

THE LEGAL CHARACTER OF A BILL OF LADING VIS-A-VIS THE DEVELOPMENT AND APPLICABILITY OF ELECTRONIC BILL OF LADING IN SELECTED COMMONWEALTH JURISDICTIONS*

Abstract

This paper examines the bill of lading and electronic bill of lading in some selected Commonwealth jurisdictions. The bill of lading is essentially the most fundamental transport document and plays a vital role in international transactions. The bill of lading is the cornerstone of international trade. This paper explores: The bill of lading and electronic bill of lading, the extent to which the electronic bill of lading has become a replacement for the paper bill of lading, the legal and practical challenges associated with electronic bills of lading as well as the legal position of the bill of lading and electronic bill of lading in some selected Commonwealth jurisdictions, in view of their apparent legal development between them and Nigeria. The covers the lucana in this sphere of legal knowledge and will undoubtedly be a veritable material for lawyers, judges, legal scholars, policy makers and general public. The paper utilized case law, statutes, articles from the various jurisdictions and the internet.

Keynotes: Bill of Lading, Development, Applicability, Electronic, Commonwealth Jurisdictions

1. Introduction

The bill of lading is primarily the most vital transport document and plays an indispensable role in international sales.¹ The bill of lading was developed as a product of mercantile convenience and soon became the cornerstone of international trade, recognized by the courts as a document of dignity, the integrity of which demanded judicial protection.² This paper is intended to explore to : (a) discuss the bill of lading and electronic bill of lading, as well as the extent to which the electronic bill of lading has become a replacement for the paper bill of lading; (b) it underscores the legal and practical challenges associated with electronic bills of lading (c) proffer possible solutions to the inherent problems aforementioned (d) it also examines the legal position of the bill of lading and electronic bill of lading in some selected Commonwealth jurisdictions, in view of their apparent colonial ties and legal historical development between them and Nigeria. Furthermore, it appraises the legal and policy implications of the use of electronic bill of lading for transportation of goods to and from Nigeria, using the United Kingdom's (UK), Canadian and international electronic commerce regimes and practices as reference points.³ The integration of electronic commerce into global business can safely be ascribed to the phenomenal growth and influence of information and communication technology/ the internet's on the lives of numerous people and businesses across the world in contemporary times are not adequate for addressing the challenges of the electronic bill of lading.⁴ Therefore, Nigeria needs a holistic legal and policy framework that will adequately accommodate the demands of contemporary international electronic commerce and documentation.

2. Definition of Terms

Bill of Lading

The 'Hamburg Rules',⁵ defines a bill of lading, in Article 1, as follows: 'Bill of lading' means a document which evidences a contract of carriage by sea and taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking'.⁶ A bill of lading is defined by the Black's Law Dictionary as 'a document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods'.⁷

Electronic Bill of Lading

This is a creation of a new species of traditional bill of lading in an electronic form whereby data is inserted in a computer and transmitted electronically using electronic messages.⁸ This document replicates all functional

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¹ Proctor C, *The Legal Role of the Bill of Lading*.

² Hare J, *Shipping Law and Admiralty Jurisdiction in South Africa*, 540.

³ T J Smedinghoff, 'The Legal Challenges of Implementing Electronic Transactions' (2008) 4:1 *Uniform Commercial Code Law Journal* 3.

⁴ O S Omadjohwoefe, 'Nigeria's Development Challenges in a Digitalized Global Economy' (2010) 4(4):17 *Indexed African Journals*, Online: 111 at 116 <http://www.ajol.info/index.php/afrev/article/view/69213/57249>. Accessed 22 Feb. 2020

⁵ *United Nations Conference on the Carriage of Goods by Sea 1978*.

⁶ Mitchelhill A, *Bills of Lading Law and Practice*, 4.

⁷ B. A. Garner (ed), *Black's Law Dictionary*, 8th Edition, (Minnesota: Thompson West, 2004). 176.

