

## **Chapter 5**

### **Liabilities on the Carrier for Delivery**

#### **without Production of B/L (1)**

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As pointed out in Chapter 4, when a bill of lading (mainly an order or bearer bill of lading is under the discussion) has been issued,<sup>1</sup> the legal holder is the only person entitled to the delivery of the goods from the carrier, and, the carrier is obliged to deliver the goods to the holder against the presentation of this original bill of lading. This is called the presentation rule of cargo delivery in this thesis.

If the carrier fails to do so, viz., if he delivers the goods without the production of a bill of lading, he may run high legal risks. When a person other than the receiver of the goods legally possesses the bill of lading, it usually will constitute a wrong delivery by the carrier.

However, from the other angle, the presentation rule is also the right of the carrier: "he is entitled to do so,"<sup>2</sup> and, the carrier may refuse to deliver the goods when no bill is presented.

Why must a delivery be made against the presentation of bills of lading? How was this rule established? This will be examined in several ways and traced back to the history of bill of lading. In addition, in this chapter, I will analyze the relationship between certain legal nature of the bill of lading and the presentation rule, and underpin the real basis for this rule.

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<sup>1</sup> Whether the presentation rule applies when a straight bill of lading is issued is still arguable, for a fuller discussion see part 3 of Chapter 6. Without being noted specially, the issues discussed in this chapter will mostly center on an order or bearer bill of lading, which is usually called negotiable bill of lading.

<sup>2</sup> *Gaskell*, p.417.

## 1. Presentation of bill of lading

### 1.1 Historical background

The presentation rule of bills of lading was established gradually along with the variation of the patterns of maritime carriage and the development of the transportation documents.

At the beginning of shipping, there seemed to be no desirability for the issuance of a document from the master since the merchants or the traders of the carried cargoes were usually the operators of the vessels. Even after the vessel operators were independent from the merchants, there was still little need for the transport documents because merchants usually traveled together with their goods. But, when the merchants did not intend to travel with the goods, they needed a proof of the receipt of the goods and they should also tell the shipowner to whom the goods will be delivered.

Although “it’s safe to say that in the 11<sup>th</sup> century the bill of lading was unknown,”<sup>3</sup> by that time, with the significant growth of the trade among the people in the Mediterranean, some records of the goods shipped showed up. The *Ordonnance maritime* of Trani<sup>4</sup> bearing the date 1063 said that every master must take on board a clerk, and, mentioned of a ship’s book or register, which was a written book of evidence “as to the goods shipped and the conditions of shipment.”<sup>5</sup> During the 14<sup>th</sup> century, in some districts, a sufficient written security should be issued to the shipper before the ship left the port. This kind of document was called “*police de chargement*” in some ports, which Bennett called “bill of lading”<sup>6</sup>. And in some districts, there were official or statutory intervention for this kind of written evidences or registers.<sup>7</sup> By then, the receipt function of the rudimentary bill of lading by an on-board record had been accomplished.<sup>8</sup> And, the merchant would send to their correspondent copies of such registers.<sup>9</sup> So it is generally purported that rudimentary bills of lading were in existence in the late 14<sup>th</sup> century.<sup>10</sup>

<sup>3</sup> *Bools*, p.1.

<sup>4</sup> An Italian town.

<sup>5</sup> See W. P. Bennett, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (hereinafter as “Bennett”), 1<sup>st</sup> ed., Cambridge University Press, 1914, p.7.

<sup>6</sup> Bennett, p.4.

<sup>7</sup> In the early 14<sup>th</sup> century, at the port of Torres, only when a merchant received his “*police de chargement*,” might the ship “leave without further permission from the officials,” op. cit., Bennett’s, p.4;

<sup>8</sup> *Bools*, p. 1; around 1350, a statute was enacted providing that “if a register had been in the possession of anyone but the clerk, nothing that it contains should be believed”, and the clerk would be severely punished if he made false matters therein, recited in *Bools*, p.1.

<sup>9</sup> *Ibid*, p.2.

<sup>10</sup>Wilson, p. 117, *Bools*, p. 1,

According to Bennett, “some proof would be required that the person demanding delivery of the goods at the port of destination was the person entitled to do so,” and “a copy of the register signed by the captain would be the most natural indicium of title.”<sup>11</sup> This conclusion is criticized as going “too far on several ways” in that stage<sup>12</sup> for the following reasons: (1) where the goods were consigned to a correspondent, only the evidence of his identity would be necessary; and in that stage, sometimes letters of advice on how the cargoes were shipped and how to deal with them were also sent, no document telling the consignee would not be used in addition; (2) even if the bill were considered as essential to delivery, it did not need to be an “indicium of title”, in the sense of ownership.<sup>13</sup>

I agree with the point (2) in that it was really a little too early to say that a proof was needed as “indicium of title” when the ownership of the goods is under the consideration, but I don’t think the argument is sufficient to deny the needs for a proof to tell who is the right person for receiving the delivery.

On the contrary, there were records that the document had played a role related closely to tell who could take the delivery of the goods from the early rudimentary stage of the bills of lading. For example, a ship’s register on the 25 June, 1390 was stated, “know all men that Anthony Ghilta shipped certain wax … *which thing must be delivered at Pisa to Mr. Percival de Nigro his agent*, and I Bartholomeus de Octono<sup>14</sup> shall deliver all his goods at Portovenere and for the better caution I affix my mark so” (emphasis added). So, the early bills of lading had borne certain instructions for the ship’s part about the person to whom the goods shall be delivered. This kind of statements also can be deemed as undertakings by the shipowner on delivery.

Though not many historical records are available, the following hypothesis will be considered logical: proofs evidencing who can take the delivery may be necessary if the consignees did not designate his agent or correspondent at the destination in advance; or, if the final consignee was still unknown upon the dispatch of the ship; or, even possibly when it was difficult to get other appropriate identity proof in some districts at that time. Under such circumstances, when the rudimentary bills of lading were sent to the consignee at the destination, it may be designed as both the receipt of the goods on board and the evidence of the consignee. This is based on the inherent requirement for the efficiency and the economy of the commerce. In addition, most likely, it superseded the abovementioned letters of advice on how to deal with the goods, though these

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<sup>11</sup> *Bools*, p. 6. It is further concluded that some proof would be required, which “clearly bind the shipowner and the consignee to the conditions of shipment.”

<sup>12</sup> *Bools*, pp.2-3.

<sup>13</sup> *Ibid.*

<sup>14</sup> The name of the mate of the carrying ship.

writings or registers were not transferable as most of those modern bills of lading were by the 14<sup>th</sup> century.<sup>15</sup>

By the 16<sup>th</sup> century, commonly, the bills of lading indicated that the goods should be delivered to “XX” or “to XX or to him that shall do for him” or “to XX or to whom shall be for him,” and ended thus: “In witness where of I have given you three *cognossements/ bylls* all of one tenor marked with *myn owne marke*, the one *performourmed* the other to be of none effect” or “…the one completed and *fulfylled* and the other to stand *voyd*.<sup>16</sup> From the words of “performance” and “completed and fulfilled” of bills of lading, it can be supposed that the bills of lading should be produced and accomplished during the delivery.

In addition, it is said that the primitive bills of lading arose in the medieval times. At that time, the bills were designed as a combination of double copies that should be cleaved from the “middle crack.” The shipper and the carrier should get each of them. At the destination, the two copies should be put together. When they matched well, goods should be delivered to the person who presented the part of it.<sup>17</sup> Bill of lading became as the “only evidence for claiming delivery at the destination.”<sup>18</sup>

The presentation rule of bill of lading on delivery as a custom of shipping indeed has a long history. The fact that “its surrender is necessary to receive the goods on arrival”<sup>19</sup> became one of the most important attributes of this kind of document.

## 1.2 Undertaking by the carrier in bills of lading

As mentioned in 1.1, no later than 16<sup>th</sup> century, had the early bills of lading provided such kind of statements that the bills should be “performed” or “fulfilled” during the delivery of goods.

Nowadays, these statements are much clearer and direct, the presentation of bill of lading for delivery is an expressly printed provision in most of the bills of lading. “Received the goods in apparent good order and condition …*One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order*” (emphasis added)<sup>20</sup> is the most common provision.

<sup>15</sup> There is no evidence that bills in the 14<sup>th</sup> century were traded and transferable, see *Bools*, p.3.

<sup>16</sup> Bennett, pp.10-11.

<sup>17</sup> Lin Qiang, *On the Sources of the Effectiveness of the Obligatory Rights Of Bills of Lading*, vol.19, Civil and Commercial Law Review, 2001,2, p., 5 at pp.1-25. According to Guo Yu, the bill of lading with this pattern was designed in or after the 17<sup>th</sup> century when bills of lading had been made in standard forms by the carriers bearing the printed articles of the contract of carriage in the back sides, see *Guo Yu's Bill of Lading*, p.2. But I doubt the time of 17<sup>th</sup> century, which might be too late. Because according to Bennett, bill of lading “was no longer part of the ship's register but a separate and independent document drawn in sets of three” since 16<sup>th</sup> century, see *Bennett's*, pp.10-12.

<sup>18</sup> *Guo Yu's Bill of Lading*, p.2.

<sup>19</sup> Clive M. Schmitthoff, *Select Essays on International Trade Law*, edited by Chia-Jui Cheng (hereinafter as “*Schmitthoff's Selected Essays*”), 1<sup>st</sup> ed., Martinus Nijhoff Publishers/ Graham & Trotman Ltd, 1988, p.377.

<sup>20</sup> See, for example, Conlinebill, Combiconbill, Shanghai Haihua shipping “combined bill of lading” and so on,

In addition, most of the bills of lading further provide that “in accepting this Bill of Lading, the Merchant<sup>21</sup> expressly accepts and agrees to all its terms and conditions.”<sup>22</sup> So, without prejudice to the mandatory regulations, the statement above-mentioned is the condition under the bill of lading on the delivery of goods. From the other angle, delivery against the surrendering of the bill is also an undertaking by the carrier under the document.

