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HOW TO CONSTRUE AN ATYPICAL BILL OF LADING

***Supreme Court Case Summary:
The “Luna” and another appeal***

[2021] 2 SLR 1054 / [2021] SGCA 84

Court of Appeal of Singapore

Judith Prakash JCA, Steven Chong JCA, Quentin Loh JAD

28 June 2021; 20 August 2021

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I. Executive summary

1 Bills of lading have been described as the cornerstone of modern sea carriage (*i.e.*, the transport of goods by sea). Traditionally, a bill of lading serves three functions: (1) it is a receipt by the carrier acknowledging the shipment of goods, (2) it is a memorandum of the terms of the contract of carriage, and (3) it is also a document of title to the goods shipped.

2 Further, a bill of lading typically co-exists alongside an underlying sale contract, which is issued to effect an underlying sale transaction which would usually precede the bill of lading. A bill of lading is independent of the sale contract in the sense that the parties to the bill of lading (the shipper and the carrier) are different from the parties to the sale contract (the buyer and the shipper/seller), and the two instruments are governed by different terms. However, these contracts operate in tandem.

3 On the rare occasion when it is clear that the bill of lading could not possibly serve any of its traditional functions (as explained above), the question would then arise as to what legal effect, if any, should be ascribed to such a bill of lading. In those situations, an over-emphasis on the “independence” of a bill of lading from its underlying sale contract risks obfuscating the proper analysis of its true legal effect. Instead, the terms of the sale contract will usually be useful to understand the true legal effect of the accompanying bill of lading.

4 In *The “Luna” and another appeal* [2021] SGCA 84 (“*The Luna*”), the Court of Appeal (“CA”) explored what legal effect should be ascribed to a bill of lading that could not serve any of its traditional functions. In doing so, the CA considered the effect of the underlying sale contract. Applying established principles of contract law, the CA held that the parties’ commercial arrangements indicated that they had not intended for the bills of lading in question to function as typical bills of lading. Hence, the bills of lading had no contractual force or effect as a contract of carriage or as a document of title.

5 Further, the CA also reiterated that the “parol evidence rule”, which restricts the types of evidence that a court may consider, does not apply to cases that involve the ascertainment of the *existence* of a contract. Rather, the parol evidence rule applies only to cases that involve the *interpretation* of an existing contract. Therefore, when determining whether the parties involved intended their bills of lading to have contractual effect, a court can consider *all* the relevant facts of the case, as this goes towards the existence of the contract and not an interpretation of a term of the contract.¹

II. Material facts

6 There are a few main parties in the case of *The Luna*: (1) Phillips 66 International Trading Pte Ltd (“**Seller**”), who was the seller of the bunkers involved; (2) the subsidiaries (“**Buyers**”) of OW Bunker A/S² (“**OW Bunker**”), who were the buyers of the bunkers; and (3) the charterers and/or owners (“**Charterers**”) of the vessels *Luna*, *Zmaga*, *Nepamora*, *Star Quest*, *Petro Asia* and *Arowana Milan* (“**Vessels**”), which were the vessels that transported the bunkers from the Sellers to the Buyers.

7 The Seller trades and supplies bunker fuel. This entails purchasing fuel oil in bulk, storing and blending the fuel oil in storage tanks leased from Vopak Terminal Pte Ltd (“**Vopak Terminal**”), and then selling the product from Vopak Terminal. In some of these sales,

¹ The CA also addressed the parties’ other claims, including the Seller’s claim in bailment and negligent misrepresentation, and the Charterers’ claims for wrongful arrest.

² OW Bunker was one of the world’s largest bunker suppliers prior to its insolvency in 2014.

How to Construe an Atypical Bill of Lading

the bunkers were sold on a free on board basis³ for delivery to bunker barges. The bunker fuel loaded on these bunker barges would then be on-sold by the Buyer's customers to ocean-going vessels in Singapore.

8 In 2014, the Seller entered into three sale contracts to sell bunkers to the Buyers. The sale contracts incorporated the Seller's General Terms and Conditions for Sales of Marine Fuel February 2013 ("GTC"). The sale contracts also provided that payment for the bunkers would only become due upon the expiry of 30 calendar days after the certificate of quantity ("CQ") date. In other words, the Buyers purchased the bunkers from the Seller on 30 days' credit.

