

SECTION 1 OF THE UK BILLS OF LADING ACT 1855:- A CRYING NEED FOR REFORM

A. Introduction

1. The UK Bill of Lading Act 1855 (“the Act”) applies in Malaysia by virtue of Section 5(1) of the Civil Law Act 1956, as part of English mercantile law¹. It was passed by the English legislature in order to remedy a problem arising from the doctrine of privity of contract, which was that a buyer of goods, who had obtained the bill of lading² from the seller or shipper of the goods could not sue or be sued on the contract of carriage made between the shipper and the carrier, to which he was not privy.
2. This paper examines some of the difficulties posed by the application of Section 1 of the Act to the rights of the buyer of goods to sue the carrier under the contract of carriage for loss or damage to the goods, and suggests that the time is ripe for the legislature to intervene and provide a commercially workable solution to these difficulties³.
3. At common law, a contract of carriage of goods by sea, which is contained in or evidenced by the bill of lading issued by the carrier for the goods shipped, cannot be transferred by the transfer of the bill of lading because the consignee of the goods or transferee of the bill of lading is a stranger to the contract made between the carrier and the shipper⁴. Hence a buyer of goods who is the consignee or endorsee of the bill of lading cannot sue

¹ See:- “The Gang Cheng” [1998] 6 MLJ 468 where the plaintiffs as consignees and endorsees of the bill of lading were entitled to sue the defendant carriers for breach of the contract of carriage under Section 1 of the Act.

² Which is traditionally regarded as a document of title representing the goods in international sales.

³ The Act is no longer in force in the United Kingdom. It was repealed and replaced by the United Kingdom Carriage of Goods by Sea Act 1924 (“UK COGSA”), which came into effect on 16 September 1924. Singapore has also done away with the Act by enacting the UK COGSA as the Bills of Lading Act 1994 (Cap 384).

⁴ By virtue of the doctrine of privity of contract.

the carrier in contract for loss or damage to the goods, even though the risk of loss or damage to the goods was on him.

4. Further, a remedy in tort was unsatisfactory, for apart from having to prove negligence, an action in tort against the carrier could be fraught with problems if the consignee (or endorsee) did not have a proprietary interest (eg ownership) or possessory title to the goods (that is a right to delivery of the goods on discharge) at the time when the goods were lost or damaged⁵. For example a buyer of a part of bulk cargo who has not yet obtained the bill of lading is unlikely to have such rights to sue in tort, as the loss or damage to the goods would usually occur prior to discharge from the vessel, when the goods are still unascertained⁶. The carrier would also be unable to rely on any contractual limitation or exemption clauses against a claim in tort.
5. As the position of a buyer of goods who is the consignee or endorsee of a bill of lading was unsatisfactory, the Act was introduced to give the consignee or indorsee the right to sue the carrier in contract, on the terms contained in the contract of carriage as evidenced by the bill of lading.

B. The effect and interpretation of Section 1 of the Act

6. In essence, Section 1 of the Act provides that the transfer of the bill of lading also affects the transfer of the contract of carriage. Section 1 states:-

“Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned

⁵ This rule was enunciated by the House of Lords in **Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd (“The Aliakmon”)** [1986] AC 785.

⁶ Under Section 23 of the Sale of Goods Act 1957 (Act 382), property in unascertained goods is transferred to the buyer only when the goods are ascertained. This would usually occur after the goods have been discharged from the vessel and allocated to the contract.

shall pass upon or by reason of such consignment or endorsement, shall have transferred to and 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” (Emphasis added).

7. Although Section 1 was intended to give the consignee or endorsee of the bill of lading a right to sue the carrier in contract, it provides that such rights of suit are only transferred to and vested in the consignee or endorsee where property in the goods has passed to him upon or by reason of such consignment or endorsement. Accordingly, it can readily be seen that in order to take the benefit of Section 1 to sue the carrier in contract, the buyer of the goods lost or damaged must establish the following requirements:-
 - (a) That he is the consignee named in the bill of lading, or the endorsee of the bill of lading; and
 - (b) That property in the goods must have passed to him “*upon or by reason of such consignment or endorsement*”.

8. As will be explained below, establishing these requirements can give rise to many problems. In particular, the interpretation of the phrase “upon or by reason of such consignment or endorsement” is fraught with difficulty, as it links the endorsement of the bill of lading to the buyer with the passing of property in the goods which can be a difficult concept. It should also be noted that property in the goods does not pass by the endorsement of the bill of lading, but by the contract of sale of the goods, in pursuance of which the endorsement is made⁷.

