

Mohammad Abdur Razzak: “Bill of Lading: A Pivotal Document in International Sale Transactions” published by Bangladesh Bar Council in its law journal titled “Bangladesh Legal Decision” (BLD) in November Volume, 2005, Pp 29-44.

BILL OF LADING: A PIVOTAL DOCUMENT IN INTERNATIONAL SALE TRANSACTIONS

Mohammad Abdur Razzak

LL.B & LL.M: University of Dhaka; LL.M: Nottingham University, UK

Advocate

Supreme Court of Bangladesh (High Court Division)

1. Introduction:¹

“Sale of goods” is a common phenomenon in modern world. This transaction may take place among the merchants trading within the territory of a country. The contract of sale of goods may also be concluded between two or more persons carrying on their trade in different countries governed by different legal systems which involves cross border movement of goods. In sale transactions of the latter kind, which is called “contract of international sale of goods”,² a question invariably posed as to how the seller will accomplish his obligation to deliver the stipulated goods to the buyer beyond his country. Usually, the parties at the very outset settle whether the goods will move by water ways, air ways or by road or by a combination thereof. The water ways being less costly and widely spread out reaching the remote corners of the earth majority of the sale transactions are effected over water ways by sea going vessels. At this stage, the parties to a sale transaction get involved in contract of afreightment in order to obtain the service of a sea going vessel for onward transmission of the goods.³ The contract of afreightment may either be in the form of charterparty⁴ or in the form of bill of lading. Generally a bill of lading, which is invariably connected almost all international sale contracts involving sea carrier, is issued after the shipment of the goods by the seller which prima facie shows that the shipment is accomplished and also allows the seller to define the destiny of the goods represented by the bill.

The purpose of this paper is to examine the versatile roles of bill of lading and to assess how far bill of lading facilitates international sale of commodities, in particular, the transactions having maritime elements in it. The paper, in the first place, reviews the

¹ I gratefully recognize the kind advice of my learned colleagues, dr. Shirin Sharmin Chaudhury and Mr. Shamsul Hasan (Barrister-at-Law), which was greatly beneficial for me to complete this work.

² See more on it paragraph 2 below.

³ In international sale on FOB terms usually it is the buyer who undertakes to procure a ship; but the duty rests on the seller if the contract is made on CIF terms.

⁴ A charterparty is an agreement by which the owner of a ship makes the vessel, or a principal part of it, available with or without crew to another, called the charterer. Charterparties fall broadly into two groups, those under which the owner parts with control of the vessel for the period of the charter, and thus has no responsibility for the carriage of goods on the vessel, and those under which the vessel remains in the control of the owner and the charterer merely has the right to direct for what period of time or what voyages the vessel is to be used and what cargo is to be carried. The former is known as 'bareboat' charter, or charter by demise. The latter is divided primarily into time charter, where the ship is chartered for a specified period of time, and voyage charter, where it is chartered for a designated voyage. Under a time charter, the hire is fixed by reference to the capacity of the vessel, irrespective of whether this is fully used by the charterer. Under a voyage charter, freight is calculated according to the tonnage actually shipped. See John Wilson, *Carriage of Goods by Sea* (2nd edn).

nature of international sale of goods involving maritime elements, nature and historical evolution as well as the functions of the bill of lading evolved through the passage of time by the activism of the judiciary and the legislature to answer the need of the merchants. As it progresses, the paper, as well, focuses on the evidentiary value of the representation made in the bill of lading and its significance in determining the rights and obligations of the parties related to the contract of sale and freightment and associated transactions with particular reference to the rules of international and municipal law so far developed on this area.

2. Contract of international sale of goods:

Transactions may be called “international sale of goods” where the place of business of the seller is in one state and that of the buyer in another and where performance of the contract involves some steps to be adopted by the parties beyond their territory. Here the two parties are governed by different legal systems, enforcement steps by one party will usually have to be taken in the other's jurisdiction.⁵ It is evident from Article 1 of the “United Nations Convention on Contracts for the International Sale of Goods” that such a character of international transaction has obtained recognition at the international level. It is, therefore, apparent, in such sales the presumption as applicable to conventional domestic sale contracts that “the delivery occurs at seller's place” does not apply.⁶ Consequently, the seller has to assume, at least, duties to accomplish some of the export arrangements. It is, for this reason, found that the international sale contracts are predominantly characterised with delivery terms describing the extent of the seller's liability to deliver the goods to buyer.

Under Incoterms 1990 published by International Chamber of Commerce (ICC) international trade terms are divided into four groups, namely, E-term, F-terms, C-terms and D-terms. Each of these terms states the extent of liability which the seller shall incur.⁷ Only f.a.s., f.o.b., c.f.r, and c.i.f. One or other of these terms, or variants of them will be employed by the seller if and when buyer requires him to ship the goods. Other terms are applicable to any mode of transport. In the foregoing pages the discussion on bill of lading presupposes that the seller has made the delivery either on F-terms or C-terms.

