and he is pushing this charterparty further down to chain. If the sub-charterer puts his goods on board of the ship he would get bills of lading and normally it would evidence a contract between him and the shipowner. The question arises whether there is a one contract or two contracts of carriage. In *The SLS Everest*^{12[12]} Lord Denning argued that there was contract between sub-charterer and the shipowner. But this proposition was not analysed. This can be argued otherwise in context of FOB sale. Main idea of this thought is that the shipowner knows that bills of lading are going to be issued and he might be transferred. So he knows the bills of lading can create contract between him and transferee. But he already have an agreement with the head-charterer in certain extend wants to make sure that every the bills of lading issued under subsequent charterparty to match head-charterparty. Most shipowners use incorporation clause into bills of lading which says "all terms and conditions as the charterparty". This type of incorporation may only refer to terms and conditions in the chareterparty which are relevant to the charterparty. If something is not relevant to charterparty must be incorporated more specifically. The arbitration clause said to be incorporated specifically. But if there is a clause which says "all terms and conditions as per charterparty" which chareterparty is referred to? *The SLS Everest* dealt with this problem and said that reference is to head-charterparty.

Conclusion

The liability of the shipowner extends largely where the charterer issues the bills of lading. This is becoming increasingly complicated when the bills of lading are transferred to a third party. This article suggests a different way to identify the governing document between the parties. The method purported here is to look from the sales context. This approach although is complicated one it would give a clearer understanding the reason why the chosen document is paramount one.

This position is not in the UK law see. Yuksel SAHIN, "The transferability of arbitration clause from charterparty to the bills of lading and vice versa, comparative study between Turkish and the UK law"

^{11[11]} (1970) 1 QB 289.

^{12[12]} (1981) 2LLR 389.