9 The Vessels were bunker barges used to supply bunker fuel to other vessels. Upon loading of the bunkers at Vopak Terminal, Vopak Terminal would generate several documents in respect of the bunkers, including a CQ and a document issued in triplicate titled "Bill of Lading" ("the Vopak BLs"). The Vopak BLs were supposed to be signed and stamped by the master of each Vessel and they included the phrase "bound for BUNKERS FOR OCEAN GOING VESSELS".

10 After the completion of each loading, the CQ, the Vopak BLs and other documents would be sent by Vopak Terminal to the Seller. If the original CQ and the Vopak BLs were not yet in hand, the Seller would email scanned copies of them, together with its invoice, to the Buyers. Once in hand, only the original CQ would be couriered to the Buyers; the Vopak BLs would remain with the Seller until after payment was received. The Seller issued its invoices for the bunker shipments sometime after the loading dates, between 31 October 2014 and 5 November 2014.

11 The delivery of the bunkers here was done without the production of the original Vopak BLs, which were still in the Seller's possession at the time in question. Further, some Vessels returned to Vopak Terminal or went to another terminal in Singapore to load additional bunkers even before the previous shipment of bunkers had been fully discharged. This resulted in the commingling of bunkers on board.

³ In such situations, the buyer is responsible for shipping, insurance and other costs as soon as the goods are loaded onto the vessel and during the voyage.

12 Additionally, the bunkers were delivered to various ocean-going vessels shortly after they were loaded on board the vessels of the Charterers. Since the Vopak BLs had been in the possession of the Seller at the material time, it was impossible for the Vopak BLs to be presented to the Charterers before the bunkers were unloaded onto the ocean-going vessels.

13 In November 2014, OW Bunker became insolvent, and the Buyers defaulted on the payment of the bunkers to the Seller. To recover the loss of payment, the Seller demanded delivery of the bunkers from the Charterers on the ground that it was the shipper and/or person entitled to possession of the bunkers under the Vopak BLs and the holder of the Vopak BLs. The Vessels were separately arrested by the Seller on 14 November 2014, 15 November 2014, and 17 November 2014.

14 After the Vessels were arrested, the Seller applied for summary judgment of its claims against the Charterers. The application for summary judgment was dismissed by the Assistant Registrar (“AR”). On appeal, the AR’s decision was upheld by the High Court (“HC”) in *The “Star Quest” and other matters* [2016] 3 SLR 1280.

III. The High Court decision

15 One of the main issues raised in the HC was whether the Vopak BLs had been intended to operate as contractual documents and/or as documents of title. The Seller contended that the Vopak BLs were typical bills of lading and ought to be given their full force as such. Conversely, the Charterers argued that the Vopak BLs merely functioned as acknowledgements of the receipt of the bunkers.⁴

16 The HC acknowledged that the Vopak BLs served none of the traditional functions of a bill of lading. It also noted that the Vopak BLs had several unusual features. For instance, there was no express port of discharge stated in the Vopak BL. While typical bills of lading would state the specific destination the bunkers would unload at, the Vopak BL

⁴ If the Vopak BLs were documents of title, then the Seller would be able to recover its losses. Conversely, if the Vopak BLs were merely acknowledgements of the receipt of the bunkers, the Seller would not be able to demand delivery of the bunkers from the Charterers or claim losses.

merely stated that the goods were “bound for bunkers for ocean going vessels”.

17 Nonetheless, the HC held that the Vopak BLs had contractual force and functioned as typical bills of lading. In doing so, it dismissed the Charterers’ counterclaims for wrongful arrest. The HC gave four main reasons for its holding:

- (a) The phrase “bunkers for ocean going vessels” in the Vopak BLs was not void for uncertainty. This is because the phrase referred to ocean-going vessels in or around the port of Singapore.
- (b) The lack of an antecedent contract of carriage between the Seller and the Charterers did not hinder the possibility of the Vopak BLs having contractual force, as the Vopak BLs could be the contract of carriage.
- (c) There was no inconsistency between the contemplation of multiple deliveries of sub-parcels to different vessels and the issuance of only one set of Vopak BLs covering the entire parcel.
- (d) It was no defence for the Charterers to claim that it was impossible for them to comply with their obligations under the Vopak BLs without breaching their obligations to the Buyers, and vice versa.