⁷ Per Lord Bramwell in **Sewell v Burdick** (1884) 10 App Cas 74 at 105. In the case of specific or ascertained goods, property passes at such time as the parties intend it to pass:- See S.19(1) of the Sale of Goods Act.

9. Furthermore in international sales, the passing of property in the goods often occurs independently of the transfer of the bill of lading to the buyer, which is consequently in no way causative of the passing of property. For instance, in the oil trade, it is common for the sale contract to provide that title to the cargo passes to the buyer upon loading on board the vessel, and the bill of lading is only received by the buyer long after the cargo has been discharged from the vessel⁸.

The requirement for a document of title?

10. Section 1 gives the rights of suit to a consignee or endorsee of a “bill of lading”. It is trite that a bill of lading serves three functions, ie it is a document issued by the carrier as a receipt for the goods, it usually evidences the terms of the contract of carriage and it may be a document of title⁹. However, the Act is silent on the nature of the shipping document required under Section 1. In particular, it does not specify that the document must also be a document of title, although the authorities suggest that Section 1 requires for its operation, a bill of lading which is regarded as a document of title under common law¹⁰.
11. Consequently, it is arguable that the operation of Section 1 of the Act is only triggered by “order” bills of lading, and thus a bill of lading which is made out to a named consignee (that is a “straight” bill of lading) or a seawaybill or some other transport document issued by the carrier which

⁸ The cargo is usually discharged against a letter of indemnity provided by the receiver of the cargo.

⁹ A bill of lading made out “to order”, or to “the order of” a specified party would be regarded as a document of title at common law.

¹⁰ See Sale of Goods Carried by Sea by Charles Debattista at page 46 and the authorities cited therein. Indeed, this is arguably apparent from the preamble to Section 1 itself, the relevant part of which states “*whereas, by the custom of merchants, a bill of lading being transferable by endorsement, the property in the goods may thereby pass to the endorsee*”.

is not regarded as a document of title, will arguably not attract the operation of Section 1 of the Act¹¹.

12. This uncertainty is clearly undesirable as with the rapid growth of multimodal carriage¹² and containerisation, the issuance of non-negotiable transport documents such as “through”, and “combined transport” bills of lading have become increasingly commonplace, and there can be no justification for placing consignees under these documents on a different footing than a consignee or endorsee of a traditional “to order” bill of lading.
13. It has also been pointed out that by restricting the applicability of Section 1 to bills of lading which are regarded as a document of title, a “straight” bill of lading made out to a named consignee would leave the buyer and the carrier in a worse position that they would have been in, had there been other buyers interposed between the original shipper and the ultimate receiver¹³.

“Upon or by reason of such consignment or indorsement”

14. Whilst Section 1 requires that the buyer must hold the bill of lading and must have acquired property in the goods, the crucial question is whether the phrase “upon or by reason of” means that property in the goods must pass to the buyer contemporaneously as the consignment (ie shipment) of the goods, or the indorsement of the bill of lading.
15. There is no reported Malaysian decision on the interpretation of these words in Section 1. Hence, English authorities would be regarded as

¹¹ Although it is possible to contend that the common use of such transport documents and their acceptability to banks under documentary credits may support a custom that they are documents of title.

¹² That is carriage which is partly by sea and partly by some other mode of transport.

¹³ See:- Sale of Goods Carried by Sea by Charles Debattista at page 47.

highly persuasive. However, until the decision of the English Court of Appeal in The Delfini¹⁴, there had been no definitive construction of Section 1 by an English appellate court. Two views had been advanced by the authorities. The narrow interpretation of the words, which held that the property in the goods must pass at the same time as the consignment or endorsement¹⁵, and the wide interpretation where it was sufficient if the property passed to the buyer under a contract in pursuance of which a bill of lading was endorsed in his favour, whether before or after the consignment or endorsement¹⁶. Therefore, according to this interpretation, it was not necessary for the consignment or endorsement to occur simultaneously with the passing of property.

16. However, in The Delfini the Court of Appeal steered a “middle” path, rejecting both the narrow and wide interpretations of the section, and held that it was not necessary for property in the goods to pass simultaneously with the consignment of the goods or endorsement of the bill of lading, provided that the consignment or endorsement played an essential causal role in the chain of events by which property is transferred to the buyer. The words of Mustill LJ are instructive¹⁷:-

“The authorities being so thin, it is necessary to go back to the wording of Section 1 itself, read in the light of the preamble to the Act. I believe that the Act means what it says in this respect – if not, as more than one Judge has pointed out, in all respects. Section 1 presents two alternative situations in which the contract is transferred to the endorsee. The first is where the property passes “upon” the endorsement (and delivery of the document). This means that the passing of property is simultaneous with the endorsement, and that the endorsement is the act which brings it

¹⁴ (1990) 1 Lloyds Rep 252.