⁸ Force, R., Yiannopoulos, A.N., Davies.M. (2002). *Admiralty and Maritime Law: Practitioners Edition Volume 1*. (USA-Beardbooks). 23

features of a traditional paper-based bill of lading namely, prima facie document of title, receipts of goods and evidence of contract of carriage of goods by sea. For example the Rotterdam Rules, 2009, allows all modes of transportation of Goods which are multi modal transport and uni-modal transport cargo to be shipped by the carrier, for example the name of the shipper, the description of the goods, the date and place of the receipt of the goods, a reference to the carrier's terms and conditions of carriage as well as private keys to be used in subsequent transmissions.⁹ One of the notable different between the two is that, e-BL replicates all functions of traditional bill of lading as mentioned above, whilst the letter does not replicates all functional features, they only possess two functional features namely, receipt of goods and evidence of the contract of carriage,¹⁰ this is to say that they are not documents of title, therefore they are not bill of lading in legal perspective.

Electronic Data Interchange

In the explanation of the working of e-BL it is necessary to briefly understand what EDI entails. EDI is electronic interchange of machine process able, structured data, which has been formatted according to agreed standards and which can be transmitted directly between different computer systems with the aid of telecommunication interfaces¹¹ or EDI as defined by the Model Law, means the electronic transfer from computer to computer of information using an agreed standard to structure the information.¹²

3. Development and Growth of Use of Bill of Lading

The bill of lading in the form in which we know it today is a result of many years of gradual development dictated by the practical needs of merchants over time.¹³ The modern bill of lading had its humble beginning in the business practices and customs of merchants in the Italian citystates of the eleventh century. The statute further placed the ship's clerk under the pain of losing his right hand, having his forehead marked with a branding iron and all his goods confiscated for any false entries in the register, whether made by him or someone else.¹⁴ One of the significant contributions of English law to the development of the bill of lading was the statutory grant of document-of-title feature or function to the bill of lading. In 1842, the English Parliament passed a statute, a provision of which deemed all documents of title including the bill of lading as conferring on their holders the right of legal possession of goods to which they related.¹⁵ Thus, whereas the use of modern and containerized ships led to faster handling of goods at the various terminals and consequently their early arrival at their ports of discharge, the inefficient international postal services, coupled with delays arising from the verification of shipping documents by banks for purposes of documentary credit, resulted in the bills of lading arriving at the destination ports long after the goods had arrived.¹⁶ This resulted in delays in delivery, port congestion and additional charges in the form of demurrage. A combination of these shortcomings of the traditional bill of lading and the increased incidents of electronic transactions since the 1990s,¹⁷ jolted the international shipping community to the need for an electronic bill of lading. The end result of the awaking was the launching of the SeaDocs in 1986 into the open market as the first commercial project for an electronic data interchange for transport documents (EDI) as well as the passage in 1990 of the Comité Maritime International *Rules for Electronic Bills of Lading* 1990 (CMI Rules) by the Comité Maritime International (CMI).¹⁸ Ever since then, it has been one of the pre-occupations of the shipping stakeholders to effect a complete dematerialization of the bill of lading and its function, particularly its document-of-title function.

At the turn of the 20th century, the international community, recognised the need for a fairer allocation of risks in international maritime transactions, and moved to harmonize various relevant national laws by negotiation and enactment of the International Convention for the Unification of Certain Rules Relating to Bills of Lading of 25

⁹Rule 4 of CMI Rules for Electronic bill of Lading

¹⁰ Force R et al, note 8. 17- 19.

¹¹ Eiselen G.T.S. (1995), 'The Electronic Data Interchange Agreement', *South African Mercantile Law Journal* 7. (Cape Town: Juta Law). 1 -18.

¹² UNCITRAL Model Law on Electronic Commerce with guide to enactment 1996 with additional Article 5 bis as adopted in 1998, Article 2 (b). For more definitions of EDI, See National Officers of Global International Trade and Business Finance. (2000). *Finance of International Trade* (9th Ed.). National Australia Bank Limited. 83

¹³ UNCTAD *Report on Bills of Lading* UNCTADOR 1971 TD/B/C4/ISL/6/Rev 1 at 10.

¹⁴ Kenneth S. Ugwuokpe, *The Bill of Lading in an era of Electronic Commerce: Legal Developments and The Reform options for Nigeria*, (LLM Thesis, Dalhousie University, 2016)

¹⁵ Section 4 Factors Act, 1842 (UK) 5 & 6 Vict, c 39.

¹⁶ AN Yiannopoulos, 'General Report' in AN Yiannopoulos, *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems* (The Hague: Kluwer Law International, 1995) 3 at 21.

