

SHIPPING & LOGISTICS

BILL OF LADING



Shepstone  Wylie
ATTORNEYS

Shipping & Logistics
Customs @ Wylie

Bills of lading & overstay issues
6 September 2018

SHIPPING  LOGISTICS

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DISCUSSION

PRACTICAL ASPECTS OF:

Bills of lading by Quintus vd Merwe

Uncleared and Abandoned Cargo by Zama
Mgwedli

BILLS OF LADING

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See website for large version of the reverse

www.abc.co.m

A ABC SHIPPING COMPANY S.A. B C 8-10, Gladbachstrasse, Zurich, Switzerland website: www.abc.com SCAC Code: ABCU		BILL OF LADING No. ABCU SD114585 NON-NEGOTIABLE COPY "Port to Port" or "Combined Transport" (see Clause 1) No. & SEQUENCE OF ORIGINAL B/L'S No. OF RIDER PAGES 02zero											
SHIPPER: LAZY SUNDAY RUA DA ESTRADA, LOTE 1 CRESTEIN 8 4470-800 MAIA PORTUGAL CONSIGNEE: This B/L is not negotiable unless marked "To Order" or "To Order of..." here. PARTY SATURDAY 2 nd FLOOR, YELLOWSTONE CRESCENT SHOPPING CENTER YELLOWSTONE PLACE JOHANNESBURG, GAUTENG SOUTH AFRICA NOTIFY PARTIES: (No responsibility shall attach to Carrier or to his Agent for failure to notify) - see Clause 2(2) PARTY SATURDAY 2 nd FLOOR, YELLOWSTONE CRESCENT SHOPPING CENTER YELLOWSTONE PLACE JOHANNESBURG, GAUTENG SOUTH AFRICA		CARRIER'S AGENTS ENDORSEMENTS: (Include Agent(s) at POD) SHIPPER'S LOAD, COUNT AND SEALED POLYCL Lloyd's No Number 64606 LINER OUT PORT OF DISCHARGE AGENT: A B C SHIPPING COMPANY (PT Y) LTD ABC HOUSE 80, WINTER STREET P O BOX 20228 DURBAN, 4001 South Africa											
VESSEL AND VOYAGE NO. (See clause 3.3.2) ABC LILY - NZ108B		PORT OF LOADING SINES PLACE OF RECEIPT: (Combined Transport ONLY - see clause 1.3.3.2) LEIXOES											
BOOKING REF. (or) SHIPPER'S REF 083L0235169 XXXXXXXXXX		PORT OF DISCHARGE Durban, South Africa PLACE OF DELIVERY (Combined Transport ONLY - see clause 1.3.3.2) XXXXX XXXXXX XXXXX											
PARTICULARS FURNISHED BY THE SHIPPER - NOT CHECKED BY CARRIER - CARRIER NOT RESPONSIBLE (See clause 1.4)													
Container Numbers, Seal Numbers and Marks MADU1522759 20' DRY VAN Seal Number: EU12278280 Tare Weight: 2,250 kgs		Description of Packages and Goods (Continued on attached Bill of Lading Rider page(s), if applicable) 39 Package(s) of CERAMIC FLOOR STATUS N FREIGHT PAID Total Items: 39											
Gross Cargo Weight 22,058,000 kgs.		Gross Cargo Measurement Total: 22,058,000 kgs.											
FREIGHT & CHARGES Cargo shall not be delivered unless Freight & Charges are paid (see Clause 14)													
<table border="1"> <thead> <tr> <th>FREIGHT & CHARGES</th> <th>QUOTA</th> <th>RATE</th> <th>PREPAID</th> <th>COLLECT</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>		FREIGHT & CHARGES	QUOTA	RATE	PREPAID	COLLECT						14. RECEIVED by the Carrier in agreement, order and condition (unless otherwise stated herein) the total number or quantity of Containers or other packages or units indicated in the box entitled Carriers Receipt for cargo, subject to the terms and conditions hereof from the Place of Receipt or Port of Loading to the Port of Discharge or Place of Delivery, whichever is applicable, (NOT ACCEPTING THIS BILL OF LADING THE MERCHANT EXPRESSLY ACCEPTS AND AGREES TO ALL THE TERMS AND CONDITIONS, WHETHER PRINTED, STAMPED OR OTHERWISE INCORPORATED ON THIS B/L AND ON THE REVERSE SIDE OF THIS BILL OF LADING AND THE TERMS AND CONDITIONS OF THE CARRIER'S APPLICABLE TARIFFS IF THEY WERE ALL SIGNED BY THE MERCHANT. If this is a negotiable "To Order" Bill of Lading, one original Bill of Lading duly endorsed in writing, surrendered by the Merchant to the Carrier (together with outstanding Freight and Charges) in exchange for the Goods or a Delivery Order. If this is a non-negotiable straight Bill of Lading, the Carrier shall deliver the Goods or issue a Delivery Order (after payment of outstanding Freight and charges) against the surrender of one original Bill of Lading or in accordance with the national laws at the Port of Discharge or Place of Delivery, whichever is applicable. IN WITNESS WHEREOF the Carrier or their Agent has signed the number of Bills of Lading, and where one original Bill of Lading has been surrendered all other Bills of Lading shall be void.	
FREIGHT & CHARGES	QUOTA	RATE	PREPAID	COLLECT									
DECLARED VALUE (Only applicable if Ad Valorem Charges paid - see Clause 7.3) XX XXXXX XXXXXX XXXXX XXX		CARRIER'S RECEIPT (No. of Cntrs or Pkgs revd by Carrier - see clause 14.1) 1 cntr											
PLACE AND DATE OF ISSUE ABC PORTUGAL (ULY) 19-JUL-2017		SHIPPED ON BOARD GATE 21-JUL-2017											
Signed on behalf of the Carrier ABC Shipping Company by ABC Company (Portugal) as Agent		Signed on behalf of the Carrier ABC Shipping Company by ABC Company (Portugal) as Agent											