¹⁵ See Scrutton on Charterparties (19th Ed) at page 27.

¹⁶ For example as advanced in The San Nicholas (1976) 1 Lloyds Rep 8, and The Sevonia Team (1983) 2 Lloyds Rep 640.

¹⁷ At page 274.

about: albeit, as Sewell v Burdick teaches, it will do so only if that is what the parties intend. The second is where the property passes "by reason of" the endorsement. This must signify something different, since the expression is "upon or by reason of" not "upon and by reason of". In my judgment it means that although the endorsement of the bill is not the immediate occasion of the passing of the property, nevertheless it plays an essential causal part in it. (Emphasis added).

17. In **The Delfini** there was a chain of contracts for the sale of 100,000 tonnes of Algerian condensate. The shippers S sold the cargo on f.o.b. terms to V who sold part of the cargo to the receivers E. V chartered a vessel from the defendants to ship the cargo. Title to the cargo passed to V on shipment. When the vessel arrived at the discharge port, the bills of lading were still with the shippers S. The cargo was discharged against letters of indemnity provided by V to the defendants, with instructions to deliver the cargo to E without production of the bill of lading. E paid for the cargo against the letters of indemnity, and eventually received the bills of lading some 11 days after the cargo had been discharged. E then sued the shipowners for short delivery of the cargo under Section 1 of the Act.
18. The Court of Appeal held that Section 1 did not apply as the property in the goods did not pass to E "by reason" of the endorsements of the bills. Although the Court of Appeal held that the endorsement of the bill of lading need not be simultaneous with the passing of property in the goods, it maintained the link between the transfer of the bill of lading and the passing of property by imposing the requirement that the endorsement of the bill of lading must play an essential causal role in the passing of property.
19. In arriving at its decision, the court was not unmindful of the problems which would flow from their rejection of a wider interpretation of Section 1,

in order to give the buyer a remedy in contract, but nevertheless felt that their hands were tied by reason of the plain wording of Section 1¹⁸ and therefore the “real remedy” was to amend the Act¹⁹.

20. The English and Scottish Law Commissions, in reviewing the Act and proposing reform, regarded The Delfini as starkly illustrating the unsatisfactory results flowing from the requirements for transfer of contractual rights to the holder of the bill of lading imposed by Section 1, and felt that it seriously weakened the bill of lading as a commercial document. Their report on “*Rights of Suit in Respect of Carriage of Goods by Sea*” was published in 1991, and attached a draft Carriage of Goods by Sea Bill, which was subsequently adopted by the UK legislature and embodied in the UK COGSA.

C. Why reform is necessary

21. Although the interpretation of Section 1 in The Delfini would improve the position of some buyers of bulk cargo²⁰, it does not adequately address various other problems caused by the linking of the transfer of the bill of lading to the passing of property. For instance, it would not allow for the application of Section 1 where property either does not pass at all²¹, or passes independently of the transfer of the Bill of Lading, that is where the transfer of the Bill of Lading is in no way causative of the passing of property under the sale contract. The Delfini approach is also of no use in addressing cases where documents other than a negotiable bill of lading is used, and where the endorsee does not obtain full property in the goods.

¹⁸ Which required that property in the goods must pass “upon or by reason of” the consignment (or shipment) of the goods or endorsement of the bill of lading.

¹⁹ Per Mustill LJ At page 275, where he added that “... *The suggestion that amendment is necessary has been current for nearly a century*”.

²⁰ In that it is no longer necessary for property in the goods to pass simultaneously as the transfer of the bill of lading.

²¹ As was the case in The Aliakmon.

22. Some shortcomings of the interpretation of Section 1 adopted in The Delfini are illustrated below:-

- (a) Where the transfer of the bill of lading plays no part at all in the passing of property.

This was the case in The Delfini itself, where the property in the goods passed to the buyers at the latest²² when the end buyers paid their sellers, and the bills of lading were only endorsed 8 days later. Hence, property did not pass “by reason” of the endorsements of the bills of lading to the end buyers, who could not assert contractual rights against the carrier even though they suffered the loss and eventually received a duly endorsed bill of lading.

