journals.unizik.edu.ng/index-php/jcpl ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

Third Party Right of Suit Under Bills of Lading in Nigeria

Festus Okechukwu Ukwueze*

Eunice Chiamaka Allen-Ngbale**

Abstract

The bill of lading (BOL) serves multiple purposes in the shipping process in international trade - as a receipt for the goods handed over by the shipper to the carrier, evidence of the contract for the carriage of the goods and a negotiable document of title to the goods. At common law only parties to the contract of carriage could sue on it as the rule of privity of contract would not permit an outsider to do so. To obviate the hardship created by the common law rule on cargo owners such as endorsees and consignees and ensure smooth conduct of international trade, most shipping nations of the world have enacted legislation conferring right of action on third parties to sue on bills of lading. This article examines the current position of the law in Nigeria on the subject. Using the doctrinal methodology as well as descriptive and analytical approaches it examines extant Nigerian statutes on the subject. It finds that presently, it is controversial as to whether it is the English Bill of Lading Act 1855, which used to be a statute of general application in the country, or the received English common law, that is applicable. The paper concludes that there is an urgent need for reform to bring Nigeria's law on the subject up-to-date in line with those of other major shipping members of the Commonwealth and best international standards.

Keywords: Shipping Law, Carriage of Goods by Sea, Bill of Lading, Document of Title, Negotiable Instrument, Third Party Right of Suit

1. Introduction

The bill of lading (BOL) is an essential documents used in the shipping process of international trade. Until recently, it was used only to move goods from one seaport to another, but nowadays, certain BOL forms can be used to move goods beyond tackle-to-tackle carriage of cargo over the sea.[1]It is usually issued and signed by the carrier (a shipping line), the shipmaster, or some other representative of the carrier, to a shipper to acknowledge receipt of goods for carriage.[2] It contains particulars of the parties, details of the cargo, conditions for the carriage, and other information about the carriage. Thus, over time BOL acquired the legal qualities not only evidencing the contract of carriage and serving as an acknowledgment for the goods delivered to

*Festus Okechukwu Ukwueze,
LLB, LLM, BL, PhD (Nig), Senior Lecturer, Department of Commercial and Corporate Law, Faculty of Law, University of Nigeria, (corresponding author), e-mail: festus.ukwueze@unn.edu.ng
**Eunice Chiamaka Allen-Ngbale, LLB, BL, LLM, Doctoral Researcher, Department of Commercial and Corporate Law, Faculty of Law,

[1] This is the case in multimodal transport arrangements under a through bill of lading which involves carriage by sea and other means such as over air or land.

[2] JA Dueholm,'A bill of lading delivers the goods: the constitutionality and effect of the Emancipation Proclamation' (2010) 31 (1) *Journal of the Abraham Lincoln Association* 22 at 25.

the carrier for carriage but also of a document of title.[3] With advancements in international trade and the development of documentary credits, from a mere document of title, BOL acquired the additional function of a negotiable document of title where the shipper wants to transfer the ownership of goods even when the consignment is still in transit.

In due course, from a document of title, which related to cases where the buyer was also the one entitled to receive the cargo from the carrier, BOL when prepared in a certain form, became negotiable or transferable to a third party as collateral for debt obligations.[4] Thus, according to Baughen, BOL:

> *…is a multipurpose document, which serves as a receipt, a document conferring constructive possession in the sale of goods during the period of their carriage, a document of title, and a potentially transferrable contract of carriage.*[5]

Where a BOL is transferred to a third party, such a third party holder acquires the same rights the transferor had concerning the goods and, depending on the particular legal jurisdiction, it enables the transferee not only to take delivery of the cargo on arrival but also to sue any other party to the contract of carriage to exercise that right.[6] This runs contrary to the common law doctrine of privity of contract, which does not permit the recognition of third-party rights in the contract except in certain specified circumstances. The philosophical foundation of the privity rule lies in the protection of parties to a contract from having contractual obligations imposed on them by a total stranger to the contract[7]and, by extension, that a stranger should not acquire rights or incur obligation by virtue of a contract which he/she is not a party to. In the context of BOL, the non-recognition of the rights of third party holders became a serious challenge to international trade and had to be addressed by statutes in different jurisdictions. In the United Kingdom (UK), this shortcoming of the common law rule of privity in the particular context of BOL has been addressed starting from the Bill of Lading Act, 1855 (BLA)[8] to the Carriage of Goods by Sea Act, 1992 (COGSA).[9]This is also the position in several other jurisdictions where the defect of the privity of contract doctrine as between parties to a BOL has been ameliorated by statutes that confer right of action on the third-party holders of BOL. For example, in the United States of America (USA), the Uniform Commercial Code (UCC) adequately addresses the issue.[10] The position is the same in many Commonwealth member states, such as South Africa[11]and Hong Kong.[12]

---

[3] Q.AMahafzah, 'The Legal Effectiveness of the Both-to-Blame Collision Clause under Bills of Lading and Charterparties' (2010) 41(2) *Journal of Maritime Law and Commerce* 263−274263; KW *Clarkson and others Business Law: Text & Cases – Legal, Ethical, Global and E-Commerce Environments 11th ed (*Cengage Learning Mason 2009) *422, 452.*

[4] *A Buckley, Multinational Finance (5th ed Pearson Harlow 2004) 617.*

[5] S Baughen*Shipping Law (*4th edn New York: Routledge-Cavendish 2009) 3.

[6] JF Wilson, *Carriage of Goods by Sea* (7thed Pearson Harlow 2010) 6.