3. Bill of lading:

3.1 Meaning and nature:

⁵ Roy Goode: “Commercial Law” Second Edition (1995) Butterworths p. 878

⁶Chapter 1, Micheal Bridge : The International Sale of Goods - Law and Practice, Oxford University Press, (1999)

⁷ E- term (ex works), in which the seller has no responsibility for delivery to a carrier or even for loading the goods on to the buyer's vehicle; F-terms, in which the seller's duty is to deliver to the carrier but the freight is payable by the buyer and is not included in the price; C-terms, in which the seller is responsible for arranging the carriage of the goods from his country at his own expense, so that the freight is included in the price; and D-terms, under which the contract is an arrival contract, requiring the seller to deliver the goods to an agreed delivery point in the buyer's country: [Roy Goode: “Commercial Law” Second Edition (1995) Butterworths P. 882].

Bill of lading is a document issued pursuant to a contract of carriage of goods by sea. In the words of Prof. Micheal Bridge,⁸ a bill of lading is a “versatile document recording the receipt of goods which also provides evidence of the contract of carriage and may also serve as a document of title to the goods it represents”. A bill of lading means and includes “a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.”⁹ Usually on the completion of the shipment of the cargo or on receipt of the same the carrier¹⁰ or charterer¹¹ of the vessel, on the demand of the shipper or otherwise, issue a bill of lading stating, inter alia, (a) a short description of the cargo loaded on board the vessel, (b) the name and principal place of business of the carrier, (c) the name of the shipper, (d) the consignee if named by the shipper, (e) the port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading, (f) the port of discharge under the contract of carriage by sea, (g) the number of originals of the bill of lading, if more than one, (h) the place of issuance of the bill of lading, (i) the signature of the carrier or a person acting on his behalf, (j) the freight to the extent payable by the consignee or other indication that freight is payable by him etc.¹² Generally the reverse side of the bill of lading contains standard terms on which the carriage contract is agreed to be performed and such terms, in case of disputes, form the basis of any claim and adjudication, provided that these terms are neither nullified by any statute nor these are oppose to public policy under any legal system where the dispute ought to be tried. The aforesaid features of the bill of lading is marginalized by its third and final character. The greater importance of the bill of lading in the modern time lies in the facts of its being a document of title of the goods its represents. Whoever lawfully holds a bill shall have the proprietary interest and constructive possession over the goods while these are in transit. It carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner.¹³

To appreciate the significance of the bill of lading in the modern commercial world, it may be apposite to give a short account of the historical evolution of the bill.

3.2 Historical evolution of the bill of lading:

During the early days of human civilization the traders used to travel with their own sea going vessels to trade their merchandise across the globe. Sea voyages were lengthy and hazardous and often ended up with sadness. These reasons, amongst others, led to the emergence of the bill of lading in around twelve century. The bill

⁸ See Chapter 13, Micheal Bridge : The International Sale of Goods - Law and Practice, Oxford University Press, (1999)

⁹ Article I (7) of the United Nations Convention on The Carriage of Goods by Sea, concluded at Hamburg on 31st day of March, 1978 (commonly known as “Hamburg Rules”).

¹⁰ “Carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper. A Shipper is One who pursuant to a contract of sale causes the goods to be loaded on board ship: Article I (a) of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, August 25, 1924, (The Hague Rules).

¹¹ “Charterer” is one who by virtue of a charterparty hires the entire ship or the principle part of it.

¹² Article III (3) of The Hague Rules; Article 15 of the Hamburg Rules. .

¹³ As above.

of lading commenced its life as a non-negotiable receipt issued by the owner of a vessel acknowledging the receipt of the goods to the merchant who did not want to travel with cargo. At that primitive stage the bill usually recorded the quantity and the apparent order of the goods shipped. For ease of understanding a specimen of bill of lading reported to have been issued in April 24, 1248 may be cited:

“We, Eustace Cazal and Peter Amiel, carriers, confess and acknowledge to you, Falcon of Acre and John Confortance of Acre, that we have had and received from you twelve full loads of brazil wood and nine of pepper and seventeen and a half of ginger for the purpose of taking them from Toulouse to Provence, to the fairs of Provence to be held in the coming May, at a price or charge of four pounds and fifteen solidi in Vienne currency for each of the said loads. And we confess we have had this from you in money, renouncing, etc. And we promise by this agreement to carry and look well after those said loads with our animals, without carts, and to return them to you at the beginning of those fairs and to wait upon you and do all the things which carriers are accustomed to do for merchants. Pledging all our goods, etc.; renouncing the protection of all laws, etc.”¹⁴

It was subsequently felt necessary to embody some terms in the bill of lading to settle the disputes between the carrier and the owner of the goods which inevitably arose between them, such as for short or miss delivery, or partial/total loss of cargo etc. Carriage contracts were effected on the terms thus incorporated in a bill.¹⁵ These two features of the bill of lading were not fit enough to answer the need of the traders and they had to wait till eighteen century for the third and final feature of the bill to develop.