¹⁷ R.J Mann, *Electronic Commerce*, 2nd ed (New York, NY: Aspen Publishers, 2008) at 1; FF Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China*, 2nd ed (Oxford, UK: Routledge, 2014) at 3.

¹⁸ A Delmedico, 'EDI Bills of Lading: Beyond Negotiability' (2003) 1:1 Hertfordshire Law Journal 95 at 95-7; Yiannopoulos, note 16 at 22.

August 1924 [Hague Rules]¹⁹ as the first ever international convention relating to the bill of lading.²⁰ Even then, the view that the Hague Rules were not sufficiently protective of cargo interests, coupled with increased containerization of sea transport, resulted in an amended or a new international regime relating to the bill of lading, the International Convention for the Unification of Certain Rules Relating to Bills of Lading of 25 August 1924 as Amended by the 1979 Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968 [Hague-Visby Rules].²¹ The perceived need to further redress existing imbalance between the interests of the shippers on the one hand, and those of the carriers on the other hand, led to the negotiation and implementation of a subsequent international regime on sea transport, the United Nations Convention on the Carriage of Goods by Sea of 31 March 1978 [Hamburg Rules]²² which was adopted in Hamburg in 1978.

The failure of the Hamburg Rules regime to provide a uniform replacement for the Hague-Visby Rules, and the desire for a regime that would accommodate the demands of modern international shipping practices, particularly electronic documentation,²³ resulted in yet another new international sea carriage convention, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 11 December 2008 [Rotterdam Rules],²⁴ formally adopted in 2008 by the General Assembly of the United Nations.²⁵ It is ironic that the various international conventions on international sea carriage, each of which was primarily conceived as a unifying instrument to achieve global uniformity in the application of rules relating to sea transport, have only served to deepen the fragmentation of international regimes on international shipping applicable across different jurisdictions.²⁶ The bill of lading therefore served as a transferable document of title in cases where the consignor required transfer of possession and ownership in the cargo while it was still in transit. It therefore became imperative to endorse the bill of lading to a third party in order to affect transfer of the goods leading to the development of the bill of lading into a negotiable instrument. The case of *The Thomas* in 1538 is regarded to contain the earliest copy of a bill of lading from which it is clear that property in the goods could be assigned before delivery thereof. The case of *Snee v Prescott*,²⁷ was the first reported case which mentioned endorsement in connection with the assignment of a bill of lading showing that the practice was well established by the 18th century and that the negotiable bill of lading was in common use. It is as a direct result of the custom, found in the case of *Uckbarrow v Mason*,²⁸ that the bill of lading is derived as being a negotiable and transferable document by endorsement and delivery therefore capable of transferring title to the goods

4. The Primary Functions of the Traditional Bill of Lading Receipt for the shipment of cargo

The original function of the bill of lading was that it was a receipt for the goods and contained statements as to quantity, condition and often a description of the goods received for shipment. It further prevented the carrier from claiming previous damage, if the goods were in an inadequate condition when delivered to the consignee.²⁹

Evidence of the contract of carriage

Dubovec states that authorities and courts have expressed different opinions as to whether the bill of lading is the contract of carriage or mere evidence of the contract. In either capacity it does anchor the contractual liabilities and obligations of the parties. It was stated by Lush LJ in the case of *Crooks v Allen*³⁰ that: 'a shipper has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those

¹⁹ *International Convention for the Unification of Certain Rules Relating to Bills of Lading*, 25 August 1924, 120 UNTS 155 (entered into force 2 June 1931) [Hague Rules].

²⁰ See note 29 at 304.

²¹ *International Convention for the Unification of Certain Rules Relating to Bills of Lading*, 25 August 1924, 120 UNTS 155 (entered into force 2 June 1931) and the 1979 *Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968* [Hague-Visby Rules].

²² *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, 1695 UNTS 3 (entered into force 1 November 1992) [Hamburg Rules].

²³ J Adamsson, *The Rotterdam Rules, A transport convention for the future?* (LLM Lund University, 2011) [unpublished].

²⁴ *The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* 11 December 2008, 63 UNTS 122 [Rotterdam Rules].

²⁵ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, GA Res 63/122, UNGAOR 63rd Sess, U.N. Doc. A/RES/63/122 (Dec. 11, 2008). See also United Nations Comm'n on Int'l Trade Law, *Report of the United Nations Commission on International Trade Law, 41st Session*, para 298, Annex I, U.N. GAOR, 63rd Sess., Supp. No. 17, U.N.Doc. A/63/17 (July 3, 2008) 305.