Another common example is in the oil trade, where it is usual for property to pass before and independently of the transfer or endorsement of the bill of lading, as there are long chains of contracts and comparatively short voyages. In such cases, the cargo changes hands many times during the voyage and the bill of lading is invariably received by the end buyer long after discharge of the cargo, and after he has already paid for and acquired title to the cargo²³. Also, as payment is usually made by letter of credit, the documents presented for payment (including the bill of lading)

²² The appeal judges were divided on when exactly property passed. For instance, Mustill J felt it was when the sellers issued their telexed invoice to the end buyers and Woolf LJ thought it occurred on physical delivery of the goods from the ship, or possibly on payment. However, all the judges were unanimous in their view that the endorsement of the bill of lading to the end buyers did not play an essential causal part in the passing of property. This only serves to illustrate that the concept of passing of property can be complex in commercial transactions as it is difficult to pin point when exactly property passes to the buyer.

²³ The cargo is usually discharged against a letter of indemnity furnished by the receiver of the cargo, and without production of the bill of lading.

would still be in the banking channels when the vessel arrives at the discharge port, and only come into the hands of the end buyer or receiver long after the goods have been discharged. Although in such a situation the bill of lading is not used to deliver the cargo, nevertheless traders legitimately expect that the contractual rights against the carrier would accompany the bill of lading, and pass ultimately to the end buyer. This makes commercial sense as the shipper has been paid in full and would have no interest in suing the carrier.

- (b) Where property in the goods does not pass at all, although the buyer is on risk.

Generally in “CIF” or “C&F” contracts, risk in the goods passes to the buyer on or from shipment. However, property passes in the case of specific or ascertained goods, when the parties intend it to pass²⁴. This may occur when the contract is made, or on shipment or payment or delivery, as the parties intend. Where the goods are unascertained, as in the case of a sale of a part of bulk cargo, property only passes when the goods are ascertained²⁵, and this occurs on delivery, when a specific portion is allocated to the contract. Hence, in cases where property in the goods is meant to pass only on delivery, there will be no passing of property if the goods are not delivered, because they are lost in transit²⁶.

The seller may also retain a right of disposal of the goods thereby preventing property in the goods from passing to the buyer²⁷. This

²⁴ S.19(1) Sale of Goods Act.

²⁵ S. 23 Sale of Goods Act.

²⁶ This arose in The Aramis (1989) 1 Lloyds Law Reports 213, in the case of a claim under one of the bills of lading.

²⁷ See S.25(1) of the Sale of Goods Act, where the bill of lading is made out to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal – S.25(2).

was the case in The Aliakmon²⁸ where property did not pass to the buyers because the sellers had allowed the bill of lading holder to claim the goods as their agents, and this amounted to a reservation in the rights of disposal of the goods by the sellers.

- (c) Where the consignee or endorsee does not obtain full property in the goods.

In the well known case of Sewell v Burdick²⁹, the House of Lords held that for Section 1 to apply, the absolute property, as distinct from special property vested in for instance a pledgee, must pass to the endorsee of the bill of lading. Therefore an endorsee of the bill of lading, such as a bank or financial institution, who obtains the bill of lading as security for credit facilities extended to the shipper or receiver is regarded as a mere pledgee of the goods and cannot rely on Section 1 to sue the carrier, if he wishes to realise his security and obtain the goods³⁰.

D. Suggested reform

23. The English and Scottish Law Commissions were of the view that the various problems caused by linking the rights to sue the carrier with the transfer of property in the goods were a “serious defect” in English law which defeated the legitimate expectations of the parties involved, which is that the buyer of goods who is on risk during the sea transit should be able to assert remedies against the carrier for loss or damage to the goods. They considered that the existing techniques to circumvent the

²⁸ [1986] AC 785.

²⁹ (1884) 10 AC 74.

³⁰ Equally the liabilities under the contract of carriage, such as the payment of freight and other charges to the shipowner are not transferred to the pledgee of the bill of lading. The rule in Sewell v Burdick was applied in Bank of China v Brusgaard Kiosterud & Co & Ors [1956] 1 MLJ 124 and The “Jag Shakti” [1986] 1 MLJ 197.

requirements of Section 1 were inadequate³¹, and recommended that the problems would be best addressed by eliminating altogether the link between the transfer of contractual rights under the bill of lading, and the passing of property, so that any “lawful holder”³² of a bill of lading would be entitled to assert contractual rights against the carrier.

24. The recommendations of the Law Commissions were accepted by the UK legislature, which repealed the Act and replaced it with the UK COGSA, which came into force on 16 September 1992.