In medieval the sea voyages were characterised with lengthy disposal due to absence of power engine to manoeuvre the vessel. This triggered the practice of delivering the bill of lading by a shipper to a third party so as to make him the owner of the cargo covered by the bill while it is under the care and custody of the carrier and thereby raise money without longing for the safe arrival of the vessel at the port of discharge. This usage attaching the attribute to a bill of lading to act as a document of title of the goods represented received recognition by the English Courts in the case of *Lickbarrow v Mason*:¹⁶

“By the custom of merchants, bills of lading, expressing goods or merchandise to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers endorsing such

¹⁴ Roy C. Cave & Herbert H. Coulson (eds.), *A Source Book for Medieval Economic History* (1936) 159-160.

¹⁵ John F Wilson : *Carriage of Goods by Sea* (2001), p. 119.

¹⁶ (1794) 5 T.R. 683 [101 E.R. 380]:

bills of lading with his, her, or their name or names, and delivering or transmitting the same so endorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such endorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other persons or persons."

Thus a bill of lading through the passage of time acquired three features to satisfy the need of the merchants and these attributes are equally important in the modern time facilitating international trade transactions to which we will shortly return.

3.3 Issue of bill of lading:

When a ship is employed as a general ship, her sailing is usually announced publicly by advertisements, placards and circulars. These show some details of her description, her port of destination, or the round of ports at which she is to call; her date of sailing; with perhaps some of the terms on which goods will be received. Rates of freight and other terms are arranged by communication with the ship's agent or master, as the case may be.¹⁷ An individual wishing to book space in the ship shall communicate with the master or agent. In shipment of goods in general ship there are usually agents on each side intervening between the shipper and the shipowner. The shipper frequently employs a forwarding agent and the shipowner a loading broker. The forwarding agent's normal duties are to ascertain the date and place of sailing, obtain a space allocation if that is required, and prepare the bill of lading. The different shipping lines have their own forms of bill of lading which can be obtained from stationers in the city, and it is the duty of the forwarding agent to put in the necessary particulars and to send the draft stamped to the loading broker. His duties include also arranging for the goods to be brought alongside, making the customs entry and paying any dues on the cargo.¹⁸ Sometime when the forwarding agent approaches the loading broker or master for booking space, he is advised when and where the goods are to be delivered to the agent of the carrier and on receipt of the same the carrier issues a receipt, often referred to as "mate's receipt"¹⁹ and from that point the goods are at the care and custody of the carrier.²⁰ However, it is the business of the loading broker to supervise the arrangements for loading, though the actual stowage²¹ is decided upon by the cargo superintendent, who is in the direct service of the shipowner. It is the broker's business also to sign the bill of lading and issue it to the shipper or his agent in exchange for the freight and mate's receipt, if any.²² Customary rule is that the bills are issued in sets²³ all of which

¹⁷ Raoul Colinvaux: "Carver's Carriage by Sea", volume 1, thirteenth edition, p. 50.

¹⁸ *Heskell v. Continental Express* (1950) 83 Ll. L.R. 438:

¹⁹ It is a receipt given by or on behalf of the ship's mate acknowledging receipt of the goods and usually surrendered for a bill of lading: See Glossary to Micheal Bridge : The International Sale of Goods (1999).

²⁰ John F Wilson : Carriage of Goods by Sea (2001), pp. 121-22.

²¹ The process of loading goods in the ship's hold: See Glossary to Micheal Bridge : The International Sale of Goods - Law and Practice, Oxford University Press, (1999)

²² *Heskell v. Continental Express* (1950) 83 Ll. L.R. 438.

²³ *Glyn Mills v East & West India Dock Co* (1882) 7 App Cas 591.

are original and handed over to the shipper. The shipper, usually the seller when the shipment is made in reference to an international contract of sale, then forwards the bills to the consignee, usually the buyer. When the ship carrying the goods arrives at the port of discharge, the consignee collects the goods on production of the bill of lading before the carrier. In the modern time, majority of international sale transactions are being financed by letter of credit.²⁴ Hence usually the shipper after shipment presents the bill of lading, along with some other documents, in the bank and receives the price of the goods therefrom.²⁵ The bill of lading is then forwarded to the consignee.

4. Role of bill of lading in international sale of goods:

From the aforesaid short description it may be clear that the bill of lading is a document playing significant role in international sale of commodities. It synchronizes the mutual rights and obligations of actors in international sale, i.e. seller, buyer, carrier etc. through its versatile functions. So it may, at this stage, be apposite to revisit the functions of the bills of lading in order to ascertain its importance in international movement of goods.

