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THE
Legal Lens
SERIES

Topic:

Bill of Lading in International Trade and the 'Contractual Carrier' Question

BILL OF LADING IN INTERNATIONAL TRADE AND THE ‘CONTRACTUAL CARRIER’QUESTION

1.0 NATURE OF A BILL OF LADING?

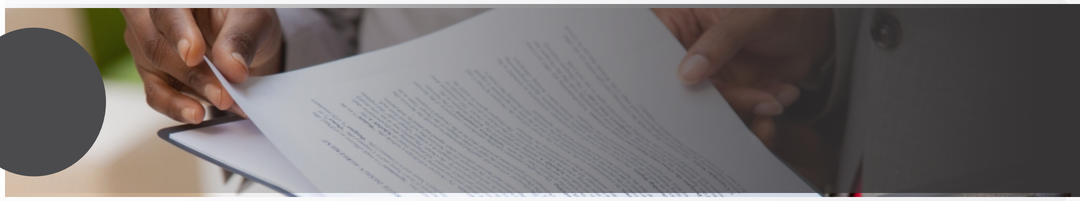
A Bill of Lading occupies a central place in the law governing the carriage of goods by sea. It performs several functions at once and is widely regarded as one of the most important commercial documents in international trade. Traditionally, it serves three principal functions:

1. It acts as a receipt for goods shipped;
2. It constitutes evidence of the terms of the contract of carriage; and
3. It operates as a document of title capable of transfer.

Ordinarily, a Bill of Lading is issued in the standard form of the carrier, who may be either the shipowner or a charterer. Although the Bill may be signed by the master of the vessel or by an authorized agent on the carrier's behalf, the person who signs it is not necessarily the carrier.

The obligation to issue a Bill of Lading may arise in several situations:
(a) where issuance is expressly provided for under the contract;
(b) where the contract of carriage itself requires issuance;
(c) where issuance is required by statute or applicable regulations, including Article III Rule 3 of the Hague Rules and Hague-Visby Rules.
Article III Rule 3 of the Hague Rules provides that, after receiving the goods into his charge, the carrier or the master must, on the shipper's demand, issue a Bill of Lading showing particulars including:
(I) leading marks necessary for identification;
(ii) quantity or number of packages;
(iii) apparent order and condition of the goods.

The duty to issue the Bill therefore arises primarily once the carrier has assumed responsibility for the cargo.
Within the Carriage of Goods by Sea framework, issuance and signing are legally distinct concepts. The Bill is issued by the carrier, but it may be signed by the master or by any person authorized by the carrier. A Bill signed by the master of the vessel carrying the goods is treated as having been signed on behalf of the carrier.



This distinction becomes especially important where a charter party exists, because the person who signs the Bill may not be the party that assumes contractual responsibility for the carriage.

2.0 RISK ALLOCATION IN CONTRACT OF CARRIAGE BY SEA BACKED BY BILL OF LADING HE PARTY HAVING POSSESSION, CONTROL, AND BENEFIT OF THE VESSEL

In Allied Trading Company Ltd. V. Gbn Line (1980-1986) 2 Nsc Vol. 2 348 @ 352 - 353, the Supreme Court laid down an important principle on responsibility in shipping transactions.
Oputa JSC stated:
"The test of liability seems to be if there is evidence that the ship owner has so divested himself of the vessel and of its use and benefit so that it is in the possession and power of someone else then that someone (or his servant and agent) will be liable and not the ship-owner."
The significance of this principle is that liability is not determined merely by legal ownership of the vessel. The Court's inquiry extends beyond title to practical and contractual realities, namely:

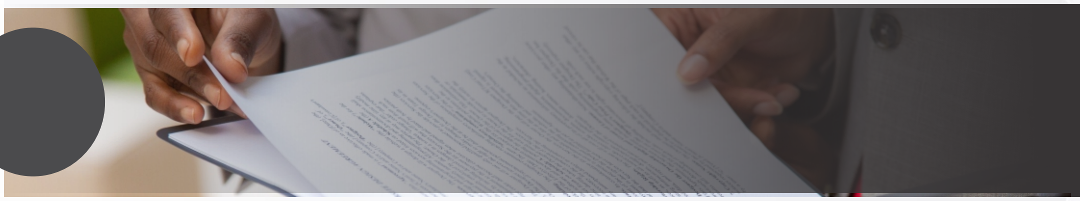
(a) who possessed operational control of the vessel;
(b) who enjoyed the use and benefit of the vessel;
(c) who contracted with cargo interests;
(d) who assumed obligations concerning the voyage.
Thus, where a shipowner has transferred substantial operational control through a charter party arrangement, the charterer may become the carrier and assume liability.

