Title to sue and COGSA 1992: Is there still a legal black hole for cargo claimants?

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Title to sue is a critical element in making a cargo claim against a sea carrier. This article examines various instances where third parties who need to bring a cargo claim against the carrier have fallen outside the statutory vesting of rights under COGSA 1992 and are forced to rely on non-contractual modes of recovery or on having the contractual counterparty recover damages for their loss. The article will pay particular attention to the operation of COGSA 1992 in respect of multimodal bills of lading, spent bills of lading, switch bills of lading and bills of lading which have been fraudulently indorsed or transferred to an innocent third party. It will then examine the extent to which the position of a claimant falling outside COGSA 1992 can be mitigated by a claim being made to recover those losses by the contractual counterparty to the carrier, an issue recently highlighted in *The Baltic Strait* and *The Fehn Heaven*. The article will seek to answer the question of whether there may still be cargo claimants who fall into a legal black hole.

Introduction

It should be a straightforward matter. The cargo has been lost or damaged during the sea carriage or has been delivered to the wrong person, and the owner or the pledgee wants compensation from the sea carrier. However, the owner or pledgee of the cargo at the time the voyage ends will probably not be the party to the contract of carriage made at the start of the voyage. The doctrine of privity of contract means that the owner or pledgee is a stranger to the contract and can neither sue nor be sued on it. Of course, there is always tort but if the original owner was not the owner of, or had the immediate right to possession of, the cargo at the time it was lost or damaged, he will not be able to sue in negligence. As for bailment, that is no use either as the person seeking to claim may not be the original bailor and will have to show that the sea carrier attorned to him – something that is very unlikely to have happened (simply delivering the cargo on production of a bill of lading is not enough). The original shipper can always sue on the contract of carriage, if he chooses, but he can recover only for his own loss, and not for that of a third party. So, the common law presents a black hole for end buyers and pledgees who have suffered loss in connection with the cargo carried on the sea voyage.

In the UK, the Bills of Lading Act 1855 was the first legislative attempt to remedy this black hole. In 1992 it was superseded by the Carriage of Goods by Sea Act, which is widely agreed to have provided the necessary remedial access through the initial contract of carriage contained in or evidenced by the bill of lading, the sea waybill or the straight bill of lading, by vesting rights of suit in the 'lawful holder' of the former and the named consignee in the latter two, as if they had been original parties to the contract contained in or evidenced by that carriage document. But is that so? This article will examine cases involving the 1992 Act in the 26 years of its operation to see if there

are still cases in which a party who has suffered loss in connection with the carriage of cargo by sea is left outside the Act. If that is the case, the article will then examine the extent to which this lack of remedy can be mitigated by the original contracting party recovering damages for the third party's loss, or by a claim in tort or bailment by the third party, with a view to determining whether there are still some claimants who fall into a legal 'black hole' when it comes to recovery against the sea carrier.

The Carriage of Goods by Sea Act 1992 (COGSA 1992)

Section 2(1) of COGSA 1992 operates by vesting rights of suit in various categories of third parties so that all rights of suit under the contract of carriage are transferred to and vested in them as if they had been a party to that contract. There are three categories of third parties who come under this provision.

The lawful holder of a bill of lading

The lawful holder of a bill of lading is defined in section 5(2) so as to cover:

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill; …

Both categories require the holder to have come into possession of the bill of lading, although continued possession is not required.[1] In addition, both categories require the person to have become the holder of the bill of lading in good faith. The wording of (a) differs from (b) in that the latter requires the 'completion, by delivery of the bill …'. This means that, with a transfer of a bearer bill or the indorsement of an order bill, there must be an intention by both transferor and transferee that this process should transfer contractual rights in the document. This will not happen if the bill is indorsed to the wrong party by mistake, or is delivered by the wrong party. Both errors occurred in *The Aegean Sea*,[2] with the consequence that the mistaken indorsee never became a 'lawful holder' and so never became potentially liable to the carrier under section 3(1) of COGSA 1992 in respect of liabilities arising out of the shipment of undisclosed dangerous cargo. In *The Erin Schulte*, the bank which received an indorsed bill of lading tendered by the shipper under a letter of credit did not become the lawful holder because it refused to pay under the credit and so held the bill to the order of the shipper.[3]

There is a third category which covers:

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates.

This covers holders of 'spent' bills who come into possession of the bill of lading after the cargo has been delivered and who fit into one of the two categories specified in headings (a) or (b). In *The Ythan*, Aikens J held that the term 'transaction' refers to the physical process by which the bill of lading is transferred from one person to another.[4] Aikens J went on to add that the transaction must

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[1] Section 2(1) refers to a person who 'becomes' (a) the lawful holder of the bill of lading.

[2] *Aegean Sea Traders Corp v Repsol Petroleo* [1998] 2 Lloyd's Rep 39 (QB). The delivery of the bill was not made by the indorser, a further reason for there being no 'completion, by delivery of the bill'.

[3] *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2014] EWCA Civ 1382, [2016] QB 1, [2013] EWHC 808 (Comm), [2013] 2 Lloyd's Rep 338. The bank eventually paid out under the credit, by which time the cargo had been delivered; however, the bank was able to establish that it was a lawful holder under the third category in heading (c) of s 5(2).

[4] *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399 (Comm), [2006] 1 Lloyd's Rep 457 (Aikens J): 'This is also the view of *Carver on Bills of Lading* … and also *Benjamin's Sale of Goods* … It appeared to be Lord Hobhouse's understanding too, given the way he refers to a transfer of a bill of lading in para 30 of his speech in *The Berge Sisar*' at [66]. See *Borealis AB v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 AC 205.

have happened in the normal course of trading,[5] although this additional requirement is not justified by the language of section 5(2)(b) and is at odds with the previous finding that a 'transaction' refers to the physical process by which the bill of lading is transferred.[6]

The acquisition of rights of suit by a person falling under this heading is subject to a caveat in section 2(2):

> Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—
> (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
> (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.[7]

In heading (a), the word 'transaction' is repeated, but with a further reference to 'any contractual or other arrangements …'. The caveat was introduced to prevent the trading of documents after the cargo had been delivered. The effect is that if the relevant sale, pledge or gift is made before delivery, the person subsequently receiving possession of the bill of lading after delivery will obtain rights of suit as a lawful holder under section 5(2)(c) if he falls within one of the three categories of 'lawful holder' identified in section 5(2)(a) and (b). There is no additional requirement that the recipient of the bill of lading has received it pursuant to a contractual entitlement.[8]

Under section 2(5), the rights of the original bill of lading shipper[9] will be divested when the bill comes into the possession of a party who becomes a lawful holder, and the same will happen when a lawful holder transfers the bill of lading to another party who in turn becomes the lawful holder. There can only be one party with rights to sue under the contract contained in or evidenced by the bill of lading.