[7] AA Olawoyin, 'The phantom of the Bills of Lading Act, 1855, lives on: enforcing ownership and contractual rights under bills of lading in Nigeria' (2004) 48(1) *Journal of African Law* 82-103 at 82.

[8] C111 of 1855.

[9] 50 of 1992.

[10] Uniform Commercial Code (UCC) 2002

[11] Sea Transport Documents Act 65 of 2000.

[12] Bills of Lading and Analogous Shipping Documents Ordinance 440 of 1993.

Nigeria is a littoral nation and a net importer of manufactured goods with a thriving maritime industry.[13] BOL has been in use in the country before her colonization by the British, as attested to by the documents found in the house of King Kosoko of Lagos, some of which date back to 1849.[14] Unfortunately, it appears that the law relating to BOL in Nigeria has not kept pace with developments in other countries. Presently, there is no statutory provision in Nigeria that exempts the application of the privity rule to BOLs. Presently, under Nigerian law, a third party to a BOL, who may even be the owner of the goods contained therein, has no *locus standi* to sue on the bill. While there may be other options for recovery of damages for loss or damage of goods by third parties to a BOL such as claims under the tort of negligence and bailment, which are outside the scope of the present discourse, it has to be recognised that those too are not without hitches. For example, for an action for loss of or damage to goods in negligence to succeed, the claimant must establish that he/she has either the legal or possessory title to the goods at the time of the loss or damage and having mere contractual rights concerning the goods would not suffice.[15]

This article interrogates the current position of Nigerian law on the contractual right of third parties to sue on a BOL and argues that in order to improve Nigeria's business environment for global competitiveness, it has become expedient for the country to reform her law on the subject in line with best international standards.

2. BOL as a Negotiable Instrument

The concept of negotiability or transferability of documents in commercial transactions was born out of expediency in response to the need to obviate the risks of merchants carrying huge amounts of cash in their long journeys because of the attendant risks and challenges.[16] The raison d'être for negotiability was to allow for the recognition of an ordinary piece of paper as constituting an authority to pay money or transfer property in goods to another person. The framework and theme for the law of negotiable instruments are anchored on the notions of recognition and certainty of honour. Statutes attribute certain characteristics to a negotiable instrument, which include that it must be capable of being transferred to the other party without notice and, upon delivery, pass full legal title to the succeeding holder free from all equities.[17] Its negotiability must be capable of being ascertained on its surface without having to refer to any other document. In other words, it represents a formal promise by the maker to become liable to the performance of the promise it contains to anyone who acquires it in good faith. The negotiated document and the undertaking it contains create a separate transaction different from the one that gave rise to it in the first place. Thus, a transferee, who takes the document in good

[13]Port News Nigeria, *Maritime's contribution to Nigeria's GDP will increase soon – NIMASA DG* (2019) <http://portnews.com.ng/maritimes-contribution-to-nigerias-gdp-will-increase-soon-nimasa-dg> accessed 15 April 2021.

[14]University of Wisconsin Press 'Letters Found in the House of Kosoko, King of Lagos (1851) English Translations' (2012) 40 *African Economic History, Special Issue: Documents Relating to Slave Laws & Practices in West Africa* 62-126 at 71, 80, 81, 92, 109.

[15]See Lord Brandon in *Leigh and Sillivan v Aliakmon Shipping Co* (The Aliakmon) [1986] 2 Lloyds Rep 1, 4.

[16] V Emerson, 'The concept of negotiability and the electronic bill of lading - an overview' (2001) <http://www.mondaq.com/uk/marine-shipping/13425/the-concept-of-negotiability-and-the-electronic-bill-of-lading--an-overview> accessed 20 May 2021.

[17] See for example, art 3 of the Uniform Commercial Code (UCC) 2002 of the US and s 13 of the Negotiable Instrument Act 1881 of India.

faith and for value, acquires a good title, even if the title of his or her transferor was defective.[18] The bill of exchange provides the most fitting example of a negotiable instrument with all the qualities of negotiability as it protects the ultimate holder from any defences arising from the principal transaction and thereby ensures that the much-coveted certainty in commercial transactions is maintained. In various forms, the bill of exchange has been very popular in domestic and international transactions because merchants accept it in lieu of payment with the confidence that it would be honoured, notwithstanding its previous circumstances.

Traditionally, one important formal requirement of a negotiable instrument is that it should be in writing; that is, in tangible form. This position may be attributable to the endorsement and signature required for the transfer of certain types of negotiable instruments.[19]BOL is a document issued by or on behalf of a carrier to the person with whom he has entered into a contract for the carriage of goods by sea.[20]It is a versatile mercantile document with a very long history, special commercial significance, and unique legal status. It is generally accepted that BOL performs three functions, namely: (1) receipt confirming that the goods to which it relates as described in it have been received by the carrier for shipment; (2) evidence of the contract for the carriage; and (3) a document of title to the goods.[21] As a document of title to the goods, its transfer is akin to a transfer of constructive possession of the goods, which may also operate as a transfer of the property in the goods. The Factors Act, 1889 of UK states that:

> *The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.*[22]

Inherent in the statutory definitions of 'document of title' is the transferability of both the document and the goods it covers.[23]Before statutory enactments designating BOL as a document of title, European courts had recognised the transferability and negotiability of BOL under the law merchant, notwithstanding the absence of municipal, commercial codes to that effect. Thus, the transition of BOL from being just a receipt to a negotiable instrument arose and grew from the custom of merchants negotiating the sale of goods that were still in transit.

---

[18] GI Zekos, 'Negotiable bills of lading and their contractual role under Greek, United States and English Law. (1998) 40(2) *Managerial Law* 5-24 at 5.