When a carrier issues a set of bills with this kind of provision to a shipper, this term in the bill evidences the undertaking by the carrier under the contract of carriage. This is a contractual obligation. When the bill of lading is transferred to a holder other than the shipper, it is obviously a promise made by the carrier to the holder. Schmitthoff observes: “There can be little doubt that it (the characteristic of surrender the bill for receiving goods, noted by the author) originated in the custom of the merchants -- in modern law this characteristic of the bill of lading is founded on contract.”<sup>23</sup> Although whether the relationship between the carrier and the holder of the bill is a contract relationship is still under theoretical controversies,<sup>24</sup> the provision of the law such as “the rights and the duties between the carrier and holder of the bill of lading shall be determined by the clauses of the bill”<sup>25</sup> also obliges the carrier to fulfill his promise in the bill of lading.

As an obligation, on the one hand, the carrier is bound to deliver the goods against the bill of lading. In general cases, if the carrier delivers the goods without bill of lading, it will be a breach of his promise and the carrier may be liable for this breach.<sup>26</sup> But on the other hand, facing a holder of the bill of lading with due endorsement, the carrier generally is not entitled to refuse to deliver the goods unless there are adverse claims or if he is authorized to do so as per legal procedures as I have discussed in 3.5 of Chapter 4.

From another angle, delivery on the presentation of the bill of lading is also a right for the carrier and he “is entitled to do so.”<sup>27</sup> The carrier is entitled to refuse the delivery if there is no returning of the bill of lading, even if the claimant is the owner of the goods.<sup>28</sup> In addition, delivery on the presentation of a proper bill of

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<sup>21</sup> Shanghai Jinjiang shipping Company” combined transport B/L” is almost the same.

<sup>22</sup> “Merchant” is an indefinite term with no exact legal meaning. In most of the bills, it includes “the consignor, shipper, consignee, the owner of goods and legal holder of bill of lading or endorsee.”

<sup>23</sup> *Supra* fn 20.

<sup>24</sup> *Schmitthoff's Selected Essays*, p.382.

<sup>25</sup> It can be defined as a contract, a relationship of instrument of value, an independent statutory relationship and so on; for details see part 3 of this chapter.

<sup>26</sup> Article 78 CMC.

<sup>27</sup> The liabilities of the carrier on delivery without bill of lading shall be further discussed in part 6 of this chapter. But under some special circumstances, the delivery without bill of lading may be justifiable and the carrier may be exempted from the this delivery, for full discussions see Chapter6.

<sup>28</sup> *Gaskell*, p.417.

<sup>29</sup> The right to the delivery is vested in the holder of the bill of lading. This right may be separated from the ownership or other real title to the goods. See part 2 and 3 of this chapter.

lading is the fulfillment of the delivery, and “such delivery serves to discharge the carrier from further obligations under the contract of carriage.”<sup>29</sup> And most of the bills of lading write, “When one the bill of lading accomplished, the others stand void.”

Though most of the bills of lading indicate the presentation rule of delivery, in my view, this rule has been taken as a custom. Even without the express statement in a contract or in a bill, it has been the implied undertaking by the carrier to deliver the goods against the production of the bill, unless agreed otherwise between the carrier and the shipper.

### 1.3 Statutory provisions

Although the presentation rule has widely accepted by the practitioners, it is rarely put into statutes, so in most districts, it runs just as a merchant custom.

The *Hamburg Rules* is the only maritime international convention that provided with the statutory provision of presentation rule, “based on which (the bill of lading) the carrier undertakes to deliver the goods against surrendering the same.”<sup>30</sup> Among the national legislations, those of the Nordic Countries provide similarly, requiring that the carrier undertake to deliver the goods “only against the surrender of the document.”<sup>31</sup>

In the Chinese version of the China Maritime Code, there is no express provision that the bill of lading shall be presented for delivery. It just defines that bill of lading is the document “based on which the carrier undertakes to deliver the goods.”<sup>32</sup> However, the English version of the code remains the same as the English version of the article 1(7) in Hamburg Rules. Although the Chinese version as the original formal version prevails over the English one, the intention of the draftsmen is to include the presentation rule under the bill of lading. It is a very common practice in China that the judges regard this rule as a “statutory obligation” of the carrier.<sup>33</sup>

However, with the development of the functions of negotiable bill of lading, the presentation rule is explained otherwise.

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<sup>29</sup> Wilson, p.158.

<sup>30</sup> Art. 1(7) *Hamburg Rules*.

<sup>31</sup> See example of Sect. 42 (2) of the *Finish Maritime Code*.

<sup>32</sup> Art. 71 CMC.

<sup>33</sup> See part 5 below.

## **2. Document of title and presentation rule**

### **2.1 Bill of lading: document of title**

One important attribute of bill of lading is that it can be used as a “document of title.” However, the definition of the “document of title” is still vague.

Under English laws, this term is used in a narrow common law with a much broader statutory sense.<sup>34</sup> In the Factor Act 1889, section 1 (5), “‘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 authorize, either by endorsement or delivery, the possessor of the document to transfer or receive goods thereby represented.” This definition is also incorporated in section 61 (1) of Sale of Goods Act 1979 by reference. The document that is defined as “document of title to goods” under the statute may not be the one in common law sense, and only the bill of lading is such kind of document in both common law and statutory sense.<sup>35</sup> The meaning of “document of title” as to the bill of lading is usually discussed in a common law sense.

However, “there is no authoritative definition of ‘document of title to goods’ at common law.”<sup>36</sup> The situation is similar in China. This term and such function of bill of lading are adopted widely in China, but it is difficult to find an exactly matched term to the “document of title.” Usually, “document of title” is translated into “the document of the right *in rem*” in Chinese. Nevertheless, the arguments on the titles under the bill of lading and on the appropriate translations for this term never stop.<sup>37</sup>

Generally and briefly, “document of title” means that the document is the symbol of the goods, and transfer of this kind of document may transfer the title to the goods to the holder.<sup>38</sup>

The title function of the Bill of lading usually is explained as “the very reason” for the delivery against the production of the bill of lading.<sup>39</sup> Similarly, it is so

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<sup>34</sup> A. g. Gueast (general editor), *Benjamin's Sale of Goods* (hereinafter as “*Benjamins's sale of Goods*”), 6<sup>th</sup> ed., Sweet and Maxwell, 2002, p.969; also see Carver on Bill's of lading, p.239.

<sup>35</sup> *Benjamin's Sale of Goods*, 18-008. p. 971-972,

<sup>36</sup> *Ibid* at p.969.

<sup>37</sup> See, for instance, Li Hai, *Questions on “Bill of Lading is a Document of Title,”* vol.17, Annual of China Maritime Law 1996, pp. 41-52; see also Hu Zheng-liang, Cao Chong, *A Re-consideration on the Functions of Bill of Lading as a Document of Title*, vol.7, Annual of China Maritime Law 1996, pp.53-77.

<sup>38</sup> However, what are exactly the titles embodied by the bill of lading needs further discussion, see part 2.3 below.

<sup>39</sup> See Paul Todd, *Contracts For the Carriage of Goods by Sea*, 1<sup>st</sup> ed., BSP professional Books, 1988,p.198.

observed in many English cases, such as *The Houda*: “Once a bill of lading has been issued only a holder of the bill can demand delivery of the goods…it is because of the existence of this principle that a bill of lading can be used as a document of title…”<sup>40</sup>

In China, the title function of the bill is a major factor in determining carrier’s liabilities for delivery without Bill of lading in vast cases. Furthermore, the expression that “provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking” in article 71 of CMC<sup>41</sup> is summarized as the “document of title function” of the bill of lading.<sup>42</sup>

But in my view, these explanations may not tell the real relationship between the presentation rule and the “document of title” feature of the bill.

Knowing the history of establishing the title function of the bill and the implication of the titles under it will be helpful to understanding the independence of and the interrelation between the presentation rule and the document of title.

## 2.2 Document of title: result of merchant customs

The title function of the bill of lading was improved for the normally long voyages and the slow speed of the ancient shipping. With the development of the trades, the owner of the goods may hope to sell the goods in the transit, and a symbol of goods was required in order to replace the physical delivery of the goods, which was impossible during the transit, by the delivery of such a symbol.

As early as in 1554, there was a Dutch bill of lading stating that the goods should be delivered to “the said merchant, his factors or assigns,”<sup>43</sup> and transferability is concluded to arise in the second quarter of the 16<sup>th</sup> century.<sup>44</sup> In addition, the endorsement of bills of lading as a well-established custom “has already been in existence for a considerable period” by the 18<sup>th</sup> century.<sup>45</sup> Though these practices could not eventually prove the title function of the bill, they could at least demonstrate the sales of the Goods in the transit.

The desire for sales on bill of lading made up for the limitation of statutory laws.

<sup>40</sup> *Kuwait Petroleum Corp. v. I&D Oil Carriers Ltd*, Neil C. J’s observation, (1994) 2 Lloyd’s Law Rep., p.550 at 541.

<sup>41</sup> As mentioned for several time in supra chapters, the English version of this article, which is slightly but significantly different from the Chinese version, is: “based on which the carrier undertakes to deliver the goods *against surrendering the same*”(emphasis added). The phrase “against surrendering the same” does not exist in the Chinese version.

<sup>42</sup> *Interpretation of CMC*, 1993, p.59; see also Xing Hai-bao, *On Effectiveness in Rem of the Bill of Lading* (hereinafter “Xing Hai-bao’s Effect in Rem”), vol. 11, Civil and Commercial law Review, 1997,4, p78 at pp.67-112.

<sup>43</sup> Bennett, p.11.

<sup>44</sup> Bools, p.3.