IV. Issues on appeal

18 On appeal, the Charterers argued that the HC erred in finding that the Vopak BLs were documents of title and contractual documents. They highlighted the following five factors:

- (a) The use of the phrase “bunkers for ocean going vessels” in the Vopak BLs;
- (b) The contemplation of multiple deliveries under the terms of the Vopak BLs;
- (c) The 30-day credit period under the terms of the sale contracts;

- (d) The passing of title and possession under the terms of the sale contracts; and
- (e) The absence of any reference in the sale contracts to bills of lading.

19 The Seller argued, in turn, that the HC was correct in finding that the Vopak BLs gave rise to contracts of carriage and constituted documents of title. Accordingly, it argued that the Charterers were bound to deliver the bunkers only upon presentation of an original Vopak BL (the “**presentation rule**”).

20 Ultimately, the CA answered the question of whether the Vopak BLs had been intended to operate as documents of title in the negative. In answering the question of whether the Vopak BLs had been intended to operate as documents of title, the CA first laid out the relevant contractual principles, before looking at the underlying sale arrangement which included an analysis of the commercial arrangement and the terms of the Vopak BL. Lastly, the CA considered the risk allocation between the parties, where the 30 days’ credit was of utmost importance.

A. The application of contractual principles in determining the nature of the Vopak BLs

21 The central question was the precise nature of the Vopak BLs. To determine this, the CA had to ascertain the Seller’s and the Charterers’ intentions behind the issuance of the Vopak BLs: specifically, whether they had intended for the Vopak BLs to have contractual force and to operate as documents of title. This inquiry went towards figuring out the very *existence* of a contract, rather than simply interpreting an existing contract.

22 This distinction was important to remember given the significant differences between the approaches that are employed in these two situations. In cases involving interpretation, the parole evidence rule and the principles governing the admission of extrinsic evidence set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 apply.

23 In cases involving contract formation, however, the approach to background is wider as there is no restriction on the evidence which the court may consider. The appropriate approach is that stated in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258: “whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract.” This is a less restrictive approach than that required for contract interpretation cases, as the court may consider all the relevant circumstances of the case to draw the appropriate inferences. Furthermore, in determining objectively whether a reasonable person in the position of the parties would have intended the Vopak BLs to have contractual force and to operate as documents of title, the court may have regard not only to the perspectives of the shipper and the carrier (*i.e.*, the Seller and the Charterers), but also to the perspectives of other parties who were generally known to use the Vopak BLs.

24 Accordingly, the CA considered the underlying sale arrangement of the bunkers and the terms of the Vopak BLs in determining whether the Vopak BLs had been intended to operate as contracts of carriage and/or documents of title.

B. The underlying sale arrangements

(1) The sale contracts and surrounding commercial arrangements

25 These were the salient features of the sale contracts and the surrounding commercial arrangements:

- (a) Under the GTC, the Buyers were given a 30-day credit period by the Seller;
- (b) The payment was required to be made by the Buyers against the presentation of the Seller’s commercial invoice and the original CQ;⁵
- (c) Under the GTC, the title to and possession of the bunkers passed to the Buyers upon loading;

⁵ The CQ reflected the aggregate amount of bunkers loaded in each shipment.

- (d) There was a conspicuous absence of any reference to bills of lading in the terms of the sale contracts and the GTC; and
- (e) The commercial arrangement was that following the loading of the bunkers on board the Vessels, it was the Buyers and not the Seller who would give instructions to the Charterers to deliver the bunkers to ocean-going vessels. The Seller was aware that these deliveries would be made shortly after loading, such that by the time the credit period expired, any attempt by the Seller to demand delivery of the bunkers would be futile as the bunkers would by then have been delivered to ocean-going vessels.

26 The CA found that in light of these arrangements, it was no surprise that the HC found that the Seller had no real obligation to transfer the Vopak BLs to the Buyers for payment, nor were the Buyers expecting to receive the Vopak BLs to claim delivery of the bunkers from the Charterers. This was clear from the fact that the Vopak BLs were not indorsed to the Buyers until after the expiry of the 30-day credit period, sometimes as late as 72 days after such expiry. It thus followed that the Seller and the Buyers could not have intended for the Buyers to be able to lawfully deal with the bunkers only upon presentation of an original Vopak BL. Rather, the Buyers could deal with the bunkers as soon as they were loaded on board the Vessels, with payment being made 30 days later. In short, the Vopak BLs did not enable the Buyers to take delivery of the bunkers, nor did they restrict the Buyers' ability to do the same.