BILLS OF LADING

WHAT IS A BILL OF LADING

- A cargo *receipt*
- Evidence of the *contract of carriage* between ship and cargo owner
- May serve as document of title

THE RECEIPT

ACKNOWLEDGMENT OF RECEIPT

“Received the goods in apparent good order and condition and, as far as ascertained by reasonable means of checking, as specified above unless otherwise noted herein...”

THE RECEIPT

ACKNOWLEDGMENT OF RECEIPT CONTINUED...

- that shipped
- as to quantity
- as to condition
- as to quality?
- as to marks

THE CONTRACT OF CARRIAGE

“Received by the Carrier from the Shipper ... for carriage subject to all the terms and conditions hereof ... from the Port of Loading to the Port of Discharge....The Merchant expressly accepts and agrees to all [the B/L’s] terms and conditions“

E.g.

“In accepting this bill of lading the **Merchant** expressly accepts and agrees to all the terms and conditions, whether printed, stamped or otherwise incorporated on **this side** and on the **reverse side** of this bill of lading and the terms and conditions of the Carrier's **applicable tariff.**”

WIDE DEFINITION OF MERCHANT

MERCHANT USUALLY DEFINED TO INCLUDE:

- The Shipper,
- Consignee,
- Holder of this Bill of Lading
- The receiver of the Goods and
- Any person owning, entitled to or claiming the possession of the Goods or of the Bill of Lading or anyone acting on behalf of this person.

HIMALAYA CLAUSE

- “...no claim...against any Person by whom the carriage is performed or undertaken (including all servants, agents, sub-contractors and stevedores of the Carrier) other than the Carrier which attempts to impose any liability greater than that imposed herein...every such Person shall have the benefit of every right and defence contained herein...In entering into this contract the Carrier does so not only on his own behalf but also as agent and trustee for such persons”

GENERAL PARAMOUNT CLAUSE

- “The Hague Rules...shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply”
- Section 1 of the Carriage of Goods by Sea Act, Act 1 of 1986 (COGSA) provides for application of Hague Rules

LAW & JURISDICTION

- “... any suit by the Merchant, and save as additionally provided below any suit by the Carrier, shall be filed exclusively in the High Court of London and English Law shall exclusively apply...”
- SA Courts have inherent jurisdiction and may ignore ouster of jurisdiction, but generally apply choice of law.

LAW & JURISDICTION CONT.

Section 3 of COGSA no 1 of 1986 states:

- **3. Jurisdiction of courts.—**(1) Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, ..., any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, **may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.**
- (2) The provisions of [ss \(1\)](#) of this section shall **not** apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the arbitration laws of the Republic.

POSSESSION ENTITLEMENT

A DOCUMENT ENTITLING TO POSSESSION

- “Before the Carrier arranges delivery of the Goods, one original of this B/L, *duly endorsed*, must be surrendered by the Merchant to the Carrier at the Port of Discharge.... In witness whereof two (2) original Bs/L have been signed, one of which being accomplished the other(s) to be void.”