<sup>45</sup> Bennett, p.11.

For example, *Napoleonic Code* made no provision for a sale of goods other than that is made through a personal meeting between buyer and seller during which the buyer had the opportunity to inspect the goods and express his satisfaction before the deal could be made. However, as early as 1818, the Mediterranean merchants asked the courts at Marseilles to recognize the legal effectiveness of the “*vente maritime*”, i.e., the “maritime sale of goods,” which was a bargain and sale of a bill of lading representing goods at sea. The court approved it. Later, other French courts accepted this practice, and, sales on bills of lading spread to all ports of the Mediterranean and every part of the continent of Europe.<sup>46</sup>

Dated from around 1840, the first English court decision recognized such course of trade.<sup>47</sup> And finally, as Bowen LJ observed in the case *Sanders v. MacLean*: “During the transit and voyage the bill of lading, by the law merchant, is universally recognized as its symbol and the endorsement and delivery of the bill of lading operates as a symbolic 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.”<sup>48</sup>

Hence, the bill of lading may represent the goods indicated in it, and the delivery of the document may represent the delivery of the goods between the traders.

But what title can a bill of lading represent? In other words, what title or titles can the holder of a bill of lading possess? This should be determined by the intention of the transferor when he transfers the document.

### **2.3 Titles to goods under a bill of lading**

#### **2.3.1 Ownership of goods**

As a traditional opinion held for a long time in English Law, transferring a bill of lading will transfer the ownership of the goods. In the landmark case, *Lickbarrow v. Mason*, it was firstly clearly expressed: “By the customs of merchants, bills of lading, expressing goods or merchandises to have been shipped…to be delivered to order to assigns … and that by such endorsement and delivery, or transmission, the property in such goods has been, and is transferred and passed to such other person or persons.”<sup>49</sup>

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<sup>46</sup> A. W Knauth, *The American Law of Ocean Bills of Lading* (hereinafter “Knauth”), 4<sup>th</sup> ed., American Maritime Cases INC., pp.374-375.

<sup>47</sup> *Ibid* at p.375.

<sup>48</sup> (1883) 11QBD 327 at p.341, recited in *Bennett's*, pp.18-19.

<sup>49</sup> (1794) 5 term reports p.685 at 683, cited in Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (hereinafter as “*Cases and Materials on Carriage by Sea*”), Cavendish publishing limited, 1997, p.171.

*Bills of Lading Act 1855* of UK confirmed this viewpoint statutorily that a bill of lading is a representation of property. “A bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the indorsee.”<sup>50</sup> In addition, in order to break the limitation of the privity of contract, as an expedient, the “rights in respect of the contract contained in the bill of lading” “should pass with property,” which provided the indorsee, i.e. the holder of the bill rights of suit against the carrier on the condition of the property.

In addition, the following English cases further enunciated the inherent relationship between the property and the holder’s right to the goods. For example, a bill of lading is a key to “unlock the warehouse of the goods” based on the property passed by the endorsement of bill of lading, the “property in the goods passes by such indorsement and delivery of the bill of lading … just as under similar circumstances the property would pass by an actual delivery of the goods … And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof … (the bill) remains in force as a symbol, and carrier with it not only the full ownership of the goods, but also all rights …”<sup>51</sup> “It is a key in the hands of a rightful owner,” the indorsee, i.e., the holder of the bill, therefore is entitled to all of the rights to the goods, including the right to take the delivery of the goods.

In China, similarly, a bill of lading was called the “document as to the ownership of goods” in a relatively long period,<sup>52</sup> and “the holder of a bill of lading enjoys the ownership of the goods in terms of the provisions in the bill,”<sup>53</sup> and the ownership of the goods was the main theoretical base for the right of the holder to claim the goods against the carrier.

This point is reflected in the jurisdiction. In the appealing cases of *Xingli Co., Guang’ao Com v. India International Corp., Malaysia Balapuer Corp. and others*, the Supreme Court of China concluded that “bill of lading is a document of title, and the holder of the a bill is the owner of the goods under the bill.”<sup>54</sup> Furthermore, in cases of *Huarun Com. of Materials of Textile Hong Kong v. Zhanjiang Shipping Agency Com. Guangzhou* on delivery without production of bill of lading other cases, the maritime courts observed that “bill of lading is the document of the ownership” and “the person who holds the bill of lading legally owns the property to the goods.”

<sup>50</sup> Art. 1 *Bill of Lading Act 1855*.

<sup>51</sup> Bowen LJ’s observation in *Sanders v. Maclean*, supra fn. 48.

<sup>52</sup> See Wei Wen-da, *Maritime law*, 1<sup>st</sup> ed., law press, 1984, pp.37-38; Shen Da-ming, Feng Da-tong, *Newly on International Trade Law*, 1<sup>st</sup> ed., law press, 1989, p. 157; see also Si Yu-zhuo and others, *Newly on Maritime Law*, 1<sup>st</sup> ed., the people’s communication press, 1991, p.151.*Interpretation of CMC*, P.59 and so on.

<sup>53</sup> Song Chun-lin, *Legal Natures of Bill of Lading*, vol.2, Annual of China Maritime Law, 1991, p.124, p.128 at pp.120-129.

<sup>54</sup> In *Gazzett of the Supreme Court of PRC*, 1991, 1, p.47.

In recent years, there is still the support for the point that "the title embodied by bill of lading is the ownership of the goods,"<sup>55</sup> and "bill of lading as document to the property of goods is in accordance with the history, the desirability of the international trade, the transactions as well as the laws."<sup>56</sup> Or, under some modified theories, though the bill of lading may play a role as a document to collateral title, during the course of sales, its "function is the title to goods, and precisely, the ownership of the goods."<sup>57</sup>

In the international trade, bill of lading indeed plays an important role on the transfer of the property of the goods in a lot of cases. For example, even under some regimes, the seller is allowed to retain the property of the goods until he receives the purchase price, so, the passing of property is on a condition of the receipt of price.<sup>58</sup> But together with this rule, most of the CIF and FOB contracts are agreed as "delivery of document against the payment."<sup>59</sup> So delivery of the bill of lading usually occurs based on the payment of the price; hence, the property usually passes with the bill of lading.

### 2.3.2 Ownership not always pass with bill of lading

However, the viewpoint that "bill of lading represents the ownership of goods" and "transfer of the bill will transfer the property of the goods" is not always in line with the practice of the international sale and finance courses

For example, buyer often provides a bill of lading as a security to the bank for the loaning. In such cases, the property has not been transferred to the banker if he holds the bill even though the buyer assumes the ownership later before the loan is repaid. In addition, by an agreement, a seller is entitled to retain the property of the goods even after a bill of lading has been transferred to the buyer. In the famous but very special English case of *The Aliakmon*,<sup>60</sup> an agreement showed that the seller transferred the bill just for the purpose of enabling the buyer to take the goods but the property of them was still retained by the seller.

Furthermore, the statutory provisions also may stop the automatically passing of the property by transferring the bill. Section 16 of the UK *Sale of Goods Act*<sup>61</sup>

<sup>55</sup> Liu Xin, *Title Presented by Bill of Lading*, *Maritime Law Review*, 2001, 1, p.61 at pp.43-61.

<sup>56</sup> Hu Zheng-liang, Cao Chong, *A Reconsideration on the Functions of Bill of Lading as a Document of Title*, vol.7, *Annual of China Maritime Law*, pp.53-77.

<sup>57</sup> Si Yu-zhuo and others, *Theory and Practice on Delivery of Cargo Without Bills of Lading---also on the Title Nature of Bill of Lading* (hereinafter as "Si Yu-zhuo's Delivery without B/L"), vol.11, *Annual of China Maritime Law*, 2000, p. 27 at pp.18-29.

<sup>58</sup> Leo D'Arcy and Carole Murray, Barrara Cleave, *Schmitthoff's Export Trade, The Law and Practice of International Trade* (hereinafter as "Schmitthoff's Export Trade"), 10<sup>th</sup> ed., Sweet & Maxwell, 2000, p.74.

<sup>59</sup> Yang Da-ming, *Delivery of Cargo Without Production of Bill of Lading---- The Potential Risks*, translated by Fan Wei and others, vol. 11, *Annual of China Maritime Law*, 2000, pp.32-33 at pp.30-57.

<sup>60</sup> *Leigh & Sullivan Ltd. v. Aliakmon shipping Co. Ltd.*, (1986) 1 AC 785, (1986) 2 Lloyd's Rep. 1.

<sup>61</sup> "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the

prevents the property from being passed before the goods have been ascertained, so the property will not normally pass until the discharge of the vessel at the earliest even though bills of lading to the goods have been transferred earlier than it as usual. This section caused the conflicts with the *Bill of Lading Act 1855* which assigned the holder of bill of lading the right under the contract of carriage and the right of suit on the basis of property passed by the bill as introduced above. The case of *The Aramis*,<sup>62</sup> in which a short delivery was made of goods forming part of a larger bulk revealed this conflict.<sup>63</sup>

This conflict in statutes was one of the important reasons that spurred the enactment of COGSA 1992<sup>64</sup> of UK, which provided the lawful holder of bill of lading with rights of suit under the contract of carriage against the carrier without linking with the property of the goods.<sup>65</sup>

Under China laws, the counterparts are entitled to make agreement on the passing of the property of the object,<sup>66</sup> so it is also possible that the property may not pass together with the transfer of bill of lading, whether sooner or later.

### 2.3.3 Varieties of the titles a bill of lading can stand for

So, under different circumstances, the title under a bill of lading to the goods may be various. As Michael D. Bools said, “The property in the goods cannot in practice be ‘locked’ into the document because the bill and the goods can be dealt with entirely separately … property is not an indivisible concept…”<sup>67</sup>

In those different cases, the intentions of the transferor become an important element. The transfer of bill of lading is the result of the transactions made between the parties under the contract of sale of goods, contract of loaning and so on; there may be different underlying intentions. Hence, “document of title” also is a comprehensive concept with various meanings: it might stand for the ownership of goods, but not always so. More and more Chinese authors began to accept this opinion, too.<sup>68</sup>

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<sup>62</sup> buyer unless and until the goods are ascertained,” Section 16 of *Sale of Goods Act*.  
<sup>63</sup> (1989) 1 Lloyd’s Rep. 213.

