BILL OF LADING AS A TOOL FOR COMMERCE[1].

What is a bill of Lading?

1.1 A bill of lading is a document signed by the shipowner or the master or other agent of the shipowner stating that certain specific goods described in the said bill of lading have been received and are being shipped in a particular ship and setting out the terms under which the goods have been delivered to and received by the ship for carriage. See **Halsburys Laws of England 4th Edition Volume 43, paragraph 490**. In the case of **F.I.Onwadike & Co. Ltd -v-Brawal Shipping Nig. Ltd & Ors [1995] 5NSC 407 at 419 CA** the Court of Appeal, Port Harcourt, described the bill of lading as "a document signed by the master of the ship or by his agent and it is given to the person shipping goods on board the vessel.... It is evidence of a contract between the shippers and the shipowners on one hand and on the other hand between the shipowners and the consignees or endorsees of the goods in the bill". See also the CA decision in **Seatrade -v- Fiogret Ltd [1989]3NSC 453**.In one of her Articles, Mrs. Abiola Falase-Aluko described the bill of lading represents the goods to which it refers and enables its holder to claim the property concerned, its possession being equivalent to the possession of the goods themselves and its transfer being a symbolical delivery of the goods and has the same effect as the actual delivery of the goods. She also wrote that it is a key to which in the hands of the rightful owner is intended to unlock the door of the warehouse where the goods are and it is an essential instrument of maritime trade and that it is delivered to the shipper by the carrier or Master or carriers agent and is usually transferred to a third party who may either be specially named in the bill of lading as the "consignee" [the person to whom delivery of the goods is to be effected] or "the holder" [person not specifically named in the bill of lading but to whom the bill had been endorsed. See **"Legal Effect of Transfer of Bill of Lading to Clearing Agents" by Mrs. Abiola Falase-Aluko, LLM.**

1.2 The goods received and shipped are usually part of other goods received and shipped. After signature, the shipowner or Master or other agent gives two parts of the bill of lading [which bill of lading is usually prepared in three

[1] Written by Mr. Michale Igbokwe, 1999.

parts], to the shipper who may either retain it or transfer it to a third person who may either consignee or the holder or indorsee, of the bill of lading. It is more commonly used in a shipping service of a line which regularly visits the ports in which the shipper is interested. It is a type of contract of affreightment [i.e. a contract for the carriage or transportation of goods in a ship which is either expressed in a charterparty [by demise] or in a bill of lading or both].The effect of a bill of lading depends on the circumstances of the particular case of which the most important is the position of the shipper and of the holder.

2. FORMS AND PRINCIPAL CHARACTERISTICS OF BILL OF LADING:

2.0 The forms of bills of lading include (a) Straight (b) Blank, (c) Feeder and (d) Through, bills of lading.

(a). **Straight Bill of Lading:-**

A straight bill of lading is the one that contains the name of the consignee and further provides for delivery of the goods to his order or to his assigns and can be transferred only by *endorsement and delivery by the consignee*. Until the delivery of either the bill of lading or of the goods to the endorsee, the endorsement may be revoked. The endorsement may name the transferee to whom delivery is to be made in which case it is called *"special endorsement"*. If no transferee is named, the endorsement is called an *"indorsement in blank"* and the goods specified in the bill are deliverable to bearer. See **Sewell -v-Burdick (1884) 10 AC 74 at 83**. **Halsbury's Laws of England supra at paragraph 514.See "Legal Effect of Transfer of Bill of Lading to Clearing Agents" by Mrs. Abiola False-Aluko,LMM.** It has also been held in **Worldwide Eng. & Manuf. Co (Overseas) Limited -v- NNSC Ltd (1988) 3NSC 382** that where a bill of lading is expressed to be "to order" it merely means that it is negotiated by the endorsement of the holder followed by the delivery to whom it may concern and since there is nothing written on either the front or reverse part of the bill by way of endorsement to connect it with the Defendant who appears only as a "notify party", the goods were not consigned to the Defendant.

(b) **Blank Bill of Lading:-**

A blank bill of lading does not name the consignee but makes the goods deliverable to bearer or to order or assigns, the space for the name of the consignee being left blank. It may be transferred by delivery without endorsement. See **Sewell -v- Burdick [supra] and Halsbury's [supra] paragraph 514**. After referring to Scrutton on "Charterparties and Bills of Lading" 3rd Edition at page 129 now 18th Edition at page 181, the Supreme Court in **Adesanya-v- Leigh Hoegh & Co 1968 1AllNLR 333** stated at **340** that so long as the goods are delivered to a name left blank, or to bearer, or endorsement is in blank, the bill of lading may pass from hand to hand by mere delivery or may be redelivered to the original holder without any endorsement so as to affect the property in the goods. But the holder of the bill may at any time fill in the blank either in the bill or endorsement, or restrict by endorsement the delivery to bearer, such power being given to him by the delivery to him of such a bill of lading. In the **NNSL -V- Owners of MV Albion 1 3 NSC200 at 206,** the CA stated that the word *"blank"* in the above passage is used in two senses," **that is, "So long as the goods are delivered to a name left blank ..... or the endorsement is in blank. By "To a name left in blank" is meant that the name of the consignee is not inserted in the bill of lading. In that case the holder may fill the blank in the bill against the consignee. It is akin to issuing a blank cheque where the holder is at liberty to make necessary entries"**, and held that since the name of the consignee is entered in the bill it is not a question of the bill being delivered "to a name left in blank" and so appellant had not shown that it falls into the category of those who qualify to sue on the bill of lading. It therefore means that blank bills do not contain the name of any person as consignee and is transferable or negotiable by mere delivery and that whoever it comes into his hands can use same to take delivery of the goods it refers to. **Halsburys Laws of England** supra also confirms this position when it stated that if the bill of lading is endorsed in blank, it is transferable by mere delivery but that the holder may at any time convert the endorsement in blank into a *special endorsement* by inserting in it the name of the person to whom delivery is to be made; and he may also specially indorse a bill of lading *to bearer*, or insert the name of a consignee in the space on the face of the bill of lading, if left blank. In these cases [i.e. of special endorsement by inserting name of consignee or bearer or a consignee in the blank space]; the bill of lading ceases to be

transferable by mere delivery, and requires indorsement by the consignee whose name is inserted or by the indorsee named in the special indorsement, as the case may be, before it is capable of being further transferred.