²⁶ D.N Metuge, *Carriage of Goods by Sea – From Hague to Rotterdam: Safer Waters* (LLM Thesis, Nelson Mandela Metropolitan University Faculty of Law, 2012) [unpublished] at 5-6.

²⁷ *Snee v Prescott* [1743] 1 Atkyns 245.

²⁸ *Uckbarrow v Mason* (1787) 2 Term Rep 63 KB.

²⁹ Jan H Senekal, *The Electronic Bill of Lading: A Legal Perspective*, 2010 (LLM Thesis, West University). Unpublished

³⁰ *Crooks v Allen* 1879 5 aBD 38 (CA) 40.

terms.³¹ For the shipper however the bill of lading does not constitute the contract of carriage but only provides evidence thereof. It can therefore be described that the bill of lading is technically. A statement by the carrier of his view of the terms of the contract of carriage

Document of title

The bill of lading as a document of title results in three uses for the bill: firstly a bill of lading may be used in the course of passing ownership of the goods; secondly it is confirmation of the right of possession and of physical control over the goods; and lastly a bill of lading may be used as security for lenders. The transfer in the ownership of the goods is performed by endorsing the bill of lading to a third party who then becomes the legal holder of the bill of lading, collection of the goods thereby obtaining possession of the goods and becoming the owner thereof. In the case of *Lickbarrow v Mason* (hereafter referred to as the *Lickbarrow* case) it was decided that the bill of lading has a proprietary function, but to reach this decision the court had to review the issue of negotiability to determine whether the bill of lading was a negotiable document of title. The House of Lords suggested that the bill of lading was indeed considered a document of title and a negotiable instrument by virtue of the customs of merchants.

The criteria for the electronic bill of lading

In order to be able to determine if an electronic bill of lading can fulfill the functions of the traditional bill of lading, and therefore be employed for operational use in international sales transactions, certain criteria must be established.

Receipt for the shipment of cargo

The first function of the bill of lading is that it is a receipt, issued by the carrier to the shipper, for the goods received by the carrier. It is an admission by the carrier that he has received the goods and further indicates the quantity and condition of the goods. The criteria in this instance would therefore be twofold: (1) A receipt of some kind must be issued by the carrier to the shipper; and (2) Such a receipt must enable the receiver of the goods to firstly obtain possession of the goods and secondly ascertain that the goods received are as they were delivered.

Evidence of the contract of carriage

The bill of lading is usually issued after the loading of the goods has taken place. Again it is obvious that a receipt needs to be issued by the carrier but the further requirement in this regard is that the receipt must reflect the terms and conditions of the contract of carriage, therefore providing evidence of the contract. To meet the requirement of evidencing the contract of carriage, the criterion for the bill of lading holds the following conditions: (1) A receipt of some kind must be issued by the carrier to the shipper; and (2) Such a receipt must contain visible evidence of the contract of carriage or a reference thereto.

Document of title

The importance of the bill of lading lies therein that it enables the holder thereof to pass ownership in the goods to a third party. To measure up to this criterion, the bill of lading would need to comply with the following conditions: (1) A receipt of some kind must be issued by the carrier to the shipper; (2) The party wishing to transfer the bill must be able to endorse it to a third party; and (3) The bill of lading, in whatever form and especially the transferring process must be established as a commercial custom amongst merchants.

5. Advantages and Disadvantages of Bill Of Lading in Nigeria

Receipt for the Goods

The importance of the bill of lading lies in its functions in commercial transactions.³² In the performance of its receipt function, the bill of lading contains information or details about the condition and quantity of the goods received for shipment.³³ It will also contain among other things details as to date of receipt of the goods and description of the goods as to quality, weight, condition and leading marks for identification, the date of loading, the identity of the carrying vessel as well as the loading and discharge ports.³⁴ The bill of lading will normally be issued based on the information contained on the 'mate's receipts', which are the ship's records of the goods loaded and presented to the carrier or its agent for signature. The statement that a bill of lading is *prima facie* evidence of the receipt by the carrier of the goods so described as concerns the shipper is trite both at common law and the regimes of Hague-Visby and Hamburg Rules.³⁵

³¹ *ibid*

³² R Aikens, R Lord & M Boole, *Bills of Lading* (London, UK: Informa Law, 2006) at 14.