25. In short, the salient features of the UK COGSA are:-

- (a) It applies not only to negotiable bills of lading but also to non-negotiable shipping documents such as seaway bills, delivery orders, and multimodal transport documents³³.
- (b) It removes completely the link between the transfer of contractual rights under the bill of lading and the passing of property in the goods³⁴.
- (c) It draws a distinction between the transfer of contractual rights and the transfer of contractual liabilities such that the latter are not imposed automatically on every holder of a bill of lading, but only on those holders who seek to enforce rights conferred on them by

³¹ These were the so-called wide interpretation of Section 1 (which was expressly rejected by the Court of Appeal in The Delfini), claims under an implied contract arising between the carrier and the bill of lading holder on the bill of lading terms under the principle in Brandt v Liverpool, Brazie & River Plate Steam Navigation Co Ltd [1924] 1 K.B. 575, assignment of the sellers rights against the carrier to the buyer and claims in tort.

³² Which was defined in the draft Bill attached to the Law Commissions Report as a consignee named in the bill of lading or any endorsee (or holder of a “bearer” bill) who is in possession of the bill in good faith. This definition was subsequently adopted in the UK COGSA.

³³ These would include “through” and combined transport bills of lading. Section 1 of the UK COGSA is expressed to cover “any” bill of lading, seaway bill and ship’s delivery order. Therefore multimodal transport documents would fall within its ambit.

³⁴ Section 2 of the UK COGSA. This is considered further below.

the said act against the carrier³⁵. This was considered to be commercially important to ensure that pledgees and others holding the bill merely as security should not become liable for freight and demurrage unless they sought to enforce their security.

26. The provision in the UK COGSA dealing with the transfer of contractual rights is Section 2(1) which provides that a person who becomes the "lawful holder"³⁶ of a bill of lading (or a person to whom delivery of the goods to which a seaway bill or ship's delivery order relates) shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.
27. Hence, the provision allows the lawful holder of the bill of lading to assert contractual rights against the carrier irrespective of the passing of property. The severing of the link between the transfer of the bill of lading and the passing of property upon or by reason of the consignment or endorsement of the bill of lading solves the problems in relation to the sale of parts of bulk cargo and the other difficulties faced by receivers of cargo (and banks and financial institutions who have taken the bill of lading as security) as considered above.
28. As the legislation allows the lawful holder of the bill of lading to assert rights against the carrier after delivery of the goods, certain safeguards have been provided in order to ensure that trafficking in bills of lading merely to give causes of action against the carrier, falls outside the ambit of the legislation. Hence, Section 2(2) provides that an endorsement of a bill of lading after delivery of the goods will transfer the contractual rights only if the endorsement was effected in pursuance of contractual or other arrangements made before delivery of the goods.

³⁵ The transfer of liabilities under the bill of lading is dealt with in Section 3 of the UK COGSA.

³⁶ Which is defined in Section 5 as any consignee identified in the bill of lading or endorsee or holder of a bearer bill who is in possession of the bill in good faith.

29. As for the transfer of liabilities under the contract of carriage, Section 3(1) of the UK COGSA provides for 3 situations where a holder of a bill of lading will become subject to the same liabilities under the contract of carriage:-
- (a) Where the holder takes or demands delivery from the carrier of any goods to which the bill of lading relates;
 - (b) Where the holder makes a claim under the contract of carriage with regard to the goods in respect of which the bill of lading was issued; and
 - (c) Where the holder takes or demands delivery of the goods from the carrier before contractual rights vest in him under Section 2 of the said act.

E. Conclusion

30. It is respectfully submitted that Section 1 of the Act is a relic of the law which should be laid to rest so that buyers of goods who obtain the bill of lading can assert contractual rights against the carrier in the event of loss or damage to the goods. The de-linking of the transfer of the bill of lading with the passing of property in the goods would effectively remove the problems associated with ascertaining when exactly property passes, and whether the transfer of the bill of lading played an "essential causal role" in the passing of property in the goods.
31. This is also in line with the commercial expectations of traders and financiers, in that the holder of the bill of lading should be able to assert remedies under the contract of carriage directly against the carrier, in the

event of loss or damage to the goods, irrespective of the passing of property in the goods. The law must be adapted to suit the needs of modern trade, and any improvement in English law along these lines should be implemented in Malaysia, where our commercial law is closely modelled along English law.

JAINIL BHANDARI
PARTNER
LEE ONG & KANDIAH