

## Answer Guidance for Chapter 19 Practice Questions

Explain how the bill of lading is:

- a receipt for the goods;
- a document of title to the goods;
- a contract of carriage.

- A bill of lading is a document issued by a carrier of goods by sea once the goods identified on it have been loaded on the ship. It acknowledges that the goods have been loaded on board and normally will state that they are in apparent good order and condition and thus operates as a representation that the carrier has received the goods.
- Lawful possession of a bill of lading is treated as possession of the goods identified in it. In other words, the document symbolises the goods and often it is said that possession of the bill is constructive possession of the goods. If the parties so intend, possessory title and potentially ownership of the goods will pass with the tender of the bill.
- Bills of lading will either contain the carrier's standard term of business or incorporate them by reference. Since a contract of carriage must have been concluded before the bill was issued, the terms are only prima facie evidence of the contract of carriage between shipper and carrier though it appears that they are conclusive evidence of the terms in favour of a transferee of the bill.

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‘The use of bills of lading promotes both protection against the insolvency of counterparties and the perpetration of fraud by them.’

Discuss.

### Introduction

- As with all essays, you should begin with an introduction that sets out what the question is about, why the topic is an important one, and how your essay will go about answering the question set. By providing an outline structure of the discussion to follow, your essay will be clearer and more structured.
- In this essay you have been asked to compare specific aspects of bills of lading. Although it is tempting to do a ‘compare and contrast’ of all aspects of these documents, you should confine your work to consider those which promote assurance to the seller of payment by the buyer, or at least recovery of the goods in the event of default, and those which assure the buyer that the seller has met his delivery obligation on the one hand and those that enable fraud on the other. However, in order to do this you will need to explain what a bill of lading is, its legal characteristics and its typical uses to provide a foundation to answering the particular issues the question raises.

### The characteristics of a bill of lading

- Because the buyer and seller in a typical international sale are separated by many thousands of miles, there are particular issues which, although potentially present in domestic sales, are particularly acute in this situation. An explanation of those problems is needed, followed by an explanation of how the bill of lading can aid in their solution. The focus should be placed on three of the key characteristics: as a receipt, as evidence of loading, and as an embodiment of the goods so that possession of the bill gives constructive possession of the goods themselves. An explanation of constructive possession could be included and you will find material on page 36 of *Commercial Law*.

### The use of bills of lading

- Chapter 19 of *Commercial Law* takes a fairly typical cif sale as an example to illustrate how bills of lading are used in practice. A good approach to this essay would be to explain such a sale by way of background and then in the next section return to the example and show how the bill deals with insolvency issues and yet can be readily used to perpetrate fraud.

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- It is important to note:
  1. That a bill of lading should only be issued once all of the goods identified on it have been loaded on board the ship.
  2. That in a cif contract the buyer must pay against tender of conforming documentation, and
  3. That a cif buyer can reject the bill if it does not conform; for example, it does not describe the contract goods or if it does not state that the goods were loaded in apparent good order and condition.
  4. The carrier commits a breach of contract if he releases possession of the goods to anyone without tender of a bill of lading.

### **Bills of lading and protection against insolvency**

- The issue for both buyer and seller is that their counterparty in the transaction performs his duties in accordance with the contract. Since the seller has almost all of the duties, in a cif contract it seems sensible to analyse first how the bill of lading provides the buyer with protection against breach by the seller, thus exposing the buyer to the creditworthiness of the seller.
- Firstly, the carrier, in issuing the bill of lading, represents to the buyer that the contact goods have been loaded in apparent good order and condition. This in effect provides the buyer with two causes of action if the goods were never loaded or are obviously damaged, the first against the buyer for breach of the contract of sale, and the second against the carrier under the contract of carriage, the benefit of which will pass to the buyer with the bill of lading. Thus, although not completely insulating the buyer from the credit of the seller, he has at least another potential defendant to sue. However, the representation by the carrier is not absolute; it is merely that the goods appeared to be in good order and condition when they were loaded.. Even if the goods are in open view they may still not conform to the contractual description which may be far more elaborate than the brief description on the bill of lading, nor may they be of satisfactory quality, which in either event would leave the buyer 'out of the money' and having to seek a remedy solely from the buyer. The problem is exacerbated if the goods are containerised and the carrier cannot inspect the goods, meaning that any representations will be of little value, save to state that something in a container was loaded and it was said to be whatever the seller has described it as. Indeed, since standard practice is for the carrier to use words like those in *The*

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*Mata K*, even in the absence of a container the representations will give very little protection to the buyer.