[19]But with the advent of computing technology and digitalization, the shipping industry has embraced the concept of electronic BOL transmitted by means of electronic data interchange (EDI) which is rapidly replacing the traditional tangible BOL. See SSY Ibrahima, *Electronic Bills of Lading, Implications and Benefits for Maritime Transport in Senegal* (LLM Dissertation University of Malmo 1999) 144; G Moens and P Gillies *International Trade and Business: Law, Policy and Ethics* (Cavendish Sydney 1998) 125.

[20] AG Guest (ed) *Benjamin's Sale of Goods* (5thed London: Sweet and Maxwell London 1997) 18-005.

[21]Wilson (n 6 above) 117-142; Baughen (n 5 above) 5-9; Felicia Monye, *Commercial Law: Sale of Good, Hire Purchase, Carriage of Goods by Sea* (Enugu: Chenglo 2006) 209-219.

[22]English Factors Act No 45 of 1889, s 1(4); English Sale of Goods Act No 71 of 1893 s 62. For similar definition of the term in Nigerian statutes, see Sale of Goods Law S1 Laws of Lagos State, s 2; Sale of Goods Law 15 1990 of Kaduna State, s 3.

[23]This is also the import of the definition of the term in s 1-201(16) of UCC.

The success and continued use of BOLs in international trade are due to its negotiable character and its attribute as a title document.[24]As far back as 1794 the court in *Lickbarrow v Mason*[25]recognised the transferability of BOL. The negotiability of a BOL is classically illustrated by the statement of Bowen LJ in *Saunders v MacLean* (1883) that:

> *A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading, by the law merchant, is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods…it is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.*[26]

A bearer bill is transferable by mere delivery, while an order bill is transferable by endorsement and delivery. Negotiability is the hallmark of BOL; however, the negotiability of BOL ceases once the goods have been delivered. Thus, delivery of the goods to a holder of BOL forecloses any further endorsement or transfer of the bill.[27]Furthermore, paper BOL is usually issued in triplicates, and the endorsement and/or delivery of one copy is sufficient to effect the transfer of the goods represented in all the copies such that any subsequent endorsement of the remaining copies will have no effect on the ownership or create any rights whatsoever over the goods covered in the bill.[28]

To date, the negotiability of BOL coupled with its vital role as a document of title justifiably makes the paper bill attractive to merchants despite calls for its discontinuance in preference to other documents that do not need physical presentation.[29]

3. Third Party Right to sue on BOL under English Law

In today's mercantile practice and in most jurisdictions, the negotiability of BOL provides several advantages. It facilitates proof of ownership of goods and makes the movement of goods between borders easy. A BOL can give rise to series of contracts where one seller merely endorses it to a buyer who instantly acquires proprietary rights in the goods. BOL facilitates dealings in goods and confers on the holder rights to maintain an action for compensation against either the carrier or the insurer or both in the case of loss of the good or damage to them. Such rights are intangible in that they cannot be physically delivered but are generally inherent in the

[24] C O'Hare, 'Shipping documentation for the carriage of goods and the Hamburg Rules' (1978) 52 *Australian Law Journal* 415 at 419.
[25]*Lickbarrow v Mason* (1794) 5 TR 683.
[26]*Sanders v MacLean* (1883) 11 BQD 327, 341.
[27]Monye (n 21) 220.
[28]*Barber v Meyerstein* (1870) LR 4 HL 317.
[29]For insightful discussion of the challenges of electronic BOL, see D Faber, 'Electronic Bills of Lading' (1996) *Lloyd's Maritime and Commercial Law Quarterly* 232 – 244; VZiakas, 'Challenges Regarding the Electronic Bill of Lading (EBOL)' (2018) 4 (2) *International Journal of Commerce and Finance* 40 – 45.

bill and its transfer also operates as a transfer of the rights. When a BOL is endorsed and delivered, the former holder's rights become subsumed and bestowed on the succeeding holder. Importantly, the negotiable BOL is generally accepted by banks and finance houses as collateral, which greatly enhances international trade financing.

Under common law, a BOL neither confers rights nor imposes obligations on third parties, for example, consignees and endorsees to whom it is transferred for value.[30] Thus, although a purchaser of goods to whom a BOL was transferred acquired constructive possession or ownership of the goods, he or she could not sue on the contract for the carriage of the goods entered into between the shipper and the carrier[31]because the rights arising from carriage contract was not assignable at common law.[32]The obvious inconvenience of the incongruous prohibition necessitated the intervention of the English Parliament by passing BLA.[33] Section 1of the Act provides thus:

> *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 therein mentioned shall pass, upon or by reason of such Consignment or Endorsement, shall have transferred to and vested in him all Rights of Suit, and be subject to the same Liabilities in respect of such Goods as if the Contract contained in the Bill of Lading had been made with himself.*

This means that under the Act, the rights of third-parties (consignees or endorsees) to sue under a BOL followed the property in the goods. This requirement of property acquisition in the goods by consignees and endorsee for the establishment of contractual rights became the subject of conflicting arguments. This is because in commercial transactions, when property in goods passes depends on the intention of the parties as deciphered from the terms of the contract of sale.[34] There are certain circumstances in which the parties may intend property to pass, namely: on shipment, delivery, transfer of title document, payment for the goods or the performance of other stated conditions. Consequently, section 1 of BLA had two inadequacies: the restriction of a third-party right of suit to the passing of property by consignment or endorsement only, to the exclusion of other methods by which property can pass, and the issue of the time at which the property passes. It was, however, generally accepted that a third party's *locus standi* to sue under a contract for carriage of goods by sea under the Act largely depended on the interpretation of the clause 'to whom the property therein mentioned should pass, upon or by reason of such consignment or endorsement'.[35] The requirement of a nexus between the consignment or endorsement and the passing of property was problematic, especially where general property in the goods does not pass at all or passes separately from the transfer of the bill. A determination

[30]Olawoyin (n 7) 84.