<sup>64</sup> See Law Commission for England and Wales, Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea*, document NO: LAW COM. No. 196, SCOT LAW COM. No. 130, march, 1991, p.5.

<sup>65</sup> See John Richardson, *A Guide to the Hague and Hague-Visby Rules*, 3<sup>rd</sup> ed., Lloyd’s of London Press, Ltd, 1994, p.76.

<sup>66</sup> See section 2(1) of COGSA 1992.

<sup>67</sup> “The ownership of an object shall be transferred upon the delivery of the object, except as otherwise stipulated by law or agreed upon by the parties.” See art.133 of CLC, in addition, para. 2of art.72 of *General Principles of Civil Law* provides almost the same explanation.

<sup>68</sup> Bools, p. 376.

<sup>69</sup> See *Guo Yu’s Bill of Lading*, pp.84-100; *Si Yu-zhuo’s delivery without Bill of Lading*, supra fn 18, pp.26-7, Li Zhang-jun, “On Legal Natures of Bill of lading,” in *Theory and Practice of Maritime Jurisdiction*, Tang Neng-zhong (chief editor), 1<sup>st</sup> ed., law press, 2002, pp. 47-76 and so on.

### **2.3.3.1 Constructive/symbolic possession of goods**

In UK, the function of possession of goods by holding the bill of lading was first demonstrated in the 1870s in the case of *Barber v. Meyerstein*, “(the bill of lading) was delivering to the right person, be a symbolic possession, and practically the key to the warehouse...”<sup>69</sup> Later on, it was further established that “possession of it (the bill) is only equivalent to a physical possession of them (the goods).” This theory also provides for the explanation for the documents purchasing under sales contracts: “possession of the bill of lading was in law equivalent to possession of goods, and that under a CIF contract the seller was entitled to payment on shipping the goods and tendering to the buyer the document of title.”<sup>70</sup>

It is so concluded by authorities: “document of title to goods” means a document relating to goods, the transfer of which operates as a transfer of the constructive possession of the goods,<sup>71</sup> or the symbolic possession of the goods<sup>72</sup> (and may operate as a transfer of the property in them).

Not only in UK, but also in other countries, this viewpoint became a common idea. For example, by the 1850s, the American courts had recognized the possession of a bill stood for the possession of the goods. In The *Bank of Rochester v. Jones*, judges observed: “...the delivery of the carrier's receipt to the bank was a good symbolic delivery of the flour. It was as effective in transferring the possession as the delivery of the keys of a warehouse, or the receipt of a storekeeper.”<sup>73</sup> And the consequent cases further confirmed that the transfer by delivery of the bills of lading “stood as an actual change in the possession of the cargo itself.”<sup>74</sup> The statutes stipulate clearly that with due negotiation of the order bill of lading, the holder of it acquires the title to the goods and the carrier is borne by the direct obligation “to hold the possession for him.”<sup>75</sup>

Now in China, it is also a popular view that the title or titles represented by the bill of lading is the right to the possession, or at least includes the right to possession of the goods.<sup>76</sup> However, the theoretical bases for the right to

<sup>69</sup> (1870) L. R. 4 H. L. 317,330 cited in *Bools*, p. 179.

<sup>70</sup> *Horst Co v. Biddell Bros*, (1912) AC 18, cited in *Payne & Ivamy's Carriage of Goods by Sea*, p.81.

<sup>71</sup> *Benjamin's Sale of Goods*, para 18-007, p.970; see also *Carver on Bills of Lading*, para. 6-001, p.239; Paul Todd, *Bills of Lading and Bankers' Documentary Credits*, 2<sup>nd</sup> ed., Lloyd's of London Press Ltd, 1990, p.12.

<sup>72</sup> *Bools*, pp. 173-184. Although the author distinguishes the “symbolic possession” from the “constructive possession” (see pp.180-181), the difference-between the two terms is slight, and they are both legal possession. And in most cases, it is not very necessary to tell one from the other.

<sup>73</sup> 4 Comst. 497, 507 (1851) cited in *Bools*, p. 176.

<sup>74</sup> *Bools*, pp.176-7.

<sup>75</sup> See USCA, TITLE 49, § 80105, “Title and Rights Affected by Negotiation”.

<sup>76</sup> See *Guo Yu's Bill of Lading*, p.86, *Xing Hai-bao's Effectiveness In Rem*, pp.80-89; Zhao De-ming, *On Attributes In Rem of the Bill of Lading as a Documents of Title (hereinafter as “Zhao De-ming's Attributes in Rem”)*, Vol.7, Civil and Commercial Law Review, 1997, p123 at pp.108-136.

possession are discrepant:

One puts the indirect possession as the theoretical basis of the symbolic delivery of goods by the document.<sup>77</sup> This theory also has its position in China Taiwan, where it is established that bills of lading merely stand for the intangible indirect possession, and for nothing else.<sup>78</sup> “Indirect possession” means the legal but non-physical possession.<sup>79</sup>

Others concluded that holding the bill of lading stands for the constructive possession of the goods.<sup>80</sup> In addition, this theory precludes the application of the theory of indirect or the legal possession.<sup>81</sup>

Some scholars even innovated the “constructive direct possession” to the goods by the bill of lading.<sup>82</sup>

Frankly, I don not think these discussions or debates are fairly meaningful. These theories have the common essence that the right stood for by the bill may be the right to the possession of the goods, which is not a physical possession. As I have demonstrated in part 3 of Chapter 2, the right obtained by the holder of the bill of lading is, in a more usual term, the legal possession to the goods. Since this legal possession is represented, or deduced by the document, it is a symbolic or constructive legal possession.

So, with an effective legal possession to the goods, the holder of a bill of lading is entitled to claim for the physical possession of the goods against the carrier who is the holder or the custodian of the goods, at the destination.<sup>83</sup>

The constructive possession to the goods by holding the bill of lading may have the following implications:

**First of all**, the right to possession may be separate from the ownership of the goods, and the right of legal possession shall prevail over the ownership to the goods when physical possession is concerned. Therefore, even though the ownership of the goods is still retained by the seller or the transferor of the bill, the holder of the bill of lading may have prevailing rights to demanding the physical possession of the goods against the carrier.

**Secondly**, the right of possession is exclusive and it may bring the control over the goods

The right to the possession will exclude others’ interference with it and may bring the control over the goods. According to the theory of legal possession, the right of control is vested in the principal of the legal possession. So, when the legal

<sup>77</sup> See Xing Hai-bao’s *Effectiveness in Rem*, pp.81 at pp.67-112.

<sup>78</sup> Zhang Dong-liang, *Newly on Maritime Law*, Taiwan wu nan books Publishing Ltd., 1986, p.304.

<sup>79</sup> See part 3 of Chapter 2 of this thesis.

<sup>80</sup> Zhao De-ming’s *Attributes in Rem*, pp.133-136 at pp.108-136.

<sup>81</sup> *Ibid*, pp. 133-134.

<sup>82</sup> Guo Yu’s *Bill of Lading*, p.86.

<sup>83</sup> See also part 3, Chapter 2 of this thesis.

possession is transferred with the bill of lading, usually, the right of control is vested in the legal holder of a bill of lading.

It is demonstrated that the transfer of the bill raises two presumptions: 1) the transferor no longer intends to exercise the control over the goods or to interfere with the transferee's ability to obtain the possession of the goods; 2) the transferee intends to exercise the control over the goods and to exclude all others from the control over the goods.<sup>84</sup>

However, this is only the presumption, the right to control may be rebutted by the evidence on the contrary.<sup>85</sup>

**Thirdly**, the bill of lading is merely the *prima facie* to the right to possession.

In my view, the bill of lading is merely the evidence of the title to the goods and it can't create the titles. The right to possession acquired by the transferee is based on the condition that the transferor is entitled as well as intends to transfer this right. The holding of the bill is merely the *prima evidence* of this title to the goods, the contrary evidence, such as the transferor retains the right of possession to the goods, or the holder got the bill of lading via illegal courses, can rebut it. This is also one of the implications of the word "constructive". So, when there are reasonable arguments or proofs that the bill of lading holder is not entitled to the possession of the goods, the carrier shall be very prudent on the delivery of goods to him.

However, from the point of the carrier, it's not so easy to examine the intention and the titles of the transferor. So, as a simplified rule, without contrary evidences, a duly indorsed bill of lading usually is deemed as the representation of the possession to the goods. Delivering the goods to the holder of the bill of lading will not only be the obligation of the carrier, but also be a protection for the carrier to avoid the infringement of title of the legal possessor.

### **2.3.3.2 Collateral title**

A considerable proportion of international trade is financed by the banks through a system of documentary credit. Under a normal international sales contract, the seller will submit the bill of lading to the bank together with the original sales invoice and other documents required by the buyer. Usually, the opening banker and the applicant for the documentary credit will make an agreement to provide a security to the advance by the bank. As the agreement, generally, the bank will retain the bill of lading before the advance repaid. In these cases, the box of consignee on the face of the bill of lading is noted as "to order of" the bank, or "to order" of the shipper. In the latter case, the bank gets the bill with the endorsement

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<sup>84</sup> See *Bools*, p.183.

<sup>85</sup> *Ibid* at p.184.

by the shipper. When the buyer fails to pay the advance, the bank, as the holder of the bill, is entitled to demand the delivery of the goods in most cases.

When the bill is transferred to the bankers, generally, the property of the goods does not pass simultaneously. So, what title does the banker get on the bill of lading? As a common idea, it is a collateral title.