3.0 WHO IS A CARRIER?

Under the Carriage of Goods by Sea regime, "carrier" includes the owner or charterer who enters into a contract of carriage with a shipper.

The Supreme Court in Snnar (nigeria) ltd. & anor v. Partenreedri M. S. Nordwind Owners of the ship M. V. Nordwind & anor (1987) LPELR-3494(SC) (Pp. 38 paras. A) held that:

"Carrier includes the owner or charterer who enters into a contract of carriage with a shipper."
The implication is clear. The issue is not who owns the vessel, but rather who entered into the contract of carriage.
Consequently:
(a) a shipowner may be carrier;
(b) a charterer may be carrier;
(c) ownership alone does not determine liability.



4.0 BILL OF LADING AS A CONTRACT

Although commonly described as a contract of carriage, a Bill of Lading is not always itself the contract. It is not susceptible to regular contractual principles of offer and acceptance Analysis of a Bill of Lading may reveal:

(i) An antecedent contract
There may exist a prior contract constituting the operative agreement between parties, such as a charterparty. In such circumstances, the Bill merely evidences that agreement.

(ii) Parallel contracts
There may exist two or more contracts operating simultaneously.

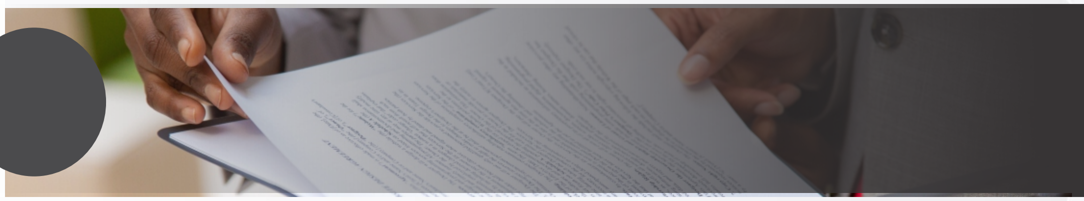
(iii) Superseding contracts
A prior contract may be superseded by a subsequent contract.
General principles of contract law become applicable only where there exists sufficient consensus ad idem between the interested parties.

In Sunrise Maritime Inc. v UVISCO Ltd(The "Hector") (1998) 2 Lloyd's Rep 287, it was judicially recognized that until a Bill of Lading supersedes an existing contract of carriage (other than a charterparty), the contract of carriage may be evidenced by the master receipt. Importantly, issuance of a Bill of Lading does not automatically supersede antecedent arrangements unless parties expressly agree through a supersession clause.

In the absent such agreement, both arrangements continue to exist; and the Bill merely evidences the earlier agreement. Notably also, where a Bill is issued to a charterer, it may not itself constitute the contract of carriage.

5.0 TERMS/TENAR OF A BILL OF LADING

A Bill of Lading usually contains two categories of provisions:
(a) contractual terms;
(b) representations or statements concerning cargo.
Contractual terms are ordinarily standard provisions appearing on the reverse side of the Bill.



Representations concerning cargo may include:

I. quantity;
ii. weight;
iii. marks;
iv. apparent condition.

Such statements generally do not constitute contractual promises.
At common law, representations bind the carrier only insofar as they are made by him or on his behalf.

In Compania Naviera Vasconzada v Churchill, the Court held that:
"The contract in the Bill of Lading is interpreted as one to deliver goods actually shipped and not necessarily goods stated to have been shipped."

6.0 IDENTIFICATION OF THE CONTRACTING CARRIER

The central issue in many carriage disputes concerns the identity of the contractual carrier.
Resolution of this issue requires consideration of:
(a) construction of the Bill itself;
(b) surrounding circumstances;
(c) authority for issuance;
(d) identity of the party assuming contractual obligations.
A survey of the cases shows procedural .... in identifying a contractive carrier.

I THE VENZULA

In *The Venezuela* **(1980) 1 Lloyd's Rep 393,** the Court was called upon to determine whether the shipowner or the charterer was the contracting carrier under the Bill of Lading.
The relevant facts were that the Bill of Lading identified CAVN as the carrier, although CAVN were in fact the charterers and not the owners of the vessel. Notwithstanding this identification, the Bill had been signed on behalf of the Master, a circumstance which was relied upon to contend that the Bill was an Owner's Bill.
The argument advanced was that because the Bill had been signed on behalf of the Master, the legal consequence was that the owners necessarily became the contracting parties. The Court rejected that submission. In doing so, the Court emphasized that the critical question was not merely who signed the document but rather who, upon a construction of the Bill as a whole, was represented to cargo interests as undertaking contractual responsibility.

