

ANALYSIS OF RECENT CASES AND CONTEMPORARY DEVELOPMENTS

TO BE OR NOT TO BE A BILL OF LADING

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The Luna
[2021] SGCA 84

The bill of lading has been described as the cornerstone of modern sea carriage. It typically co-exists, in the context of the carriage of goods by sea, alongside an underlying sales contract. However, these two instruments serve different purposes that have been extensively explored in contemporary jurisprudence. But, once in a blue moon, these co-existent and distinct instruments may assume roles unlike their traditionally well-recognised ones. On this occasion, the blue moon has indeed shone its light on *The Luna*, and thus presents a fitting opportunity for us to examine and clarify some of the fundamental principles underlying the symbiotic relationship between bills of lading and their supporting sales contracts.²

Introduction

The Singapore Court of Appeal's decision in *The Luna* is not just another chapter in the (seemingly never-ending) OW Bunker saga.³ This time its demise merely caused the dispute to arise, but the legal issues in *The Luna* do not relate to bankruptcy, property, liens or priority rights etc. The fundamental question in *The Luna* is: what does it take to be a bill of lading?

Background

In September/October 2014 the respondent (Phillips) sold bunker oil (fob) to OW Bunker Far East and Dynamic Oil Trading. These two 'buyers' were subsidiaries of OW Bunker. The sales were subject to Phillips' general terms and conditions and payment was due after 30 days. The buyers in turn sold the bunkers to different ocean-going vessels that were lying in (the vicinity of) the Singapore port.

The appellants were the demise charterers of the *Luna*, one of the barges engaged for the transportation of the bunkers from the Vopak Terminal to the ocean-going vessels. Upon loading of the bunkers in October 2014, Vopak produced a document headed 'Bill of Lading' which was to be signed and stamped by the master of the *Luna*. This document stated, inter alia:

SHIPPED in apparent good order and condition by PHILLIPS 66 INTERNATIONAL TRADING PTE LTD on board the SINGAPORE vessel called [name of vessel] whereof [captain's name] is Master of this present voyage now at the port of PULAU SEBAROK, SINGAPORE and bound for BUNKERS FOR OCEAN GOING VESSELS

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² Steven Chong JCA, under para 1 of his introduction to the case.

³ The *Luna* is the name of the bunker barge in *The Luna v Philips 66 International Trading Pte Ltd* [2021] SGCA 84 between its demise charterers and Phillips 66 International Trading, but there were five other vessels involved, including the *Star Quest*, for instance, which lent its name to the High Court decision in *The Star Quest and Others* [2016] SGHC 100.

Remarks:

which are to be delivered in the like good order and condition at the aforesaid port of BUNKERS FOR OCEAN GOING VESSELS or so near as the vessel can safely get, always afloat, unto TO THE ORDER OF PHILLIPS 66 INTERNATIONAL TRADING PTE LTD or assigns weight, quantity or quality unknown.

Not responsible for leakage, deterioration of quality and contamination. Freight and all other conditions and expectations as per Chartered stated dated in PAYABLE AS AGREED

In witness whereof, the Master of said ship has signed THREE(3) ORIGINAL Bill of Lading all of this tenor and date, one of which being accomplished, the others to stand void.

Once the loading had been completed, Vopak sent the (3/3) document (together with a quality certificate and other documentation) to Phillips, and that is where the Vopak bill of lading remained from then on.

Shortly afterwards, within a few days from the date of loading, the bunkers were delivered to the respective ocean-going vessel(s). The *Luna* did not require the presentation of an original bill of lading in that process. In fact, the presentation of an original bill of lading would not have been possible anyhow as the full set was still held by Phillips at that time. The *Luna* delivered the bunkers without presentation, the ocean-going vessels accepted the bunkers without presentation and Phillips, in possession of the bill of lading and aware of the delivery,⁴ did not object.

However, that quickly changed after the bankruptcy of OW Bunker in November 2014. The insolvency of OW Bunker caused the buyers to default. The purchase price remained unpaid, the bunkers could no longer be retrieved and Phillips turned to the demise charterers of the *Luna* for the alleged misdelivery of the bunkers under the bill of lading contract.

