



BILLS OF LADING

Negotiable bills of lading

Executive summary

- A negotiable bill of lading contains features making it capable of being transferred to someone other than the original shipper or named consignee.
- Endorsements come in different forms and negotiable bills of lading can contain multiple endorsements.
- Bearer bills of lading are negotiable bills of lading which are transferable without endorsement.
- Contractual rights and liabilities are transferred to the lawful holder of a negotiable bill of lading.
- An original bill of lading must be presented in order to take delivery of cargo.

A. Who is this article intended for?

This article is written with the member, in-house claims teams or legal counsel in mind and anyone else involved in endorsing bills of lading.

For the more practical aspects we refer to the Club's '*Practical Guide: Negotiable bills of lading*' and recommend that the two be read and considered together.

B. What do we mean by a negotiable bill of lading?

A negotiable bill of lading is one which contains features making it capable of being transferred to someone other than the original shipper or named consignee, thereby transferring to that other person the right to take delivery of the cargo.

Most frequently these features use 'to order' to describe the consignee or the phrase 'to the order of' a named consignee. A bill of lading consigned to a party 'or their assigns' has also been held to be a negotiable bill of lading. The transfer of the bill of lading is generally done by endorsement of the bill of lading and its delivery to the endorsee, but bearer bills are transferable without endorsement.

If the bill of lading simply contains the name of a consignee, without containing any terms such as 'order' or 'assigns', then it is likely to be a non-negotiable (or 'straight') bill of lading – or it may be a waybill rather than any kind of bill of lading. For more information on these documents, we refer to our separate publications.

Typically, at the time that bills of lading are issued in respect of a cargo, the ship will retain a non-negotiable copy and the originals (usually three) will be

provided to the shipper. Whilst the cargo is on its way to the discharge port in the ship, the original bills of lading are sent separately, and will enable the receiver to take delivery of the cargo on its arrival. It is when the original bills of lading are in transit in this way, that they are liable to be endorsed and transferred.

The term 'endorsement' simply refers to the signature and/or stamping of an original bill of lading by someone other than the issuer of the bill of lading prior to its transfer. This is done as part of the process of delivering – or negotiating - a bill of lading to someone else.

The general rule is that a carrier's obligation is to deliver the cargo upon the presentation of an original bill of lading. Thus, in order for a receiver to be able to take delivery of the cargo at the discharge port they will, generally speaking, be required to produce an original bill of lading to the carrier.

An original bill of lading presented at the discharge port may look slightly different from the non-negotiable copy retained on board because stamps and signatures – endorsements - have been added to the bill of lading since it was issued. Almost invariably the endorsements are on the reverse side of the bill of lading - and are mostly undated. However, none of the information originally inserted on the face of the bill of lading at the time of its issue should have been changed.

C. Why are bills of lading endorsed?

Endorsements come in a variety of forms, but their purpose remains the same: to enable the negotiation or transfer of the bill of lading (and with it rights to take delivery of the cargo) to another party. The party transferring the bill of lading will sign it before passing it on - thereby, upon delivery, transferring a possessory title to the goods and any property in the goods which the endorser may intend to pass. In this way, bills of lading perform a key function in international trade and are valuable documents. They facilitate the trading of cargo internationally and can act as a valuable security mechanism to banks offering trade finance under, for example, Letters of Credit, in so far as a bank may be able to secure such credit against the value of the cargo.

In an old Court of Appeal case - *Sanders v Maclean* (1883) 11 QBD 327 - predating the current Carriage of Goods by Sea Act 1924 (COGSA 1924), the role of a bill of lading was described by Bowen LJ as follows, and it is a description which remains valid today:

'A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading is universally recognised as its symbol; and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the

cargo. Property in the goods passes by such endorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods ... It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.'

From the point of view of a carrier, ownership of the cargo on board a ship may well be changing hands during the voyage, with potential consequences in terms of the parties to whom the carrier may owe obligations or against whom they may have rights under the contract of carriage originally concluded with the shipper of the cargo.

Before turning to the different types of endorsement below, therefore, it is important to appreciate the legal consequences for a carrier of the endorsement of bills of lading.

D. Contractual consequences of endorsement and transferring a bill of lading

In addition to transferring a possessory title (and any further property in the goods which the endorser may intend to pass) upon endorsement and delivery, the Carriage of Goods by Sea Act 1924 (COGSA 1924) makes provision for the possibility of both (a) rights and (b) liabilities to be acquired by the transferee as against the carrier.

(i) Transferring rights

In order to transfer rights, the transferee must first become a lawful holder of the bill of lading within the meaning of section 5, COGSA 1924.

A holder is a person in possession of the bill of lading who is:

- a. The named consignee; or
- b. An endorsee - a person to whom the bill of lading has been delivered in completion of an endorsement of a bill of lading; or
- c. A person to whom a bearer bill of lading has been transferred.

(ii) Lawful holder

To be a lawful holder, the holder must have taken possession of the bill of lading in good faith after it has been delivered to them.

The law surrounding the notion of exactly what may constitute the acceptance of delivery and the taking of possession is complex and outside the scope of this article; but the mere sending and receipt of a document may not, without

more, constitute delivery. Rather, the endorsee must accept delivery and intentionally receive the document into their possession as endorsee. It therefore follows that delivery to someone who knows that delivery is a mistake may not render that person a lawful holder.

(iii) Acquiring liabilities

In terms of acquiring liabilities, it is necessary for the lawful holder to take or demand delivery, or make a claim under the contract of carriage.

In a situation where the third-party endorsee has not yet become a lawful holder - and thus not yet acquired rights of suit against the carrier - liabilities may still be transferred when they do become a lawful holder. This is provided that, at a time before such rights are transferred, the third-party endorsee had either taken or demanded delivery of the goods.

