

Electronic bills of lading: A step forward or two steps backward?

Electronic bills of lading were introduced to keep up with technological advancements and digitalization in the shipping industry. The shift from traditional paper bills of lading to electronic ones also aims to reduce paper-based frauds. However, despite these efforts, doubts remain about whether digitalization reduces risk exposures, and whether the law adequately embraces the shift.

The development of electronic bills of lading stems from the ease with which fraudsters copy, manipulate and forge paper-based trading documents. In the hope of reaping the benefits of digitalization, electronic bills of lading services are now offered by Bolero, essDOCS and E-title, and recognised as "approved systems" by the International Group of P&I Clubs.

Reduction of paper-based fraud

Bills of lading are used to evidence receipt, the contract of carriage, and the title. Whilst it is accepted that there is no foolproof method of eradicating documentary fraud, electronic bill of lading systems contain features that combat fraud. These include the digital authentication of signatories, which allows only authorised persons to have access to the system. Digital authentication makes any amendment to the bill of lading less straightforward once it has been issued. An electronic bill of lading system records an audit trail, which tracks changes made, the time at which the changes were made and by whom.

Increasing vulnerability

As an added safeguard, insurance protection against security breaches and other cyber risks (non-marine) are available. However, there are concerns that such protection is not all-encompassing, and cannot keep pace with new and evolving documentary frauds. This begs the question of whether electronic bills of lading are the solution or an impulsive move to keep up with technology.

The systems that generate, track and administer electronic bills of lading are a playground for hackers, pirates and cyber criminals looking to target shippers, agents and carriers. Electronic bills of lading could, also, be at risk of internal collusion when an authorised person who has access to the system generates bills legitimately within the system, and perversely gains credibility because the bills of lading are electronic. Therefore, a technological system is only as reliable as the people who maintain it.

Embracing technology

In order to benefit from technology, electronic bills of lading must be designed to facilitate electronic trading, incorporate terms that safeguard the interests of contracting parties and ensure consistency, without compromising on security. The development of electronic trading systems has been recognised by BIMCO through the introduction of a clause in the NYPE form. The clause provides that:

1. the use of an electronic trading system is at the charterers' option;
2. owners shall subscribe to the system elected by charterers, provided that such a system is approved by the International Group of P&I Clubs;

3. charterers shall pay any fees incurred by the owners in subscribing to such elected system; and
4. charterers shall indemnify owners for any liabilities incurred arising from the use of the elected system, so long as such liability does not arise from the owners' negligence.

The three electronic trading systems, approved by the International Group of P&I Clubs, aim to replicate the legal characteristics of a paper bill of lading. This means that the International Group of P&I Clubs will provide cover for any liability arising under carriage covered by the approved electronic trading systems provided that such liability would also have arisen under a paper bill.

Not ready for change

The bill of lading is a document of title, which can be negotiated. Title is transferred with the transfer of the bill of lading, and whoever has the bill, has the right of possession to the goods. This may not automatically be the case with an electronic bill of lading if proper provisions are not made to reflect the use of technology.

Following the recent judgment in *MSC Mediterranean Shipping Company SA v Glencore International AG* [2017] EWCA Civ 365, cargo should be released only in accordance with the contract evidenced by the bill of lading, even where an electronic release system is being used. In this case, cargo was released on the presentation of a PIN code, despite there being no provision for this in the bill of lading. Two of the released cargo consignments were released to unauthorised persons.

The case is a reminder that the cargo is delivered on the presentation of one original bill of lading to the Master of the vessel and on the terms set out in the bill of lading. When using an electronic bill of lading, contracting parties must consider carefully the effect of electronic systems and negotiate terms accordingly, to avoid disputes arising from uncertainty.

The bill of lading seeks to replicate the contractual matrix between parties to a trade. Not all jurisdictions recognise electronic contracts, let alone electronic bills of lading. Potential issues may arise where a court or tribunal in Indonesia, for example, is faced with the question of whether an electronic bill of lading evidences a binding contract.

In Singapore, the Electronic Transaction Act excludes from its scope documents such as a bill of lading, warehouse receipt, dock warrant or negotiable instruments. Therefore, the Act does not currently enable the use of electronic equivalents of such transferable documents or instruments.

Despite the speed at which technology is advancing, paper bills are proving resilient to change. There is apprehension about whether electronic bills of lading are able to comprehensively mirror paper bills, which have been fundamental to international trade. It remains to be seen if, and when, the shipping industry and national laws will truly and bravely embrace a paperless world.



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