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In the opinion of the Court:
"...it seems to me that if CAVN did not wish to contract as the carrier, then the bill of lading issued by CAVN should at least have made it clear with which company the shipper was entering into the contract of carriage. Until the shipper or holder of the bill of lading was told that Samjohn Governor was on time charter for the voyage in question there was nothing on either side of the bill of lading which indicated that anyone other than CAVN was contracting as carrier."

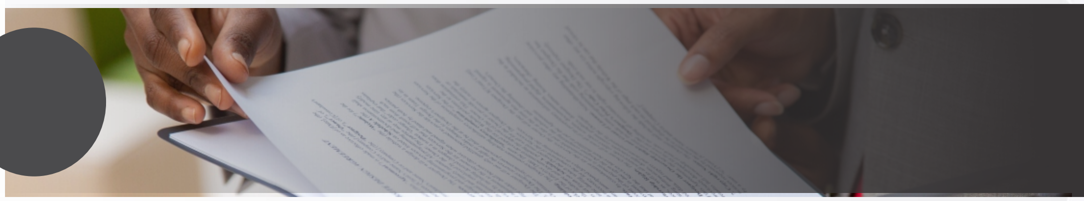
The Court therefore concluded that the surrounding circumstances and the contents of the Bill pointed overwhelmingly toward CAVN as the carrier.
The significance of the decision lies in the principle that a signature on behalf of the Master is not conclusive evidence that the Bill is an Owner's Bill. Rather, the Court must determine which party objectively assumed the role of carrier.

ii THE HECTOR

In *Sunrise Maritime Inc. v UVISCO Ltd (The Hector)* (1998) 2 Lloyd's Rep 287, the Queen's Bench Division considered a dispute concerning whether a Bill of Lading constituted an Owner's Bill or a Charterer's Bill.

The vessel in issue had been time chartered by the owners to US Express Lines (USEL) under New York Produce Exchange terms and was subsequently sub-chartered under a GENCON charterparty.
A Bill of Lading was signed by an associated company of the sub-charterers beneath the printed words:
"For and on behalf of the Master"

On the face of the Bill appeared a typed stipulation identifying USEL as the "Carrier". However, on the reverse side of the Bill there existed a demise clause suggesting that the owner of the vessel was the carrier.



Thus, an apparent inconsistency arose:
(a) the front of the Bill identified USEL as carrier;
(b) the reverse side suggested that owners were carriers;
(c) the signature suggested execution on behalf of the Master.
Rix J approached the issue by emphasizing that determination of the carrier required examination of the Bill as a whole and of the objective intentions disclosed by the transaction.
The Court rejected the proposition that signature "for the Master" automatically transformed the Bill into an Owner's Bill.
The Court stated:
"Carrier is the expression in which the party with the obligations to carry out the bill of lading contract is clothed."

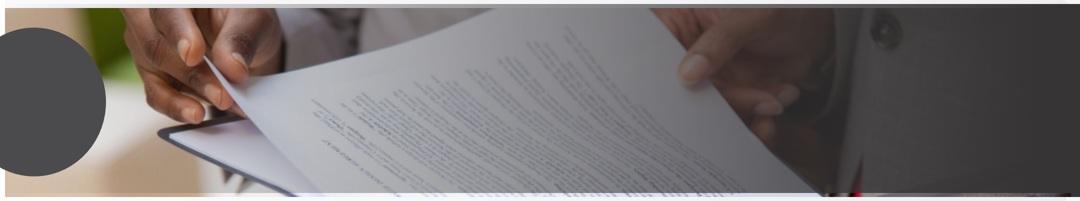
The Court further observed that the typed provision appearing on the face of the Bill identifying USEL as carrier possessed greater significance than printed standard clauses appearing on the reverse side.
Consequently, the Court held that:
(a) USEL intended to contract as carrier;
(b) cargo interests would objectively understand USEL to be the carrier;
(c) the Bill was therefore a Charterer's Bill.
The importance of *The Hector* lies in its establishment of the principle that identification of the carrier depends on objective construction of the Bill rather than on assumptions arising from signatures or vessel ownership.

iii THE STARSIN

The decision in **Homburg Houtimport B.V. v. Agrosin Private Ltd. (*The Starsin) (2003) 1 Llyod's Law Report 571,*** represents one of the leading modern authorities concerning identification of the contractual carrier under a Bill of Lading.