27 In these circumstances, it was clear that as between the Seller and the Buyers, the Vopak BL was a non-essential 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.

28 This affected the analysis of the Vopak BLs as between the Seller and the Charterers. Typically, a carrier that issued a bill of lading assumed a fundamental obligation to deliver the goods at destination only against presentation of the bill of lading. However, in light of the Seller's commercial arrangements with the Buyers, the Seller knew that the Vopak BLs would not allow it to regain possession of the bunkers it

had sold by presenting the same to the Charterers and demanding delivery.

29 Further, the Seller had always looked to the Buyers for payment, rather than regarding the Vopak BLs as security against the risk of non-payment. Notably, this would also have been known by the Charterers who, as the carriers loading and discharging the bunkers bought and sold, were active participants in the commercial arrangements between the Seller and the Buyers. Therefore, when the Vopak BLs were issued, neither the Seller nor the Charterers could have intended for delivery of the bunkers to be made only upon presentation of an original Vopak BL. 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 Seller's part. The corollary of this arrangement was that the Vopak BLs could not have offered the Seller any security against default by the Buyer that typical bills of lading would. In sum, the parties' commercial arrangements indicated that they had not intended for the Vopak BLs to function as typical bills of lading.

(2) *The terms of the Vopak BLs*

30 The CA considered that the above analysis was also supported by the terms of the Vopak BLs. In particular, the Vopak BLs contained several features atypical of traditional bills of lading, reinforcing the view that they were not intended by the parties to operate as such. This was because (a) the Vopak BLs did not specify a port of discharge and (b) the parties contemplated deliveries of bunkers to multiple ocean-going vessels.

(a) The Vopak BLs did not specify a port of discharge

31 The Vopak BLs did not specify a port of discharge. Instead, the phrase "bunkers for ocean going vessels" was inserted in place of where a destination would ordinarily be indicated. The CA noted that the HC interpreted the phrase to mean that bunkers were to be delivered to ocean-going vessels in or around the port of Singapore, hence the Vopak BLs were not void for uncertainty as they did specify a destination of discharge. However, the CA held that this construction was flawed. One of the vessels was not permitted to operate within Singapore port limits.

Conversely, the other Vessels were not restricted to operating only within Singapore port limits. The CA also found this construction overly broad, as there could be hundreds of ocean-going vessels within the port limits of Singapore on any day.

32 While the Seller tried to circumvent this difficulty by suggesting that any uncertainty could be cured via the nomination of a destination by the Seller or its indorsees, the CA noted that there was no such right or obligation on the part of the Seller or its indorsees to nominate a destination for the bunkers after the issuance of the Vopak BLs. That would require a variation of the bill of lading, which the carrier must agree to. However, no evidence was produced at trial of any such agreement between the Seller and the Charterers. Indeed, the evidence showed that the Seller never made any choice as to which vessel the bunkers should be delivered to and, in the context of the relevant contractual arrangements, did not have any role in making such choices.

33 Further, the insertion of the phrase “bunkers for ocean going vessels” where a destination would ordinarily be indicated suggested that the parties intended to omit a destination altogether. The CA found this to be wholly consistent with the commercial context, which is that the Charterers operated as “mobile petrol kiosks” where they supplied other ocean-going vessels with bunkers for those vessels’ consumption.

34 The CA recognised that the provision of a destination of discharge of bunkers was essential for the Vopak BLs to function as documents of title. Hence, the lack of specification of the destination of discharge was a significant departure from typical bills of lading. On this view, the bunkers loaded on board the Vessels were not intended for carriage from one port to another in the traditional sense, but were intended to be pumped into the bunker tanks of ocean-going vessels to be subsequently burnt as fuel. This fundamental difference between the Vessels’ carriage of the bunkers and a typical contract of carriage suggests that the Vopak BLs were no ordinary bills of lading, and had not been intended by the parties to operate as such. The CA held that the absence of a port of destination illustrated the point that the Vopak BLs were not intended to function as contracts of carriage and/or as documents of title.

- (b) The parties contemplated deliveries of bunkers to multiple ocean-going vessels

35 The Charterers had to deliver the bunkers to *multiple* ocean-going vessels. The CA held that the fact that multiple deliveries were contemplated was in line with the deliberate omission to specify a destination of discharge, and it reinforced the view that the Vopak BLs were not intended to operate as typical bills of lading.

