Delivery without the Bill of Lading: Is this always the cause of loss?

Patrick Simon

1. The general position.

It is a well known rule: a sea carrier who delivers a cargo to a consignee without being presented with the original bill of lading is at fault and will be liable to the shipper if the latter is not paid by the buyer. If the bill of lading has not yet arrived at the port of discharge and is still travelling through the banking system the sea carrier then has a choice : he can keep his ship waiting on roads and will be entitled to remuneration for this delay either by means of demurrage (under a voyage charter-party) or by means of hire (under a time charter-party), as has been endorsed by several arbitration awards, for example in "Massira" and in "Blida". Alternatively, he can discharge the cargo against a bank guarantee presented by the consignee.

2. Some special cases.

(a) However, if the consignee cannot or does not want to give such a guarantee, the situation remains blocked. In order to unblock the cargo, sometimes the shipper might authorize the sea carrier to discharge and deliver the cargo. In this case the sea carrier will be released from his obligations since the shipper, who is still the holder of the bill of lading, has authorized him to deliver to a party who cannot prove his title.

There are many reasons why the shipper might consent to such delivery : perhaps he trusts his buyer because he has been trading with him or with others in the same group for many years, or perhaps delivery has become urgent following a delay in loading and the consignee is about to run out of stock, or perhaps the shipper has been provided with solid guarantees in the form of letters of credit, or other goods, or with funds which could be used to set off a potential debt. He nevertheless authorizes delivery and thus releases the sea carrier, as was held for example in the "Sam Chong" award.

(b) The situation is rather more complicated when there are several intermediate sellers between the shipper and the consignee. For example the shipper might be a producer who sells his goods to a European company, who in turn sells the goods to an African buyer, or there might be a long chain of sub-sales and purchases involving a line of some 5 or 6 traders.

The sea carrier may thus receive an order from his charterer-seller intermediary to discharge the goods without production of the bill of lading. He then finds himself in a delicate situation:

- if he acts on this order, he may be exposing himself to a claim by the shipper, being the holder of the bill of lading, if the shipper is not paid ;
- if he refuses, he puts himself at risk of being blamed by his charterer for breach of the charter-party.

Let us assume that he carries out this order, discharges the goods and delivers them to a consignee who does not have the bill of lading. Some weeks later, the bill of lading arrives but the consignee does not pay and revokes the documentary credit because he is in dispute with his seller. Can the sea carrier be held liable for delivery in these circumstances?

Undoubtedly the sea carrier should not have obeyed his charterer's orders and would have done better to adopt the classic position : no bill of lading, no discharge. But the difficulty now shifts from liability to the cause or causes giving rise thereto: was the loss caused by some fault of the sea carrier?

(c) The chain of causation.

In the first of the special cases at 2 (a) above, we have a shipper-seller and a consignee-buyer. If the seller authorizes discharge of the goods he cannot later complain to the sea carrier that his buyer has not paid, since it was he who took the initiative to authorize delivery.

In the second of the special cases at 2 (b) above, we have three or more traders. In order to establish whether the end buyer has failed to pay, the bill of lading must first have reached the bank which opened the letter of credit for the buyer. However, in order for this bill of lading to reach this bank, the intermediate seller's bank (this seller being the charterer of the ship, and having bought the cargo from the shipper and resold it to the consignee) must first have paid. If this second bank has not paid, the bill of lading is returned to the original seller-shipper's bank. If it has paid, then the bill of lading carries on travelling through the banking circuit and eventually arrives at the end-buyer's bank. But in this case it means that the shipper has been paid by his buyer, so he has not suffered any loss through the delivery. The loss is suffered by the intermediate seller who has paid the shipper but who has not himself been paid by the end-

buyer. In this situation, however, the unpaid seller cannot take recourse against the sea carrier for this non-payment because it was he and he alone who ordered the carrier to discharge.

If, on the other hand, the shipper is not paid for his cargo and pursues the sea carrier, he must produce the original bill of lading which should have been returned to him by his bank, but in this case the bill of lading has not completed its journey through the banking system. It is therefore the party who gave the order to discharge (the charterer) who has not paid. Why would he not pay his seller when he has a buyer who is paying more, so that he is making a profit on the way? It does not seem logical. What could possibly explain such apparently irrational behaviour? This could be for a variety of reasons, for example :

- there might be a dispute between the charterer and his shipper-seller, and this charterer may thus be trying to set off his losses ;
- the intermediary seller-charterer is effectively paid by his end buyer (outside of documentary credit, so no need for the bill of lading) but does not himself pay his seller because of some dispute ;
- the end buyer is insolvent and the charterer fraudulently tries to extract the price of the cargo from the sea carrier instead.

We can also imagine another situation, such as discharge into the hands of a third party or trustee. Here, the cargo is discharged from the ship but is not delivered : it is kept in a warehouse until presentation of the bill of lading. The trustee-agent is under a duty to hold the goods in his custody, but when he receives instructions simultaneously from a regular client (the charterer) and from an unknown client (the shipowner), he prefers to obey the charterer and to make an irregular delivery.

This opens up the question of the liability of the agent.

Nevertheless just as one train might conceal another steaming up behind it, a delivery without production of the bill of lading may conceal a fraud between three traders devised as follows :

- **A** sells a cargo of goods to **B** and deliberately withholds the bill of lading ;

- **B** sub-sells to **C** and instructs the sea carrier to deliver to **C** as a matter of urgency ;

- the sea carrier delivers the goods and is pursued by **A**, who pretends to know nothing about the instructions given by **B**.

In order to prevent such crooked conduct from succeeding and leading to a fraudulently obtained judgment or award it is helpful if the judge or arbitrator dealing with a claim by an unpaid shipper orders production of the entire file of bank credits, correspondence and documentary evidence of the entire journey of the bill of lading from bank to bank.

Patrick Simon
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