The consignee under a sea waybill and a straight bill of lading[10]

This category also covers the consignee under a straight bill of lading, that chameleonic document which sometimes functions as a bill of lading and sometimes does not. COGSA 1992 is an instance

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[5] 'This is because the "transaction" of the bills from UBS to Marsh has nothing to do with the normal course of trading a bearer bill of lading, such as these two bills of lading. The transaction was made solely to enable Primetrade to collect from the underwriters once the casualty had taken place and the insurance settlement had been made. Without those events, Primetrade would never have had possession of the bills (through the insurance broker Marsh), because they would have remained in UBS's possession (actual or constructive) until the purchasers from Primetrade had paid for them under the letters of credit that had been established in Primetrade's favour.'

[6] See Sir Guenter Treitel and F M B Reynolds (eds) *Carver on Bills of Lading* (4th edn Sweet & Maxwell 2017) para 5-025, who criticise the decision on these – and other – grounds.

[7] The section can also apply where the goods are destroyed with the sinking of the carrying vessel, as was the case in *The Ythan* (n 4). Section 5(4) provides that: 'Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates— (a) cease to exist after the issue of the document; or (b) cannot be identified (whether because they are mixed with other goods or for any other reason); and references in this Act to the goods to which a document relates shall be construed accordingly'. The reference to s 2(2) means that s 5(4) will not restrict the operation of s 2(2) in vesting rights in a party who becomes the holder of a bill of lading following destruction of the cargo.

[8] *Pace Shipping Ltd v Churchgate Nigeria Ltd (The Pace)* [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep 183. The transaction in question preceded the delivery of the cargo to the receiver but it was argued that, as the receiver had no contractual entitlement to the bill under the sale contract as payment had been made by a third party, NBIC, the receiver fell outside the provisions on spent bills in COGSA 1992. Teare J rejected this argument. The contracts of sale concluded with the respondent before the bills became spent were the reason or cause of the endorsement and delivery of the bills to the respondent. See para [50].

[9] This will be the party named as shipper or consignor in the bill of lading, although he may not be the party who has made the contract of carriage contained in or evidenced by the bill of lading, as is the case with a fob seller. See *The Athanasia Komninos* [1990] 1 Lloyd's Rep 277, 280 (QB).

[10] '[t]he person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract …'.

of where it does not so function, but rather functions as a sea waybill.[11] There is no divestment of the original shipper's rights in relation to these documents.

The person named in a ship's delivery order[12]

The relevant provision in COGSA 1992 was generally assumed to reflect the common law definition of a ship's delivery order, namely instructions to which the shipowner had agreed to deliver to the person named in the delivery order, and also to the holder of a delivery order which did not name that person in the delivery order.[13] This assumption has been challenged by the recent observations of Sir Christopher Clarke in the Court of Appeal in *Glencore International AG v MSC Mediterranean Shipping Co SA* that: 'It seems to me implicit in those circumstances that the parties intended that the delivery order should have the key attribute of a bill of lading, namely an undertaking by the carrier to deliver the goods to the person identified in it …'.[14]

Problem cases

Multimodal bills of lading and waybills

This is an issue that received some academic commentary in relation to the applicability of the Bills of Lading Act to such bills, with Bateson and Carver arguing that such bills are not included within the Act.[15] The Law Commission's report gives no real guidance on this issue. The report notes the fact that traders typically treat such documents as traditional bills of lading and provision is made for tender under the Uniform Customs and Practice for Documentary Credits (UCP), which states that: 'We have no evidence from consultants that there are particular privity problems which are unique to combined transport bills of lading as distinct from the traditional ocean variety'. It goes on to state that 'since implementing legislation is expressed to cover any bill of lading, including "received for shipment" bills, multimodal documents are capable of falling within its ambit'.[16]

COGSA 1992 provides no definition of a 'bill of lading', although section 1(2)(b) provides that the Act applies to 'received for shipment' bills. However, it is likely that this requires at least an indication of the carrying ship and of receipt by the sea carrier. Carver also argues that at common law a bill of lading refers only to a document containing or evidencing a contract for the carriage of goods by sea, a fact bolstered by the title of the Act itself, the Carriage of Goods by Sea Act 1992.[17] As against that, the definition of 'contract of carriage' in section 5(1) refers to the 'contract of carriage contained in or evidenced by the bill of lading' and makes no reference to that contract being by sea. It is possible that the Act might be construed so as to operate as regards transfers of the contract of carriage that take place between shipment and completion of the sea voyage, during which period the document will be a document of title, providing there is a notation as to shipment. The whole of

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[11] This is attributable to s 1(2), which provides that: 'References in this Act to a bill of lading— (a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement'. The straight bill, however, is treated as a sea waybill under the Act by virtue of s 1(3), which provides: '(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but— (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract'.

[12] '[t]he person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order, shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract …'.

[13] See *Peter Cremer GmbH v General Carriers SA (The Dona Mari)* [1973] 2 Lloyd's Rep 366, 372,where Kerr J held: 'In other cases, they may be what are sometimes referred to as "ship's delivery orders", that is, documents which are usually issued by shipowners' agents addressed to the master or chief officer or other persons authorising delivery to the holder or to the order of a named person'.

[14] [2017] EWCA Civ 365, [2017] 2 Lloyd's Rep 186 at [46].

[15] H D Bateson 'Through bills of lading' (1889) 5 *Law Quarterly Review* 424; Carver 'On some defects in the Bills of Lading Act 1855' (1890) 6 *Law Quarterly Review* 289, 294.

[16] Uniform Customs and Practice for Documentary Credits (UCP 600) para [2.49].

[17] *Carver on Bills of Lading* (n 6) para 8-081.

the contract of carriage would be transferred, so allowing the lawful holder to sue in relation to loss or damage that occurred outside the period of sea carriage. In contrast, a 'sea waybill' is defined in section 1(3)(a) as 'such a receipt for goods as contains or evidences a contract for *the carriage of goods by sea*' (emphasis added), which would exclude combined transport waybills from the scope of the Act.[18]

However, it should be noted that in no case has the validity of the operation of first the Bills of Lading Act 1855 and then the Carriage of Goods by Sea Act 1992 been challenged in cases involving a multimodal contract of carriage by sea evidenced by a bill of lading or sea waybill.[19] The most recent of these is *The Maersk Tangier*,[20] where Andrew Baker J considered that the receiver had title to sue either as a party to the original contract or as the person to whom delivery was to be made under a waybill pursuant to section 2(1)(b) of COGSA 1992. The title to sue point was not considered in the subsequent decision of the Court of Appeal affirming the first instance decision.[21]

The Contracts (Rights of Third Parties) Act 1999 might prove useful in overcoming these residual uncertainties as to title to sue under such documents. Section 1(1) allows a person who is not a party to a contract to enforce the contract in its own right if: '(a) the contract contains an express term to that effect; or (b) … the contract purports to confer a benefit on the third party'. Under section 1(3), the third party has to be expressly identified in the contract either 'by name, as a member of a class or as answering a particular description', although it need not be in existence when the contract is entered into. In the light of these provisions, it should be a relatively straightforward matter to draft a clause that allows a third-party holder of a combined transport bill of lading to claim the benefit of that contract.[22]