4.1 Functions of bills of lading:

Through the centuries bills of lading have acquired three different functions and these have already been recognized by All principal legal systems. The Appellate Division also appears to have approved such functions of the bills of lading. “1. . . is a receipt for goods shipped, containing the terms on which they have been received. 2. It is an evidence of the contract for the carriage of goods. 3. it is a document of title to the goods specified therein.”²⁶ Primarily these functions mainly based on and were regulated by customary rules and usages. Later on, these customs and usages started to be recognized by the judiciary and the legislature and became part of the regime of maritime law. Apart from this, various conventions adopted by countries/international institutions effecting maritime law also embodied such customs and usages as rules of customary private international law. In the following pages efforts will be made to reexamine the functions of bills of lading keeping in constant view the rules of municipal and private international law.

4.1.1 As a receipt of the goods shipped:

Historically speaking, the first and foremost duty of a bill of lading is to act as a receipt of the goods shipped on board the vessel. When the shipment is over, the master of the ship or the agent appointed in this behalf shall, if so asked by the shipper, issue a bill of

²⁴ Letter of credit is a process under which a bank, called issuing bank, gives an undertaking on behalf of the buyer, called applicant, to seller, called beneficiary, to pay the price of the goods as stipulated in the underlying sale contract; provided that the seller/beneficiary presents documents stated in the terms of the letter of credit. See more on “letter of credit” p. 58, Journal of International Affairs”, Vol. 7, No. 1, published by Bangladesh Institute of Legal and International Affairs, January-June, 2003.

²⁵ The nature of entitlement of the shipper to receive payment depends on the terms of the letter of credit.

²⁶ DLR 44 AD 1992 65 para 24: Abu Taleb Alias Tyeb and Another V. Anis and Co. and Others; Government of Bangladesh V Anis and Co. and Others

lading. A bill so issued makes representations as to three aspects of the goods shipped.²⁷ In the first place the bill states the number and quantity of the goods actually shipped. Secondly, it records the apparent order and condition of the goods and finally it records the leading marks, if any, levelled on, or attached to, the goods.

4.1.2 As evidence of the terms of the contract of carriage:

In the second place, a bill provides evidence of the terms under which the contract of afreightment is performed. All standard bills of lading, on the reverse side, contain some stipulations under which the contract of afreightment is undertaken to be performed. On the back side the bill states, amongst others, the mode of performance of contract, duties and liabilities of the parties to the contract, rate of damages to be paid by the carrier in the event of damage of cargoes, freight and lien, jurisdiction and applicable law for adjudication/settlement of any dispute arising out of the contract etc. Generally all the terms are fully printed on the back of the bill of lading. However, when the bills are issued under a charterparty, a clause often inserted so as to incorporate all the terms of the charterparty in the bill. In such a case “. . . as between the shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charterparty, and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit. But where the bill of lading is endorsed over, as between the shipowner and the indorsee the bill of lading must be considered to contain the contract, because the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods.”²⁸ However, the consignee shall not be bound by the terms of the charterparty unless it is brought to the notice of the consignee in clear terms in the bill.²⁹

4.1.3 Evidentiary value of the representations and terms:

The representations made on the front side and the stipulations printed on the reverse side of the bill of lading have immense evidentiary value, i.e these are admissible in a proceeding adjudicating dispute between shipper, consignee and carrier. But the degree of conclusiveness of the presumption of law as to the evidentiary value may differ in different circumstances.

In English law it has long been established that if the bill remains in the hand of the shipper, the representations as to the cargoes and the terms of afreightment shall not be conclusive, rather be prima facie proof of the fact.³⁰ In *Ardennes* Lord Goddard CJ observed:³¹

²⁷ Article 3 (3) of the Hague Rules as appended in Schedule to the Carriage of Goods by Sea Act, 1925; Article 15 (1) (a) of the Hamburg Rules.

²⁸ *The Al Battani* [1993] 2 Lloyd's Rep. 219: (per Sheen J. at 222)

²⁹ *Chemical Industries Corpn. And another V. MV Kavø AlKyon and Others*: 38 DLR 1986 209

³⁰ *Ardennes* [1917] 2 KB 664. For an earlier authority see the case of *Crooks v. Allen (1879) 5 Q.B.D. 38 (C.A.)*: “A bill of lading is not the contract but only the evidence of the contract and it does not follow that a person who accepts the bill of lading which the shipowner hands him necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. (per Lush L.J. at 40). For a recent authority see the case of *Cho Yang Shipping Co. Ltd. v. Coral (U.K.) Ltd.*

'It is, . . . well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms ... The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that it contains terms with which he is not content, or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not . . . thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed and that it was different from that which is found in the document or contained some additional term.'

But when the bill of lading is transferred to a bonafide third party who purchases it for value, then the presumption of law as to the conclusiveness of the bill of lading is just other way round. In a case³² decided by English Court where a consignment of timber became badly stained with petroleum while awaiting shipment and these were shipped on board being so tainted. The master nevertheless issued a bill acknowledging that the timber had been shipped in good order and condition. The carrier was held liable and was estopped as against an assignee of the bill from denying the truth of the statement. As decided in *Leduc Vs. Ward*³³, if the bill of lading is in the hand of the consignee, the bill provides conclusive evidence of the facts contained therein. On this basis the court held the carrier liable for unjustifiable deviation since there was no liberty clause in the bill of lading although shipper had the knowledge that the ship would deviate from its usual route while proceeding from Fiume to Dunkirk.