³³ *B. M. Ltd. v Woermann-Line* (2009) 13 NWLR (Pt. 1157) 149 at 178, *E*.

³⁴ S Baughen, *Shipping Law*, 3rd ed (London, UK: Cavendish Publishing Limited, 2004) at 5; Hague-Visby Rules, Art 3(3); Hamburg Rules, Art 15(1).

³⁵ J F Wilson, *Carriage of Goods by Sea*, 5th ed (London, UK: Longman, 2004) at 119.

Evidence of Contract of Carriage

The bill of lading is not in itself the contract of carriage, but merely evidences it. Thus, it is possible for the shipper to claim for breach of contract in cases where the goods are lost or damaged even before the issuance of the bill of lading.³⁶ Accordingly, if the terms of the bill of lading eventually issued differ from the terms of any earlier oral agreement, the shipper will be at liberty to lead oral evidence to establish the true contractual terms.³⁷ An electronic bill of lading can easily replicate the evidence of contract-of-carriage function of a paper bill.³⁸ Furthermore, in jurisdictions like Nigeria, the courts have held that, in deference to equity, a party who has derived benefits from a contract will not be allowed to impeach the validity of such a contract..

Document of Title

It can confidently be asserted that the function of serving as a document of title is the most significant feature of the bill of lading.³⁹ It enhances international trade finance as banks and other financial institutions accept the bill as security or collateral for letters of credit advances to the importer or exporter because of the banks' confidence in the document-of-title feature of the bill of lading.⁴⁰

Sea Waybills

The sea waybill can, be referred to as a half-brother of the bill of lading. For example, it performs the first two functions of the bill of lading, namely, as receipt for the goods received for shipment or actually shipped, and as evidence of the contract of carriage. However, unlike the bill of lading, it is not a document of title. It is used as an alternative to the bill of lading in situations where there is no intention to resell the goods while in transit.⁴¹

6. Appraisal of Electronic Bill of Lading in Some Commonwealth Jurisdictions Nigeria

Admissibility of evidence in Nigeria is now governed by the Nigerian *Evidence Act*, 2011 (EA),⁴² which has made great inroads into many of the traditional common law rules of evidence that had created uncertainties about the admissibility of electronic evidence in the not too distant past. But even prior to the enactment of the EA, the Nigerian judiciary had exhibited a willingness to extend conventional common law rules of evidence to accommodate the advances in the information and communications technology. Thus, as far back as 1969, the Supreme Court of Nigeria, in *Esso West AfricInc v T Oyagbola* held that 'the law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.'⁴³ The above position was restated in *Yesufu v African Continental Bank Ltd*⁴⁴ and *Trade Bank Plc v Chami*,⁴⁵ by the Supreme Court of Nigeria itself and the Nigerian Court of Appeal respectively.⁴⁶ In *Anyaebosei v R T Brisco Nigeria Ltd*,⁴⁷ the Supreme Court of Nigeria specifically held that computer-generated evidence is admissible. In spite of the favourable decisions above, there still remained uncertainties about the admissibility of computer-generated evidence in Nigeria.⁴⁸ In *FRN v Fani-Kayode*,⁴⁹ the computer printout of a statement of account of the respondent which was tendered as an entry in a banker's book of accounts was rejected by the Federal High Court of Nigeria. The lower court's decision was however reversed by the Nigerian Court of Appeal which held that the computer-generated statement of account substantially complied with the provisions of Section 97(2)(e) of the old *Evidence Act* (now Section 90(e) of the *Evidence Act*, 2011) and was admissible since PW2 testified on oath that it was a document from the custody of the bank which was certified as a true representation of the statement of account kept by that bank. It is however a condition precedent to the admissibility of such an electronic document to produce a certificate signed by a person responsible for the computer at the material time, identifying the document containing the statement and describing the manner in which it was produced and the particulars of any device involved in the production as may be appropriate for the purpose of showing that the document was produced by a computer and certifying compliance with the conditions laid down in section 84(1).⁵⁰ Like the CEA, the Nigerian

³⁶ *Pyrene v Sciencha Navigator Co* (1954) QB 402.

³⁷ Section 128 (1) *Evidence Act*, 2011.