Contracts for carriage of goods by sea are excluded in section 6(5), except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract. A contract for the carriage of goods by sea is defined in section 6(6) as referring to a contract: '(a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction, or (b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction'. The terms 'bill of lading', 'sea waybill' and 'ship's delivery order' bear the same meaning as they do under COGSA 1992, so if a multimodal bill of lading is not a bill of lading for the purposes of that Act then it would be outside the exclusion.[23]

However, section 6(5)(b) excludes 'a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport

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[18] But see *Quantum Corp Ltd v Plane Trucking Inc* [2002] EWCA Civ 350, [2002] 1 WLR 2678, [2002] 2 Lloyd's Rep 25,where the road legs of a multimodal contract of carriage involving air carriage were subject to the Convention on the Contract for the International Carriage of Goods by Road (CMR) as involving 'carriage by road'. On this basis, the sea leg of a waybill could be regarded as constituting a contract for the carriage of goods by sea, as regards the sea carriage element of the overall carriage.

[19] *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402; *Mayhew Foods v Overseas Containers* [1984] 1 Lloyd's Rep 317.

[20] *AP Moller-Maersk A/S (t/a Maersk Line) v Kyokuyo Ltd (The Maersk Tangier)* [2017] EWHC 654 (Comm), [2017] 1 Lloyd's Rep 580, [32]. There was no problem with the Hague-Visby Rules applying to the sea leg of the contracts, contrary to dicta of Flaux J in *Bhatia Shipping & Agencies Pvt Ltd v Alcobex Metals Ltd* [2004] EWHC 2323 (Comm), [2005] 2 Lloyd's Rep 336.

[21] *Kyokuyo Co Ltd v AP Moller-Maersk A/S (The Maersk Tangier)* [2018] EWCA Civ 778, [2018] 2 Lloyd's Rep 59. Flaux J was one of the Court of Appeal judges in *The Maersk Tangier*.

[22] These provisions will not, however, enable contractual liabilities to be transferred to the third party.

[23] However, standard form bills of lading, or waybills, for multimodal carriage do not include any clause conferring on third parties the benefits of the contract. Clause 8 of Multidoc 95 may have this effect as regards the right to delivery of the goods under the bill of lading. It provides that: 'The MTO undertakes to perform or to procure the performance of all acts necessary to ensure Delivery of the Goods:

(i) when the MT Bill of Lading has been issued in a negotiable form "to bearer", to the person surrendering one original of the document; or

(ii) when the MT Bill of Lading has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed; or

(iii) when the MT Bill of Lading has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transferred "to order" or in blank, the provisions of (ii) above apply'.

convention'. Therefore, the Act will only assist if the particular combined transport bill of lading is regarded as a contract for the carriage of goods by sea, which is outside the ambit of COGSA 1992,[24] and is also not to be treated as a contract for the carriage of goods by road subject to the CMR. Such a situation would arise when goods are unloaded from a lorry onto the ship, so taking the contract outside the ambit of Article 2 of the CMR.

One suspects that there is a convention by carriers and P&I clubs not to take the point, but that does not mean that there is not a point to be taken. However, a simple way to enable the consignee to sue on the document would be by an assignment of rights by the shipper. If the combined transport bill falls outside COGSA 1992, then the shipper will have the right to claim damages for the consignee's loss,[25] and that right will be assigned to the consignee.

Spent bills

Most of the cases on COGSA 1992 have involved spent bills in situations where the normal trading arrangements have broken down. In *The David Agmashenebeli*,[26] the contract of sale was renegotiated after the bill of lading had been rejected under the letter of credit. The vessel had sailed from the loading port without bills of lading being issued, because of a dispute as to whether they should be claused. At the discharge port this was resolved by claused bills being issued to the order of the shipper, Agrosin, who marked them as 'accomplished' and returned two of the bills to the master. The cargo was then discharged and the bills of lading became exhausted. Delivery had been made to the party entitled to possession in the goods and the bills of lading were not capable of triggering any delivery obligation on the part of the ship to any party other than Agrosin. Agrosin then submitted their bill of lading under a letter of credit opened by the sub-buyer, Guangxi with whom they had agreed to deal direct under a cut-out arrangement. Guangxi's bank rejected the claused bills. By the time the bills of lading were passed to the bank possession of those bills no longer gave to a transferee any right as against the carrier to possession of the goods to which those bills related and therefore no right of suit passed to the bank. The sale to the sub-buyer was renegotiated. The price was reduced, Agrosin's obligation as seller was to present the claused bills to the bank, with delivery to be taken from Agrosin and not the vessel. The letter of credit was discounted, following which Agrosin released the cargo to its buyer, and the bill of lading was then re-presented. Payment was made and the bills were then transferred to Guangxi, whose right to sue depended on whether the proviso to section 2(2)(a) applied. The proviso did not apply as the transfer of the bill was called for by contractual or other arrangements made after the bills of lading ceased to be documents of title vis-à-vis the ship, which had happened at the latest at the time discharge had commenced. The right to sue under the bill of lading therefore remained in the original shipper.[27]

The Ythan involved an explosion on a vessel causing the loss of the cargo. The owners sought to advance a claim for damages for shipment of undisclosed dangerous cargo against the party holding the bill of lading. Orinoco had shipped the cargo under a fob sale to Primetrade, who had in turn on-sold on cif free out terms to Orient. After the casualty, Orinoco received payment following tender of the bearer bills of lading to UBS under the letter of credit opened pursuant to Primetrade's instructions. Primetrade agreed with Orient to cancel the letter of credit under the sub-sale[28] and ordered UBS to send the bills to its insurance broker, Marsh, as part of the claim UBS was making

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[24] Section 6(5)–(7) specifically excludes from the Act's ambit contracts for the carriage of goods by sea to which COGSA 1992 applies.

[25] Under *Dunlop v Lambert* (1839) 6 Cl & F 600, 626–27, which is discussed below.

[26] [2002] EWHC 104 (Admlty), [2003] 1 Lloyd's Rep 92.

[27] The claim was for damages caused by the master's breach in wrongfully clausing the bills, but failed as the master could have claused the bills on a different basis which would have led to their rejection under the letter of credit.

[28] The sale being on out-turn terms, Primetrade would have been obliged to reimburse Orient for the price of the cargo that would now be undelivered.

under its open cover. The owners directed their fire at Primetrade, arguing that on receipt of the bills of lading by Marsh Primetrade had become the lawful holders of the bill under either section 5(2)(b) or (c).