(c) **Feeder Bill of Lading :-**

A Feeder bill of lading is a bill of lading to which cargo owners are not parties issued by subcontractors to shipping lines which had subcontracted carriage of cargo to such subcontracting carriers because the shipping lines' bill of lading gave them [the shipping lines] wide powers to subcontract the whole or a part of the carriage on any terms. It recognises bailment on terms as a means of circumventing the handicap created by the doctrine of privity of contract which a third party to a bill of lading contract between shipper and carrier has in enforcing claims against carrier or protection of carrier against liability. Through it, "*the benefit of certain terms of the contract of carriage is made available to parties involved in the adventure who are not parties to the contract.*"

In the **Pioneer Container [1994]2AC324**, the appellants were owners of goods on board the respondents vessel, *The Pioneer Container* which sank after a collision off the coast of Taiwan. The bill of lading provided that the shipping line had wide authority to subcontract the whole or part of the carriage on any terms. The respondents who received the goods as subcontractors issued their bill of lading [the feeder bill of lading] which provided for exclusive jurisdiction for courts in Taiwan. The appellants sued in Hongkong whilst shipowners sought to rely on the exclusive jurisdiction clauses in the feeder bills of lading to which the appellants were not parties. It was held that though there was no contractual relationship between the shipowners and the owners of the goods, by voluntarily receiving the goods into their custody from the shipping line with notice that they were owned by other persons, the shipowners assumed the duty to the owners of the goods of a bailee for reward and were obliged to take reasonsble care of the goods. Consequently, the shipowners could invoke the terms on which the goods were subcontracted to them, including the exclusion jurisdiction clause, because by agreeing to allow subcontracting on any terms, the owners of the goods had consented to the sub-bailment of and its terms. In **The Mahkutai [1996]3WLR 1**, where the main issue was whether the shipowners who were not parties to the bill of lading contract, can invoke against the cargo owners the exclusive jurisdiction clause

contained in that contract the bill of lading being a charterer's bill of lading issued by their agents to the shippers and the shipowners claimed to be entitled to do so either under a *Himalaya* clause incorporated into the bill of lading or alternatively on the principle of *bailment on terms*, Lord Goff stated:-

"The two principles which the shipowners invoke are the product of developments in English law during the present century. During that period, opinion had fluctuated about the desirability of recognizing some form of modification of, or exception to, the strict doctrine of privity of contract to accommodate situations which arise in the context of carriage of goods by sea, in which it appears to be in accordance with commercial expectations that *the benefit of certain terms of the contract of carriage should be made available to parties involved in the adventure who are not parties to the contract.*"

After tracing the development and fluctuation of judicial opinion on bailment on terms, it was held that by receiving the goods on bailment on terms, it was held that by receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligations as bailees were not effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession because it is inconsistent with the terms of the bill of lading.

(d) **Clean and Claused Bills of Lading:-**

A clean bill of lading has been defined in the case of **Alan Bojor Brothers -v- Greek West Africa Line 1NSC 173 at 175** citing Cave J. in the case of Restitution S.S. Co -v- Sir John Pirie & Co where it was observed that *"there is a very clear statement as to the meaning of the phrase 'clean bill of lading' to be found in Pollock and Bruce's Law of Merchant Shipping and there it is said that a clean bill of lading is a bill of lading which contains nothing in the margin qualifying the words in the bill of lading itself, 'Shipped in good order and well-conditioned; goods of a certain character, or a certain weight or quality or what not'"* In the case of **British Imex Industries Ltd-v-Midland Bank [1958] 1QB 542 at 551** Salman J. described it as a bill of lading "that *does not contain any reservations* as to the apparent good or order or condition of the goods or the packing". Banks rely on and accept clean bills of lading as security or pledges for loans unlike "claused" or "dirty" bills of lading because of the "clean bill" it gives as to the condition of the goods. Where there is a contradiction

between the clean bill of lading and the Master's protest about the condition of the goods received, the courts tend to follow the clean bill of lading and disregard any opposing documents. See **Silver -v- Ocean Steamship Co Ltd [1930] KB 416**. On the other hand a "claused" bill of lading is one that is **qualified** or **has reservations**. The carrier is also estopped from later denying the clean state of the goods at the time of their delivery to him for shipment if a clean bill of lading had been issued. Therefore, where the bill contained the expression, *"Received in apparent good order and condition"* which was qualified by "Signed under guarantee to produce ship's clean receipt", it was held that the bill was not clean and so the consignee could not rely on estoppel to preclude the carrier from denying that the goods were not in a claused condition. See **Canada & Dominion Sugar Co Ltd -v- Canadian National [West Indies] Steamship Ltd [1947] AC 46**. Moreover, where the bill of lading is clean the onus of proving the *condition, weight and quality of the goods* when shipped lies on the carrier and the consignee or endorsee is relieved of the burden whereas the consignee or endorsee has the burden of proving them if the bill is claused.

2.1 Although a bill of lading is commonly used for smaller quantities of general goods, statute has intervened to to affect freedom of contract in bills of lading in regulating the rights and duties of the parties (unlike in charter-parties where there is no statute interfering with freedom of contract of the parties). Until 1924, bills of lading [which in its earliest stage in the 14th century was used as a non-negotiable receipt for cargo received by the shipowner from a shipper who usually did not intend to travel with the cargo], were governed by common law and express and implied terms of the contract until 1921 when the Hague Rules were prepared by the International Law Association at the Hague and in 1924 the revised rules were signed in Brussels and embodied in an International Convention aimed at making the liabilities of cargo-owners and shipowners to be uniform worldwide. Nigeria like many countries ratified the Convention and adopted the Hague Rules into its laws in the schedule to the Carriage of Goods by Sea Act (cap 29) of the Laws of the Federation (hereafter called COGSA). Generally, the Hague Rules protect holders of bills of lading by ensuring that certain rights conferred on them cannot be deprived, define the circumstances under which a carrier can avoid

liability and render null and void any clause or contract purporting to relieve a carrier of his liabilities under the Rules, (Art III rule 8) although a carrier is free to increase its liabilities.

