



## UNDERSTANDING THE BILL OF LADING FRAUDS

**Dr. Dan Malika Gunasekera, Attorney-at-Law, Legal Counsel, LLM (Utrecht), PhD (Hamburg), Former Dean, Faculty of Management, Humanities & Social Sciences, CINEC Campus, Former Executive Director, Ceylon Shipping Corporation. Tel: 0777577179 / E-mail: gdmdsg@live.com**

### What is a Bill of Lading?

- A document issued for the carriage of goods by sea showing among other things, the parties to contract of carriage, description of goods, voyage, vessel, undertakings, terms & conditions
- It is considered a 'receipt', 'evidence of a contract', 'document of title', 'document passing the constructive possession of goods'
- Issued in various forms by either the actual carrier or contractual carrier to the party entering into carriage contract or bestow the carriage obligation
- Every single Bill of Lading is issued in three sets to remain individually with the actual carrier, contractual carrier, and cargo owner

### What are the different types of Bills of Lading?

- **Received for Shipment B/L:** issued by a Carrier when the goods are received at a time prior to the actual loading onto carrying vessel
- **Forwarder's B/L (House):** issued by a 'contractual' carrier undertaking the responsibility as if he is the Carrier notwithstanding that he physically carry the goods
- **Combined Transport B/L (Multimodal):** issued for carriage involving more than one mode of carriage such as sea, air, rail, and/or road thus undertaking responsibility for the entire transportation
- **Shipped B/L:** issued depicting the actual receiving on board whereby accepting responsibility for being on board whether or not the goods are actually on board
- **Ocean B/L (Master):** issued by an actual Carrier inducing responsibility from loading (goods passed from the shackles to on-board the vessel) up to discharge
- **Shipowner's B/L:** whereby the shipowner undertakes carriage as Contractual Carrier particularly as Private Carrier

- **Charterer's B/L:** issued under a Charterparty of a ship operated by the Shipowner where Charterparty clauses are incorporated into the Bill of Lading
- **Liner B/L:** where the Carrier (the Liner) undertakes responsibilities of loading, stowing, and discharging the goods

### **Why Bill of Lading is considered a Document of Title?**

- According to *Official Assignee of Madras v Mercantile Bank of India Ltd [1935]* the BL is the only 'document of title' recognised at common law
- It is a document by which the 'holder' acquire constructive possession in the goods
- As per *Lickbarrow v Mason [1791]* the indorsement of a BL could transfer not only possessory rights but also rights of ownership in the goods
- In *Sanders Bros v Maclean & Co [1883]* it was held that during the period of transit when the goods are in the hands of the carrier, the handing over of BL is recognised as symbolic delivery of cargo to indorsee
- Based on its 'negotiability' character, the indorsee cannot transfer any rights in the goods greater than those he already has as also held in *Kum v Wah Tat Bank Ltd [1971]*
- BL is always 'negotiable' when made out 'unto order or assigns' but in the absence of such endorsement, the BL is 'non-negotiable' as held in *CP Henderson & Co v The Comptoir D'Escompte de Paris [1873]*
- As per *Stettin [1889]* the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of BL
- According to *Meyerstein v Barber [1870]* a short delivery would not entail that a BL is exhausted until the buyer has actually received full and complete delivery of the goods
- The obligation of the carrier to effect 'due delivery' extinguishes with the obtaining of the original BL, and if fail to do; the contractual liability would remain against the carrier by the shipper

### **In what circumstances a carrier could be sued for his liability?**

- As the BL operates as an 'evidence of a contract' as well as a 'document of title'; there may exist of several occasions where an action against the carrier for failing to perform his duties could be made by either the shipper or the consignee
- It must be handled in conjunction with the 'terms on carriage' as per the INCOTERMS as well as the 'holding of the BL'
- In the use of the terms FOB / FCA / DAT / FAS, the consignee obtains right to sue in general while in CIF / CFR / DDP / CIP, the shipper obtain right to sue in general; but the circumstances may vary depending on the 'holding of BL'
- When the BL has been endorsed against payment for goods in favour of the consignee where right to sue or be sued rests with consignee
- As held in *Dunlop v Lambert [1839]* shipper has the right to sue if the goods have been sold prior to delivery and while on-board where consignee is the indorsee of BL
- On presentation of BL and taking of delivery would allow the consignee to sue the carrier for any fault based on BL

- A claimant against any type of the breach of responsibility of the carrier that result in his liability can bring a legal action under Law of Contract or Law of Tort
- In order to bring an action under Law of Contract, the claimant must show the presence of a valid contract between the carrier and the cargo owner
- Under Law of Tort, the claimant can bring an action in negligence or in bailment as of a trust between the parties, namely the bailor and the bailee

### **The case of P&O Nedlloyd BV v Utaniko Ltd / Maersk Line v East West Corp [2003]**

The claimants from Hong Kong agreed to sell certain goods to a buyer in Chile on cash against delivery. The goods were sent on board a liner operated by P&O Nedlloyd and Maersk. The BL named claimants as shippers and the buyer as notify party while they were consigned to the order of buyer's bank in Chile. Goods were released by the line without presentation of BL. The buyer later refused to pay the bank, and the bank returned the BL to shipper without indorsing them.