Aikens J held that Primetrade was not a lawful holder under section 5(2)(b) as, with the destruction of the cargo, by the time Primetrade obtained the bills through its agent, the bills no longer gave a right to possession of the cargo against the shipowner.[29] Neither was Primetrade the lawful holder under section 5(2)(c). It would not have become the lawful holder if the transaction had taken place before the bills ceased to give the right to possession as the bills would have stayed with UBS until Orient had paid for them. UBS had clearly become the lawful holder of the bills when it paid Orinoco and had ceased to be the lawful holder when it relinquished its pledge and sent the bills to Marsh. However, if Marsh was not the new lawful holder, as it was holding the bills as agent for Primetrade, and Primetrade was not the new lawful holder, the only possible lawful holder would be UBS – which was not worth suing as it had taken none of the steps required by section 3(1) for a lawful holder to become liable under the contract contained or evidenced in the bill of lading. Aikens J went on to consider the position if Primetrade had been constituted a lawful holder under section 5(2)(c). Primetrade would not be vested with rights under section 2(1) because the transaction fell outside the proviso in section 2(2)(a) in that the immediate and proximate cause of the transfer was the settlement of the insurance claim, something which had occurred after the explosion, albeit the claim arose under an open cover which predated the explosion.[30]

The decision in *The Ythan* would mean that where cargo is a total loss during the voyage, resulting in the bill of lading ceasing to give the right to possession to it as against the carrier, the intermediate seller in a chain, when it comes into possession of the bill of lading will not be constituted as a lawful holder and will be unable to sue for the loss of the cargo under the bill of lading. This is because the bill is spent, but in the normal course of trading the seller would never have come into possession of the bill because it would have been transmitted directly by its bank to the sub-buyer's bank under the letter of credit opened in its favour.

In *The Erin Schulte*, the normal flow of the trade transaction was disrupted by the conduct of the buyer's bank under the letter of credit.[31] The bank received the documents, queried them, and did not pay the seller, Gunvor, to whom the letter of credit had been transferred, although it retained the documents. It held them as agent for the shipper. Subsequently, after the cargo had been delivered, it agreed to pay out on the credit and sought to sue the carrier for misdelivery of the cargo. At first instance, Teare J held that the bank who had received the bill as indorsee had title to sue under section 5(2)(b) but that, if this were not the case, it would have title to sue under section 5(2)(c).[32] The Court of Appeal reversed the first of these findings and held that the indorsement to the bank did not constitute it as a lawful holder as there had been no completion by delivery. The completion of an indorsement by delivery required the voluntary and unconditional transfer of possession by the holder to the indorsee and an unconditional acceptance by the indorsee. This seems to refer to an accompanying intention to transfer and accept the rights under the contract of carriage.[33]

However, the bank did fall within the provisions relating to spent bills in section 5(2)(c).[34] The bank's subsequent agreement to pay under the credit related back to a transaction which predated the delivery of the cargo – the transfer of the letter of credit – and so fell outside the exclusion in section

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29 The same would also be the case once the cargo had been delivered to a party not entitled to its possession.

30 *The Ythan* (n 4)[85].

31 [2014] EWCA Civ 1382, [2016] QB 1.

32 [2013] EWHC 808 (Comm), [2013] 2 Lloyd's Rep 338.

33 *The Erin Schulte* (n 31) [26], although subsequently Moore-Bick LJ refers to unconditional transfer of possession, and of unconditional acceptance by the indorsee (at [28]).

34 The documents were presented before the letter of credit expired and as Gunvor's actions were to be interpreted as insisting on the validity of that presentation, there was no difficulty in accepting that the transfer of the documents occurred pursuant to the original terms of the letter of credit.

2(2)(a).[35] In contrast to Aikens J's analysis of the proviso – that one was required to find the proximate cause of the transfer of the bill of lading – Teare J had referred to the 'real and effective' cause. Moore Bick LJ did not find this helpful, and stated: 'Given that section 2(2)(a) refers to a transaction effected in pursuance of a contractual or other arrangement, I think it is preferable simply to identify the arrangement, if any, pursuant to which the transfer was made'.[36] Here, the letter of credit was the relevant arrangement and, although the credit had expired shortly before discharge began, it remained open for the bank to waive the expiry date and accept the documents against payment of the face value of the credit.

The parties had agreed that, by the time the seller accepted payment from the bank, the bill of lading no longer gave a right as against the carrier to possession of the goods to which it related – that right had been lost once discharge began on 15 June 2010. However, Moore-Bick LJ was of the view that the bank fell under section 5(2)(b) as the bill had not become spent because the cargo had not been delivered to a party entitled to possession of the goods.[37] Although a bill of lading continues as a document of title after a misdelivery, this may not be the case as regards the transfer of contractual rights under COGSA 1992, as seen in Aikens J's decision on this point in *The Ythan* in relation to the cessation of a right to possession against the carrier in respect of cargo which became a total loss during the voyage.[38] However, the recent decision of the Singapore High Court in *Oversea-Chinese Banking Corporation Limited v Owner and/or Demise Charterer of the Vessel 'Yue You 902'*[39] has followed the dicta of Moore Bick LJ in *The Erin Schulte* in finding that, for the purposes of COGSA 1992, a bill of lading does not become spent when delivery is made to a person who is not entitled to possession of the goods to which it relates, as is the case with its continuing function as a document of title.

Switch bills

Switch bills are replacement bills of lading which may be issued for a variety of reasons, both legitimate and illegitimate. A common reason is to conceal the identity of the shipper; another reason is to enable a change in the discharge port. Both reasons are legitimate and, if the original bills are surrendered prior to the issue of the new bills, there should be no problems for the holder of the new bills in claiming delivery of the cargo and in obtaining contractual rights of suit through COGSA 1992.[40] The original shipper will have the right to name a new consignee prior to transfer of the bill or delivery of the cargo,[41] and will also be entitled, on surrender of the original bills, to require the issue of a new set of bills of lading with an alteration in the name of the consignee.[42] In *The Finmoon*,[43] bananas were shipped from Ecuador to St Petersburg. Two sets of bills of lading were

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[35] By accepting payment of the face value of the credit, Gunvor necessarily accepted that SCB was entitled to take up the documents, so constituting an unconditional transfer of the documents sufficient to constitute SCB the holder of the bill of lading. It did not matter whether that was characterised as a further presentation or merely an insistence that SCB accept the documents pursuant to the original presentation.

[36] *The Erin Schulte* (n 31) [56].

[37] This view also underpins the analysis of the transfer of contractual rights of suit under COGSA 1992 adopted in *The Dolphina* [2011] SGHC 273, [2012] 1 Lloyd's Rep 304 (HC, Singapore), discussed below. The discussion on spent bills in the Law Commission's report is entirely directed at the situation where a person entitled to delivery of the cargo comes into possession of the bill of lading after he has taken delivery of the cargo. See Report of the Law Commission and Scottish Law Commission 'Rights of suit in respect of carriage of goods by sea' (Law Com No 196, Scot Law Com No 130) [2.42].