2.2 However, it must be pointed out that the Hague Rules of our COGSA has the following limitations and as such not applicable to all maritime claims:-

(i) it relates to the carriage of goods by sea in ships *carrying goods from any port in Nigeria to another port in Nigeria*, i.e. domestic waterborne cargo or outward-bound international cargo[Section 2 COGSA].Regrettably though the Rules were misapplied to the following cases which concerned inward-bound cargo, namely; **Henry Stephens & Sons Ltd -v- Polish Steamship Co 1NSC 139 by Adefarasin J.; NNSL -V-Emenike 3NSC 163 CA; Adikibi-v-NNSL 3 NSC 152,**, the Supreme Court in the case of **Leventis Technical-v-Petrojessica Ent. Ltd [1999] 6NWLR [Part 605]** 45 settled the matter of its not being applicable to inward-bound cargo unless the clause paramount indicates that COGSA should apply. Before then, it had been properly applied to **Millers Ltd-v- Bulk Lighterage [Nig]. Ltd 2NSC 198;Allied Trading Co Ltd-v-Elder Dempster 1NSC 277.**
(ii)applies only to carriage by sea (i.e. from time of loading into vessel until discharge), in which case through or multi-modal transport excluded to the extent to which it involves "on carriage" or carriage before loading,
(iii)applies only to a carriage covered by a bill of lading, charterparties therefore excluded.
(iv)does not apply to carriage of live animals or to cargo carried on deck of the vessel.

2.3 Although, the Hague Rules do not have a force of law in Nigeria and COGSA is not mandatory but directory by providing a model framework to guide parties to a contract of carriage of goods by sea and may be incorporated in the bill of lading or contracted out of by agreement of the parties,[see **"The Applicability of International Cargo Conventions in Nigeria" by Mrs. Abiola Falase-Aluko LLM];** the following are the major provisions of the Hague Rules as contained in the schedule to the COGSA, which are now incorporated in bills of lading terms and conditions (small prints usually at its back):-

(a) ***General paramount clause:-*** an express statement that every bill of lading issued in Nigeria to which COGSA

applies must contain and specifically state that it is subject to the Rules contained in COGSA,[Section 4 COGSA].The *paramount clause* will override any *choice of law clause* as the former will usually provide that the terms evidenced by the bill of lading shall have effect subject to the *clause paramount*. See **Ocean Steamship Co-v-Queensland Wheat Board [1941]1KB 402**. The incorporation of the *paramount clause* in the bill of lading is to give the cargo convention [as stipulated in a bill of lading] a *contractual force* and the paramount clause may give effect to any or all of the cargo conventions depending on how it is framed e.g. though not domesticated in Nigeria if the paramount clause provides for Hague-Visby Rules in respect of inward-bound bill of lading by agreement of the parties, the Hague-Visby rules not domesticated in Nigeria will be applied to the case and proved as foreign law. Where there is no paramount clause in the bill of lading, the court must look at and apply the choice of law or foreign jurisdiction clause in the bill of lading but in the absence of the choice of law clause, the terms of the bill of lading will govern the contract of carriage and accordingly applied in resolving any cargo claims or dispute. ***See "The Applicability of International Cargo Conventions in Nigeria" by Mrs Abiola Falase-Aluko LLM***. It is however interesting to know how the foreign jurisdiction clause may still apply in view of Section 20 of Admiralty Jurisdiction Act, 1991 which makes it inapplicable in Nigeria.

(b) Carrier is to carefully load, handle, stow, carry and discharge the goods,

(c) Carrier must diligently ensure that the vessel is seaworthy,

(d) Carrier must upon shipper's demand issue a bill of lading upon showing:-

(i) marks or necessary identifications of the goods,

(ii) number of packages or pieces or weight of the goods shipped,

(iii) the apparent condition of the goods shipped.

(e) Carrier is entitled to reasonably deviate if the aim is to save life and property at sea,

(f) Provisions where the carrier and his ship are exempted from liability for loss or damage (i.e.excepted perils) e.g:-

(i)act, neglect or default of Master, Mariner, Pilot or the servants of the carrier in the navigation and management of the ship,

(ii) Fire, unless caused by the actual fault or privity of the carrier,
(iii) Perils, dangers and accidents of the sea or other navigable waters,
(iv) Act of God, (v) act of wars, (vi) act of public enemies, (vii) saving or attempting to save life or property at sea (Art IV Rule 2)
(g) Carrier's entitlement to dispose of dangerous cargo loaded without his consent,
(h) Limitation of the carrier's liability to N200 per package or unit in respect of loss or damage to goods unless the nature and value of the goods are inserted in the bill of lading,[Art. 4 rule 5]- the Gold Clause.
(i) Carrier's immunity from liability if action is not brought within one year from the date of delivery (or when the goods ought to have been delivered)[Art. 3 rule 6].
However, it should be noted that any clause or agreement in a bill of lading relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties under the rules or lessening the liability is void. [Art. 3 r.8].

2.4 Although the Hague Rules had since been amended by the new Hague-Visby rules at the Conference in Visby, Sweden and also by the Hamburg Rules initiated by the UN Conference on Carriage of Goods by Sea in 1978, Nigeria is not a signatory to any of them yet. Whilst the Hague Rules favour the cargo owners, the Hague Visby Rules favour the shipping and industrial nations whilst the Hamburg Rules favour the developing cargo owing-nations such as Nigeria. However, neither the Hague-Visby Rules nor the English COGSA 1971 is applicable in Nigeria. See **Adikibi -v- NNSC Ltd (1987) 3NSC 152**.In the same vein, the UK Carriage of Goods Act of 1992 is not applicable in Nigeria.

2.5 The Bill of Lading generally is in triplicates, the master retaining one and giving two to the shipper. If the bill of lading is not made out according to the instructions of the owner or shipper of the goods or he is refused a copy thereof, he may demand the redelivery of his goods. The shipowner is bound by the Master's signature of the bill of lading provided that the master did not exceed his authority in doing so but where he has exceeded his authority and the shipowner repudiates liability, if the master signed the

bill of lading as agent only he will be liable for breach of warranty of authority but if he made himself a party to the contract, he will be liable on the bill of lading. Though prepared in set, the transfer of one of it is a transfer of the bill of lading and the other parts cannot be effectively transferred.