The court held that the claimants were unable to claim in contract as the BL was not indorsed to the consignee. The bank was not the holder of proprietary interest of the goods nor the consignee who had not paid the price. But however, an action in bailment could lie against the carrier as the claimants retained the right to immediate possession of the goods at all material times leaving the responsibility for loss or damage on the carrier being the bailee.

Therefore, the carrier was in breach of duty in bailment, and was responsible to deliver up the goods to a person entitled to them against the presentation of an original BL

### **What is the applicable law in Sri Lanka for like scenarios?**

The law applicable for Bills of Lading in Sri Lanka is two folded. On one hand, the common law, which is also known as the case law or the decisions of the court apply to BLs including the English Law that has a persuasive value under Civil Law Ordinance, and the Carriage of Goods by Sea Act No. 21/1982 (COGSA)

### **How does the COGSA apply for Bills of Lading in Sri Lanka?**

This law applies to carriage of goods by sea only when a bill of lading or any similar document of title has been issued expressly or by implication in a contract of carriage

This law also gives the force to the Hague Visby Rules of 1968 (HVR) to be applied within the application of COGSA.

In such context, the COGSA applies only if:

- (a) the BL is issued in a Contracting State of HVR;
- (b) the carriage is from a Contracting State of HVR;

- (c) the carriage is from a Sri Lankan port to any other port whether in or outside Sri Lanka;
- (d) the contract contained in or evidenced by the BL provides the application of HVR;
- (e) The BL issued in Sri Lanka is mandatorily to be applied the HVR

## **What are the main features of COGSA in relation to BLs?**

### **Obligation to issue BL**

It is mandatory to issue the BL but on demand of the shipper with a liberty to either make it 'clean' or 'claused'

If any similar document has been issued previously to the issuance of 'shipped BL', such documents shall be surrendered

### **Convincing Acknowledgment**

An issued BL is prima facie (on the face of it) an evidence of the receipt of goods by the carrier as described in the BL

### **Shipper's Obligation**

Shipper is obliged to guarantee the accuracy of all details pertaining to shipment and shall indemnify carrier for any loss or damage resulting from any inaccuracies and shall not hold any liability in events of mis-statements

### **Notice of Loss or Damage**

For any apparent damages sighted at removal shall be brought to the notice of the carrier immediately in writing while any unapparent damages shall be brought to such notice in writing within 3 days from removal

### **Extent of Liability**

Due to the right to limit liability, the carrier shall only be liable to the details mentioned in BL unless nature and value have been pre-agreed by the carrier

## **Claims that give rise to Frauds**

- Wrongful Delivery
  - Handing over of the goods due to lack of care and mis-understanding of the lawful owner that would take place due to improper indorsements in the Bill of Lading document.
- Mis-Delivery
  - Handing over of the goods to someone else than the lawful owner or improper delivery to another who is not the lawful owner as per the Bill of Lading or mis-judgment of the right Consignee.
- Short Delivery

- Anything that may cause in handing over of wrong quantity in violation of stated quantity in the Bill of Lading coupled with criminal misappropriation of the goods duly handed over to the carrier.
- Mis-Statement
  - Wrong information or incorrect mentioning of facts in the Bill of Lading thereby causing prejudice to the lawful owners of the goods.
- Mis-Representation
  - Where the Bill of Lading does not tally with the goods, owners, or delivery process leading to disparity between document and delivery of the goods.
- Statutory Claims
  - Failure to abide by the statutory requirements under the Law including the Carriage of Goods by Sea Act and corresponding Hague-Visby Rules that require the taking of special steps and procedures.

### **Instituting Criminal Liability**

- What is a ‘Documentary Fraud’?
  - According to S. 452 of the penal Code of Sri Lanka, “Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to the Government, or to support any claim or title, or to cause any person to part with property, or enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery”.
  - According to S. 453, “A person is said to make a false document – (a) who dishonestly makes, signs, seals, or executes a document or part of a document, or makes mark denoting the execution of a document, with the intent of causing it to be believed that such document or part of a document was made, signed, sealed, or executed, by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed; or (b) who, without lawful authority, dishonestly, or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or (c) who dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him he does not, know the contents of the document or the nature of the alteration”.