³⁸ SC Chukwuma, 'Can the Functions Of A Paper Bill Of Lading Be Replicated By Electronic Bill of Lading?' (2013) 3:8 Public Policy and Administration Research 101 at 104.

³⁹ ET Laryea, *Paperless Trade: Opportunities, Challenges and Solutions* (The Hague: Kluwer Law International, 2003) at 67.

⁴⁰ See note 38 at 444.

⁴¹ Baughen note 34 at 25

⁴² Evidence Act 2011, LFN 2004.

⁴³ (1969) 1 NMLR 194 at 198.

⁴⁴ (1976) 1 All NLR 328.

⁴⁵ (2003) 13 NWLR (Pt 836) 158 at 216.

⁴⁶ T Nwamara, *Electronic Evidence in Nigeria – Disclosure, Discovery and Admissibility* (Aba, Nigeria: Law and Educational Publishers Limited, 2012) at 27.

⁴⁷ (1987) 3 NWLR (Pt 59) 84.

⁴⁸ See note 79.

⁴⁹ (2010) All FWLR (Pt 534) 181.

⁵⁰ Evidence Act 2011; *DrUmoruKubor v Hon Seriaki Henri Dickson* (2013) 4 NWLR (Pt 1345).

Evidence Act, 2011 does not deal with the common law distinction between records produced by systems with no human inputs and those compiled by humans within electronic systems.⁵¹ It is noteworthy also that satisfying the requirements for admissibility set down in Section 84 of the EA does not preclude the court from rejecting an electronic document for failure to comply with other mandatory requirements of the law.⁵²

United Kingdom

The determination of the admissibility of electronic documents/records under the UK law may likely begin with an analysis of whether or not such documents/records constitute real or hearsay evidence.⁵³ This is because, as the Court of Appeal held in *R v Wood*,⁵⁴ evidence generated directly by a computer, which in this case was being used as a calculator, is a direct evidence. Also, in the *Statute of Liberty*,⁵⁵ a collision occurred between two vessels on the Thames estuary. The estuary was monitored by radar and a film of the traces of that radar was admitted into evidence as real evidence. On rejecting the argument that the film was hearsay, Simon P held that, the law must take note of the replacement of human efforts by mechanical means in our modern world. He then placed the film on par with direct oral evidence. In *Camden London Borough Council v Hobson*,⁵⁶ it was held that computer-generated evidence is real evidence if the statement originated in the computer. Such evidence would be admissible as the record of a mechanical operation in which there was no human input. But a statement originating from a human mind and subsequently processed by a computer would be hearsay and inadmissible. The Divisional Court, per Birch DJ further held in *Sophocleous v Ringer*,⁵⁷ that Section 69 of the *Police and Criminal Evidence Act 1984*, which sets preconditions to admissibility of documentary hearsay, does not apply where a computer which had been used to calculate results produced direct evidence.

Canada

Appreciating that complete reform of the law was the only practical way to adequately respond to the pressures put upon traditional legal rules of evidence by the advances in information and communications technology, the Uniform Law Conference of Canada (ULCC), in 1998, adopted the *Uniform Electronic Evidence Act* (UEEA) as a model statute to modernise the traditional common law best evidence, hearsay and authentication rules in line with current technological realities.⁵⁸ The Parliament of Canada for federal matters and all the jurisdictions of Canada except British Columbia, New Brunswick, Newfoundland and Labrador, and Quebec have adopted the UEEA in one form or another. Quebec and New Brunswick enacted distinctive provisions applicable only to civil proceedings since the *Canada Evidence Act* (CEA),⁵⁹ which contains the UEEA's provisions in sections 31(1)–31(8) applies to criminal proceedings throughout the whole of Canada as a matter of superior legislative competence of the Federal Parliament of Canada over the Provincial Assemblies.⁶⁰ Interestingly, even the *British Columbia Evidence Act*,⁶¹ so far as affects the requirements for proof for electronic records, was duly influenced by the UEEA.⁶² Section 31(1) of the CEA provides for authentication of electronic documents. Authentication means establishing the integrity of the electronic documents in terms of content and source. It involves demonstrating that the information in the electronic document is what it purports to be and has remained unchanged and that the origin is just as claimed.⁶³ Further, Canadian courts have always from the earliest need, and even before the regime of UEEA and its statutory offspring, demonstrated a positive attitude to ensuring incremental development of the law of electronic commerce to accommodate advances in technology, so far as is consistent with their traditional role as umpires as well as the integrity of the judicial proceedings and processes.⁶⁴ The Supreme Court of Canada also held in *R v Khan*,⁶⁵ that even a statement which is hearsay should be received so long as there are guarantees of necessity and reliability, subject to such safeguards as the Judge may deem necessary and subject always to considerations affecting the weight to be accorded such evidence.