[31]*Thompson v Dominy* 153 ER533.

[32]*Sargent* v *Morris* (1820) 3 B &AId 227; *Berkley v Watling* (1837) 7 Aid & EI 29; *Sanders v Vanzeller*(1843) 12 L J Ex 497; *Howard v Shepherd* (1850) 9 C B 297.

[33] N Curwen,'The Bill of Lading as a Document of Title at Common Law' (2007) *Mountbatten Yearbook of Legal Studies*140-163.

[34]For example, s 17(1) of both the English Sale of Goods Act 1893as replicated in most Sale of Goods Laws of states in Nigeria provide that 'Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.' See s 15 the Sale of Goods Law of Lagos State 2010; s 529(1) of the Contract Law 26 Revised Laws of Enugu State 2004.

[35]Olawoyin (n 7) 85.

of whether the transfer of a BOL caused the passing of property and at a point between the time the contract of carriage was concluded and the time the goods was delivered, the transfer of property occurred became issues of importance. One school of thought interpreted this requirement narrowly and literally that the passing of property and the endorsement or delivery of a BOL had to be contemporaneous;[36] while another held a wider view that only a causal link between the two events (consignment/endorsement of BOL and transfer of property) was required.[37]

The narrow view was that property in the goods must pass concurrently with the endorsement or delivery of the bill. Consequently, the right to sue on the bill did not pass to a consignee or endorsee of a BOL where the general property in the goods did not pass at all or passed after delivery or endorsement of the bill or independently of consignment or endorsement. This was aptly described as 'the old Common Law rule in *Thompson v Dominy* with a different face'[38] which hampers trade and defeats the purpose of the Act. On the other hand, the broad view is that right to sue on the bill arises whenever property passes to the consignee or endorsee irrespective of whether property passed before or after the consignment or endorsement of the bill so long it passed before the goods are delivered. This view was considered too wide and as going beyond the intended purpose of the Act.[39]The English Court of Appeal in *Enichem Ante SpA&Ors v Ampelos Shipping Co Ltd (The Delfini)*,[40] rejected both the narrow and broad construction adopted a middle approach and held that a consignee or endorsee can acquire the right to sue under a BOL even though the endorsement of the bill is not the immediate cause of the passing of property provided it plays an important causal role in the chain of events culminating in the transfer of the title. This means that the consignment or endorsement of BOL must form an 'essential causal part' in the transfer of property, that is, be the event that sets off the process by which the property is passed.[41] Section 1 of BLA would therefore not apply, and the contractual rights would not pass if the consignment or endorsement of a BOL was of no consequence in the transfer of property. For example, where the goods are handled physically and delivered against an indemnity before the bill's arrival, the provision in section 1 would not be applicable and hence the contractual right would not have been transferred.[42] Because of the problem of interpretation created by the wording of section 1 of BLA1855, there were circumstances in which a third party's contractual right to sue did not go together with the transfer or endorsement and consignment of a BOL and transfer of property.[43]

Under the BLA regime, ship owners were in an advantageous position where sometimes indisputable claims for damage to or loss of goods by consignees and endorsees of BOL were *defeated* because of the wordings of section 1 of the Act. Thus, a holder of BOL could suffer loss

[36] AA Mocatta and others (eds) *Scrutton on Charterparties* (19thed London: Sweet & Maxwell 1984) 27.
[37] R Colinvaux (ed) *Carver Carriage by Sea* (13thed London: Stevens 1982) para 98.
[38]Olawoyin (n 7) 87.
[39]*Ibid*.
[40][1990] 1 Lloyds Rep 252.
[41] B Reynolds, 'Some further thoughts on the Carriage of Goods by Sea Act, 1992 (UK)' (1994) 25 *Journal of Maritime Law and Commerce* 143-58.
[42] FMB Reynolds,'The Carriage of Goods by Sea Act, 1992', [1993] *Lloyd's Maritime and Commercial Law Quarterly* 436 – 443, 438.
[43]See the statement of Mustill LJ in *Hispania de Petrolens SA & Anor v Oceania Navigacion SA* (The Kapetan Markos) [1987] 2 Lloyds Rep 321, 330.

without asserting any remedy against the carrier. By the turn of the 20th century, the international community has recognised the need for a fairer allocation of risks in maritime transactions as well as the harmonisation of relevant national laws.[44] This led to the adoption of the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924 (Hague Rules), which was later amended by Protocols in 1968 and 1979 (Hague-Visby Rules),[45] aimed to provide better protection of cargo interests and redress the perceived inequities in the interests of shippers and cargo owners.[46]