E. Different forms of endorsement

(i) Signature by the shipper

If the bill of lading does not identify the consignee, but simply has the words 'to order' inserted in the consignee box, then this means that the goods have been consigned to the 'order of the shipper'. The bill of lading can be transferred/negotiated by the shipper, by signing the document and passing it on.

(ii) Signature by consignee

If the consignee is named in the bill of lading - e.g. 'to order of B Bank' or 'C Company or order' - then no signature by the shipper is necessary. Once the bill of lading has been transferred by the shipper to the named consignee, the named consignee may sign the bill of lading and transfer it to another endorsee.

(iii) Endorsement 'in blank'

The bill of lading may be endorsed 'in blank' - meaning that the endorsee is not specifically named by the party signing. As suggested in Voyage Charters (para 18.146), it follows that an 'order' bill of lading endorsed in blank is equivalent to a 'bearer' bill.

(iv) Named endorsee

If the party signing the bill of lading wants to restrict to whom the bill of lading is to be transferred, then, as well as signing the bill of lading, the name of the party to whom it is being transferred (the endorsee) will be inserted.

In order to allow the endorsee of the bill of lading to transfer the bill of lading again, the words 'or order' are likely to be inserted along with the named endorsee.

F. Bearer bills of lading - no endorsement required

If the bill of lading does not identify the consignee, but has the words 'to bearer', then the bill of lading is known as a bearer bill, and the cargo is deliverable to whoever has possession of the bill of lading (i.e. the bearer) without the necessity for signature.

The same is true if the consignee box on the bill of lading has been left blank (i.e. it has not been filled in). This has some important practical implications when a) the cargo is delivered and b) when a cargo claim is presented to the carrier and their P&I club.

G. Simplified example of the operation of a negotiable bill of lading

A agrees to sell cargo to C on condition that a Letter of Credit is set up with B bank in A's favour. After the cargo is loaded, a bill of lading is issued to the order of B, and A presents the bill of lading to B and receives payment from B for the cargo. Until C subsequently reimburses B, B will hold the bill of lading as security against the value of the cargo. Once B is reimbursed, the bill of lading may be endorsed and transferred to C who can ultimately take delivery of the cargo. However, whilst the cargo is in transit, the bill of lading could also be endorsed by B to the order of C, such that C could then on-sell the cargo to E with a Letter of Credit being set up in C's favour by D bank. Thus, a chain of sale contracts can emerge and endorsement and transfer of the bill of lading can enable cargo to be traded multiple times whilst still on board a vessel.

As explained above, being able to transfer a bill of lading to the order of a bank facilitates the usage of Letters of Credit in trade finance, because the bank can become a holder of the bill of lading - thus affording a measure of security against the value of the credit offered to the applicant for that credit.

Where the endorsements are in favour of named endorsees, it should be possible to establish the last endorsee in the chain. This involves starting by looking for a signature by either the shipper or consignee named in the bill of lading, as appropriate, together with the name of the party to whom the bill of lading is being endorsed, followed by their signature, and so on.

H. How to spot a negotiable bill of lading

Being able to spot the difference between a negotiable and non-negotiable bill of lading is important for a shipowner/the Master. Whether or not a bill of lading is negotiable - and the way in which it might be endorsed - are all factors relevant to the delivery risk in respect of the cargo.

a. The Master should check the copy bill of lading held on board. The key word to look for is 'order'. However, the Master should also be alerted by the word 'bearer' or a bill of lading which has a blank consignee box.

b. If the copy held on board the ship shows that a negotiable bill of lading was issued, then before delivery of the cargo the Master should check as follows:

- Is an original bill of lading being presented to take delivery of the cargo? It is important to compare the original bill of lading being presented against the copy held on board to check that it is genuine.
- If no original bill of lading is available, the Master should inform the Owners and request instructions. There are serious risks associated with delivering cargo without production of an original bill of lading. These include claims from the rightful owners of the cargo, and loss of P&I cover.

c. If the consignee appears as 'to order' or 'to the order of X', then in addition to the above points, the Master/discharge port agent can expect that when an original bill of lading is presented it will contain one or more endorsements. It is good practice to check, if possible, whether the original bill is being presented by the last endorsee. Where the bill of lading has been endorsed a number of times, it will be a case of having to trace the history of endorsements starting with the stamp/signature of the original shipper or consignee until one arrives at the last endorsee.

It is important to remember, however, that the key issue is that the carrier is usually obliged to deliver against presentation of an original bill of lading, and it is generally not for the carrier to question whether or not the holder is a lawful holder or to verify the identity of the presenting party

I. Letters of Indemnity

The decision whether or not to accept a Letter of Indemnity (LOI) in return for delivery of cargo without production of an original bill of lading is always a commercial decision and takes an Owner outside the scope of P&I cover.

Understanding whether the missing bill of lading is negotiable or not - and, if so, its likely journey through its endorsements - is one way for an Owner to consider/ manage the risk involved in delivering the cargo against a LOI.

For example, a bill of lading issued to order of a bank, will place Owners on notice that a Letter of Credit is involved. It may then be possible to establish whether the bill of lading is still in the banking chain and performing a role in payment for the cargo.

Conversely, a bill of lading made out simply 'to order' provides Owners with no clues as to where the bill of lading might be in any sale transaction and/or whether there is a bank or an unpaid seller who is retaining it as security.

Although standard wordings for LOIs have been drafted by the International Group of P&I Clubs the recommendation is always that they should be countersigned by a first-class bank.

For more information on LOIs, we refer to our publication *'In Focus: Letters of Indemnity'*.