In a not short period, there was no concept of pledge under the laws of PRC.<sup>86</sup> The *General Principles of Civil Law* does not handle the collateral titles and the *Legal Views of the Implement* of it issued by the Supreme Court in 1988 merely deals with the right of mortgage when a thing is agreed to be as a security for the debt. “When a fortune is provided for a security, whether it is a movable, real estate or a document for value, whether the possession of it is delivered or not, it shall all be called Mortgage.”<sup>87</sup> So the bill of lading as a security to the bank is also deemed as a mortgage then.

With the enforcement of the *Collateral Law*, the situation changed. The Law deals with the mortgage, pledge, lien, *arra* and other collateral rights. As to a pledge, it is divided into “pledge of movables” and “pledge of rights.”<sup>88</sup> In the “pledge of rights”, it is so provided that the “following rights, *inter alia*, bill of exchange, stock, intellectual property and bill of lading can be pledged.”<sup>89</sup> So, the consensus has met that when a bill of lading is transferred as a security, it constitutes a pledge to the transferee.<sup>90</sup>

Though the bill is usually transferred from the seller to the bank, I argue for the point that buyer is the *pledgor*. The advance contract is made between the buyer and the bank, and the bill is the security for buyer’s debt. When the seller submits the bill of lading and other documents to the bank, it constitutes a delivery of documents to the buyer, and under the sales contract, the obligation of delivery of the document is usually fulfilled by this submission if the documents have no defect. Under this circumstance, the bank can be deemed as the agent of the buyer to receive the documents. Then under the contract of letter of credit, the buyer transfers the bill to the bank as a security. In order to simplify the course, the bank shall get the bill directly from the seller, which is a shortcut of the circulation of the bill.

<sup>86</sup> But before the founding of P. R. China, there were provisions on pledge and other collateral titles. And even in ancient China, there was only the concept of pledge but without the one of mortgage.

<sup>87</sup> Wang Li-min, Guo Ming-rui and Fang Liu-fang, *Newly on Civil Law*, 1<sup>st</sup> ed., Publishing House of China University of Politics and Law, 1988, p.313.

<sup>88</sup> See Chapter 4 “Pledge,” *Collateral Law of PRC*.

<sup>89</sup> Art.75, *Collateral Law of PRC*.

<sup>90</sup> According to the *Collateral Law of PRC*, the main differences between the mortgage and pledge are: 1) a mortgage can be set up on a real estate, but a pledge can not; 2) pledge can be established on a title or right, but a mortgage only on the things; 3) in a pledge, the possession of the movables or document of title or document of right shall be delivered to the *pledgee*. However, there is no definition for the “document of title” or “document of right” under China law.

As a collateral title, it provides the pledgee with a privilege to the disposal of the object when the *debtor* fails to fulfill his debts,<sup>91</sup> and the creditor holding the bill may exercise the exclusive rights to the goods, including demanding the goods from the carrier excluding the title or right of the owner, or other persons in most cases.<sup>92</sup>

There are viewpoints that the pledge of bill equals to pledge of the goods. For example, this is a common idea under the common law.<sup>93</sup> *Factors Act 1889* of UK stipulates the same: “A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.”<sup>94</sup> In China, it is also accepted to a certain extent. “In the theory of constructive possession, pledge on bill equals to the pledge on goods … so after the pledge of the bill it is not necessary to make another contract on the pledge of the goods.”<sup>95</sup>

Some other authors, noticing that the *Collateral Law* of China distinguishes the “pledge of movables” from the “pledge of the rights”, and the bill of lading is specifically included in the latter, concluded that the transfer of the bill as a security to the debt should constitute both the pledge on the goods and the pledge of the document itself.<sup>96</sup>

However, under China law, it is not very necessary to add the pledge of goods to the pledge of rights. Just the theory of pledge of rights under the bill of lading or the pledge of document<sup>97</sup> can explain the creditor's rights well, and it matches the situations of the rights of the holder even better.

**First**, when a bill of lading is transferred as a security to the creditor, there is no persuasive evidence that the parties of the debt have the intention to pass the possession of goods immediately. On the contrary, the bankers usually are unwilling to claim the goods for a long period after they get the bills, and in most cases, the banks are very indifferent to the arrival of the goods at the destination.

**Secondly**, more importantly, the pledge provides the creditor with a right to the disposal of goods with a condition, that is, if the debtor fails to fulfill his debt. A bill of lading is generally transferred to the banker attached with a bill of exchange. In view of the collateral title relationship, usually, the creditor is not entitled to claim the goods or to dispose of the object before the period of the bill of exchange or the period fixed for the repayment of the advance expires.<sup>98</sup>

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<sup>91</sup> Art. 63, *Collateral Law of PRC*.

<sup>92</sup> However, a holder of a lien or possession lien shall have priority in the possession and disposal of the goods over others.

<sup>93</sup> See *Bool*, p. 176.

<sup>94</sup> Section 3, *Factors Act 1889*, UK.

<sup>95</sup> *Zhao De-ming's Effectiveness in Rem*, p. 135.

<sup>96</sup> *Guo Yu's Bill of Lading*, p.100.

<sup>97</sup> Because the rights to the goods are embodied in the document.

<sup>98</sup> According to *Collateral Law of PRC*, if the time for cash or the time for delivery under a bill of exchange and bill of lading or other documents expired before the expiration of the secured debt, the pledgee may

So, the transfer of the bill of lading as security does not transfer the legal possession or the property to the goods immediately. It transfers the title to the goods in the future. The possession of goods, even very possibly the property to the goods, may be transferred only when the pledgee fails to fulfill his debts. These future titles provide the pledgor with a security. I like the term in some English cases that with the transfer of bill as a security, “the interest to goods” pass.<sup>99</sup>

In addition, even regardless of the possession or property title to the goods in the future, the bill of lading may provide the creditor with sufficient security too. Since the right to delivery of the goods is not only a right based on the title to goods, but also a obligatory right, or in other words, *jus in personam*, by the bill of lading itself.<sup>100</sup> So, when the creditor gets the bill in due course, he may get the right to the delivery of goods immediately, no matter when the possession of the goods will be transferred. Furthermore, if the obligor of the pledged right fails to perform his obligation, the pledgee is entitled to sue against the obligor.<sup>101</sup> This provision entitles the holder of bill as the creditor to sue against the carrier for infringing his pledged right when the latter, the obligor of the pledged fails to deliver the goods to him.

Therefore, in this sense, it will be more proper to call the pledge of bill “pledge of rights”, which may provide the pledgee sufficient security.

#### 2.4 Title function and presentation rule

In summary, as a “document of title to goods,” a bill of lading may represent different titles to the goods covered by it under various circumstances. The title function of bill of lading mainly plays an important role during the course of the sales of goods, finance, security and so on. And, which title to the goods will pass with the transfer of bill of lading will be determined by the intention of transferor and the status of the property of him. In addition, the applicable property law will also determine what are the titles under a bill of lading. Nevertheless, the title function of the bill of lading reflects the close relationship between the sales contract and contract of carriage of goods by sea.

First of all, the presentation rule of the bill of lading on delivery and the function of it as a “document of title” are independent from each other.

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claim the cash and delivery in advance, see art. 77. But this provision merely resolves the conflicts of the expirations between the right under the document and the right of the the principal-debt, it provides the pledgee with a limited right and he is not entitled to the disposal of the goods or money until it has been agreed between the pledgee and the pledgor.

<sup>99</sup> See *Cases and Materials on Carriage Sea*, pp.172-3.

<sup>100</sup> As to the exact source of this kind of *jus in personam*, there are different theories, such as the contract of carriage, the bill of lading, the document of value and so on, for details see the coming part 3 “Transferability of bill of lading and presentation rule.”

<sup>101</sup> Art. 106, *Interpretations on the Implement of the Collateral Law of P. R. China by the Supreme Court*.

From the above introductions of the histories of the presentation rule and the title function of the bill of lading, it is clear that the presentation rule came from the merchant customs and the undertakings by the carrier. It is very likely that the presentation rule came up earlier than the document of title function was accomplished in the 16<sup>th</sup> century.

In addition, the functions of the presentation rule and the “document of title” are also different. It may be said that the presentation rule, from the beginning of its establishment, is the way to tell the carrier to whom the goods shall be delivered when a bill of lading has been issued. Delivery against the production of bill of lading is a promise of the carrier under the contract of carriage.

However, the title document of the bill of lading means the document can present for the goods under it or the titles of the goods. The transfer of the document may complete the symbolic delivery of goods under the sales contract, or may provide the collateral title to the goods.

The presentation rule is “simpler” than the title function of the bill. The former merely deals with the obligation of the carrier under the contract of carriage of goods at the point of delivery, but is not involved in the transactions of the goods. From the perspective of the carrier, he has no opportunity to examine which title is included under the bill of lading, either. Moreover, as I have emphasized above, the delivery of goods under the contract of carriage does not handle the transfer of the propriety titles.

In this sense, the rule and the function of the title of goods is independent from each other. “Surrender of an original bill at the place of arrival is a condition for the delivery. This feature is not a consequence of the bill being a document of title or being quasi negotiable<sup>102</sup> in logic it is quite separate from them.”<sup>103</sup> The legal meanings and connotations of the presentation rule and the document of title, which are the two attributes of bill, are different.

However, these two functions are not isolated from each other. In fact they are related closely in a lot of cases.

First of all, why is the bill of lading rather than other documents, chosen to be this kind of symbol of goods? Suppose it is because of the demand for the efficiency and safety of the merchant, as well as because of the features bill of lading had possessed in the early stage. Because the early bills of lading had borne the function of the receipt of the goods, it could provide the evidence of the quantity and conditions of the shipped goods during the trading. In addition, with the development of the presentation rule of the bill on the delivery, it might provide a security for the buyer of the goods to get the things directly from the carrier on

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<sup>102</sup> According to Schmitthoff, the feature as quasi-negotiable document means “rights of contractual nature can be transferred”, *Schmitthoff's Selected Essays*, pp.377-378.