The unsatisfactory state of English law on the subject of discourse and developments at the international level led to the enactment of COGSA1992, which repealed BLA in its entirety. COGSA departed from BLA in some important respects, notably by divesting the title to sue from a property in goods and detaching the transfer of rights under a contract of carriage from any transfer of liabilities. It also extended its scope beyond BOL to cover similar shipping documents such as sea waybills and ships' delivery order. By section 2(1) of COGSA, title to sue was vested in the lawful holder of a BOL whether or not he or she is the owner of the goods contained in the bill.[47] The Act defines 'lawful holder' of BOL broadly to include a person in possession of the bill in good faith and is identified in the bill as consignee or endorsee thereof or a person who would have fallen within these categories if he or she had come into possession of the bill before it ceased to be a document of title.[48]It also includes the holder of a bearer bill, which is transferable by delivery without the need for a specific endorsement.[49]This broad definition of 'lawful holder' covers situations where goods are delivered under a bank's guarantee before the bill coming into the possession of a consignee or an endorsee[50] as well as where goods are lost in transit even before a BOL enters into the hands of a consignee or ultimate endorsee.[51]In such situations, the ultimate holder of the bill will acquire title to sue provided that he obtained the bill under a contract or other arrangements made before the bill ceasing to be a transferable document of title.[52]

---

[44] KS Ugwuokpe, *The Bill of Lading in an Era of Electronic Commerce: Legal Developments and the Reform Options for Nigeria* (LLM dissertation Dalhousie University Halifax 2016) 24.

[45]International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924 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.

[46]This quest to balance the interests of shippers and cargo owners have led to the adoption of two other international conventions: the*United Nations Convention on the Carriage of Goods by Sea* 1978 (Hamburg Rules) which entered into force on 1 November 1992 and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules) which is yet to enter into force. The Hamburg Rules have not been adopted by the major shipping nations and have therefore failed to achieve desired uniformity in international regime for carriage of goods by sea which informed their drafting while the Rotterdam Rules are yet to come into force having not received the required number of ratifications. The Hague Rules and the amending protocols were domesticated in UK by the Carriage of Goods by Sea Act Chapter 22 of1924 as amended by the Carriage of Goods by Sea Act 19 of 1971.

[47]See *East West Corp* v *DKBS 1912* [2003] 1 Lloyd's Rep 239.

[48]COGSA s 5(2)

[49]*Keppel Tatlee Bank* v *Bandung Shipping* [2003] 1 Lloyd's Rep 619. But it did not include an endorsee where the bill is endorsed by mistake and is not delivered by endorser to endorsee; see *The Aegean Sea* [1998] 2 Lloyd's Rep 39.

[50]*The Delfini*[1990] 1 Lloyd's Rep 252.

[51]COGSA s 5(4). See *The Ythan*[2006] 1 Lloyd's Rep 457.

[52]COGSA s 2(2)(a).

The transfer from one lawful holder of a bill to another, of the right of action under section 2(1) of COGSA, will extinguish the contractual rights of the shipper or of any intermediate holder of the bill.[53]This will still be the case even if the shipper retains the property in the goods after such endorsement; he will not regain title to sue even if subsequently, he regains possession of the relevant title documents unless they have been endorsed back to him. In *East-West Corp* v *DKBS*,[54]BOLs had been endorsed to a bank in connection with documentary credits. When the buyer failed to pay for the goods, the bills were sent back to the shipper without any further endorsement on any of them. In these circumstances, it was held that the shipper had no right of action on the bills. As the right to sue is detached from property in the goods, a person with rights of suit under section 2(1) may not have suffered personal loss or damage resulting from the carrier's breach of contract of carriage. Under such circumstances, such a person can sue for the benefit of the party who suffered the loss, and obtain damages from the carrier for the account of the person who suffered the damage.[55]

Under COGSA, liabilities under contracts of carriage of goods by sea are no longer transferred concurrently with the right to sue. Such liabilities will only follow the persons with rights of a suit when they obtain or demand the goods' delivery, make a claim under the contract or take or demand delivery of the goods before the right became vested in them under the bill.[56]

4. Third-party Rights to Sue on a BOL under Nigerian Law

By virtue of Nigeria's colonial heritage, BLA applied in Nigeria as part of the received English law. The colonial legislature in Nigeria re-enacted the English Carriage of Goods by Sea Act 1924 as local legislation in 1926[57] with the Hague Rules scheduled to it. After her independence, Nigeria enacted the Merchant Shipping Act (MSA)[58] in a bid to consolidate the law relating to merchant shipping. MSA1962 was repealed and re-enacted with the same name in 2007.[59] Meanwhile, following her ratification of the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), Nigeria domesticated the convention by enacting the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.[60]

Nigeria's Carriage of Goods by Sea Act 1926 contains provisions relating to BOL but does not provide much protection for consignees and endorsees of BOL as it incorporates the Hague Rules (but not the Hague-Visiby Rules). Although the Hague-Visiby Rules never had any application in Nigeria as any local legislation did not domesticate them, it is noteworthy that the Rules did not provide for third party right of suit in relation to BOL. Also, while the Hamburg Rules domestication statute contains provisions on BOL aspects, it does not make provisions relating to the rights of consignees and endorsees of BOL. It is the Nigerian Merchant Shipping

[53]COGSA s 2(5).
[54][2003] 1 Lloyd's Rep 239.
[55]COGSA s 2(4).
[56]COGSA s 3(1).
[57]Carriage of Goods by Sea Act 26 Laws of the Federation of Nigeria (LFN) 1958.
[58]No 30 of 1962, Cap 224 LFN 1990 and Cap M111 LFN 2004.
[59]Merchant Shipping Act No 27 of 2007.
[60] No 19 of 2005.