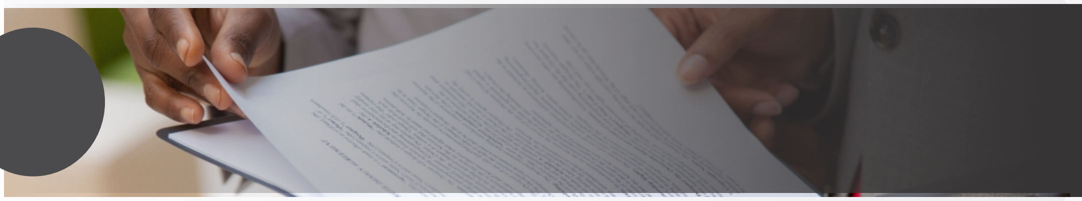
The defendant's vessel, *Starsin*, had been time chartered to Continental Pacific Shipping Ltd (CPS).
The Bills of Lading used were liner Bills of Lading on CPS forms.
The Bills were signed by port agents:
"As Agent for Continental Pacific Shipping"
The signature box also identified CPS as "Carrier".

However, on the reverse side of the Bills appeared an identity of carrier clause and demise clause suggesting that owners were the contracting parties.



At first instance, the Court held that the Bills were Charterer's Bills and that owners could not be liable as contractual carriers although the shipowner could be liable in tort.
The Court of Appeal subsequently reversed the decision.
On appeal to the House of Lords, the issue became whether owners or charterers were the contractual carriers.
The House of Lords unanimously restored the trial court's decision.
Lord Bingham emphasized that commercial persons dealing with Bills of Lading would naturally look first to the face of the document rather than obscure printed clauses appearing on the reverse side.
The House held that where the identity of the carrier is clearly disclosed on the face of the Bill, that identification takes precedence.
The House stated in substance that where the front of the Bill clearly identifies the carrier, one never reaches the demise clause because the language on the face of the Bill takes priority.
The House consequently held that:
(a) CPS was the sole carrier;
(b) owners were not parties to the contract of carriage;
(c) the Bills constituted Charterer's Bills;
(d) owners incurred no contractual liability under the Bills.

The importance of *The Starsin* is that it reinforced and strengthened the principles in *The Hector*, namely that:
(i) greater weight is attached to the face of the Bill;
(ii) standard printed clauses on the reverse cannot defeat clear indications on the front;
(iii) commercial certainty requires cargo interests to ascertain the carrier from the document itself.



7.0 PRINCIPLES ARISING FROM THE AUTHORITIES

The combined effect of The Venezuela, The Hector and The Starsin establishes the following principles:

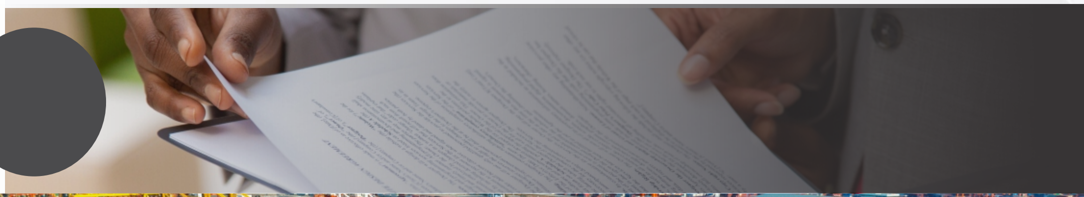
1. The identity of the carrier on the face of the Bill generally prevails over conflicting printed clauses.
2. Signature by the Master does not automatically create an Owner's Bill.
3. Courts consider the Bill as a whole.
4. Objective intention of parties is relevant.
5. Liability follows the party assuming contractual responsibility.
6. Ownership of the vessel alone does not determine liability.
7. A charterer may be the contractual carrier.
8. A Bill issued by a charterer may constitute a Charterer's Bill notwithstanding references to ownership elsewhere in the document.

8.0 CONCLUSION

The place of the bill of lading in the contract of carriage of goods by sea cannot be overemphasised. It is indeed the epitome of international trade, and understanding its features is critical in risk allocation in the event of an untoward incident arising out of the carriage, such as loss of, or damage to, goods, or short delivery of goods. At the heart of the legal conundrum is the identification of the contractual carrier of the goods, who almost always bears liability.

From the survey of the cases as explored above, the court adopts a test in allocating liability so that it is the person exposed to have direct control or dominion over the cargo during the voyage that bears liability. It is the writer's view that there is reason in this judicial method, as it helps to shield the actual owners of a ship from liability arising from charterparty back-to-back transactions, which are prevalent in international trade.

This exercise often entails a forensic examination of the bill of lading, thus highlighting the need for contracting parties to diligently negotiate the terms of a bill of lading, as the contents, as the cases show, have far-reaching implications that could not have been contemplated at the time of the contract.



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