36 This was for several reasons. One, this process envisioned a single initial delivery to the lawful holder of the Vopak BLs, followed by multiple deliveries thereafter to various ocean-going vessels. This meant that subsequent deliveries were incompatible with the presentation rule (where each delivery would require an original Vopak BL).

37 Two, such an interpretation would mean that during the credit period and while the Vopak BLs were in the possession of the Seller, only the Seller as the lawful holder of the Vopak BLs could give delivery instructions for the bunkers. The evidence was, however, plainly contrary to such an interpretation. For instance, the Seller never gave instructions to the Charterers to make deliveries to ocean-going vessels; instead, the Charterers took instructions from the Buyers directly.

38 Three, the HC's interpretation meant that breach of contract was an unavoidable consequence of the parties' arrangements. The HC had sought to resolve this difficulty by proposing that the Vopak BL was independent from the underlying contractual arrangement. Thus, even if the two sets of obligations were in conflict, it would be no defence for the Charterers to set up one set of obligations to excuse them from complying with the other set of obligations.

39 However, the CA noted that the HC's reasoning was predicated on an antecedent finding that the Vopak BLs were intended to have contractual force (*i.e.*, the HC assumed that the Charterers had agreed to undertake conflicting obligations in the first place). Instead, the CA emphasised that the main inquiry was whether the Vopak BLs were even intended to be contracts of carriage and documents of title, and thus whether they intended the presentation rule to apply. Ultimately, the CA held that contrary to the HC's finding, the conflict between the

presentation rule and the contemplation of multiple deliveries, especially in light of the 30-day credit period, should have instead led the HC to find that the parties never intended the presentation rule to apply.

C. *The risk allocation between the parties*

40 The CA noted that by extending the 30-day credit to the Buyers and deliberately omitting to stipulate for the use of traditional bills of lading under the sale contracts, the Seller had accepted the risk of non-payment by the Buyers. Additionally, in granting the credit period such that the Buyers would be able to take delivery of the bunkers during the credit period without production of the Vopak BLs, it followed that it would not be necessary for the Seller to tender the Vopak BLs to obtain payment from the Buyers.

41 In a typical sale contract involving shipment, the bill of lading is the most important shipping document. The bill of lading is akin to a key to a warehouse. By retaining the bill of lading, the holder can retain his property and keep his goods locked in the warehouse. Without a bill of lading, one essentially leaves the warehouse unlocked, accepting the risk of non-payment. Deliberately omitting a reference to the bills of lading in the sale contract indicated the Seller's acceptance of the risk of non-payment. This shows that the Seller had looked to the Buyers for payment, rather than regarded the Vopak BLs as security against the risk of non-payment.

42 Further, the parties, including the Seller, expressly agreed that the Vopak BLs would play no role in facilitating the delivery of the bunkers to the Buyers or their order. The risk of non-payment thus arose as a direct election by the Seller to extend credit and not to stipulate for the use of bills of lading under the underlying sale contracts. It was therefore absurd to suggest that the Seller's decision to accept the risk of non-payment by the Buyers could, in any way at all, result in the transfer of that risk to the carrier.

43 It was also untenable for the Seller to suggest that the Charterers agreed to assume the risk of non-payment by the Buyers. This would effectively mean that the Charterers had agreed to a situation whereby they would be in breach of their obligations to the Seller under the presentation rule in every case. The Charterers were merely carriers

and had no reason to assume the risk of non-payment by the Buyers under a separate contract to which they were not a party.

44 The CA therefore held that the Vopak BLs were not documents of title as they did not and could not serve the traditional functions of bills of lading.

V. Lessons learnt

45 *The Luna* is a case that encapsulates principles of contractual formation and interpretation applied in the context of sea carriage. There are two main learning points in *The Luna*. *First*, it is not advisable to draft the bill of lading in an atypical fashion (as the parties did in this case). *Second*, for a bill of lading to be a document of title, the contracting parties must have intended it to be as such from the beginning. Contracting parties cannot simply claim that it is a document of title to recoup their losses and repossess their goods when trouble occurs. This would create an onerous outcome that would shift the burden of the buyers' non-payment onto charterers who are often not parties to the sale contract.