Act in its original version (hereafter MSA 2004) that contained provisions relating to third party right of a suit under a BOL. Section 375(1) of the Act provided thus:

> *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 therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit and, be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.*

Surprisingly, this provision, which is *ipsissimaverba* with section 1 of English BLA, was not re-enacted in the MSA 2007, prompting the question of whether the repeal of MSA 2004 by section 439 of MSA 2007 also has the effect of abrogating the application of the English BLA1855 as a statute of general application in Nigeria.[61]The answer to this question raises a further issue as to which law is applicable in determining the contractual rights of action of consignees and endorsees of BOLs under Nigerian law. If the first question is answered in the affirmative, meaning that the BLA has become inapplicable in Nigeria by the repeal of MSA 2004, then it means that the common law on the subject is now applicable. Conversely, section 6(1)(a) of the Interpretation Act[62]provides that the repeal of an enactment shall not revive anything not in force or existing at the time when the repeal takes effect. Consequently, it can be argued that a better view is that the repeal of the entire MSA 2004 without re-enacting the provisions of section 375 of MSA 2004 in MSA 2007 simply means that Nigeria has fallen back to section 1 of BLA 1885 as the applicable legislation on the subject. This position is justified by the fact that MSA 2004 did not cover all the matters covered by BLA 1885.In the UK, for instance, statutory regulation of merchant shipping dates back to 1854[63]and had existed side by side with legislation on BOL.[64] Thus, MSA 2004 did not in any way purport to repeal the entire BLA 1885 or any section thereof. The Nigerian Supreme Court relying on English authorities[65] made it clear in the case of *The Governor of Kaduna State v Lawal Kagoma*,[66]that a statute repeals another by implication only if the terms of the latter one are so inconsistent with and so repugnant to those of the earlier one that they cannot stand together. It is therefore submitted that, while the MSA 2004 was in force and having the same provision on the same subject matter (section 375) with BLA (section1), the local legislation could be deemed to have suspended (not repealed) the consistent specific provision of the earlier statute of general application. The repeal of the relevant provisions in the later statute (in this case, the MSA 2004) means that the earlier statute's relevant provision (that is, BLA) is revived. Although this point is yet to be pronounced on by the court,[67]

---

[61] HU Onuaguluchi, *Introduction to the Laws of International Merchant Shipping* (Enugu: De-Adroit 2008) 197.

[62]Cap I23 LFN 2004.

[63]Merchant Shipping Law Amendment Act 1853 16 & 17 Vict, Cap 131.

[64]Presently merchant shipping is regulated by the Merchant Shipping Act chapter 21 of 1995 while BOL and related matters are regulation by COGSA.

[65]*Kutner v Phillips* [1891] 2 QB 267, 271; *Butller v Attorney-General (Victoria) 106 CLR 268, 276.*

[66](1982) LPELR-3176 (SC); (1982) All NLR 160; (1982) 6 SC44.

[67]This is because the cause of action in most of the cases decided recently by the courts, especially the Court of Appeal and the Supreme Court, arose prior to the enactment of MSA 2007.The Court of Appeal missed this point in the case of *Bua International Ltd v Mediterranean Shipping Co Nig Ltd & Anor* (2018) LPELR-45531 (CA) by relying and quoting copiously section 375 of MSA 2004 which had been repealed by the time the cause of action in the matter arose in 2008.

this view is preferred to falling back on the common law position which, as far as the subject matter is concerned, was considered more detrimental to cargo owners, consignees, and endorsees than section 1 of BLA.

Although section 375 of MSA 2004 (same as section 1 of BLA)was considered an improvement over the common law position, it created problems for cargo owners who were consignees and endorsees of BOLs in enforcing contractual rights arising under the bills. The English courts generally construed section 1 of BLA to mean that that a person who was neither the consignee nor endorsee of a BOL did not have a right to sue on it and that where a person is the consignee, endorsee or holder of BOL but property in the goods had not passed upon or because of the consignment or endorsement of the bill, such a person would not have a right of action on the bill.[68] However, unlike their English counterparts, in construing the same provision, Nigerian courts seemed to have adopted a somewhat 'simplistic approach' which is neither concerned with determining the kind of property that is passed nor the supposed link between the transfer of property and the endorsement or delivery of a BOL but only with whether there had been an endorsement or delivery of a BOL.[69]This may be why the Nigerian Court of Appeal stated regarding section 1 of BLA that it '…is so explanatory that it hardly needs any serious interpretation...'[70] With this approach, Nigerian courts simply treated BOL as a negotiable instrument and permitted its holder to sue on it irrespective of when and what kind of property passed or from whom a BOL is endorsed. In some cases, agents and pledgees who became endorsees of BOLs were held to have *ipso facto* acquired a right of a suit.[71]

The paramount consideration in the application of section 375 of MSA became whether the claimant is the consignee or endorsee of the BOL that is in issue. This in itself did not give rise to serious contentions as, in most cases, it will be apparent on the front or reverse side of the bill whether a claimant is a consignee or endorsee therein. However, a large number of cases handled by Nigerian courts bordered on the rights of notify parties instead of those of consignees and endorsees. In practice, most BOLs are either order bills, which are usually delivered to banks as collaterals or other forms of BOLs where the bank financing the transaction is named as the consignee. In such scenarios, the actual owners of the goods are merely described as notify parties, a situation which places the owners at a serious disadvantage vis-à-vis the bill.[72] In addition to whether the claimant is the consignee or endorsee, another salient consideration is the form of the endorsement on the bill. This is because to determine whether a party is an endorsee of a BOL, it is necessary to distinguish between two forms with endorsement on a BOL can take. There is 'endorsement in blank' by the shipper and 'endorsement to the order' of a named person. In the former, a holder of BOL can be an endorsee without his or her name being on the