[38] *The Ythan* (n 4) [70]: 'Like the authors of *Carver*, my view is that there cannot be a contractual right (as against the carrier) to possession of goods that no longer exist (for practical purposes) because they are at the bottom of the sea. If the reason for the loss is a breach of contract by the carrier, there may at that stage spring up a contractual right to damages, but whether there is and who can exercise that right are different questions which I need not discuss here'. See *Carver on Bills of Lading* (n 6) para 6-035.

[39] [2019] SGHC 106 (High Ct Singapore), noted by S Baughen (2019) 25 *JIML* 266.

[40] The terms of any 'Himalaya' clause in the first bill would continue to apply as s 2 of the Contracts (Rights of Third Parties) Act 1999 precludes variation of third-party contractual rights obtained under s 1 of the Act without consent of the third party.

[41] *Mitchell v Ede* (1840) 11Ad & El, 888.

[42] *AP Moller-Maersk AS (t/a Maersk Line) v Sonaec Villas Cen Sad Fadoul* [2010] EWHC 355 (Comm), [2011] 1 Lloyd's Rep 1.

[43] *Finmoon Ltd v Baltic Reefer Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep 388.

issued for a shipment of bananas from Ecuador to Russia. The first was issued at the loadport to the sellers, naming them as shipper and specifying a named consignee. On receipt of the price of the goods from the buyers, the sellers returned the bills to the ship's agent who issued a second set of bills at the port of discharge recording the same loadport and shipment date as the first set. The bills were given to the buyer's agent and Eder J held that the buyer was not the lawful holder of the first set of bills but was the lawful holder in respect of the second bills and obtained rights of suit under section 2(1).[44]

However, switch bills may be issued for an illegitimate purpose, such as to conceal the place of loading so as to enable export from a country, such as Iran, that is subject to sanctions. In such a case, a second bill of lading would be issued which fraudulently misstated the port of loading and any subsequent transfer of the bill might be tainted by that fraud with the result that the innocent transferee would not be constituted as a lawful holder and would have to resort to non-contractual actions to claim against the carrier for any loss or damage to the cargo, a question discussed below.

Fraud

In *The Dolphina*,[45] fraud in the transfer of the bills was held to prevent the completion by delivery contemplated by section 5(2)(b) with the result that the indorsee or transferee was not vested with the rights in the contract contained in or evidenced by the bill of lading. This happened where a fraud was perpetrated by the holder of an order bill, in collusion with the shipowner, on a Chinese bank. Cargo was delivered without production of a bill of lading. The usual indemnity was given, with a condition that on receipt of the bills the receiver would surrender them to the shipowner, marked 'accomplished'. The bills recorded shipment in March and cargo was delivered in early April. When the receiver obtained the bills it did not surrender them to the shipowner but used them as part of a scam with a fake sale contract in June under which the bills formed part of the documents submitted to the bank under the letter of credit. The buyer dropped out and the bank then wanted to take delivery of the cargo; not surprisingly, this was no longer possible.

The bank to whom the bills had been indorsed sued the shipowner in contract under the bills and in tort for conspiracy. The contract claim[46] failed because the indorsement was fraudulent in that it was made in breach of the undertaking by the receiver to surrender the bills to the shipowner when they came into its possession. On receipt of the bills the holder then submitted them under the letter of credit to the first bank who then passed them on and received payment from the second bank. Neither bank became a lawful holder. Although they had received possession of the bills and there had been an indorsement, the fraud of the indorser meant that there had not been any completion by delivery. The operative fraud was the receiver's failure to return the bills to the shipowner, and its putting them into circulation under the letter of credit supporting the sham sale contract. This seems rather hard on the indorsee bank in that the indorsement was fraudulent as a result of the failure of the receiver to surrender the bills to the shipowner, who was held to have been a party to the conspiracy directed at the bank.

However, although the decision determined that the bank did not become a lawful holder under section 5(2)(b), it is doubtful whether the bill of lading had any validity by the time the receiver indorsed it.[47] The right to possession in the cargo had gone when the receiver, the person entitled

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[44] The problem with this analysis, as pointed out in *Carver on Bills of Lading* (n 6) para 5-046, is that the first set of bills of lading were straight bills and the second set were probably straight bills as well, although this is not stated in the judgment. However, the buyer would still have been able to obtain rights of suit under the second bills, as the named consignee under a straight bill, under s 2(1)(b), but not as the lawful holder of a bill of lading under s 2(1)(a).

[45] *The Dolphina* (n 37).

[46] The action was brought in Singapore, but the bills of lading were subject to English law, hence the discussion of transfer of rights of suit under COGSA 1992.

[47] See Aikens J's rejection of the argument in *The Ythan* (n 4) that Primetrade had become a lawful holder under s 5(2)(b), because at that time the cargo had ceased to exist and there could no longer be a right to its possession against the carrier.

to it, consented to its release to third parties. It could not fall under section 5(2)(c) either as the arrangements for the transfer of the bill had been made after the goods had been discharged to the party entitled to possession in them. The bank was not, however, left without remedy and was able to make recovery against both the transferor of the bill and the shipowner under the tort of conspiracy.[48]

There is also an overriding requirement in section 5(2) that the putative lawful holder has become the holder of the bill of lading in good faith. Presumably, any bad faith would be that of the transferee rather than the transferor, although a transferee who knows of the fraud of the transferor would also be acting in bad faith.

Divestment under section 2(5)

The original shipper whose contract is contained in or evidenced by the bill of lading will be divested of its contractual rights – but not its liabilities – on transfer to a party who becomes a lawful holder and that party, in turn, will be divested of its rights when it transfers the bill of lading to a party who then becomes a lawful holder. This is the effect of section 2(5), a provision that does not apply to waybills/straight bills. This was the provision that caused severe problems to the shipper in *East West Corp v DKBS 1912 AF A/S*[49] when it indorsed the bill of lading to the consignee, a bank who was to act as its agent at the Chilean discharge port. On receipt of the bill the bank became the lawful holder and the contractual rights in the document vested in it under section 2(1), and consequently the shipper was divested of its rights by section 2(5) and was unable to bring contractual claim against the carrier for misdelivery of the cargo. Fortunately, the Court of Appeal held that the divestment of contractual rights had no effect on its rights under the bailment and these formed the basis of its eventual recovery.[50]