- In what circumstances can this happen?
  - E.g. (1) A has executed a BL by inserting a different date than that of the exact and delivers to B purporting it to have been done correctly, and intending that it may be believed by B . A commits forgery
  - E.g. (2) A without authority of B places a signature / seal on a BL with the intention of passing the goods to C and obtain charges. A commits forgery.
  
- What is a ‘document’ as laid down by the Penal Code?
  - The word ‘document’ denotes any matter expressed described upon any substances by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, or which may be used, as evidence of that matter.
  - E.g. a writing expressing the terms of a contract which may be used as evidence of the contract, is a document.
  
- What would fall within the meaning of ‘fraudulently’?
  - A person is said to do a thing fraudulently if he does that thing with the intent to defraud, but not otherwise.
  - Both the criminal elements of *mens rea* (guilty mind) and *actus reus* (guilty act) should be present in committing such fraud.
  
- Can any act by mistake constitute a fraud?
  - Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it.
  
- What if the ‘act’ was done without ‘criminal intent’?
  - Nothing is an offence merely by reason of its being done with knowledge that is likely to cause harm if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property.
  - It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify excuse the risk of doing the act with the knowledge that it was likely to cause harm.
  
- What is the act was done in good faith for the benefit of a person without consent?

- Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith even without that person’s consent, if the circumstances are such that it is impossible for that person to signify consent,... provided that this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.
  - Mere pecuniary benefit is not benefit within the meaning of this.
- Can anyone abetting or aiding could be held liable?
    - A person is said to abet if he abets the commission of any act which is an offence if committed within the territory of Sri Lanka and beyond Sri Lanka which would constitute an offence if committed in Sri Lanka.
    - A person abets the doing of a thing who (a) instigates any person to do that thing; or (b) intentionally aids, by any act or illegal omission, the doing of that thing.
    - A person who, by willful misrepresentation or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
    - Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence voluntarily conceals by any act or illegal omission, or makes any representation which he knows to be false is said to be acting in concealment of facts associated with it.
    - A conspiracy for the doing of a thing is when two or more persons agree to do that thing or cause or procure that thing to be done.
    - Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.
  - What would amount to ‘cheating’?
    - According to S. 398, “whoever by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit if he were not so deceived, and which act or omission causes or likely to cause damage or harm to that person in,... property... is said to ‘cheat’.

### **Case Law on Documentary Fraud and false Documents**

- *D. P. Nanayakkara v. Republic of Sri Lanka* (1993)

The word 'makes' appearing in S. 452 should be construed in the border sense of creating or bringing into existence, the impugned document and not in the narrow sense of only writing the impugned document. Such an interpretation is necessary in a situation where the impugned document is typed or printed.

- *De Zilva v. Cassim* (1903)

No man can set up his own fraud to avoid his own deed.

- *The King v. Peiris* (1946)

Using a forged document as genuine is an offence itself. Canekeratne J in interpreting the term 'fraud' relied upon the Roman Jurist, Labeo who described it as every kind of craft, fraud or covin used for the purpose of circumventing or deceiving another but further expanded by stating that it is a concept of the utmost possible generality and comprehensiveness that may be described in wide and unrestricted terms.

- *Emperor v. Raghunath Sing* (1946)

Lord Camdon CJ stated that "nothing is said to be done or believed in good faith which is done or believed without due care and attention".

- *Rex v. Periatamby* (1902)

Moncreiff, A.C.J described the meaning of 'defraud' as implying the infliction of some kind of loss upon the person defrauded, and it is not mere deceit.

### **Connected Charges outside the ambit of Frauds**

- Criminal Breach of Trust (CBT)

- According to S. 388 of the Penal Code, "whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust".
- E.g. A, a carrier entrusted by Z with property to be carried by water, A dishonestly misappropriates the property. A has committed criminal breach of trust.
- The dishonest intention of the person entrusted with the transaction is a must to be established by the person who entrust the property on him. The word 'dishonestly' is defined as "whoever does anything with he intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly" while 'wrongful gain' is defined as "gain by unlawful means of property to which the person gaining is not legally entitled" and 'wrongful loss' as "the loss by unlawful means of property to which the person loosing it is legally entitled".



- Wrongful gain includes wrongful retention of property as well as when such person acquires wrongfully while wrongful loss includes being wrongfully kept the person so entitled out of property as well as when such person is wrongfully deprived of property.
  - According to S. 389, whoever commits criminal breach of trust shall be punished with imprisonment either rigorous or non-rigorous for a term which may extend to three years, or with fine, or with both. As per S. 390, whoever commits CBT as a carrier, warfinger, or warehouse keeper shall be punished with a maximum of seven years imprisonment and a fine.
-