[68]*The Delfini (*n 51).
[69]Olawoyin (n 7) 90.
[70]Olatawura, JCA in *Captain Chacharos & Anor v Ekimpex Ltd &Ors* [1980-1986] 2 NSC 236, 246.
[71]See *Oriental Trading and Technical Agencies Ltd v Boothia Maritime SA Inc* (unreported) Suit No FHC/L/CS/138/91; *Exquisite Industries (Nig) Ltd v Owners of MV Bacoliners 1-3*(1998) 5 NWLR (Pt 549) 335 (agents) and *Savannah Bank of Nig Ltd v Pan Atlantic Shipping & Transport Agencies Ltd* [1987] 1 NWLR (Pt 49) 212 (pledgee)..
[72]*Awolaja v Seatrade Groningen BV* [1993] 3 NWLR (Pt 280) 209; *Boothia Maritime Inc v Fareast Mercantile Co Ltd* [2001] 9 NWLR (Pt 772) 572.

bill,[73] while in the later the endorsee's name must appear on the face of the bill. If this distinction in the form of endorsement is not fully appreciated and the court does not adequately consider the intention for the endorsement, the type of property that is anticipated to or that passed by virtue of the endorsement as well as the connection between the endorsement and passing of property, the right of the actual owner of the goods to sue may be detrimentally affected.[74] Without reference to the difficulties in the application of the wordings of section 375 MSA 2004, Nigerian courts adopted the position that consignees and endorsees of BOLs have rights to sue on the bills by virtue of the fact that that they are they are so described on the bills. In the case of *Fasasis Adesanya (Trading under the Name and Style of Negro Commercial Agency) v Leigh Hoegh & Co A/S,*[75] one of issues before the court was whether a notify party under a BOL who is also the owner of the goods can sue the carrier for loss of or damage to the cargo. In resolving the issue, the Nigerian Supreme Court held that the plaintiff who was a notify party had no standing to sue on the bill because he was not the consignee or endorsee of the bill. The court stated that he had no connection with the contract of carriage evidenced by the BOL and is not entitled to enforce the contractual rights flowing there from.[76] This decision has remained a reference point for Nigerian courts on the rights of third-parties to sue under a BOL. In *Pacers Multi-Dynamic Ltd v MV 'Dancing Sister'& Anor*,[77] the court stated that:

> *A Notify party…is not a party to the contract contained in a bill of Lading. The appellant not being a consignee or endorsee in respect of the subject bills of Lading…ought not to have instituted an action on the…bills as it cannot sue on them. The appellant is a total stranger to the contact contained in the bills of Lading and the fact that the appellant claims ownership to the goods is irrelevant to a suit founded on contract in the bills of Lading. The appellant cannot sustain a claim on the bills of Lading.*

Generally, it appears that Nigerian courts have not adverted to the fact that a party who was not named in a BOL or who was merely named as a 'notify party' can by the terms of the BOL be considered as the consignee. For example, where a BOL is endorsed in blank if a person that was at first only a notify party to the bill subsequently becomes the holder of the bill for value; such a person would have become an endorsee of the bill. In such a situation, Nigerian courts would not even admit extraneous evidence outside a BOL, such as other documents issued by the shipper to establish that the claimant who is not the consignee or endorsee of a BOL is the owner of the goods.[78]

Nigerian Court of Appeal has considered the requirement of the passing of property in deciding the rights of consignees and endorsees to sue on a BOL in a few cases. The first of such cases is *Niger brass Shipping Line Ltd v Aluminium Extrusion Industries Ltd*,[79] where the plaintiff, as the

[73]*Pacers Multi-Dynamic Limited v MV 'Dancing Sister'& Anor* (2012) LPELR-7848(SC); [2000] 3 NWLR (Pt 648) 241.
[74]Olawoyin (n 7) 91.
[75][1907-1979] 1 NSC 128; **(1968) LCN/1580(SC).**
[76]See *Worldwide Engineering and Manufacturing Company (Overseas) Ltd v Nigeria National Supply Co Ltd* [1987-1990] 3 NSC 382.
[77](2012) LPELR-7848(SC) per Rhodes-Vivour JSC 19-20 paras E-B.
[78]*Supermaritime (Nigeria) Ltd v Essential Seafoods Ltd* (2018) LPELR-45109 (CA).
[79][1994] 4 NWLR (Pt 341) 733.

owner of the goods, sued the defendant/carrier for breach of the contract of carriage or breach of duty of care in the carriage and delivery of the goods. The bill in the case was consigned to a third party (a bank), and the owner was merely indicated as a notify party. The bank endorsed the bill to the owner of the goods, who endorsed it to its agents for purposes of clearing the goods. The defendant challenged the suit because the plaintiff was not a party to the contract of carriage and therefore lacked the *locus* to sue on the bill. The issue the court had to resolve was whether by endorsing the bill to the agent, the plaintiff had divested itself of the right to sue under it. Tobi JCA in deviating with the simplistic approach, stated that:

> *It is not every consignee or endorsee of a bill of lading who has the right to sue on it, but only a consignee or endorsee 'to whom the property in the goods mentioned therein shall pass upon or by reason of such consignment or endorsement'….in such a situation, a court of law cannot simply rely on an endorsement on a bill of lading without more, in coming to a decision as to whom may sue on it. The court has a duty to go beyond the mere formal endorsement to determine the legal and factual aspect as to whether the property mentioned in the bill of lading really 'passed upon or by reason of such consignment or endorsement'.*[80]

In the case of *The MV 'Caroline Maersil'& Ors v Nokoy Investment Limited*,[81] the Court of Appeal also took a position that eased the undue reliance on the mere consignment or endorsement to establish a right of action in BOL, when it stated that a court should not merely rely on an endorsement, in deciding who can sue on a BOL and that it is also necessary to require the consignee or its assigns to prove that they paid for the goods before they can sue bill. In *Brawal Shipping (Nigeria) Limited v Onwadike*[82] the Nigerian Supreme Court also observed that property in the goods passes not only by endorsement or consignment assignment of BOL but by the contract between the endorser or consignor and the endorsee or consignee, by which the parties intend the property to pass.[83]