Claimants outside COGSA 1992

If the claimant is not within COGSA 1992, how can it recover from the carrier? The claimant may be able to establish a contractual right against the carrier in three situations. First, if the claimant was the owner of the goods at the time of shipment, the shipper will be taken to have made the contract of carriage as the claimant's agent and so the claimant will be able to sue directly under that contract.[51] Secondly, the holder of the bill of lading may have concluded a charter with the shipowner and its rights under that contract will be unaffected by what happens to the bill of lading which in that party's hands will amount to a receipt and a document of title, but not a contract of carriage. However, the charterer will need to establish that it has suffered a loss as a result of the breach of charter, an issue which is discussed further below. Thirdly, the claimant may seek to establish the existence of an implied contract between itself and the carrier based on the actions of the parties at discharge/delivery of the cargo. This doctrine developed as the principal way in which the courts were able to fill the gaps in the Bills of Lading Act 1855. With the passing of COGSA 1992, this device is largely otiose. Prior to that its utility had been severely restricted by the Court of Appeal's decisions in *The Aramis*[52] and *The Gudermes*.[53] Mere delivery of the goods without some payment to the shipowner from the party taking delivery will, in the absence of some

[48] There are references in the judgment to a claim for conversion having been made, but no decision was made on this. It is submitted that the bank could not have made such a claim as it never had the immediate right to possession in the goods which were carried on the vessel.
[49] [2003] EWCA Civ 83, [2003] QB 1509.
[50] The carrier was in breach of the bailment by virtue of its negligence in failing either to deliver up the goods to the person entitled to them against presentation of an original bill of lading or to arrange for the third parties to whom it gave possession of the goods to be under any similar obligation regarding delivery up.
[51] *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146 (QB).
[52] [1989] 1 Lloyd's Rep 213.
[53] [1993] 1 Lloyd's Rep 311.

unusual degree of cooperation between the parties to facilitate delivery,[54] be insufficient to justify the implication of such a contract.

Suit by the party with title to sue

Another avenue of recovery is through the shipper claiming for the loss under its contract of carriage with the carrier. Under English law there is generally no right to damages for breach of contract in respect of a loss sustained by a third party. However, in *Dunlop v Lambert*[55] the shipper was able to recover for the loss sustained by the consignee, although such recovery will not be possible where the consignee has its own contractual right against the carrier, as was the case in *The Albazero*[56] where the third party had allowed that right to become time barred and was not able to recoup its losses through an action brought by the shipper, an associated company of the consignee. It is unclear whether the restriction in *The Albazero* extends to cases where the third party has a right to claim against the shipowner in tort, albeit the third party has no contract with the shipowner.

Secondly, if the shipper is the owner of the goods either at the time they are lost or damaged or at the time of their delivery, then the shipper will be able to recover the value of the lost or damaged goods as damage to its proprietary interest, notwithstanding that risk in the goods had passed to the buyer at that time. This was the case in *R&W Paul Ltd v National Steamship Co Ltd*,[57] in which Goddard J had found that a recovery from an intermediate seller was *res inter alios acta* as regards the bill of lading holder's contractual entitlement to damages. The bill of lading holder would have had to account to its seller in respect of the damages received in relation to that recovery, but that did not affect its contractual entitlement to recover damages in full from the shipowner. Subsequently, in *The Sanix Ace*[58] Hobhouse J held that a charterer could make a full recovery for breach of contract in respect of damage to goods which it owned at the date of damage, although the goods were at the risk of its purchasers. Any recovery would have to be held for the account of those sellers.[59]

In *The Baltic Strait*, Andrew Baker J held that *The Sanix Ace* had not qualified the principle in *R&W Paul Ltd* by restricting it to situations where the claimant could establish that it had owned, or had the immediate right to possession of, the cargo at the time at which it had been damaged. Andrew Baker J summarised the principles of recovery thus:

> Assuming title to sue in contract, the carrier is liable to full damages if sued by the receiver who, by reason of the carrier's breach, receives damaged rather than sound goods (R&W Paul) or if sued by a claimant who did not receive the damaged goods but who owned the goods when they were damaged by the carrier's breach (The Sanix Ace), in each case irrespective of how financial loss reflecting or resulting from the cargo damage is or comes to be distributed across the sale of goods chain (ibid). The former sues as the owner of the damaged goods since but for the breach he would have been the owner of undamaged goods; the latter sues as the owner whose sound goods were damaged.

Thirdly, section 2(4) of COGSA 1992 provides that:

> Where, in the case of any documents to which this Act applies—
> (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

[54] Such as was found on the unusual facts of *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 (CA). Such cooperation must be willing cooperation and not such as is imposed upon the parties by the exigencies of the situation as in *The Gudermes*, where the parties arranged for transhipment of a cargo of oil that had not been heated to a sufficient degree to allow it to be discharged directly from the ship into the receiver's pipeline.

[55] (1839) 6 Cl & F 600, 626–27.

[56] [1977] AC 774.

[57] (1937) 59 Ll L Rep 28.

[58] [1987] 1 Lloyd's Rep 465.

[59] Hobhouse J stated that if the claim had been pursued in tort, the charterer would have had to show it had the immediate right to possession of the goods at the time they were damaged, and that ownership would not suffice. This may be compared with the finding of Thomas J in *East West Corp* that a claim in tort could be brought on the basis of the reversionary interest in the goods, notwithstanding that the right to possession no longer enured to the claimant at the time of the loss.

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

The provision applies only to actions brought by persons with a statutory right of action created by the Act and does not create a separate cause of action in such persons.[60] The operation of this provision was recently considered in *The Baltic Strait*.[61] The seller had chartered the vessel from its owner to carry a cargo of bananas. Altfadul was the lawful holder of the bill of lading and SIAT was the assignee of the holder of the bill of lading's claim under the bills of lading against the carrier. The bananas were damaged and the lawful holder, Altfadul, had a claim for US$4.5 million, which it assigned to its insurers. The shipowners pointed to the fact that Altfadul had received partial compensation from the seller of just over US$.2.5 million and that its claim should be reduced accordingly. The arbitrators found that Altfadul was able to claim the full amount of the damages sustained by the cargo, and that the US$2.5 million for which it had been compensated by the sellers could be recovered under section 2(4) of COGSA 1992. The arbitrators found: (i) section 2(4) was not limited to situations in which the third party whose loss was being claimed by the lawful holder had been a previous lawful holder and had lost its rights through section 2(5); and (ii) section 2(4) did allow Altfadul to recover for the seller's loss. Section 2(4) required one to hypothesise that the charterers had vested in themselves the rights of suit under the bill of lading and, if so, whether they would have been entitled to recover the loss suffered, to which the answer was 'yes'.

The owners appealed from the tribunal's decision. Andrew Baker J agreed with the first finding of the arbitrators but not with the second finding. The seller had been an intermediate holder of the bill of lading but, as it had a voyage charter with the shipowner, under the rule in *The Dunelmia*[62] the bill of lading in its hands was a mere receipt. The statutory vesting of rights of suit in it under section 2(1) did not entitle a charterer to whom the mere receipt rule applied to sue the carrier under the bill of lading for losses it had suffered. Its entitlement to recover those losses from the carrier was governed by the charter alone. As stated above, section 2(4) required one to hypothesise whether the person who sustained the loss would have been able to exercise rights of suit under the Act if those rights had been vested in that person. The answer with a charterer to whom the 'mere receipt' rule applied was clearly 'no'. Accordingly, section 2(4) did not entitle the lawful holder to exercise its rights for its seller as the person who had sustained loss or damage, through the partial compensation it had paid to Altfadul in respect of the cargo damage. However, Andrew Baker J went on to find that the tribunal's decision to award the full amount of loss to Altfadul was correct under common law principles as regards damages entitlements under contracts for the carriage of goods by sea.