The rules of English law as to the conclusiveness of the bill of lading have also been reflected on the major conventions relating to bills of lading. The Hague-Visby Rules³⁴ and the Hamburg Rules³⁵ provide that the bill of lading is prima facie evidence of the facts stated therein; however, proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods in the bill. It should be noted here that as to the presumption of conclusiveness the Hague Rules (which has been included in the Schedule to the Carriage of Goods by Sea Act, 1925, in force in Bangladesh) differs from the Hague-Visby and Hamburg Rules. The Hague Rules flatly

[1997] 2 Lloyd's Rep. 641 (C.A.); [1997] C.L.C. 1100: "In English law the bill of lading is not the contract between the original parties but is simply evidence of it ... Indeed, though contractual in form, it may in the hands of a person already in contractual relations with the carrier (e.g. a charterer) be no more than a receipt ... Therefore, as between shipper and carrier, it may be necessary to inquire what the actual contract between them was; merely to look at the bill of lading may not in all cases suffice. It remains necessary to look at and take into account the other evidence bearing upon the relationship between the shipper and the carrier and the terms of the contract between them ... The terms upon which the goods have been shipped may not be in all respects the same as those actually set out in the bill of lading." (per Hobhouse L.J. at 643).

³¹ Ibid

³² *Compania Naviera Vascongada v Churchill* [1906] 1 KB 237.

³³ [1888] 20 QBD 475]

³⁴ The Hague Rules was amended by a Protocol adopted in Visby in 1968 and the amended version of the Hague Rule is known by the name "Hague-Visby Rules". Article 3 (4) of the Hague-Visby Rules provides as to the presumption of law relating to bills of lading. See also Roy Goode: "Commercial Law" Second Edition (1995) Butterworths p. 1069.

³⁵ Articles 16

states that a bill of lading shall be “prima facie evidence” of the receipt by the carrier of the goods as therein described. Therefore, according to Hague Rules, the bill of lading, be it in the hand of the shipper or consignee, shall provide “prima facie evidence” of the fact recorded in the bill and so, it is submitted, there is no bar for a carrier, while facing a claim by the consignee, to adduce before the Court the evidence that the statements of the bill of lading as to the number, weight, apparent conditions and order, leading marks, time of shipment etc. are not true and thereby leaving no room for the Courts to apply the principle of “estoppel” to protect the interest of the bona fide thirdparty who, for value, and in good faith, relying on the statements recorded in bill purchase the bill of lading. The Courts of the country have cautiously interpreted Article III of the Hague Rules without disturbing the said statutory postulation as to the evidentiary value of the bill of lading. However, in order to hold the carrier for causing damage to the goods while in his custody, it is observed by the High Court Division,³⁶ “As soon as the shipper delivers the goods to the carrier at the port of origin in good condition he is entitled to receive the goods at the port of destination in the same good condition and the carrier will be held responsible for loss or damage, if any, to the said goods while in his care and custody.” But it seems that High Court Division has used the principle of “estoppel” in the aforesaid case, as done by the English Courts, to hold carrier liable for the damage caused to the goods.

But the evidentiary value of the bill of lading may well be marginalized by the carrier by printed or stamped clause across the face or margin of the bill of lading, such as “Weight unknown”, “condition unknown”, “S.T.C”, etc. When bills are issued with such qualifying remarks, they cease to be regarded as a “clean bill”³⁷ and as a result decline commercially to which we will return soon. In *New Chinese Antimony Co Ltd v Ocean Steamship Co*³⁸ where the bill of lading covering a cargo of antimony oxide stated that 937 tons had been shipped. In the body of the bill was a printed clause in ordinary type to the effect that ‘weight, measurement, contents and value (except for the purpose of estimating freight) unknown’. In these circumstances the court held that the written statement in the bill did not provide even prima facie evidence of the quantity shipped. Viscount Reading LJ while speaking for the court observed, “Where in a bill of lading, which is prepared by the shippers for acceptance by the defendants’ agent, the agent accepts in the margin a quantity “said to be 937 tons”, and in the body of the bill of lading there is a clause “weight &c unknown”, there is no prima facie evidence that 937 tons have been shipped. I think that the true effect of this bill of lading is that the words “weight unknown” have the effect of a statement by the shipowners’ agent that he has received a quantity of ore which the shippers’ representative says weighs 937 tons but which he does not accept as being of that weight, the weight being unknown to him, and that he does not accept the weight of 937 tons except for the purpose of calculating freight and for that purpose only ...” Similarly, where the shipper describes the goods as Muriate of Potash in Bulk, gross weight: 11,000 MT but the bill of lading states: “Weight, measure, quality, quantity, condition, contents and value unknown”, to answer

³⁶ *Trans Oceanic Steamship Co. Ltd. and another Vs. Adamjee Insurance Co. Ltd. and another*: 46 DLR 23 para 13; *Muhammadi Steamship Co. Ltd. Vs. Province of East Pakistan and others* 22 DLR 96

³⁷ Article 32 of Uniform Customs and Practice for Documentary Credit, ICC publication No. 500, 1993 revision (UCP 500) states that a clean transport document is one which is issued without recording any defects in the goods.