TRANSFER OF TITLE

- Negotiability
- “To Order” or
- Blank
- Endorsement
- Intention to pass title

STRAIGHT B/L

- Named consignee
- Not to order
- really non-negotiable receipt
- Consignee can't endorse

Similar to a Seawaybill, but differences

English law different to SA position

LIMITATIONS

TIME BAR AND PACKAGE LIMIT

- 1 year time bar: always applicable unless H-V not applicable
- “In the case of any claims of whatsoever nature other than of damage to or loss of the goods or claims relating to the goods against the Carrier, notice to be given within two days and suit to be brought within two months after discharge, such claims being otherwise definitely waived and time barred”
- Liability limit: 2 SDR per kilogram or 66.67 SDR per *package*

OTHER POINTS

- “Received for shipment” v “Shipped on board”
- Accuracy of information
- Clean B/L
- Indemnities
- Fraud

EXPECT THE UNEXPECTED

THE UNEXPECTED COSTS ARISING FROM A SHIPPING CONTRACT

There are inevitable instances where there go wrong.

The question then arises who is liable for the additional or wasted costs



CASE STUDIES

LYKES LINES LTD V VEREENIGING MEAT PACKERS (279/2012) [2013] ZASCA 18

- Claim – The Appellant (ocean carrier) claimed for damages against the Respondent arising out of the loss of a reefer container which was being conveyed by the Appellant from Montreal, Canada to the port of Durban in terms of a contract of carriage, more fully described in the Bill of Lading
- Terms of carriage were subject to the carrier's conditions printed on the reverse of the Bill of Lading
- Clause 6(b)(1) of the Bill of Lading
- Series of events
- The container was not returned to the Appellant as the truck transporting the container was hi-jacked en route from Durban to the Respondent's premises and the container was stolen
- The issue: Whether the Appellant proved that it suffered loss as a result of the loss or theft of the container. In other words, whether the allocation of the loss in terms of the aforesaid internal arrangements vested the Appellant with the right to recover from the Respondent, the loss it claims to have suffered as a result of the non-return of the container

CASE STUDIES

LYKES LINES LTD V VEREENIGING MEAT PACKERS (279/2012) [2013] ZASCA 18- CONTINUED...

- High Court – Judgment in favour of Appellant
- Respondent successfully appealed to the full court. Appellant's claim was dismissed with costs.
- Interpretation of Clause 6(b)(1) of the Bill of Lading and breach of contract
- Respondent's argument – Appellant did not have locus standi to sue and that the appellant had not proved that it was the entity that bore the risk of loss in respect of the container
- Internal arrangement
- Appellant did not prove on a balance of probability that it suffered any loss as a result of the loss or theft of the container.
- Onus and sufficient evidence for discharge of onus
- The appeal was dismissed with costs



CASE STUDIES

IZMIR JUDGEMENT

- The Izmir Construction Ltd v Mediterranean Shipping Company Depots (Pty) Ltd
- A Himalaya clause may be enforced in favour of a party which has given a Carrier authority to conclude an agreement incorporating such a clause. Consideration therefore will be constituted by the acceptance of the obligation to perform the obligations of the Carrier. The Carrier's obligation will continue after delivery of goods at the port of discharge if it is provided that the Carrier should also undertake the storage of goods pending delivery of the goods.
- Clause 17 of the Bill of Lading – Carrier of his agent would not be liable for loss or damage to goods during the period before loading and after discharge from the vessel. Goods in the custody of the Carrier or his servants before loading and after discharge were in such custody at the sole risk of the Merchant and the Carrier would not be liable for a loss or damage arising from any cause whatsoever.
- Clause 18, Clause 2, Clause 5
- The Carrier was defined as the owner of the vessel or the demise charterer and provided that MSC would act as agent for the owner or demise charterer in arranging the transport covered by the BOL

CASE STUDIES

IZMIR JUDGEMENT CONTINUED...

- MSC Izmir shipped a mobile crane from Dakar to Durban in terms of the Bill of Lading. The crane was offloaded at Durban. A month later, while it was in storage at the warehouse of MSC South Africa, a subsidiary of MSC, the container in which it was, was dropped and the crane sustained damage.
- The owner of the crane claimed damages and instituted action for this claim. The Defendant's defence was that it was not liable to LTA for the loss it had suffered in terms of Clause 18 of the Bill of Lading.
- Court held:
- Requirements for applicability of a Himalaya Clause such as that provided for in the Bill of Lading were, according to *Scrutton Ltd v Midlands Silicones Ltd* [1962] 1 ALL ER 1, that the Bill of Lading must indicate clearly that the servant is intended to be protected by the limiting provisions, and that the Carrier contracts both for itself and its agents..