The section refers to recovery on behalf of 'a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage'. If, as *Carver* suggests, these words bear the same meaning as they do with the test for title to sue in negligence, this would create a very limited scope for recovery by the lawful holder for a third party's loss: 'In particular it is for this purpose *not* sufficient that the claimant had a contractual right to have the goods delivered to him or that the goods were at his risk'.[63] A seller under an out-turn contract may be thought to be the type of third party at which this section is directed, but *Carver* notes that the loss may not be such as to amount to an interest in or relation to the goods.[64]

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[60] *Pace Shipping Ltd v Churchgate Nigeria Ltd The Pace (No 2)* [2010] EWHC 2828 (Comm), [2011] 1 All ER (Comm) 939, [2011] 1 Lloyd's Rep 537 QBD (Comm).

[61] *Sevylor Shipping and Trading Corp v Altfadul and SIAT* [2018] EWHC 629 (Comm) (23 March 2018).

[62] [1970] 1 QB 289 (CA).

[63] *Carver on Bills of Lading* (n 6) para 5-085.

[64] ibid para 5-086: 'But payment may be due and made against documents, with a provision for price-adjustment depending on the outturn; and in such a case it is again hard to see what 'interest' the seller has in or in relation to the goods'. The Report of the Law Commission and Scottish Law Commission (n 37) refers at para [2.41] to sellers under out-turn contracts being protected

Assignment by party with title to sue

In all three situations discussed above, there is no obligation on the original contracting party to make such a claim. Of course, such a party can assign its rights of suit to the third party,[65] if that third party has a genuine commercial interest in enforcing those rights.[66] *The Fehn Heaven*[67] is a reminder that the third party can obtain no greater rights than the assignor. If the assignor could not recover for third-party losses all that will be assigned is a right to claim nominal damages for the breach of contract.[68] Here, the charterers had loaded a cargo of organic sunflower seeds and organic wheat, carried under two straight bills of lading, which named Justorganic as consignee.[69] At some stage in the voyage the cargo had to be fumigated and, as a consequence, it could no longer be sold as organic. The charterers had to discount the price to their two Dutch buyers and sought to recover the amount of the discounts from the shipowner. They claimed in arbitration against the shipowner either as assignees of the consignee's rights under the bills of lading or in their own right under the charterparty.

The tribunal awarded the charterers damages and found that the charterers had title to sue, as assignee of the consignee's rights under the bill of lading. However, the tribunal made no express finding that Justorganic, the assignor, had suffered loss. This was a critical absence in the award because of the principle that an assignee could not recover more from the debtor than the assignor could have done had there been no assignment.[70] The award could not be upheld on the alternative basis of the charterers' claim that they had a right to recover their losses under the charterparty, as it was clear that the tribunal had decided that the charterers' title to sue was based on the assignment rather than on the charterparty. The owners' appeal, therefore, succeeded and the matter was remitted to the tribunal.

The claimant's non-contractual avenues

If the claimant is unable to sue contractually, then it may be able to recover non-contractually, and if the bill of lading is a charterer's bill, this will be the only avenue of recovery against the shipowner. First, the claimant might sue in negligence, which it will be able to do if it can show that the breach of the duty of care which caused the loss or damage to the goods happened at a time when the claimant either owned the goods or had the immediate right to their possession.[71]

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by taking assignments from their buyers, and does not mention them in its proposals in relation to s 2(4) (at para [2.27]), which are directed at claims by agents who are named as consignee under the bill of lading. Presumably the bank in *East West Corp* had no interest in pursuing such a claim, although it could have assigned its rights back to the unfortunate shipper.

[65] Any assignment would have to take place at a time when those rights of suit are still in time under the terms of the assignor's contract.

[66] See *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH (The Kelo)* [1985] 2 Lloyd's Rep 85. Staughton J held that the assignment of a right of action would be valid and would not be struck down as an assignment of a bare cause of action or as savouring of maintenance where the assignee had a genuine commercial interest in taking the assignment and enforcing it. There was no requirement that the cause of action be enforced for the assignee's own benefit. The case involved the assignment by the endorsee of a bill of lading to whom rights had passed under the Bills of Lading Act 1855 to their discharge port agents. Commercially, it made good sense that, as part of their duties, they should deal with claims against the ship and, if they wished to do so, deal with those claims in their own name. A similar instance of a valid assignment is *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [1999] 1 Lloyd's Rep 307 (QB), where the charterer, who was owner of 70% of the cargo carried on the voyage, arranged transhipment of the cargo in return for an assignment by the bills of lading holders of their rights against the shipowner under the bills of lading.

[67] [2018] EWHC 1606 (Comm).

[68] The assignor's right to recoverable loss for damage to its property will not disappear when that property is transferred to the assignee. In *Pegasus Management Holdings SCA v Ernst & Young* [2012] EWHC 738 (Ch) at [30], Mann J rejected the argument that the assignor had not suffered loss because it no longer had the assets in which the loss was reflected, concluding: 'Where a wrong has been committed in relation to property, and loss is capable of arising as a result, the fact of an assignment … does not mean that it thenceforth has to be acknowledged that the assignor no longer can be said to have suffered loss… the law says that the loss flowing can and should still be treated as a loss of the assignor which the assignee can recover. Black holes are to be (as all black holes should be) avoided where possible'.

[69] Although not stated, Justorganic must have been the seller of the cargo to the charterer.

[70] Hugh Beale (ed) *Chitty on Contracts* (32nd edn Sweet & Maxwell 2015) para 19-075.

[71] *Leigh & Sillivan Ltd v Aliakmon Ltd (The Aliakmon)* [1986] AC 785 (HL).

Secondly, the claimant might sue in bailment. In *East West Corp* the shipper wanted to sue the carrier for allowing a misdelivery of the cargo from the terminal in Chile.[72] The bill of lading was an order bill which named the shipper's bank as consignee, although the bank was to act only as the shipper's agent at the discharge port. The shipper indorsed and transferred the bill to the bank. The bank became the lawful holder of the bill under section 5(2)(a) of COGSA 1992 and, accordingly, section 2(5) divested the shipper of its rights of suit under the bill. Subsequently, the bank transferred the bill back to the shipper but this did not mean that the shipper became the lawful holder under section 5(2)(c) as there had been no indorsement and, even if there had been, the transaction was one which fell within the exclusion in section 2(2)(a) as it was made after the goods had been delivered and therefore after the time at which the bill of lading gave the right of possession in the goods against the carrier. The contractual avenues being blocked, the shipper had to sue in tort or bailment.