<sup>103</sup> *Ibid*, p382.

showing the bill. So these features of the early bills of lading impelled the traders to make the bill of lading, instead of other separate document, the symbol of goods.

From the other point of view, in most cases, the function of “document of title” may explain why the holder of a bill of lading has the prevailing title to the physical possession of the goods. In order to avoid the infringement of title to the goods, the carrier shall deliver against the bill. It is also a protection for the carrier. So, the title function forces the insistence on the presentation rule. In addition, the title function may be related to the nature of the liabilities of the carrier when he fails to comply with the presentation on the delivery.<sup>104</sup>

So, I’d like to say that the presentation rule of bill of lading encouraged the sales of goods in the transit and the transfer of the bill on one hand; while on the other hand, the title function of the bill in trading strengthens the necessity of presentation rule in the carriage.

### 3. Transferability of bill of lading and presentation rule

Usually, resulted from the transactions or agreements between the certain parties, bills of lading are transmitted from one to another by the delivery of the documents, in addition, with the endorsement in them when they are order bills.<sup>105</sup> This is called the transfer of bills of lading.

However, not all kinds of bills of lading are transferable. In the traditional view of bill of lading system, only bills noting the consignee as “to order of XX”, “to order” or those in similar words as well as those kept blank with the box of “consignee” are recognized as transferable. In addition, if the bill of lading lacks the word “order” or if it is explicitly described as non-transferable, usually as “non-negotiable”, then it is not transferable.<sup>106</sup>

In English law, the “transferability” and the “negotiability” of the documents are different, and the English scholars avoid using the latter word to describe an order or bearer bill of lading.<sup>107</sup> But in practice, the words “negotiability” and

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<sup>104</sup> For the possible liabilities of the carrier for delivery without bill of lading see part 5 and 6 below.

<sup>105</sup> Under a bearer bill of lading, the transfer of it is completed by the surrendering of the document without endorsement.

<sup>106</sup> In this point, usually a straight bill of lading is deemed as non-transferable. However, this is not accepted in all regimes. For example, in some scholars’ views, under civil law systems, a straight bill of lading is still transferable even when it is forbidden to be endorsed, but the extent of transfer is limited, see *Shi’s Specific on Obligation Law*, pp.595-596. In addition, this opinion is also expressed in the recent case law in common law system, such as *The Rafael S.*, (2003) 1 LLR, 113. For details of the case and the fuller discussions on legal natures and the presentation rule under straight bill of lading see Chapter 6.

<sup>107</sup> English scholars regard the “negotiable” is an inaccurate word for bill of lading, and the main difference is that “negotiability” of document means the transferee can obtain better title than the transferor, but the “transferability” does not, see *Scruton*, art. 94, p.185, *Debattista*, pp.55-7, *Carver on Bills of Lading*, p.4 and others.

“negotiable” are used in a wider range.<sup>108</sup>

In order to avoid the confusion, I will use the words in the group of “transfer” mainly in this part, and without noting specially, the bill of lading in this part means the order or bearer one.

### **3.1 Legal nature of the transfer of bill of lading**

Often, the “transferability” of bill of lading is considered together with the feature of “document of title.” In common law, generally, only bills of lading bearing of the feature of transferability can be recognized as document of title.<sup>109</sup> The transfer of bill of lading may usually be accompanied with the transfer of the title to the goods. However, this point merely describes the effect of the transfer of bill among the traders and other parties in the course of sales and finances etc., it can not express the effect of the relationship between the transferees and the carrier, nor can it explain why liabilities in addition to the title of goods are imposed on the holder of bill. In addition, the transfer of bill of lading does not always embody the transfer of proprietary right to the goods under it, it does not bring merely the title *in rem*.

#### **3.1.1 Theories and comments**

When the shipper holds a bill of lading, there is no argument that it is an evidence of the antecedent contract of carriage between the shipper and the carrier. The provisions in the original contract of carriage, no matter whether in written or in other ways, which are different from those in the bill of lading, will prevail. When the bill of lading is transferred to the person other than the original shipper, the obligations and rights between the carrier and the holder shall be concluded by the clauses in the bill of lading.<sup>110</sup> Theories to describe the relationship between the holder and the carrier, or the legal nature of the transfer of the bill of lading are various. The main assumptions are as follows:

##### **1) Bill of lading contract**

It is widely accepted that, between the carrier and the transferee, there is a contract of carriage independent and separate from the original contract between the original shipper and the carrier. “The bill of lading is the contract of carriage,”<sup>111</sup> or the contract “contained in the bill of lading,”<sup>112</sup> or bill of lading is

<sup>108</sup> For example, in USA's legislations the transfer of bills of lading is described as “negotiation” or “negotiable,” for example, USCA TITLE 49, CH 801, the UNCITRAL Draft Instrument uses the word “negotiable” too.

<sup>109</sup> *Debattista*, 3-03,p.54.

<sup>110</sup> E.g., art. 78 of CMC .

<sup>111</sup> *Carver on Bills of Lading*, para3-007, p, 67.

the “only evidence” of the contract of carriage,<sup>113</sup> “excluding any terms agreed to between the shipper and the carrier outside the bill”<sup>114</sup> are the usual conclusions. Under these viewpoints, this contract is usually called the bill of lading contract.

In UK, this is the prevailing opinion. According to the case law and statutes, the orientations of bill of lading contract are mainly from two approaches.<sup>115</sup>

One is the approach of the implied contract. The contract was made impliedly by the delivery of goods against presentation of the bill and providing the consideration by the payment of freight or other charges by the receiver of the goods. The cases such as *Brandt v. Liverpool SN Co*<sup>116</sup> and *Cremer v. General Carriers*<sup>117</sup> are examples of application of this principle. However, this principle brought certain problems and difficulties and cannot explain all the cases well, so it has been gradually removed.<sup>118</sup>

The other way is the legal fiction. Since the judicial techniques had failed to produce a satisfactory solution, legislative intervention was deemed to be necessary.<sup>119</sup> The *Bill of Lading Act 1855* firstly provide the legal fiction that “every consignee of goods named in a bill of lading, and every endorsee of a bill of lading,” shall have transferred to and vested in him rights of suits, 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 him (emphasis added).”<sup>120</sup> The COGSA 1992 superseded the former act, but with similar words. The lawful holder of a bill of lading shall have transferred to and vested in him all rights of suit under the contract of carriage “as if he had been a party to that contract.”<sup>121</sup>

In China, bill of lading contract is also well accepted to a certain extent; when the bill of lading transferred to the third party, “the document itself is the contract of carriage” because of the provision of art.78 of CMC.<sup>122</sup>

The theory of bill of lading contract can express the relationship between the holder and the carrier well, especially why the rights and the obligations of the carrier and the holder are determined by the terms of bill of lading. However, it arouses several conflicts with the traditional theories of contract law. First of all, the creation of bill contract does not comply with the general course of the offer

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<sup>112</sup> *Debattista*, 7-04.p.135.

<sup>113</sup> *Carver on Bills of Lading*, ibid, see also *Scrutton*, art.33, and p.67.

<sup>114</sup> *Debattista*, 7-06.p.136.

<sup>115</sup> Other theories, such as that of agency, were of the same orientations, but were rejected, see *Carver on Bill of Lading*, 5-003, pp.152-3.

<sup>116</sup> (1924) 1 KB 575 cited in *Wilson*, p. 143.

<sup>117</sup> (1973) 2 Lloyd's Rep 366 cited in *Wilson*, p. 143.

<sup>118</sup> *Wilson*, pp.143-146, see also *Carver on Bills of Lading*, p.155

<sup>119</sup> *Carver on Bills of Lading*, 50005,p.155.

<sup>120</sup> Sect. 1 *Bill of lading Act 1855*.

<sup>121</sup> Sect. 2(1) (a) COGSA 1992.

<sup>122</sup> See Li Zhang-jun, “On Legal Natures of Bill of Lading,” in *Theory and Practice of Maritime Jurisdiction*, edited by Tang Neng-zhong, 1<sup>st</sup> ed. law press, 2002,p.60 at pp. 47-76.

and acceptance of a contract. Secondly, it does not clarify the relationship between the original contract of carriage and the bill contract. It is usually difficult to understand that on one carriage there should be two contracts. And questions like what are the differences between the rights and obligations of the shipper and the holder, where does these differences come from, and why is the shipper deprived of the right to delivery etc., can not be well answered. Furthermore, the independent contract theory cannot express the circulation of bill of lading or explain the transferability of it.

So the hypothesis of bill of lading contract would be a practicable solution, but not a rigorous theory.

## **2) Assignment of Contract**

This is also one of the popular opinions in China.<sup>123</sup>

Under this theory, the bill of lading is also deemed as the contract between the transferee and the carrier, but the holder gets the contractual position via the assignments of the original contract of carriage or the former bill of lading contract or contracts in the chain of transit if any.

This presumption can demonstrate the circulation of bill of lading as well as explain the distribution of the rights and obligations between the shipper and the holder. But one of the main disadvantages of this theory is the difficulty to explain why the carrier shall not avail himself of the defenses in the original contract against the transferee of bill. For example, when a bill of lading is issued under a charterparty, it is usually deemed as only the receipt of the goods, without the evidentiary function of the original contract, and the rights and liabilities in the bill are almost very different from those of the charterparty. The viewpoint in this theory, relationship between the carrier and transferee comes from the former contract, cannot explain aforesaid situations well.

Another difficulty of this theory lies in its inability to explain why the surrendering of the document is essential to consignee's right of delivery of goods. According to the assignment theory, the whole or part of the contract is assigned by the agreement and delivery of the document is not necessary in all cases.