The proceedings in Singapore

Following two preliminary rounds after which the demise charterers of the *Luna* were allowed to raise a full swing defence,⁵ Phillips was successful at first instance. The judge held that the Vopak bills of lading 'had contractual force and functioned as typical bills of lading'. More particularly, the judge found that the destination 'bunkers for ocean-going vessels' was clear enough, that the bill of lading had contractual force, that the issuance of only one set for several parcels did not affect its validity and that the impossibility of complying with the presentation rule was not a valid defence. The judge held that the demise charterers of the *Luna* were liable in contract.⁶

On appeal, however, the court disagreed with the judge. In determining the nature of the Vopak bill of lading, the court started from the generally accepted position that 'the modern bill of lading serves three functions: it operates as (a) a receipt by the carrier acknowledging the shipment of goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to the goods'.⁷ Whereas the receipt function was obvious enough in this case, the question was whether the Vopak bill of lading had in fact also been intended to operate as a contract of carriage and/or a document of title.

The court first dealt with the intentions of the contracting parties in the underlying sale. The court established that the parties had agreed on a 30-day credit period, that there was no need to produce the bill of lading in this relationship, that the title to the bunkers had already passed to the buyers upon loading,⁸ that there was no reference to a bill of lading in the sales contracts and that the bunkers would be delivered to the ocean-going vessels shortly after loading. All of this led the court to conclude 'that as between the respondent and the buyers, the Vopak BL was a non-essential

⁴ *The Luna* (n 3) [55].

⁵ *The Star Quest and Others* (n 3).

⁶ See the judgment of 30 January 2020 of the Court of Appeal in *The Luna* (n 3) paras 20 ff.

⁷ *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 2 AC 423.

⁸ Clause 2.1(b) of the T&Cs stipulated: 'Notwithstanding any right of the Seller to retain the shipping documents until payment, title to and risk in the Product shall pass to the Buyer as the Product passes the Vessel's permanent flange connection at the Loading Terminal or the supplying Vessel's manifold'.

document with no contractual force or effect as a contract of carriage or as a document of title. It did not and could not serve the traditional functions of a bill of lading'.

Moving on to the intentions of Phillips and the demise charterers of the *Luna*, these observations with regard to the sale clearly resonate in the court's assessment of the contract of carriage. The bill of lading did not play a 'security role' in the sale, and the court held that 'this would also have been known by the appellants who, as the carriers loading and discharging the bunkers bought and sold, were active participants in the commercial arrangements between the respondent and the Buyers'.

Arguably, the key consideration then follows immediately afterwards, namely that:

[w]hen the Vopak BLs were issued, neither the respondent nor the appellants could have intended for delivery of the bunkers to be made only upon presentation of an original Vopak BL. Put differently, the Vopak BL was not regarded as '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' (see *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327 at 341). On the contrary, all parties conducted themselves on the basis that the Buyers could direct the Vessels to deliver the bunkers to various ocean-going vessels immediately after loading, without any involvement on the respondent's part. The corollary of this arrangement is that the Vopak BLs could not have offered the respondent any security against default by the buyer that typical bills of lading would (see *APL Co Pte Ltd v Voss Peer* [2002] 2 SLR(R) 1119 at [53]). In sum, the parties' commercial arrangements indicate that they had not intended for the Vopak BLs to function as typical bills of lading.⁹

As such, the Vopak bill of lading did not need to be produced in order to obtain delivery, and the delivery of the bunkers to the ocean-going vessels did not amount to a misdelivery.

Comments

The modern bill of lading serves as a receipt, it evidences the contract of carriage and it is a document of title.¹⁰ However, not all bills of lading possess these three functions, let alone display them all the time and in every relationship. A charterer's bill of lading, for instance, starts out as just a receipt in the hands of the charterer.¹¹ As between charterers and owners it does not evidence the contract of carriage, but it may acquire that role upon its transfer (as a document of title) to a bona fide third-party holder.¹² And with the presentation to the carrier in the port of discharge, the bill of lading loses its document of title function and becomes 'spent'. Some bills of lading will actively play all these different roles in the course of an international documentary sale; others will simply spend their cycle of life hidden in a drawer.

The Vopak bill of lading in *The Luna* was hardly the archetypical kind. First, it was not issued by the master of the *Luna*, but instead by the consignor, Vopak. In addition, it was vague as to the consignee and the destination. The Vopak bill of lading only mentioned that the bunkers were destined for 'ocean-going vessels'. Once issued, the Vopak bill of lading was sent to Phillips, where it stayed (dormant in a drawer), while the bunkers were physically delivered to the end users, only to be reanimated after OW Bunker's bankruptcy with the sole objective of going against the charterers of the *Luna*. Is such a document then really a bill of lading?

In its construction of the nature of the Vopak bill of lading, the Court of Appeal leaned heavily on the intentions of the contracting parties to the sale. And, indeed, the 30-day credit period, the passing of the title to the buyers upon loading and the delivery of bunkers to third parties almost immediately afterwards all confirm that the role of the Vopak bill of lading in the sale, if any at all, was limited to a receipt.