2.6 Due to the fact that the contract of the carriage is made with the shipper alone, the shipper cannot by his dealing defeat the shipowner's right against him to demand for freight payment; although payment of freight by the consignee discharges the shipper from any further liability, where the ship is under charter, the charter has responsibility to pay the freight as stated in the charterparty. Though not being a party to the bill of lading, the consignee is not liable to pay freight yet because of the statutory provision of Section 1 **Bills of Lading Act 1855** re-enacted in **Section 375 Merchant Shipping Act** (cap.224 Laws of the Federation of Nigeria), where he is named as a *consignee* in the bill of lading, he has a duty to pay the freight as if he is a party to the contract. By virtue of the name statute, an endorsee of a bill of lading to whom property in the goods had passed as a result of the endorsement is liable to pay freight to the shipowner [See **Sewell-v- Burdick (supra)]** provided that property in the goods had passed to him [and not where the endorsee is an agent to whom the consignee had endorsed the bill for convenience or purpose of clearing the goods]. If the property in the goods does not pass to the consignee or endorsee because there was no such intention, there is no liability incurred by the endorsee by reason of the endorsement, albeit as a result of the circumstances surrounding his receipt of the goods, he may be liable under a new implied contract in the same way as a consignee. See **Brandt –v- Liverpool B & RPSN CO. Ltd (1924) IKB 577.**

2.7 Based on the common law principle of privity of contract which prevents a stranger or third party to a contract from suing or being sued on the contract even if the contract is for his benefit, in order not to allow it to hamper the benefits to be derived from a third party/transferee or endorsee of bill of lading, some ways have been devised to circumvent the common law principle of privity of contract namely:-

(i) statutory provision of Section 1 Bills of Lading Act 1855 of UK re-enacted in Section 375 MSA which allows the indorsee of the bill of lading to whom property in the goods had passed and who he had given value, to have the same rights and duties as the consignee will have in respect of the bill of lading, though not a party. This therefore confers on him locus standi to claim against the carrier or shipowner for loss or short-delivery of the cargo. This creates problems though when property in the goods has not passed because the goods are unascertained (bulk cargo), where bills are endorsed to clearing agents to help clear goods of consignee and bills are pledged to banks.

(ii) Court's attitude of implying existence of a contract between the consignee and the shipowner because the consignee paid the freight (consideration) and has accepted and taken delivery of the goods i.e. the **Brandt –v- Liverpool** principle. The principle has its short comings in that if the freight had been prepaid by the shipper or consignee or there is a total loss of the goods and so nothing for the endorsee to accept, such a contract cannot be implied,

(iii) the "sub-bailment on terms strategy" in the Pioneer Container case based on the commercial expectations that the benefit of certain terms of the contract of carriage should be made available to parties involved in the adventure who are not parties to the contract of carriage.[see paragraph 2.0[c] above]

(ii) By the Himalaya clause in a bill of lading as laid down in **Midland Sillicones Ltd-v-Scruttons Ltd [1962] AC 446** and followed in **Commet Shipping Agencies Ltd –v- Panalpina World Transport Nig. Limited 3NSC 483** where the clause in the bill of lading states that:-

(a) the stevedore (or clearing agents, servants or those employed by the carrier to deal with the goods on arrival) is intended to be protected by the provisions in the bill of lading which limit carrier's liability,

(b) the carrier contracts for itself and/or on behalf of the stevedore to whom the bill of lading shall apply,

(c) the carrier has the stevedore's authority to do so or even if without such authority the

stevedore ratifies it and there is consideration for it and

(d) the Bills of Lading Act 1855 applies to it, the immunity from the liability from loss, damage, negligence which has been conferred by bill of lading on the carrier is enjoyed by the stevedores though they are not parties or consignees or endorsees of the bill of lading.

Although the 1992 COGSA UK is not applicable in Nigeria and is not a replacement of the UK 1971 COGSA, by it the law in England now concerns itself with who is a lawful holder of a bill of lading and not endorsees or consignees and does away with the issue of locus standi and does away with the problems connected with privity of contract. It is also noteworthy that English law has gone further by allowing through legislation [UK Contracts [Rights of Third Parties] Act, 1999 which came into effect on 11/5/2000, third parties to English law contract to enforce its terms, as long as the contract states reasonably clearly that it is intended that the third party should benefit from it or be able to enforce it.

4. Functions of bill of lading.

4.1 According to the report by the Secretariat of the United Nations Conference on Trade and Development, Geneva (UNCTAD) 1974, the bill of lading, serves three main functions namely:- (i) as a receipt of the goods, (ii) evidence of the contract of affreighment concluded before it was issued (in respect of shipments in liner vessel) or when held by a third party (when issued in respect of shipments made under a charter-party) or (iii) evidence of title to the goods depending on the circumstance of each case. In the latter case, it enables the consignee who is in possession of it to take delivery of the goods at the destination and makes it possible for the shipper whilst the goods are still in transit to pass ownership in the goods by endorsement and transfer of the document to a buyer. As a document of title, a bill of lading serves as a basis for documentary credits on international trade. Thus the bill of lading has become an indispensable tool of modern international commerce because as evidence of title a merchant who wants to sell his goods on the

ship before arrival can do so and endorse the bill of lading to the holder or use it as security of pledge or mortgage or loan. The fact that the bill of lading performs three main functions was confirmed by the CA when in the **F.I.Onwadike case supra at 419CA**, the it stated that the " bill of lading performs three distinct functions: (a) it is evidence of the terms of contract of affreightment; (b) it is evidence of the shipment of goods; and (c) it is evidence that the holder of it has the property in the goods or, in other words, it is a document of title."

4.2 As Evidence of Contract of carriage.

(i) Though not itself the contract between the shipowner and the shipper of the goods [because the contract is usually signed before the bill of lading is issued], the bill of lading can be a good evidence of the terms of such contract. Therefore in **Ardennes [Cargo Owners]-v- Ardenes [Owners] [1951] 1KB 55**, shipowners were held liable for damages suffered by shippers when instead of sailing to London as stated in the bill of lading, the vessel sailed first to Antwerp. See **also The Future Express [1992] 2Lloyd's 542**. The contract conditions in small prints at the back of a bill of lading are construed as the terms agreed to between the shipper of the goods and the shipowner and can either be relied on by the shipper (in an action for loss or damage to his goods) to show that the shipowner has defaulted, or relied on by the shipowner to show that he has performed his obligations or that he is not liable, See **Allied Trading Company Limited -v- G.B.N Line (1985) 2NSC 348**.The Ardennes is proper law as between the shipper and the shipowner, but not between the shipowner and the indorsee to whom the bill of lading had been endorsed for valuable consideration. However, the way out for the indorsee or third party is the case of **Leduc –v- Ward (1888) 20 QB 475** where based on Section 1 of Bills of Lading Act 1855, the bill of lading was held by provide conclusive evidence of terms of the contract. That way, the third party will not be bound by any other contract apart from the bill of lading the rights and duties of the transferor of the goods covered by which he had stepped into and can enforce.