⁵¹ Section 84 (5) Evidence Act 2011.

⁵² *Dr Umoru Kubor v Hon Seriaki Henri Dickson* (2013) 4 NWLR (Pt 1345) SC 534.

⁵³ S Mason, C Freedman & S Patel, 'England & Wales' in S Mason ed, *Electronic Evidence* (London, UK: Butterworths, 2012) 327 at 343 - 344.

⁵⁴ (1983) 76 Cr App Rep 23.

⁵⁵ (1968) 2 All ER 195.

⁵⁶ *The Independent*, January 28, 1992, 24 (Clerkenwell Magistrate's Court).

⁵⁷ (1988) RTR 52.

⁵⁸ Uniform Electronic Evidence Act 1998 (UEEA).

⁵⁹ *Canada Evidence Act* R.S.C. 1985, c. C-5 (CEA).

⁶⁰ L Duranti, C Rogers & A Sheppard, 'Electronic Records and the Law of Evidence in Canada: The Uniform Electronic Evidence Act Twelve Years Later' (2010) 70 *The Journal of the Association of Canadian Archivists* 95 at 119.

⁶¹ R.S.B.C. 1996, c.124.

⁶² See note 86.

⁶³ C Reed, 'The Admissibility and Authentication of Computer Evidence - A Confusion of Issues' (Paper delivered at the 5th BILETA Conference of the British and Irish Legal Technology Association, 03 April 2005) [unpublished] at 6.

⁶⁴ *Watkins v Olafson*, (1989) 2 SCR 750.

⁶⁵ (1990) 2 RCS 531 at 548.

7. Conclusion and Recommendations

This paper has explored the history of the bill of lading which has for centuries been a crucial transport document in international trade transactions. The use of the electronic bill of lading in shipping transactions across the globe is not yet a complete success story, and the picture is even less bright in regard to emerging economies such as Nigeria. Although it has been identified that the use of the electronic bill of lading in shipping businesses has great advantages, including savings in time and monetary costs, the problem has continued to be how to successfully replicate all the functions of the traditional paper bill of lading in an electronic setting. While it may not be difficult for an electronic bill of lading to fulfill the first two functions of a traditional paper bill of lading namely, serving as a receipt for the goods shipped or received for shipment and as evidence of the contract of carriage, the same cannot be said of the third function of serving as a document of title in relation to the goods forming the subject matter of the contract of carriage by sea. Achieving the desired replication of these functions, particularly the third function in an electronic setting, will require responsive legal and policy frameworks and/or adoption of appropriate commercial practices that will accord equal recognition and value to electronic bills of lading as are enjoyed by their conventional counterparts. Apart from the specific challenge of negotiability, the effective utilization of the electronic bill of lading is also hampered by the general challenges that beset all other electronic transactions, namely the question of the time of offer and acceptance made in an electronic setting, the writing and signature requirements, as well as the admissibility and evidential value of electronic communications or documents. At the global level, there have been concerted efforts to address these problems resulting in international instruments. Some of these instruments are mere model rules which, except when adopted into a national statute, do not enjoy the status of mandatory enforcement. Even if these model rules are incorporated into the carriage of goods by sea contracts by the parties, they will have no validity where there is a local law that contains a contrary or prohibitive provision. The UK and Canada are among such nations. There is no binding electronic commerce legislation in Nigeria, apart from the general provisions of the Nigeria *Evidence Act*, 2011, that has taken cognisance of electronic documents generally. There are, however, two electronic-commerce-focused bills in Nigeria, namely, *Electronic Commerce (Provision of Legal Recognition) Bill*, 2011 (ECPB) and *Electronic Transactions Bill*, 2011 (ETB). Even the UK and Canada, with better and specific electronic commerce laws than Nigeria, have not been able to establish legal frameworks that will dispense with or afford an electronic equivalent of the physical act of negotiation of the traditional bill of lading. This is because the courts may not be willing to uphold the use of an electronic bill of lading or to apply the provisions of any international rules or model laws if there are no express terms for that in the contract of carriage of goods by sea between the parties. The following measures may be helpful:

Technical Measures as an Integral Part of Legal Responses

Other than legislative and/or juridical intervention, building an effective infrastructure for electronic commerce will require collaboration among many professions including record managers, information technology professions and digital forensics.