Thomas J held that the shipper's rights as a bailor were divested by section 2(5), along with its contractual rights, but that it could sue in negligence by reason of its reversionary interest as owner of the misdelivered goods.[73] The Court of Appeal held that the right in bailment was independent of the contractual right and was not lost when the bank became the lawful holder of the bill of lading. The shipper was able to recover against the carrier for breach of the bailment, although there was some doubt as to whether it would be liable in conversion in relation to the bailee's liability for the default of its independent contractor under a bailment that had become non-contractual. As regards the negligence claim on which Thomas J had found for the shipper, Mance LJ thought there were serious problems with such a claim owing to the difficulties in accommodating the duty of care with the obligations and terms of the bailment under which the carrier had accepted possession of the shipper's cargo.[74]

A problem with bailment arises where the claimant is the successor in title to the original shipper, and attornment by the shipowner will be required if there is to be an action in bailment to recover the loss or damage to the goods that occurs while the goods were in its custody. For there to be an attornment, there needs to be some act by the shipowner by which it shows that it now acknowledges it owes a duty of care to the successor in title to the original bill of lading. *The Starsin* shows that merely delivering the cargo against production of a bill of lading will not constitute such an acknowledgement.[75] The claimant might argue that it was the original bailor, relying on observations of Lord Hobhouse in *The Berge Sisar*[76] that the fob buyer is the bailor, rather than the fob seller. However, as Mance LJ stated in *East West Corp*, this will not be the case 'where the consignor was acting on his own behalf in shipping the goods or at all events reserving the right vis-à-vis the consignees to deal with and redirect the goods shipper has reserved the right of disposal'.[77]

Conclusion

COGSA 1992 generally works well to give rights of suit to those who need them under contracts for carriage of goods by sea. However, there are still some problem areas where a party who needs to sue finds that they are unable to do so under the contract contained in or evidenced by the shipping document issued for the sea carriage. That party may never have obtained such a right or may have had a right and lost it. Transfer of an order bill without indorsement is an example of the former, while transfer to a consignee who will be acting as an agent is an example of the latter. This is exemplified by *East West Corp*. The problem would not occur had a straight bill been issued, as section 2(5) would not then have divested the shipper of its rights. The problem would also arise if

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[72] [2003] EWCA Civ 83, [2003] QB 1509.

[73] [2002] EWHC 83 (Comm), [2002] 2 Lloyd's Rep 182.

[74] ibid [50]: 'In these circumstances, it is unnecessary to examine the authorities and arguments deployed for and against the proposition that, if the appellants had no other potential responsibility towards the respondents, they must at least be regarded as owing the respondents an ordinary duty of care. *The Aliakmon* rejected such a proposition in a case where the buyer at risk was attempting to hold the carriers responsible in negligence, without having any proprietary or possessory basis for so doing'.

[75] *Homburg Houtimport BV v Agrosin Private Ltd* [2000] 1 Lloyd's Rep 85, 109 (QB).

[76] *The Berge Sisar* [2001] UKHL 17, [18].

[77] ibid [35].

the shipper were named as consignee and made a special indorsement to its agent, although a general indorsement or a transfer of a bearer bill would probably not transfer contractual rights as there would be no completion by delivery owing to the absence of an intention to make such transfer by the transferor.

The second situation, which we see in the spent bill cases, is where there are unusual trade arrangements. In *The David Agmashenebeli*, this was the renegotiation of the sale contract after delivery, which meant that the transferee of the spent bill was outside the proviso to section 2(2)(a) as the transaction which gave rise to the transfer of the bill occurred after the bill had ceased to give a right to possession as against the carrier. Similarly, in the *East West Corp* case, the consignee's return of the bills to the shipper did not constitute the shipper as recipient of a spent bill. There was no indorsement, but even if there had been, the transaction which gave rise to the transfer back of the bill was one that took place after delivery of the goods had taken place. In *The Erin Schulte*, the bank's initial refusal to pay meant that it failed to obtain rights in the bill indorsed to it as there was no completion by delivery as the bank was holding the bill as agent for the shipper. A further example is where the cargo is lost during the voyage, as was the case in *The Ythan*.

The third situation is where there is some antecedent fraud prior to what appears to be a valid transfer of the bill. This was the situation in *The Dolphina*, where the indorsement of the bill to the bank in breach of the undertaking to return the bills marked 'accomplished' to the shipowner constituted the fraud and prevented the bank from obtaining rights of suit. This is an unsatisfactory judgment as it penalises the victims of the fraud. A fraudulent bill is not a nullity and if this reasoning is followed any fraud such as agreeing to issue a clean bill for fraudulent cargo would prevent the innocent transferee from being able to sue on the bill. A better justification for the decision would be that this was a spent bill which fell outside the proviso in section 2(2)(a) as the transaction, the fraudulent sale contract, took place after delivery of the cargo. Interestingly, the decision assumed the bank's putative title to sue would be based on its status as an indorsee under section 5(2)(b). However, the bill had ceased to give a right to possession against the carrier when the party entitled to possession, the fraudulent shipper, obtained delivery of the cargo from the shipowner. This was the same analysis adopted in *The David Agmashenebeli*. COGSA 1992 provides its own qualification to deal with fraud in providing for 'good faith' in the definition of a 'lawful holder' in section 5(2), which must be that of the transferee rather than the transferor.

If the cargo claimant does fall outside COGSA 1992, then there is the possibility of the party which does have contractual rights of suit suing on the claimant's behalf under section 2(4) or under *Dunlop v Lambert*, if the claimant never obtained rights of suit under the shipping contract. There is no obligation on the party who does have contractual rights to make such a claim. Also, section 2(4) is not available where the third party is a charterer in whose hands the bill of lading had had no contractual significance owing to the rule in *Dunlop v Lambert*. Rather than commence suit for the third party's losses, the contractual party may prefer to assign its rights to the third party. However, this is by no means a panacea as the assignee will not take any greater rights than those vested in the assignor. As *The Fehn Heaven* reminds us, if the assignor has suffered no loss as a result of the breach of contract the assignee will be unable to recover any damages, unless the right assigned is one whereby the possibility of claiming for a third party's loss is recognised – either through section 2(4) or through *Dunlop v Lambert*. In the unfortunate *East West Corp* situation, an assignment by the consignee bank might have solved the problem. Although the bank had suffered no loss as a result of the misdelivery of the cargo, section 2(4) gave the bank the right to sue for a third party's loss, in this case that of the shipper, and that right could be assigned back to the shipper. If a consignee under a multimodal bill is regarded as outside COGSA 1992, then *Dunlop v Lambert* would come into play, thus allowing the consignor to sue for the consignee's loss, and this right too would be worth assigning.

Finally, it should be noted that in all the cases involving claims under COGSA 1992 the claimant has managed to find a route to recovery in some form or other, notwithstanding that he may have been unable to sue contractually under the contract contained in or evidenced by the bill of lading.