So, the assignment of contract is not a very satisfactory theory either.<sup>124</sup>

## **3) Contract for the beneficiary of a third party**

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<sup>123</sup> See Si Yu-zhuo and others, *Newly on Maritime Law*, 1<sup>st</sup> ed., Dalian Maritime University press, 1999, p.170, Xing Hai-bao, *Law of Marine Bill of Lading*, 1<sup>st</sup> ed., Publishing House of China University Politics and Law, 1999, p. 471-475.

<sup>124</sup> Besides the abovementioned two insufficiencies of this theory, it is also observed that the assignment approach does not in line with the traditional manner of assignment of contract. Assigning the contractual rights shall notify the counterpart, sometimes shall even obtain the approval by the counterpart, when the obligation is assigned, see e.g. art. 80. 84 of CLC. But the transfer of the bill will never notify the carrier. However, in my view, this is not the very difficulty of this theory. As the technique of the assignment is concerned, it may be resolvable or altered by the intervention of law or of an agreement in advance between the contractual parties.

The contract of third party's benefit was created in civil law,<sup>125</sup> and is also an important theory to explain the bill of lading relationship in some civil law countries.

In China, more attention has been paid to this theory in recent years, and some scholars conclude that when the consignee is a person other than the shipper, the contract of carriage is the one made for the third party's benefit.<sup>126</sup> It is further supported that only this theory can "explain the source of the rights and obligations of the consignee and the holder of bill of lading, and the distributions of the rights and obligations among the parties involved in the bill of lading."<sup>127</sup>

I agree with the point that the contract of carriage made by shipper and carrier is a contract made for the third party's benefit when the consignee is different from the shipper.<sup>128</sup> Delivery of goods to the designated consignee or the person ordered by someone is an arrangement for the third party's right to the delivery. However, this is the common nature of the general contracts of carriage whether by sea, by air or by road.

The theory of third party's benefit can illustrate the still triangle relationship between the shipper, carrier and the consignee; in addition, it can explain why it is the other one, but not the shipper, that is entitled to the delivery of goods. However, it ignores the moving circulation of bill of lading during the transit.

Furthermore, there are still several weaknesses of this theory:

**First of all**, in this theory, it is difficult to explain why the bill of lading is different from the sea waybill, since the rights of the consignees all come from the contract of carriage with the third party's benefit. Under traditional theory of beneficiary third party, there is no need to deliver the document to the beneficiary party.

**Secondly**, under the contract of third party's benefit, the obligator or *promisor* is entitled to invoke the defenses in the original contract against the third party. But when the bill of lading is transferred, if the provisions under the bill of lading are different from those in the original contract, the carrier is not allowed to use the

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<sup>125</sup> See Wang Ze-jian, "The Effect of Protection of the Third Party in Contract Relationship", in *Researches on Theories and Cases of Civil Law*, 1<sup>st</sup> ed., Publishing house of China University of Politics and Law, 1998, vol. 2, p.33, at pp.32-55.

Furthermore, this theory is well introduced into and developed in common law countries. For example, the Uniform Commercial Code of USA, sect. 2-318 regulates the "Third party's Beneficiaries of Warranties Express or Implied", UK promulgates the Contracts (rights of Third parties) Act 1999, see also to Corbin, *Corbin on Contract*, translated by Wang Wei-guo and others, 1<sup>st</sup> ed., China Encyclopedia Press, 1998, pp.175-250; see also Wang Ze-jian's, *ibid*, and Yang li-jun, *On Privity Principle in Anglo-America Contract*, vol. 12, Civil and Commercial Law Review, 1998, pp.352-454.

<sup>126</sup> Han Li-xin, Kan Ling-ling, *On the Legal Nature of the Contract of Carriage of Goods Evidenced by Bill of Lading---- Addition on the Effectiveness of Bill of Lading against a Third Party* (hereafter as "Han & Kan's Legal Nature"), awarded thesis in China "Sino-trans cup" thesis competition on maritime law 2003.

<sup>127</sup> *Ibid.*

<sup>128</sup> See supra part 3, Chapter 4.

defenses in the original one to defeat the claim by the holder. The situation will be the same between the bill of lading and some charterparties as cited for arguing against the theory of assignment. Even the supporters of this theory cannot explain this inconsistence well.<sup>129</sup>

Thirdly, this theory can't explain why the right of control of goods shall be transferred to the transferee of bill of lading but not like the situation under the sea waybill that retained by the shipper.

In addition, it cannot explain the phenomenon that a carrier under a bill of lading may be different from the one in the original carriage contract, so on and so forth.

In summary, the theory of the contract of third party's benefit contract rightly point out the legal nature of the contract of carriage and the origination of the rights of the consignee, when he is a third party under the contract of carriage. But this theory can't illustrate the legal feature of the bill of lading well, nor can it underpin the transferability of the bill.

#### 4) Instrument relationship

According to this theory, bill of lading is one kind of instrument of value, the relationship between the carrier and the holder of bill of lading is the as same as that of instrument. This theory is popular among the scholars of China Taiwan.<sup>130</sup> Some national statutes also treat the bill of lading as if it is an instrument for value. Article 820 of the *Commercial Code of South Korea* provides that the nature of instrument shall be applied to a bill of lading, while the *Greek Code of Private Law* provides that under an order bill of lading, "the existing laws on bill of exchange shall applied by analogy to the defenses against the holder of bill of lading."<sup>131</sup> This theory also has its position in China.<sup>132</sup>

In addition, there are theories of statutory relationship,<sup>133</sup> the tort<sup>134</sup> and so on.

#### 3.1.2 Mixture: contract of third party's benefit and instrument structure

Briefly, most of these theories have both advantages and disadvantages: a single

<sup>129</sup> For example, *Han& Kan's Legal Nature* avoided putting forward the solution for this difficulty.

<sup>130</sup> See *Shi's Specific Obligatory Law*, pp. 589-590; *Zhang Dong-liang, Newly on Maritime Law*, Tai wan wu nan books publishing Ltd., 1986, p.307.

<sup>131</sup> Cited in *Guo Yu's Bill of Lading*, p.111.

<sup>132</sup> See *Guo Yu's Bill of Lading*, p.110-123; Lin Qiang, *On the Sources of the Effectiveness of the Obligatory Rights Of Bills of Lading*, vol19, Civil and Commercial Law Review, 2001,2,pp.1-25.

<sup>133</sup> Under this theory, the right of the consignee is not from the agreement of contract or from the assignment of the shipper, but from the statutory provisions. Tai wan scholar Yang Ren-shou holds this point. See *Guo Yu's Bill of Lading*, p.109-110. The advantage of the this theory is the briefness and clarity, but it can't resolve all the issues under bill of lading when the laws do not provide sufficient system.

<sup>134</sup> See *Carver on Bills of lading*, 5-005, pp.154-155. When the carrier fails to deliver the goods, he shall be liable on the basis of tort, but this theory can not demonstrate the rights between the holder and carrier, nor can it explain why obligations are imposed on the holder in a lot of cases.

theory cannot answer the legal nature of the bill of lading very well. In my view, the relationship among the carrier, the shipper and the holder of the bill of lading is a combined one of the contract of third party's benefit and the relation of instrument of value.

As a common feature of the all contracts of carriage of goods, the original contract between the shipper and the carrier is a contract for the third party's benefit when the consignee is different from the shipper. It is implied in the contract that the goods shall be delivered in accordance with the provision of bill of lading, and usually, the goods shall be delivered to the holder of the bill of lading. Delivery of goods to the holder against the production of bill is also one of the carrier's undertakings made to the shipper in the original contract.

However, different from the traditional third party's benefit contract, when the bill of lading has been transferred to the third party, the rights and obligations of the carrier and the third party, the holder of the bill, are independent from the original contract, and the bill of lading relation is the one of instrument of value between them. Treating the bill of lading as an instrument of value has reasonable bases:

**Firstly**, the negotiability of the instrument can express and explain the transferability of the bill of lading.

**Secondly**, the transfer of the rights under the document is accomplished by the delivery of document with endorsement if necessary, that reflects the same characteristic as the bill of exchange and other instrument of value. This characteristic is different from the transfer of contract, for the latter shall not be accompanied by the document.<sup>135</sup> So, the document is the basis of the right of the holder. Deprived of the document, the transferee will be deprived of the right to the delivery. That is one of the good reasons why the holder is usually the only person entitled to the delivery of goods under the bill, also it's one of the reasons why the presentation rule merely applies to the bill of lading but not to sea waybill.

**Thirdly**, instrument of value has the characteristic that the records and provisions in the document are conclusive. Bill of lading bears this feature. The rights and obligations between the holder and the carrier shall be determined by the document itself. Neither the carrier nor the holder may invoke the defenses under the original carriage contract.

In addition, the conclusive effect of the document also can explain the possibility that the carrier in the bill relationship is different from the one who makes the original contract of carriage with the shipper. Because the debtor under the bill relationship is the one who makes promises in the bill, so usually is the one who signs, or on whose name the bill of lading is signed. That is also one of the reasons

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<sup>135</sup> See A. G. Guest (chief editor), *Chitty on Contracts, General Principles*, 27<sup>th</sup> ed., Sweet & Maxwell, 1994, 19-049, pp.989-990.

why the carrier under the bill shall be identified from the signature of the bill, at least from the clues in the bill. The carrier under a bill does not have to be the one who concludes the original contract, or who actually or physically performs the transportation.

It needs to be pointed out that the instrument of value relationship between the holder and the carrier is an obligatory relationship, or a relationship *jus in personam* that is distinguished from the relationship *in rem* or of property interest. This is the common sense of the all the abovementioned theories.