Private and Public Key Encryptions and Digital Signature

Cryptography is a process where readable information - called the plaintext - is encrypted using a code called the cipher key to produce an encrypted copy of the information - known as the ciphertext - which can only be decrypted and restored to the original plaintext through the use of the cipher key. A cipher key is similar to a password but is usually much longer and therefore cannot be guessed.⁶⁶ Encryption ensures that a message is kept secret between the sender and the recipient and unintelligible to Encryption guarantees the confidentiality of the electronic information and the authenticity of its digital signature with the sender's public key and compares the hash value he or she creates with that added to the data by the sender to determine and/or confirm the integrity of the data message.

The Registry System

It has been observed and rightly so, that, in order to successfully replicate the third function of serving as a document of title in an electronic environment, the adopted electronic alternative method, must possess the capacity for determining who the holder of the electronic bill is in such a manner as to guarantee that a data message already used in transferring rights or obligations cannot subsequently be used inconsistently with such rights or obligations already transferred.

SEADOCS

Seaborne Trade Documentation System (SeaDocs), (established in) 1986, was the first serious effort to dematerialise an electronic bill of lading through the central registry system. Upon receiving the original paper from the shipper, an electronic test code or key code would be provided to the shipper who was required to notify

⁶⁶ A.C Vieira, *Electronic Bills of Lading* (LL.M Thesis, University of Nottingham School of Law, 1999) [unpublished] at 21.

SeaDocs electronically of its intention to negotiate the bill and to provide the buyer/endorsee with a portion of the key code.

Bolero Project

The Bolero Project, with backing from the European Commission, was created in 1999 as an initiative of the International Chamber of Commerce (ICC) and is jointly owned by the Through Transport Club (TTC) and the Society for Worldwide Inter Bank Financial Telecommunications (SWIFT).

ESS-Databridge

The ESS-Databridge system operates under the legal framework of ESS-Databridge Services and Users Agreement (DSUA) which binds all users of the platform. One of the range of services offered to members of ESS-Databridge is CargoDocs by which electronic bills of lading could be issued and transferred. The implication of this is that Nigeria can also as a developing country access the services of the CargoDocs if the enabling environment is put in place.

Common Law Option

The common law, which gained its foothold into the Canadian and Nigerian legal systems as a colonial legacy of the UK, refers to 'judge made law which originated at a time when the courts were the prime law-makers.' right, that the courts and the legislatures are not competitive organs of government, but rather they have a co-operative role to play in furthering the common good.' The courts have always by their pronouncements assisted in the incremental development of the law to address issues of social change. This has been the attitude of the Nigerian courts which have, at one point or the other even in the absence of legislation, and by expansive interpretation of existing rules admitted electronically produced evidence. The common law based legal reformation, which draws upon the wisdom of earlier decisions through the determination of individual disputes in which litigants and their lawyers present contending arguments on the merit of their respective positions, results in gradual but steady change in the legal order. The implication of this is that in the normal course of maritime transactions and dispute resolutions, the Nigerian courts will not have the opportunity for incremental development of the law of electronic bills of lading since there will be no opportunity for adjudication

Legislative Option

The legislative option for addressing the challenges of the electronic bill of lading in Nigeria will be considered within the context of Nigeria's constitutional framework. Nigeria is similar to Canada which also has a constitutional division of governmental powers between the federal government and the federating provinces. Given the nature and extent of the growth in information and communication technology, there is need for significant and far-reaching changes in the contract, commercial and evidence law, rules and principles so as to accord validity to electronic transactions

Incorporation of International Rules into Carriage of Goods by Sea Contracts

There are also commercial options for Nigeria. One of such options is for the parties to incorporate by reference, model laws or rules or international practices or a part of them into their contracts for carriage of goods by sea.

Adoption and Participation in Registry System Arrangements

Nigerians and their business partners can as well adopt and participate in some of the registry systems like Bolero Project and ESS-Databridge as private arrangements to circumvent the challenge of document-of-title function of a bill of lading in an electronic environment.