³⁸ [1917] 2 KB 664.

the question: does the bill of lading represent that 11,000 tonnes of muriate of potash were shipped? Clarke J had no hesitation to state, "If this question is to be answered on the construction of the bill of lading as it stands, the answer, in my judgment, is No. The reason is that given in a number of decided cases, namely that a bill of lading which states that 11,000 tonnes of cargo were shipped "quantity unknown" is not a representation that 11,000 tonnes were shipped. Any other conclusion would give no meaning to the expression "quantity ... unknown".³⁹

The right of the carrier to curtail the evidentiary value of bill of lading is also recognized by the conventions although the right is circumscribed by rules to minimise its abuse by the carrier. The Hamburg Rules states that if the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking. In *River Gurara*⁴⁰ governed by the Hague Rules the description of the goods in the bills of lading was qualified simply by the letters "s.t.c." (said to contain). It was observed that under the proviso to article III, rule 3 of the Hague Rules the carrier is not required to state on the bill of lading the number of packages received when he has had no reasonable means of checking this. The proviso plainly applies in relation to packages stuffed in containers by the shipper or his agent. In such circumstances it is commonplace for the bill of lading to state the number of packages as furnished by the shipper, but to qualify the statement with the words "weight, number and quantity unknown". Where the bill of lading is so qualified it does not even constitute prima facie evidence that the goods detailed by the shipper have been shipped.

4.1.4 As a document of title:

The last and final feature, so far attached to a bill of lading, is its capacity to act as a "document of title". Before the introduction of steam engine the sea voyages were usually lengthy and time consuming. After shipment the merchants had to wait for a considerable period of time in order to deliver the goods to the buyers and raise money for the next venture. This inconvenience led to the introduction of a new trend among the traders during 17th/18th centuries. In order to transfer the proprietary interest in the goods while the same is in the care and custody the merchants started to transmit the bills of lading to their respective buyers with endorsements on the bills stating the fact of transfer of title in the goods represented by the bills to such buyers. This trend became so popular and was so widely used by the traders that it acquired the status of customary

³⁹ *Agrosin Pte Ltd. v. Highway Shipping Co. Ltd. (The Mata K)* [1998] 2 Lloyd's Rep. 614; [1998] C.L.C. 1300: (per Clarke J. at 616)

⁴⁰ *Nigerian National Shipping Line Ltd. v. Owners of Cargo on board the ship River Gurara* [1998] Q.B. 610 (C.A.); [1998] 1 Lloyd's Rep. 225: (per Phillips L.J. at 625).

rule for maritime transactions and This customary rule later on had the recognition in *Lickbarrow v. Mason*⁴¹ decided in 1794. Since time of *Lickbarrow v. Mason* the bill is treated to be the document of title.

However, a bill shall operate as a document of title if it is drafted as “order bill”. A bill is called “order bill” if the cargo represented by it is deliverable to a named consignee or to his order or to the bearer thereof. Order bills can be drafted in two ways: in the first place, the bill may contain the name of the consignee in which case goods are delivered to the named consignee or his order. The second type of order bill makes the goods deliverable “to order or assigns” without naming the consignee and hence anyone lawfully holds the bill may demand delivery of cargo from the carrier. Order bills are negotiable. The first kind of order bills are negotiable by endorsement by the transferor and delivery to the transferee. The second type is negotiated just by delivery to the transferee.⁴² Conversely, “straight bills” are those where a bill is drafted to a named consignee and containing some words negating transferability, such as “goods are to be delivered to X and none else”. The named consignee cannot transfer the bill to another person so as to make him the owner of the goods represented by the bill and hence “straight bill” is not regarded as document of title.⁴³

Although this feature of the bill of lading has not separately been described in the major conventions on maritime laws, the bill of lading is usually being mentioned with other documents of title. To take an instance, like the major maritime conventions section 4 of the Carriage of Goods By Sea Act, 1925 states, “Every bill of lading, or similar document of title . . .” which confirms the third feature of the bill of lading as a document of title.⁴⁴ Further, section 2 (4) of the Sale of Goods Act, 1930 while defining “document of title to goods”, includes a bill of lading.

4.2 Significance of bills of lading in international sale of goods:

4.2.1 Transfer of proprietary interest:

This has been stated elsewhere that a bill of lading is a negotiable document. It is transferable by delivery with or without endorsement and on negotiation it conveys to the transferee the title over the goods represented therein.⁴⁵ But this attribute of the bill of lading has fiercely been criticised. Prof. Micheal Bridge remarks, “Being the due holder of a bill of lading is no guarantee of ownership of the underlying cargo: it does not ensure that the person who placed the goods on board the ship owned them in the first place. . . .the negotiation of a bill of lading does not necessarily transfer the ownership of the

⁴¹ (1794) 5 T.R. 683 [101 E.R. 380]:

⁴² See more about “order bills” from Chapter 1, G.H. Treitel & F.M.B. Reynolds: “*Carver’s Bills of Lading*” 1st ed. (2001).