1[I] Some of the areas where the clauses at the back of bill of lading have been relied on as evidence of contract and construed by our courts are considered below:-

(1[ia] Foreign jurisdiction clause:- Whether raised by the shipper or the shipowner, a foreign jurisdiction clause in a bill of lading indicates the lexi loci contractus i.e. the law or court of the country that will entertain and apply the construction of the terms. Though in the case of **Leventis Technical Limited -v- Container Terminal Co (Nigeria) Limited & Ors (1981) Vol. 2 NSC 84** the Federal High Court upheld a preliminary objection to the case being brought in Nigeria because the bill of lading had specifically provided that any dispute arising under it shall be governed by Japanese Law and decided by a Tokyo Court, Nigerian Courts will where there are strong reasons for trying the case in Nigeria, discountenance the foreign jurisdiction clause - See **G.B.N Line & Ors -v-Allied Trading Company Limited (1984) Vol. 2 NSC 210, The Norwind 3NSC 175 and Inlaks Limited -v- NNSC Limited (1984) Vol. 2 NSC 203**. It has also been argued by Mr. Mbanefo SAN in his article titled "Problem Areas in Nigeria Admiralty Proceedings" in his book titled "Essays On Nigerian Shipping Law" at pages 50-51 that "Nigerian courts should be slow to dismiss a suit because of a foreign jurisdiction clause in cases where the parties did not sit down to negotiate their contract i.e. where one party becomes bound by the contract through the operation of law (such as an endorsee of a bill of lading). But where it is clear that the contract has no connection with Nigeria (for example, where it is between two foreign parties and the action is brought here contrary to the jurisdiction clause for the mere convenience or advantage of the Plaintiff), the courts shall not hesitate to refuse to try that case in Nigeria if one of the parties objects to its jurisdiction" especially if the objector had entered unconditional appearance to the suit

1[I](b) Incorporation of charterparty in bill of lading - There is a strict test of incorporating terms of charterparties into the bill of lading by strict construction of the language of incorporation used in bill of lading to determine the extent of what is being incorporated by reference into the bill of lading. General words of incorporation such as "all terms, conditions and exceptions to be as per charterparty" are taken to be conditions and exceptions in the charter which relate to

the main undertakings in the bill of lading as to shipment, carriage and delivery of goods and payment of freight and not collateral terms like arbitration. Once the bill of lading incorporates the terms of the charterparty, the rights and obligations of the charterparty extend to theose who are bound by the bill of lading. See **Agricor Inc of USA –NNSL Ltd 4NSC 8**.

1[I](c)Time Limitation:- Due to Rule 8 of Article 3 COGSA which renders void any clause or covenant in the contract of carriage (bill of lading) releasing the carrier from liability for loss or damage, any clause in a bill of lading which reduces the time within which an action may be filed to less than one year will be a nullity. Therefore in **Kaycee Nigeria Limited -v- Prompt Shipping Corporation (1986) Vol. 2 NSC 431** it was held that any interpretation of the exemption clause in a bill of lading to wit, "No claim made under this bill of lading will be admitted unless made and properly attested within 3 days" after the goods have arrived to limit liability only to claims brought within 3 days (as contained in Article 3 Rule 6 of COGSA) is wrong. In the same way, no exemption clause in the bill of lading will be allowed to exclude the carriers liability because it violates Art 3 Rule 6 of the COGSA. See **Adikibi -v- NNSC Limited (1987) 3NSC 152.**

1[I[(d) Seaworthiness:- By Article 3 Rule 1(a) of the Hague Rules, the shipowner must ensure the seaworthiness of his vessel. Where therefore in **Coastal Shipping & Agencies Company Limited -v- Mandilas & Karaberis Limited (1969) Vol. 1 NSC 485** where one of the conditions was that "... carriers are not to be responsible for any loss, damage or delay to goods from whatever cause arising..." the shipowner was held to have undertaken that the ship was reasonably fit for the purpose of a carriage when the ship sunk because of unseaworthiness.

1[I[(e)Identity of the carrier:- The identity of the carrier clause in a bill of lading emphasises the general law and mercantile usage where a bill of lading is primarily a contract between the shipper or consignee and the shipowner, and the shipowner is deemed to be the carrier and where agents of the shipowner will not be liable.

1[I](j) Cessation of shipowners liability:- Under this term of the bill of lading, the carrier is not in charge of or

responsible for the goods before loading in and subsequent to their discharge from the ship. Consequently, in **Holts Transport Limited -v- K. Chellarams & Sons Nigeria Limited (1973) Vol. 1 NSC 222** the shipowner was held not liable for goods lost after being discharged from its ship into lighters belonging to a bailee because when the goods were discharged from its vessel the shipowner's liability under the bill of lading ceased.

(ii) **The Bill of Lading in the hands of a charter.**

The bill of lading issued by the shipowner to the charterer in respect of latter's goods, is a receipt and a document of title only but the contract of carriage is evidenced in the charterparty only. See **Rodocanachi Sons & Company –v- Milburn Brothers (1886) 18 QB67**. If the shipper is not the charterer and indorses the bill of lading to the charterer, the charterparty will still govern the contract of carriage. The attitude of shipowners is to incorporate the charter party into the bill of lading by reference but the court strictly will not take the charterparty to have been so incorporated unless by distinct and specific words and not general words as those written in the margin of the bill of lading.

Moreover, as between the shipowner and an endorsee of the bill of lading the bill of lading amounts to the contract of carriage of goods, [See **Bank of Australasia -v- Clan Line Steamers Ltd [1916]1KB 39** even if there is a charterparty especially when the indorsee is ignorant of the terms of the charterparty and may also be the contract between the shipowners and the shipper. As between the shippowner and the charterer, the bill of lading may in some cases have the effect of modifying the contract contained in the charterparty, but generally the charterparty will prevail where there is a conflict between the contents of the charterparty and the bill of lading and the bill of lading will operate as only an acknowledgement of receipt.