- Secondly, since the buyer will only pay when he receives the bill of lading, he will receive constructive possession of the goods in return for his money, entitling him to demand physical possession of them from the carrier once they are unloaded. In fact, he will also obtain title to them as well, since this will be presumed to be the intention of the parties. In consequence, the buyer avoids exposure to the risk that he pays but does not simultaneously obtain possession or title to the goods.
- Turning now to the position of the seller, the key risk to which he is exposed is that the buyer obtains title to the goods but does not pay. This is prevented if, as is normal, the seller only parts with possession of the bill on receipt of payment. As the example transaction in *Commercial Law* shows, payment may simply amount to a promise by a bank to pay, thus substituting the creditworthiness of the bank for that of the buyer. However, a bank's promise to pay will normally be more reliable than that of a commercial enterprise.

### Bills of lading as means of fraud

- Because the buyer (or, in the example in the book, the buyer's bank, which in turn will debit the buyer's account once it has paid the seller) must pay, as against a tender of conforming documentation but before he has had time to examine the goods, he is exposed to the risk of fraud by the seller who might ship worthless material of appropriate weight and packaging. In reality this is not a risk which arises by virtue of the bill itself, but the reliance which is placed on the efficacy of the bill or, putting it another way, reliance on the honesty of the seller.
- A risk in all transactions involving carriers is that the carrier will release the goods without demanding tender of a bill of lading, thus enabling the buyer to obtain possession of the goods without paying the seller. Typically, the buyer will not be able to give good title to the goods to a purchaser from him by virtue of the *nemo dat* rule, so that, in addition to the claim against the buyer under the contract of sale, the seller will have a claim in conversion against the hapless purchaser – if he can trace him. He will also have a claim against the carrier for misdelivery of the goods. So in this instance the bill provides some protection to the seller against the fraud of the buyer but the extensive practice of releasing goods against an indemnity from the buyer certainly promotes the perpetration of fraud, even if it is not the seller who suffers.

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- However the practice of issuing bills in sets of three originals does provide an opportunity for fraud against a buyer, as *Glyn Mills Currie & Co v East and West India Dock Co* illustrates – though here it was a pledgee who was defrauded. The major difference to the point above is that the easily identifiable and normally solvent potential defendant, the carrier, is not liable since he is entitled to release the goods against any one of a set unless the contract of carriage states to the contrary. The solution to the problem is simple: either issue only one bill of lading or alternatively insist in the contract of sale that the seller must tender all of the bills in a set, something banks will always insist on if advancing credit on the strength of a bill of lading.

### Conclusion

- Only a very brief conclusion is needed since it is clear that the use of bills of lading in the context of a typical cif international sale provides protection for both buyer and seller from the insolvency of the other, though this protection is not complete. However, because bills are regarded as the key to the floating warehouse or the ship, rather surprising business practices by carriers and traders there are opportunities for fraud which the use of bills of exchange further rather than inhibit.

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**3.** You have been consulted twice in relation to a number of transactions in relation to some goods. Fletcher was the shipper of goods and was issued with three original bills of lading. He agreed to sell the goods on Cif terms to Godber on 1 February and tendered one bill of lading. Godber consulted you and asked whether she had to accept one bill of lading. You were busy and said that it was her duty to do so. She has indicated that she may sue you for negligence if she loses financially on the deal.

Was your advice accurate?

Godber accepted the bill of lading on 2 February. However, when she presented the bill of lading to the carrier, she was told that the goods had been delivered to Baraclough on 2 February. Fletcher had called the carrier saying the bills of lading had been lost and told it that he had sold the goods to Baraclough and the carrier should deliver the goods to her. The carrier had demanded an indemnity from 'Indemnity Bank', and once Fletcher had arranged for this, the carrier had issued a ship's delivery order in Baraclough's favour and delivered the goods against it.

Godber consults you and asks whether she has a claim against the carrier. She also wonders whether the carrier will be happy to pay anyway, because it always has the indemnity. She also asks whether she has a claim against Baraclough. You look at the bill of lading and see that it was issued in a state which is not a party to any convention on the liability of carriers and it contains a clause which states that 'all duties of the carrier shall cease once the goods have been stored in its warehouse at the port of discharge and all risk of loss or damage to the goods shall be in the owner'.

Has Godber got a claim against the carrier? Is the indemnity enforceable against Indemnity Bank? Has Godber got a claim against Baraclough?

### Introduction

- Many students think that only essay questions require an introduction, but this is not so. Answers to problem questions should also begin with a lucid and well-structured introduction that clearly highlights the area (or areas) of law to which the question relates. By doing this, you demonstrate immediately that you have understood the question and have clearly identified the relevant legal topics.

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- This question raises a number of issues concerned with bills of lading in the context of a cif contract. It should be noted that, although the final paragraph seems to ask the only questions in this problem, there is one not listed in the body of the text. Remember, reading a question carefully is important because it could be easy to miss this earlier issue.