⁹ The APL case is (especially in Singapore) somehow often referred to as *APL v Voss Peer*, but the name of the unpaid seller of the Mercedes, relying on the security of the straight bill of lading in his hands, was Peter Voss.

¹⁰ *The Rafaela S* (n 7).

¹¹ *Rodocanachi v Milburn Brothers* (1886) 17 QBD 316; *President of India v Metcalfe Shipping Co Ltd (The Dunelmia)* [1969] 2 Lloyd's Rep 476.

¹² *Leduc v Ward* (1888) 20 QBD 475.

Whereas Phillips was a party to the sale, the demise charterers of the *Luna* were not. As such, the operation of the bill of lading within the sale cannot be applied one on one to establish the role of the bill of lading in the contract of carriage. These contracts are to some extent connected, of course, but at the same time independent. The limited role of the bill of lading between Phillips and its buyers cannot prejudice its role in the contract of carriage.

Turning then to the contract of carriage, it is unusual but not really relevant that Vopak drafted the bill of lading and initiated its issuance. Far more important is that the bill of lading was issued to the order of Phillips and subsequently signed for the demise charterers of the *Luna*.¹³ In the absence of any other 'shipping document' (or contract), the Vopak bill of lading therefore not only confirmed good receipt of the bunkers,¹⁴ but also evidenced a contract between Phillips and the charterers of the *Luna* for their carriage from the Vopak terminal to certain ocean-going vessels.¹⁵ Admittedly, that destination will have puzzled an outsider, but it was apparently perfectly clear for the *Luna*, Phillips (Vopak) and the ocean-going vessel in question when and where the bunkers should be delivered. In spite of the description, there was never any confusion and the bunkers were delivered without any problem.

Arguably, the Vopak bill of lading was also a document of title, albeit for a very brief period of time. It had all the usual features of a document of title. It had been issued in a (3/3) set and contained not only an order clause, but also an attestation clause. The fact that the bill of lading was eventually not used as a document of title does not mean that it could not have been a document of title to begin with.

In the case at hand, Phillips clearly did not see any reason to do so, but it could in principle have exercised its right of instruction. Phillips held the bill of lading, and for a few days it could have presented the charterers of the *Luna* with the full (3/3) set and ask for (re)delivery of the bunkers or give new instructions.¹⁶ In fact, if the *Luna* were to have sunk on her way to an ocean-going vessel, Phillips would surely have been required to produce the bill of lading in order to pursue its claim.

This also works the other way around. Again, Phillips had no intention of using the bill of lading as a document of title, but what would have happened if the charterers of the *Luna* had simply refused to deliver the bunkers without presentation. This was the case in *The Houda*, for instance, and Millett LJ stressed the risks for the carrier in such a situation since 'unless the bill of lading is produced to him, he cannot know whether it has been negotiated or not'.¹⁷

Although the Vopak bill of lading was not used as a 'regular' bill of lading by any of the parties involved in this case, it is submitted that it was a bill of lading all the same. The Vopak bill of lading confirmed the receipt of the bunkers, it evidenced the contract of carriage from the terminal to the ocean-going vessels and it was even a document of title for a few days.

However, a different view on the nature of the document would not have changed the outcome of the case. The presentation rule is not a mandatory rule. Phillips and the charterers of the *Luna* were perfectly free to discard it as they did, but not without consequences. Phillips had accepted a 30-day credit period while it knew that the bunkers were going to be delivered to (and used by) ocean-going vessels within just a few days.¹⁸ Phillips did not object or interfere and only acted as the lawful bill of lading holder after the bankruptcy. By then it was too late. Once the delivery of the bunkers to the correct ocean-going vessel(s) had been achieved with Phillips' implicit approval, that delivery could not become a misdelivery later on just because of the buyers' default.

¹³ Apparently, they were ultimately not signed by the master, but instead by the chief officer. See *The Star Quest and Others* (n 3) [64].

¹⁴ See the wording of the Vopak bill of lading: 'SHIPPED in apparent good order and condition by PHILLIPS 66 INTERNATIONAL TRADING PTE LTD on board (...)'.
¹⁵ The Vopak bill of lading also contained a few standard exemptions, eg 'Not responsible for leakage, deterioration of quality and contamination'.

¹⁶ Or switch the bills. S D Girvin *Carriage of Goods by Sea* (OUP 2022) 246; M Goldby *Managing the risks of switch bills of lading* NUS Centre for Maritime Law Working Paper 19/03.

¹⁷ *The Houda* [1994] 2 Lloyd's Rep 541.
¹⁸ *The Luna* (n 3) [55].