However, any claimant will be well advised to find out who the carrier is, whether charterer or shipowner where there is a charterparty before filing a claim because the suing of a wrong party may occasion delay which may extinguish the claimant's right of action before the claimant gets

round to suing the proper party after the first suit or the wrong party has been struck out. Though it is not always clear whether the proper defendant/carrier is the charterer or shipowner, except if it is a demise (or bare boat charter); the *general guide* is to discover whether the Master signed the bill of lading for the charterer or shipowner or the bill of lading is signed by the Master as the agent of the shipowner. Therefore in **Saude –v- Surr (1866) LR 286** where there was a charter but the bill of lading was signed by the Master, it was held that since there was no demise of the ship, the ship continued in the possession of the owner through the master and crew who had authority to bind the owner who is therefore liable. In **Anita Shoe company Limited –v- Owners of MV Republic Di. Genova & Ors (1995) 5 NSC 368**, where the Plaintiff "notify party" sued the shipowners for breach of contract, the Defendant contended that no privity of contract existed between the Plaintiff and the Defendant because the bill of lading that was endorsed to the Plaintiff was not signed by the master of the vessel but on behalf of the carrier and that the shipowners not having authorised the signing of the bill of lading were not liable, it was held 384-385:-

(i) since the bill of lading was endorsed to the plaintiff [by the consignee]after the transshipment in Rotterdam, the plaintiff has locus standi to maintain and institute the action,
(ii) a Plaintiff who wishes to sue on a bill of lading has the onus heavily placed on him to find out the proper party to be sued namely the shipowner or demise charter,
(iii)it is only when the bill of lading is signed either by the Master of the ship or someone authorised by him that the shipowner can be held liable for any loss. But where the bill of lading has been signed on behalf of the carrier; then the carrier is liable for any loss in respect of the goods,
(iv)the carrier can be either the shipowner or the charterer but the plaintiff must find out the proper party to sue and cannot sue the shipowner when he ought to have sued the carrier who is the charterer of the ship: **Allied Trading Co. Ltd-v- GBN Line [1985]2NWLR [Pt5] 74 at 81-82.**

In ascertaining the ownership of a ship, the claimant ought to diligently search the Lloyd's Shipping Register or other sources to know the proper party to sue. See **The Phoenix 4NSC 260 at 263.** The formula for deciding a shipowner who can sue or be sued is as given by Lord Herschell in

Baunmwoll MVS-V-Furness [1893] C 17 as a person who has the absolute right to the ship who is the registered owner in fee simple and such a person who appoints the master, officers, the crew of the ship and pays them and gives them orders and deals with the vessel in the adventure, during that time all the rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is for those purposes during that time, in point of law regarded as the owner; was in **The Phoenix** case [supra], stated by Sanyaolu J. to be wide enough to cover a charter by demise.

Therefore, if the Master signed the bill on behalf of the charterer and the shipowner is sued, a wrong party has been sued. In Canada a trend has developed where both the charterer and shipowner are sued jointly and severally in order to overcome the above-stated chaos as to the right defendant to sue in cargo loss and the demerit of suing a wrong party and losing right of action. See the Article **Who is a Carrier? Shipper or Charterer." by Christopher Giaschi.**

4.2 **Bill of lading as Evidence of Shipment or Acknowledgement of Receipt :-**

(i) **Bill of Lading as a Receipt**

The bill of lading acts as an acknowledgement of the fact that the goods shipped had been received by the shipowner or carrier but where it is signed on behalf of the shipowner by his agent or Master, it becomes conclusive evidence of the fact that the goods contained were shipped only against the person signing it; but may be controverted by evidence showing that the goods were never shipped. The ship owner's agent has no authority to sign a bill of lading for goods never shipped or for greater quantity than actually received. Consequently, a shipowner who delivers goods to consignee without production of the bill of lading does so at his peril even if he does so with an indemnity agreement or letters of indemnity with or from the purchasers and their bankers. See **The Settin [1889] 14 PD 142.**

Generally the bill of lading can act as evidence of receipt as to three main things namely (i) the condition in which

the goods were received, (ii) the leading and identification marks of the goods and (iii) as to the quantity of the goods placed on board of the vessel.

(a) ***Receipt to condition of the goods:-***

In determining the condition under which the goods were received by the shipowner from the shipper the statement or qualification of the statement of the bill of lading shows whether a bill is a clean or claused or dirty bill of lading. Both clean and dirty bills of lading have been described earlier in this paper, see paragraph supra] but for the purposes of this function of the bill of lading it is necessary to mention where the bill does not have any reservations or qualify the weight, condition and quantity of the cargo at the time of receipt, the carrier is estopped from saying at the time of discharge that the cargo was bad or less than the weight.

(b) ***Receipt as to quantity :-***

The bill of lading is prima facie evidence of the quantity of goods that were shipped and in the absence of fraud, the shipowner in bound by the statement in the bill of lading. Whatever the *quantity* of goods carried is stated in the bill of lading is the quantity shipped. Consequently in **K. R. International (Nig.) Limited -v- K. Line Inc. & Alraine Nigeria Limited (1986) 2 NSC 444** the court held that when goods are not found on an arrival of a ship, it is not the shipper that is liable but the carrier because it is the duty of the carrier to deliver to the consignee whatever is stated to have been put on board its vessel in accordance with the bill of lading. See **AG Ceylon -v- Scindia Steam Navigation Co. Ltd [1967] AC 60**. However, the shipowner is not estopped by his agent's signature in the bill of lading from proving that the goods stated in the bill of lading to have been shipped were not shipped or that the quantities specified are incorrect. See **Silver -v- Ocean Steamship Co. Ltd [1930]1KB 416**. Where the bill of lading expressly states that the quantity stated by carrier is conclusive evidence of quantity shipped, in the absence of fraud, the shipowner is bound by the statement and cannot lead contrary evidence. However where words are inserted qualifying the statement as to quantity or the charterparty contains an inconsistent condition which is incorporated into the bill of lading, the bill of lading is no longer to be regarded as conclusive evidence of the quantity shipped