⁴³ For more on non-negotiable bills, see *Ibid*.

⁴⁴ Similar statements are also found in the major conventions on carriage of goods by sea. See Article 15 of Hamburg Rules; Article I (b), Article III (7), of Hague and Hague-Visby Rules, etc.

⁴⁵ *Lickbarrow v. Mason*, see above.

cargo. Nor is there any rule of law that the ownership of a cargo can be transferred only through the medium of a bill of lading. . . . It is just a matter of mercantile practice that the bill of lading is used as the instrument in effecting proprietary transfers when the goods are in transit. . . . but in reality the property in goods passes by virtue of the contract of sale.”⁴⁶ As to the first point raised by Prof. Micheal Bridge it may be pointed out that in a contract of sale be it CIF/FOB or similar other terms it is the seller or any person authorised shall make the shipment of the goods. It is an express provision of law that during the sale the seller impliedly undertakes that title of the goods covered by the sale contract belongs to him.⁴⁷ Hence the shipment is being made in pursuant to the contract sale, presumption of law will be in favour of the fact that the seller/shipper enjoys at the time of shipment full proprietary interest in the goods. As far as the second point is concerned, Prof. Bridge has rightly mentioned that the bill of lading can never substitute the underlying sale contract and the property in the goods passes to the buyer (consignee in terms of a bill of lading) with the shared intention of the parties as expressed in the contract of sale. But, it is submitted, this intention of the parties is finally effected through the medium of bills of lading. The lawful holder of a bill of lading enjoys full title over the goods represented by the bill and entitled to demand the delivery of goods from the carrier at the port of discharge and, subject to a carrier’s lien if there is unpaid freight, carrier cannot refuse delivery.

4.2.2 Delivery of goods:

Delivery of bill of lading substitutes physical delivery of goods. IN international sale since the parties are not trading over the counter, rather seller sends the goods by the carrier to the buyer’s port/place of business, the requirement of physical delivery is redundant and the same is replaced by, as was recognized from *Lickbarrow v. Mason*⁴⁸ period by the delivery of bill of lading representing the contracted goods. The holder of bill, therefore, has constructive possession over the underlying goods.⁴⁹ Earl Loreburn LC said that ‘delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves’.⁵⁰In the words of Bowen L.J., a bill of lading “. . . is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.” and of “its indorsement and delivery . . . as a symbolical delivery of the cargo”.⁵¹ This principle of English law is adhered to by the Appellate Division: “. . .an endorsee is at least entitled to the possession of the goods on the basis of the duly endorsed bill of lading.”⁵²

4.2.3 Transfer of contract:

⁴⁶ See Micheal Bridge : *The International Sale of Goods - Law and Practice*, Oxford University Press, (1999) ch. 11.

⁴⁷ See Section 14 of the Sale of Goods Act, 1930. Similar provision can also be found in the Sale of Goods Act, 1992 (of UK).
⁴⁸ (1794) 5 T.R. 683 [101 E.R. 380]:

⁴⁹ See Micheal Bridge : *The International Sale of Goods - Law and Practice*, Oxford University Press, (1999), ch. 11.

⁵⁰ *Clemens Horst (E) Co v Biddell Bros* [1912] AC 18.

⁵¹ *Sanders v. Maclean* (1883) 11 Q.B.D. 327 (C.A.), p. 341.

⁵² 44 DLR AD 1992 65 paras 24, 25.

Customary rules on bills of lading lessen the rigor of the “privity doctrine”⁵³ of law of contract. The contract of afreightment is, in the first place, made between the shipper (seller in terms of sale contract) and the carrier. Representations made on, and the terms carriage contract included in, the bill of lading form part of the contract as between the shipper and the carrier. However, when the bill of lading is transferred to the consignee who purchases it for value, the contract of afreightment also stands transferred.⁵⁴ It has been observed by the High Court Division in *Chemical Industries Corpn. And another V. MV Kavo AlKyon and Others*⁵⁵ that The rights and obligations as between an indorsee of the bill of lading or consignee of the cargo and owners of the ship which carried the cargo would be governed by the bill of lading. The corollary of this principle is that the consignee steps into the shoes of the shipper and, as well, receives higher protection as to his proprietary interest in the underlying cargo than enjoyed by the shipper himself. As it has been stated above, a bill in the hand in the consignee constitutes conclusive evidence of the representations made therein as to the goods and the terms of contract of carriage. These representations are commercially quite significant. As pointed out by J.F. Wilson,⁵⁶