### Does a cif buyer have to accept one bill of lading?

- The temptation here is to rely on the most obvious answer, namely that according to the Court of Appeal decision in *Sanders v MacLean* the answer is yes, accompanied by an explanation about the practice of issuing multiple original bills of lading and an explanation of the reasoning in *Sanders*.
- However, the key point about *Sanders* is the fact that the prima facie position is subject to agreement to the contrary. Because of the problems which *Glyn Mills* illustrates normally the parties to a cif contract will provide that the seller must tender all of the bills in a set. The example cif transaction contained in *Commercial Law* involves a bank, which in this case effects payment, but often banks will be financing the transaction, perhaps lending money to the seller pending sale with a different bank lending money to the buyer so that he can pay. It is the invariable policy of banks to insist that all shipping documents in asset are tendered before they will make payment. It is worth pointing out that if commercial custom is to insist on issuing all shipping documents in a set it is at least arguable that this custom has, in the 120 years or more since *Sanders*, resulted in a term to that effect being implied into every cif contract unless the contract states to the contrary.

### Is the carrier liable for releasing the goods to Baraclough?

- By virtue of being in lawful possession of a bill of lading, Godber is prima facie entitled to delivery of the goods from the carrier since by virtue of s2(1) Carriage of Goods by Sea Act 1992 all of the rights under the contract of carriage have been transferred to her. However, all bills of lading, if issued in a set, contain a provision usually similar to the one set out in the sample bill of lading in *Commercial Law* at page 491 to the effect that, once delivery is made against any one of the bills in a set, all others shall be of no legal effect. In fact we do not know whether the carrier received either or both of the other two bills of lading from Fletcher. If it did, and assuming that the contract of carriage did not require tender of all three bills in order to induce a release from the carrier, then Godber has no claim and her bill is

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'stale'. The only exception according to *Glyn Mills* is that the carrier had good reason to suspect Fletcher was entitled to the goods. In fact it is unlikely that the carrier received any bills from Fletcher, since there would have been no need for an indemnity if it had.

- There remains the issue of the exclusion clause, which in effect seeks to terminate the carrier's obligations once the goods have been discharged into the warehouse so that it would at first sight have no liability for mis-delivery of the goods to Baraclough. However the carrier is a bailee and, as *Gibaud v Great Eastern Railway* (noted on page 35 of *Commercial Law*) illustrates, the Courts are wary of permitting bailees to exclude liability for failing to carry out the contract in the way they said they would. Indeed, in *Gibaud*, Scrutton LJ seemed to find that any such attempt would be void. This seems extremely doubtful in the light of *Photo Production Ltd v Securicor Transport Ltd* and the abolition of the so-called doctrine of fundamental breach. That said, the Courts will carefully scrutinise any clause like this one which undermines the whole purpose of a contract of bailment that the goods should be dealt with, as directed by the bailor. That said, a clause which stated that the carrier had no duty to deliver the goods to the person lawfully entitled to them or at all might be sufficient on the authority of *Motis Exports v Dampskibsselskabet AF*. Finally, *Commercial Law* points out on page 35 that statute has intervened to limit the capability of a bailor and limit his liability, particularly under the Carriage of Goods by Sea Act 1971 and the Unfair Contract Terms Act 1977. This issue is dealt with in chapter 22 of *Commercial Law*, but, for the sake of completeness here, the reasonableness test imposed by UCTA does not apply in business to business contracts of carriage of goods by sea by virtue of Sch1 para 2. Similarly, COGSA only applies if the bill of lading is issued in a country which has adopted the Hague Visby Rules and the question specifically states that this is not the case here.

### Would the carrier be unconcerned if it had to compensate Godber?

- The carrier has received an indemnity against loss arising from its release of the goods, as directed by Fletcher. This is a commonplace procedure and in fact the carrier can be confident that Indemnity Bank will pay. However, as *Brown Jenkinson v Percy Dalton* illustrates indemnities may be legally unenforceable, though the indemnity there was against liability for the tort of deceit, rather different to an indemnity for liability in respect of an apparently non fraudulent breach of contract.

### Has Godber a claim against Baraclough?

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- In a cif contract, property in the goods will pass from seller to buyer with the bill of lading in the absence of a term to the contrary, though there will often be a retention of title clause so that property will remain in the seller until payment. However, again unless agreed to the contrary, in a cif contract, payment must be made against documents. Consequently, it is highly likely that property in the goods passed to Godber so that the purported sale by Fletcher to Baraclough will fail to vest title in her, though of course she has possession of them. If this is so, then Godber may demand return of the goods from Baraclough and sue in conversion if she fails to comply. (See page 21 of *Commercial Law* for an explanation of the tort of conversion).

### Conclusion

- A short conclusion is needed. However, it is important to note from this problem question that, although international sales are materially different to domestic sales, you need to keep in your mind domestic sales law, especially in relation to the passing of property and title to goods. Similarly, you can never ignore material contained in chapter 1, especially that relating to bailment, since it is a central concept in international sales where almost inevitably the goods are at least for some of the time in the possession of a carrier or warehouseman, both of whom are bailees.