The challenges of the proper interpretation of section 1 BLA (section 375 MSA 1990) and the simplistic approach to the matter adopted by Nigerian courts have led to the proposition for the application of the constitutional right to be heard in the discourse of the *locus standi* of third parties to sue on BOL.[84] Section 6(6)(b) of the Nigerian Constitution[85] provides that the judicial powers vested in the courts:

> *shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.*

[80]*Nigerbrass Shipping Line Ltd v Aluminium Extrusion Industries Ltd* 743.
[81][2000] 7 NWLR (Pt666) 587, 601.
[82][2000] 11 NWLR (Pt 768) 387, 411. Unfortunately, the question of *locus standi* in this case was, decided on the narrow principle of demurrer and there was no discussion on the issue of timing of the acquisition of property vis-à-vis right of suit in contract under a BOL.
[83]The view is consistent with the relevant provisions of the Sale of Goods Laws; see n 33 above.
[84]Olawoyin (n 7) 98 – 102.
[85]Constitution of the Federal Republic of Nigeria 1999.

This constitutional provision is strictly interpreted, and according to the Supreme Court in *Adediran v Hinterland Transport Ltd*,[86]any law which imposes conditions where the determination of the civil rights and obligations of a person is in issue is inconsistent with the free and unrestrained exercise of that constitutional right and therefore void to the extent of such inconsistency. However, the general effect of the constitutional provision is that standing to sue will be accorded to a person who can show that his or her civil rights or obligations have been or are in danger of being violated or adversely affected by the act or omission complained of.[87] This seems to establish a link between standing to sue and the jurisdiction of the court to hear and determine a matter[88]since it is only when the civil rights or obligations of a person or persons are in issue that the adjudicatory powers of the court can properly be invoked. Olawoyin asserts that adopting the constitutional approach to the issue of *locus standi* of third parties in BOL and subsuming section 375 MSA into it will create more challenges than it is intended to solve and rather suggested that section 6(6)(b) of the Constitution can be invoked to declare that section 375 MSA 1990 is not consistent with the Constitution and therefore, void.[89]

5. Conclusion

The transferability of a BOL arises from its nature as a document of title,[90] however, owing to the rule of privity of contract, the BOL at common law, as a contract of carriage of goods by sea, did not bestow rights or entail obligations on third parties such as consignees and endorsees who are not parties to the contract. This occasioned great hardship on cargo owners who, usually in the practice of international trade, might not be the consignees but receive BOL as endorsees from other parties, such as banks that financed the transaction. In UK, third parties to BOL acquired the right to sue on the bill by legislation. First was section 1 of BLA (enacted in Nigeria as section 375 of MSA 1990), which conferred the right of action on consignees and endorsees of BOL subject to the property in the bill has passed to such a consignee or endorsee by the consignment or endorsement of the bill. Anomalies inherent in the wording of section 1 BLA (section 1 of MSA 2004) and its interpretation by the courts, portended that a true owner of goods under a BOL who is an assignee or an endorsee of the bill did not have right of action under it. The simplistic approach adopted by Nigerian courts in interpreting the provision of section 1 of BLA (section 375 MSA) made matters worse for the actual owners of the goods in a BOL who is described therein as a notify party.

In order to remove the deprivation suffered by cargo owners in suing under the BOL, the UK Parliament passed COGSA, which repealed BLA and divested the right to sue from a property in the goods and vested same in the lawful holder of a BOL irrespective of whether or not he or she is the owner of the goods to which the bill relates. Despite the acknowledged improvement brought about by COGSA, which has been adopted by several Commonwealth shipping nations such as South Africa,[91] New Zealand,[92]and Singapore,[93]Nigeria has wobbled from replicating the

[86][1991] 9 NWLR (Pt 214) 155, per Karibi-Whyte JSC 180.
[87]*Senator Abraham Adesanya v President of the Federal Republic of Nigeria & Anor* [1981] 1 All NLR 1, 39.
[88] TI Ogowewo, 'The Problem with Standing to Sue in Nigeria" [1995] 39 *Journal of African* Law 1-at 3.
[89]Olawoyin (n 7) 100-101.
[90] C Debattista, *The Sale of Goods Carried by Sea* (2nd edn London: Butterworths, 1998) 2.
[91]Sea Transport Documents Act 65 of 2000.
[92]Contract and Commercial Law Act 5 of 2017.

provision of section 1 of BLA as section 375 of MSA 2004 to repealing the same by MSA 2007 leading to the present situation where it is not clear as to whether it is section1 of BLA (as a statute of general application) or English common law that is applicable on the rights of third parties to sue on BOL in Nigeria.

The position of Nigerian law on this important aspect of carriage of goods by sea has been retrogressive. Since removing section 375 of MSA 2004 from the re-enacted MSA 2007, the Nigerian legislature should have enacted another law on the matter, but to date, there is not even a bill pending before the National Assembly on this very important subject. It is therefore strongly recommended that urgent steps be taken to amend MSA 2007 to incorporate the relevant provisions of COGSA on the matter. This has become imperative and will make for the certainty of the applicable law in Nigeria and an appreciable level of uniformity in the laws of the major shipping countries of the Commonwealth on a third party's contractual right to sue on BOL.

[93]Bill of Lading Act 384 of 1994.