and the shipowner can show that the whole or part of the goods specified was not shipped (**Halsbury's supra paragraph 493**). The onus is on the carrier to show that the goods were not shipped as stated in the bill of lading See **Henry Smith & Co –v- Bedoin Steam Navigation Company Limited (1896) AC 70**. Where the goods were not shipped at all, the shipowners were not liable even where the bill of lading had been transferred to a third party -- **Grant –v- Norway (1851) ER 263** because in that case the Master did not have the usual authority to bind the shipowner. This meant that a third party who paid for the goods was and who was not in a position of knowing whether or not the goods were actually shipped, was left high and dry. This led to statutory intervention by the **Section 3 of Bills of Lading Act 1855 UK** (a statute of general application to Nigeria in 1900) which makes the Master's statement that the goods had been shipped on board conclusive evidence of the shipment in favour of an endorsee or the consignee who offered value but the shortcoming of the provision is that the remedy is only limited against the Master and does not involve the shipowner thereby reducing the compensation the consignee or endorsee can receive where the Master is not of substantial means. Art 3 Rule 4 of the Hague – Visby Rules (not yet domesticated in Nigeria) attempted to reduce this shortcoming by making statements in the bill of lading as to quantity to be conclusive evidence in favour of the consignee or endorsee who had taken the bill of lading in good faith and by Section 4 COGSA 1992 UK, representations as to the quantity of goods are conclusive evidence in favour of the lawful holder of bill of lading. However, because of the possibility of the shipowner contracting out of the aforesaid statutory provisions and inserting phrases like "shippers count" "weight and quantity unknown" or "said to weigh" in the bill of lading; the evidential conclusive and/or prima facie evidence of the quantity shipped can be thus displaced. In **New Chinese Antimony Company Limited –v- Ocean Steamship Company Limited (1917) 2 KB 664**, it was stated that the true effect of the bill of lading with words "weight unknown" is that the statement by the shipowner's agent that he has received a quantity of ore which the shipper's agent said weighs 937 tons but which he did not accept as being of that weight, the weight being unknown to him, and that he did not accept the weight of 937 tons except for the purpose of calculating freight and for that purpose only.

(c) **Receipt as to leading marks or identification**:-

Although the identification marks of the goods received by the shipowner as stated in the bill of lading are used to know whether the goods delivered are the same as the ones shipped, where the identification and quality marks in the bill of lading are not the same as those on the goods, the carrier may show that the cargo carried is the same as the cargo received. See **Parsons –v- N. Z. Shipping Company (1901) IQB548.**

4.3 **Evidence of Document of Title:-**

The bill of lading is a symbol of the right of property in the goods specified in it. Its possession is often seen as a symbolic possession of the goods and its transfer as a symbolical delivery of the goods if that is the intention of the parties and is thus described as "the keys to the warehouse" where the goods to which it relates are kept. On a transfer of a bill of lading by way of sale, *mortgage or pledge*, the property in the goods it relates to passes according to the *intention of the parties* to the transferee provided that the transferor was competent to so dispose of them. The right of the original owner of the goods to stop them in transit is either wholly defeated [where there is a sale] or becomes subject to the mortgage or pledge. In order to overcome the legal disadvantage consequent to the doctrine of privity of contract, **Section 1 of the UK Bills of Lading Act 1855** [a statute of general application in Nigeria but which has been replaced in UK by UK COGSA, 1992], allows every *consignee of goods named in a bill of lading* and every *endorsee of a bill of lading to whom the property in the goods mentioned passes upon or by reason of such consignment or endorsement*, to have transferred to him all rights of suits and be subject to same liabilities in respect of the goods as if the bill of lading contract had been made with himself. In other words, a person named in a bill of lading as a consignee of the goods or if not so named, but the bill of lading is endorsed to him, can be subject to the benefits and burdens of the terms of the bill of lading notwithstanding that he lacks privity of contract with the shipowner. If he is not named in it as consignee or not an endorsee with intention to transfer property in the goods to him, he will lack locus standi to sue on the bill of lading for loss or damage to the goods even if he is a holder of the bill. The expression "to

endorse" means " to write at the back": see **Adesanya -v- Leigh Hoegh & Co [1976] 1NSC 128at 133**.

(ii) It is pertinent to mention here as stated earlier that endorsement of a bill of lading can be either *special* [i.e. where the person to whom it is endorsed is named] or *blank* [where no person is named]:see **Adesanya's** case [supra]. It is in this respect that a bill of lading is often said to be like a negotiable instrument which under **Section 32 of the Bills of Exchange Act** is required to be *endorsed* in order to be transferable. However, when properly transferred with the intention of allowing property in the goods to pass, the transferee of a bill of lading can only get the interest the transferor can transfer under the principle of *nemo dat quod non habet*. The Supreme Court in the **Adesanya** case (supra) stated that "the goods shipped under a bill of lading may be made deliverable to a *named person* or to *a name left blank* or to *bearer*. In the last two cases, they may or may not be made deliverable to order or assigns. Bills of lading making goods deliverable to order or assigns are by mercantile custom negotiable instruments the endorsement and delivery of which may affect the property in the goods shipped. 'So long as the goods are delivered to any name left blank, or to bearer or the endorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be re-delivered to the original holder without any endorsement so as to affect the property in the goods. But the holder of the bill may at any time fill in the blank either in the bill or endorsement or *restrict by endorsement, the delivery to bearer*, such power being given to him by the delivery to him of such a bill of lading"'.