CASE STUDIES

IZMIR JUDGEMENT CONTINUED...

- ..., that the Carrier had authority to make such stipulations, and that consideration is transferred from the agent to the Carrier
- LTA – It had not been shown that the Carrier had the Defendant’s authority to conclude a contract on its behalf, nor that the Defendant had given any consideration in respect of the contractual provision in respect of which it claimed indemnity in the present case
- Evidence – MSC had authority of its subsidiary, at all times, to conclude contracts on its behalf.
- Question of Consideration
- In this case, when the damage to the crane occurred, the Defendant was performing part of the obligations undertaken by the Carrier.
- Defendant alleged that by the time the damage occurred, the contract of carriage had terminated.
- Clause 5 of the Bill of Lading - custody of carrier pending delivery to LTA
- Evidence – It was within the contemplation of the parties that a removal and storage service would be rendered at the port of discharge
- The damage was sustained by the crane at a time when the contract recorded in the Bill of Lading had not yet terminated
- MSC was therefore entitled to rely on the Himalaya Clause. Action dismissed.

INSURANCE

- Cargo insurance
- What about where cargo diverted, or rejected and returned etc

EXAMPLES

- Export cargo rejected at destination or not collected;
- Permits or permissions not in place – stopped in transit
- Packaging or dunnage infested
- Person appointed SA agent of Forwarder and reflected as consignee on Ocean Bill of Lading
- SAPS, NRCS & SARS stops

PART TWO

ABANDONED & UNCLEARED CARGO



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John niclaus buno | 09

ABANDONED & UNCLEARED CARGO

ABANDONED/ UNCLEARED CARGO: STATE WAREHOUSE

- The general principle is that cargo must be cleared / entered within 7 days from the date on which it is deemed to have been imported.
- Goods in a container depot must be entered within 28 days from the date they were landed.
- Where goods remain unentered, then recourse must be had to section 43 of the Act, which has important ramifications.

ABANDONED & UNCLEARED CARGO

ABANDONED/ UNCLEARED CARGO: STATE WAREHOUSE- SECTION 43

- If due entry is not made within the prescribed periods, the container operator, or person who has control of the goods, is required to furnish list of un-entered cargo, together with all available documents to the Controller.
- Such un-entered goods must also be removed to either the State warehouse or any other place indicated by the Controller.

ABANDONED & UNCLEARED CARGO

ABANDONED/ UNCLEARED CARGO: STATE WAREHOUSE

- Where a person has failed to remove the goods as required, the Controller may:
 - remove the goods himself at the risk and expense of such person, OR
 - Allow them to remain under the control of such person, in which case such place will be deemed to be a State warehouse, i.e., virtual State warehouse.

ABANDONED & UNCLEARED CARGO

ABANDONED/ UNCLEARED CARGO: STATE WAREHOUSE

- On the lapse of 60 days from the date the goods were removed to the State warehouse or remained in a virtual State warehouse, they may be sold by public auction provided they were not imported in contravention of any law.

ABANDONED & UNCLEARED CARGO

ABANDONED/ UNCLEARED CARGO: STATE WAREHOUSE

- The person in whose control the goods are kept is:
 - Responsible for the goods as though they are being kept in a State warehouse;
 - Liable for the duty on the goods as long as they remain at such place;
 - Entitled to payment of the outstanding amount due in respect of the storage of those goods at the time of sale from the proceeds of the sale of those goods as charges according to the order contemplated in subsection (3).

ABANDONED & UNCLEARED CARGO

ABANDONED/ UNCLEARED CARGO: STATE WAREHOUSE

- Once sold, the proceeds of the sale are applied in discharge of:
 - Duty;
 - Expenses incurred by customs;
 - Charges due to:
 - Customs, incl State Warehouse rent;
 - A port or railway authority;
 - The Dept of Transport;
 - A container / depot operator;
 - Any person other than a container / depot operator in whose premises the goods were stored (virtual State warehouse)

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Shepstone & Wylie acts for international and local clients providing a full bouquet of legal services. **Customs @ Wylie** is a division concentrating on Customs and Trade related matters.

The practice covers all modes of transport (sea, road, rail & air), as well as warehousing. We specialize in international trade and customs matters. Our team includes attorneys, as well as Customs specialists.

For full details of the team see our website www.wylie.co.za.

QUIZ TIME

JUST KIDDING!

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LADING



THANK YOU
FOR YOUR
TIME

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