- (i) first the bill of lading forms the very basis for the claim by the holder of the bill if there is a short delivery or these are found damaged on delivery.⁵⁷ As the High Court Division puts it, “As soon as the shipper delivers goods to the carrier at the port of origin in good condition he is entitled to receive the goods at the port of destination in the same good condition and the carrier will be held responsible for the loss or damage to the goods which are in his care and custody.”⁵⁸
- (ii) If the goods are sold on C.I.F. terms, the buyer can exercise his right to reject the goods where the description of the goods in the bill does not correspond with the description in sale invoice.
- (iii) The terms of the sale contract, in particular, where the buyer discharges its payment obligation by opening a letter of credit,⁵⁹ may entitle the buyer or the bank to insist on the production by the seller of a “clean bill”,⁶⁰ i.e. a bill containing an unqualified statement that the goods have been shipped in good order and condition.
- (iv) the representations may seriously affect the negotiability of the bill in the hands of a consignee, since the goods will not readily be saleable in transit if the bill records that they have been shipped in a damaged condition.

⁵³ Doctrine of privity of contract denotes that the rights/obligations arising out of a contractual relationship can be enforced by or against the parties to the contract. A stranger to the contract neither be required to perform what is agreed in the contract nor he be entitled to enforce any obligation undertaken by the contracting parties.

⁵⁴ For an excellent survey on the development of “privity doctrine”, see John F Wilson : *Carriage of Goods by Sea* (2001), ch. 5.

⁵⁵ 38 DLR (1986) 209 para 17.

⁵⁶ John F Wilson : *Carriage of Goods by Sea* (2001), p. 122.

⁵⁷ See the case of *Leduc V. Ward* [(1888)20 QBD 475]

⁵⁸ *Trans Oceanic Steamship Co. Ltd. and another Vs. Adamjee Insurance Co. Ltd. and another*: 46 DLR 23, paras 13 and 14. See also *Muhammadi Steamship Co. Ltd. Vs. Province of East Pakistan and others* 22 DLR 96; *Albert David (Bangladesh) Ltd. Vs. Brosterm Shipping Company Limited and two others*: 34 DLR 362.

⁵⁹ For the meaning of “Letter of credit” see anti; see also Article 2, Uniform Customs and Practice for Documentary Credit, ICC publication no. 500 (UCP 500).

⁶⁰ Article 32 of UCP 500.

- (v) Invariably, standard forms of bill of lading set out in clear terms the amount to be paid by the carrier in the event of damage/loss of cargo or state the law to govern the bill of lading which will state the rate or amount of compensation to be paid by the carrier in the event of short or wrong delivery of, or damage to, the goods represented by the bill.⁶¹

These aforesaid matters, amongst others, influence the decision making process of a trader in entering into a sale contract. The security as provided by a bill to the merchants is the incentive for them to pay value for purchasing the bill of lading and thus international trade transaction keeps moving.

5. Conclusion:

From the foregoing discussion it may be clear that in international sale contract which in particular, involves maritime voyage, bill of lading plays a significant role. Bill of lading is a document that prima facie shows whether the seller has performed his delivery obligation. Bill also provides means to its holder whereby to enjoy effective control over the goods represented thereby and at the end of the voyage to have the delivery of the goods from the carrier. Bill confers proprietorship over the goods represented therein to the holder and any intermediate holder who do not desire to have the actual delivery of the goods can transfer title in the said goods to the subsequent buyer by transferring the bill of lading with or without endorsement which facilitates “string sale” in international sale transaction. Where the contract of sale is financed by the letter of credit, the bill of lading, inter alia, entitles the seller to be reimbursed by the bank. Furthermore, if the goods are damaged or destroyed while under the care and custody of the carrier, the liability of the carrier is adjudicated on the basis of the terms of the bill of lading, be it in the hand of the shipper or consignee.

Before concluding a few words may be stated to record a recent development in terms of bill of lading. Recently, efforts have been made to introduce paperless cargo movement by the device of electronic data interchange (EDI).⁶² Under this procedure the information normally contained in the bill of lading is fed into the carrier’s computer and the shipper is provided with a ‘private key’ to access such material and control the goods during transit. He can relinquish the right of control by giving irrevocable instructions to the carrier to hold the goods for a named consignee, who will accordingly be entitled to delivery at the contractual destination. The named consignee can then, if he so wishes, give similar irrevocable instructions to the carrier requiring him to make delivery to an alternative consignee. On each transfer the existing private key is cancelled and replaced by a new key issued to the transferee. The carrier is required to take instructions regarding the disposition of the goods exclusively from the current

⁶¹ A bill of lading may be issued to be governed by the Hague Rules, Hague-Visby Rules, Hamburg Rules or any municipal law incorporating any such convention(s).

⁶² See the Rules for Electronic Bills of Lading adopted in 1990 by the CMI. (see <http://www.bolero-project.com>).

key holder and delivery at destination is made to the party referring to the code valid at that time. The use of electronic bill may be a demand of time and for the bill to remain as an important document in international sale transaction needs to adjust itself to the changing trend of the international trade and commerce.