However, it must be noted that being a holder of a bill of lading (which by mercantile custom entitles the holder to take possession of the goods mentioned therein) does not necessarily bestow the right to sue in respect of the said goods. So where the Plaintiff has only shown that the property in the goods had passed to it through a body which was neither the consignee nor the endorsee of the bill of lading, but had failed to establish in what respect it had locus standi to bring the action, its claim will fail - See **Nigerian National Supply Company Ltd -v- Owners of MV" Albion I" (1987) 3NSC 200. See par 2.0[b] supra.**

(iii) Problems have usually arisen as to who has locus to sue or whether right to sue has been lost by

consignee/endorser where the bill of lading is endorsed or re-endorsed to an agent or servant of the consignee or its holder for the purpose of either clearing and warehousing the goods. To have locus standi to sue on a bill of lading, the Plaintiff must either be the consignee or endorsee. In the Supreme Court's case of **Broadline Enterprises Limited-v-Monterrey & Ors 6NSC 1**, the plaintiff was held to have locus standi because it was the consignee. A notify party has no right to sue even if he is the owner of the property: **Alpha Paper Mills Ltd-v-Owners of MV "Stadiongracht & Ors The Stadiongracht 6NSC 137.**

The right solution to such problems are:
[a] to look at the agreement between the original parties in order to discover the effect as between them of a delivery of the endorsed bill of lading and determine the legal consequences that follow the delivery of the goods.
[b]. look beyond the mere formal] endorsement on the bill of lading to discover what the intention of the parties was and whether there was an intention to transfer the property the goods because S.1 Bills of Lading Act 1855 as re-enacted in S.375 MSA the property in the goods passed upon and by reason of the endorsement as held in **Sewell-v-Burdick** supra,
[c] the most important factor or consideration in determining the legal and facual aspect as to the intention of the parties or whether property in the goods passed upon or by reason of such consignment or endorsement, is whether the consignee or endorsee gave value for the bill of lading to the one who got it from the consignors of the cargo. See **Nigerbrass Shipping Line Ltd-v-Aluminium Extrusion Ind.Ltd 5NSC 30** following **Sewell-v-Burdic**k, supra] and which was followed by the Court of Appeal, Port Harcourt Division in **F.I Onwadike & Co Ltd –v- Brawal Shipping 5NSC 407** where it was held that the fact that the appellant re-endosed and transferred the bill of lading to Ngo West Africa Ltd [its clearing agents], which then became the holder and last endorsee did not ipso facto imply that the right of action on the bills of lading rested in the latter so as to disentitle the appellant to maintain the action. For the transfer to have effect, there must be an intention that property should also pass and this can be inferred from the endorsee's payment of the value of the goods the bill of lading relates to,
[d] as shown in **Burgos-v-Nascimento**, which follows **Sewell-v-Burdick**, discover whether the intention with which the

endorsement was made was to pass the whole or general property in the goods[in which case the endorsee becomes the sole owner of the goods against the endorser and the whole world] or to pass a special property or particular right for a particular purpose or as stated by **Halsbury's at paragraph 515** e.g. clearing or warehousing the goods in which case the effect of the endorsement is limited to the that purpose.
[e]as suggested in the case **of Exquisite Industries Nig. Ltd –v- Owners of MV Bacoliners 1,2,3 FHC/L/CS/167/92**, the agency relationship between the original endorsee and the clearing agent must be specifically pleaded in the statement of claim and proved in order to raise the issue of lack of intention to transfer whole or general property to the clearing agent. The oral evidence of agency or intention of the parties will not be inadmissible under Section 131 Evidence Act to vary, contract or alter the bill because it can inter alia come under one of the exceptions under that Section and is evidence of usage or contract. See generally, **"Legal Effect of Transfer of Bill of Lading to Clearing Agents" by Mrs. Abiola Falase-Aluko, LLM.**

In recent times, our courts have come to the assistance of the plaintiff who has fully paid for the goods in the case of "the withheld bill of lading" [i.e. where the shipper or consignor refuses, fails or neglects to forward the bill of lading to the consignee/endorsee after receipt of payment for the goods thereby preventing the consignee/endorsee from clearing the goods, see: **Vimba-v-Sam Yang Corp. FHC/L/CS/137/96.** The plaintiff in this case had claimed a declaration that that having paid in full the cost and freight value of the goods, she was entitled to receive the bill of lading from Sam Yang Corp. to enable it take delivery of the goods. The court granted the claim on the following basis:
[I] property in the goods had passed to the plaintiff upon the payment of the full purchase price to the shipper,
[ii] the shipper did not give evidence of any contrary right or claim to the goods in spite of receiving full payment,
[iii] there was no adverse claimant to the goods within the statutory period for filing claims under the relevant cargo convention; thereby like in the **Onwadike** and **Nigerbrass** cases, the court looked beyond the mere endorsement on the bill of lading for evidence to determine title to the goods and the locus standi to sue on the bill of lading.

However, from the decision of **Sanyaolu J.in F.I.Onwadike & Sons Co.Ltd-v- Brawal Shipping Nig. Ltd 5NSC240 at 248** where he held that the Plaintiff by endorsing the bill of lading which has come into his possession as endorsee in blank to another party, has divested itself of its right to sue and

no longer has the locus standi to sue on the bills, and that the **Nigerbrass** case by the Court of Appeal, was in conflict with the Supreme Court case in **Adesanya** and chose to follow the **Adesanya** case because the Supreme Court decision is binding on the Court of Appeal and the lower courts; and also from the previous decisions including the Adesanya case and **Oriental Trading & Technical Agencies –v- Boothia Maritime S.A Inc. 2NSC 477** not yet overruled; it seems that the position is far from being certain and may require another opportunity by the court of last resort in Nigeria, the Supreme Court to consider the present situation or reconsider the **Adesanya** case in the light of **the Nigerbrass and Sewell** position. A final solution may lie in the growing practice of using the expression *"as agents only"* on the text of the bill of lading given the clearing agent which shows on the face of the bill that only a special property in the goods had passed whilst the general property still remained in the owner or original endorsee of the bill. As a result of similar problems, the UK had gone further by promulgating the COGSA 1992 where in defining in its Section 2 the person to have locus to sue on a bill of lading as the "lawful holder' thereof [i.e. a person in possession of the bill of lading as a result of any endorsement], it eliminates the need for a connection between the right to sue [the carrier or shipowner for], and the title to the goods [lost] and now includes pledgees. See the Article, **"UK Carriage of Goods by Sea Act, 1992"; by Brian Davenport QC**. Nigeria may amend **Section 375 of the Merchant Shipping Act** in line with Section 2 of the UK COGSA 1992, in order to carry this into effect and eliminate the above problems.

5.0 **CONCLUSION:**

The bill of lading has since its evolution become an important tool of maritime trade and international documentary letters of credit. From its various forms and principal characteristics, a better understanding of the bill of lading is had and from its functions the different uses to which it can be put are appreciated and it can be seen that it has become an indispensable tool of modern commerce.

M.I.IGBOKWE Esq.