Under this "mixture" structure, the original contract of carriage is the reason for the issuance of the bill of lading. This is similar to all the other instruments, whose issuances always are based on an original arrangement, such as the advance contract, sales contract or so. The existence of the original contract does not conflict with the independence of the bill. In addition, under the original contract, it is carrier's promise that the goods will be delivered to the holder of the bill of lading. Furthermore, the transfer of the bill of lading does not exclude the right or obligation on the shipper under the original contract. When the carrier fails to fulfill his obligation of the carriage, the shipper is still entitled to claim for compensation if he suffers actual loss under the original contract. Whereas, under the contract of the third party's benefit, if the third party does not accept the rights under the contract, the original contractual party, shall still be bound by the contract, by both the rights and obligations under the contract. So, when the holder of bill of lading does not show up, or does not accept the benefit under the contract, the carrier usually is not entitled to force him to receive the goods or other rights, and, the obligations relating to the goods may return to the original shipper. For instance, if there is no bill of lading holder comes to receive the goods at the destination, usually the shipper shall give the carrier instructions to make the goods deliverable,<sup>136</sup> or to pay for the freight or other charges to the goods even it is stated "freight collected" in the bill of lading.

Of course, the differences between the bill of lading and other traditional instruments still exist, but treating the bill of lading as the instrument of value may avoid the weaknesses of other approaches to the largest extent, and, more importantly, this will not conflict with features of the bill. However the instrument system of bill of lading needs further improvement.

### **3. 2 Effects of the transfer of bill of lading**

With the transfer of the bill of lading, it may have the following effects on the holder of it:

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<sup>136</sup> For further discussion on the situation when the consignee fails to receive the goods see Chapter 7.

### 1) Prove holder's title to the goods

This is from the function of the bill as a document of title as discussed in part 2. Being the symbol of goods, transferring of bill of lading may usually transfer the title to the goods under it.

But as mentioned above, the transfer of the title to goods is not always the inevitable result of transfer of the bill; the bill is only the evidence to that transfer. Sometimes, with the intention or agreement by the transferor, the title to the goods, such as the property or right of possession of them may be retained by himself after the transferring of the bill. The effectiveness *in rem* will be, but not always be the effect of the transfer of bill of lading.

### 2) Confer the right to delivery

Under civil law, the rights to delivery may include two kinds of rights: one is the right to the goods themselves, in the other words, the right to possess goods, which is a proprietary right. The other is the right of claiming for delivery, which is a right *in personam*, or an obligatory right.

As the relationship between the carrier and the holder of bill of lading is concerned, this right is the latter one, and it comes from the carrier's promise under both the contract of carriage and the instrument relationship. Sometimes, it is very possible that this right to delivery is combined with the *right in rem* in the case when the property or the title to possession of the goods transferred to the holder simultaneously, but, even without the transfer of the title to goods, the legal holder may still be entitled to the delivery of the goods.

Though the theoretical bases for the origination of the holder's right to the goods are different, most national legislations protect the obligatory right of the holder. For example, COGSA 1992 of UK provides the holder right of suit (including the right to delivery) against the carrier regardless of the transfer of the property or other titles to the goods.<sup>137</sup> In addition, even when the bill of lading ceases to be a document of title, the transfer of the bill also may entitle the holder the right to the delivery.<sup>138</sup>

As the same, UNCITRAL Draft Instrument provides the holder of negotiable transport document with the right to delivery without the basis of title to goods.<sup>139</sup>

### 3) Power to pass the right to delivery

The right to claim delivery from the carrier is quite different from the power to pass this right to others.<sup>140</sup> In most cases, the legal holder of a bill of lading is entitled to pass his right to the delivery of goods to others through the transfer of the document. The power is one of the most important differences between the

<sup>137</sup> Sect 2(1) COGSA 1992.

<sup>138</sup> Sect 2(2) of COGSA 1992, UK.

<sup>139</sup> See Art. 49 in WP.32, Sect. 10.3.2 in WP.21.

<sup>140</sup> *Debattists*, 3-04, p.55.

consignee under a sea waybill and a holder of a transferable bill of lading. The consignee under the sea waybill is also entitled to the delivery of the goods, but he is not entitled to transfer this right to others by surrendering the document, unless he assigns his right under the contract of carriage.

So, this feature of passing the right under the bill of lading is a unique function for the holder of the bill, which tallies with the negotiability of the instrument

What needs to be pointed out is that when the holder surrenders the bill of lading to the carrier, he is exercising his right to delivery, but not transferring it to the carrier. After the delivery of goods against the surrendering of the document, the whole set of bill of lading are complicated.

#### **4) Create the rights and obligations between the holder and carrier**

The transfer of the bill of lading shall bring the rights and obligations between the holder and the carrier in line with the terms of the bill of lading and mandatory regulations.

However, under an instrument, the holder may opt to exercise his right or not, and the obligations shall be imposed on him only when he claims his rights. So, under the bill of lading, in my view, the holder is not obliged to exercise his right to delivery. But, when he claims or exercises any of his right, meanwhile, he is forced to assume obligations under the bill. The COGSA1992 imposes the obligations on the holder when he demands or is taking the delivery of goods or claims any right in relation to the goods.<sup>141</sup>

#### **5) Right of control against the carrier**

As discussed in Chapter 4,<sup>142</sup> the rights of control in the carriage of goods include the right to change the consignee, to change the destination and give other instructions concerning the goods and carriage and so on.

The holder of the bill of lading is entitled to demand the delivery of goods<sup>143</sup> and is authorized to pass the right to the goods in most cases, so the holder may redirect the consignee by transferring the goods. In addition, the bill of lading being the instrument of value bring the exclusive right to the goods under the document, which makes the holder of it the controlling party bearing rights and obligations to the carriage against the carrier. This right of control is not based on the title to the goods, but on the right in the instrument relationship, or on the basis of the contract when bill of lading is deemed as the contract. Briefly, the controlling right is based on the obligatory relationship between the carrier and the holder of bill of lading.

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<sup>141</sup> Sect. 3 COGSA 1992.

<sup>142</sup> See supra 4.4 in Chapter 4 of this thesis.

<sup>143</sup> UNCTAD Secretariat, *The Use of Transport Document in International Trade*, UNCTAD/SDTE/TLB/2003/3, 16 Nov., 2003, p. 6.

### 6) Conclusive right by the holder with good faith

The former five effects of the transfer of bill of lading have the common precondition that the holder shall be the legal one, or, the holder shall get the bill of lading in due course.

However, whether the bona fide holder for value may get a conclusive right to the goods under the bill is still under the controversy.

In English common law, it is generally held that the transferee gets no better title than the transferor has,<sup>144</sup> or according to principle of property law, “*Nemo dat quod non habet*”, a transferee of a bill of lading does not take it free from defects in the transferor’s title. So, when the order or bearer bill is under consideration, “bill of lading is not a negotiable document,” or the “negotiable” in a bill of lading is no more than “transferable,”<sup>145</sup> or it is just a “quasi- negotiable” instrument.<sup>146</sup> Under such theory, when the transferor gets the bill of lading by theft or with other fraud, the transferee in good faith for value shall not get the title to the goods. In addition, if the transferor merely possesses the bill of lading as agency of the principal and is not entitled to transfer the right to the goods under the bill, the bona fide transferee for value is not entitled to demand the goods either.

In China, the Maritime Code does not deal with this issue. But in theory, there is also the controversy on “whether the holder may get better right than the transferee owns.” Or, under the hypothesis of instrument system, the arguments arose on whether the bill of lading is an abstract instrument or a causative one.<sup>147</sup>

This issue will depend on national laws, but under Chinese law, providing conclusive right for the delivery to the bone fide transferee for value will be more reasonable.

As to the obligatory right to the delivery, the right originates and is transferred with the instrument and it is an independent right from the original contract. When the person gets a bill of lading in good-faith and for value, his expectation is getting the rights under the document. There is no sufficient or justifiable reason to deprive him of the rights under the instrument.

On the other hand, as pointed out at the beginning of this chapter, “delivery against the surrendering of bill of lading” is the promise made by the carrier in the bill of lading. It is both the protection and obligation for the carrier. The carrier has no knowledge of the transfer of the bill from the seller or other transferors to the buyer. Bill of lading is the only but sufficient evidence to tell the carrier who may be entitled to take the delivery. The carrier is unable and is held unnecessary to probe into the rights of the transferor hidden under the circulation of it. Otherwise,

<sup>144</sup> See Bennett, p.21, see also *Carver’s Carriage by Sea*, para. 1599,pp.1115-6.

<sup>145</sup> *Carver on Bills of Lading*, 6-014,15, p.249-250.

<sup>146</sup> Schmitthoff’s *Selected Essays*, p.377.

<sup>147</sup> See also *Guo Yu’s Bill of Lading*, p. 117.

it will put too heavy responsibilities on the carrier.

In addition, even when bill of lading operates as a document of title, in Chinese law, the theory of acquisition in good faith may apply to the bona fide holder for value. In such circumstances, the possession of bill shall symbolize the possession of the goods, and the holder in good faith for value shall get the right to the actual possession of the goods.

So, the *bona fide* holder of the bill for value shall get the conclusive rights to goods under the bill of lading, we may call the transferable bill of lading “negotiable instrument”.

### **3.3 Transferability of B/L and presentation rule**

In short, the transfer of bill of lading may have two kinds of effects on the holder of it: one is the effect on title to the goods; the other is an obligatory right. Both of the two effects can explain why the holder is entitled to demanding for the goods under the bill. However, the title effect of the document is not always the result of the transfer, nor does the carrier care for the transfer of property or possession to the goods under the bill. But, the obligatory right to delivery always adheres to the legal transfer of the bill. Between the holder and the carrier, the bill of lading is an obligatory document, but not a document of title.<sup>148</sup>

Delivering the goods to the holder against surrendering of bill first of all is a promise made by the carrier under the contract of carriage and the bill of lading and in the original contract on one hand. On other hand, only the legal holder of the bill is entitled to the delivery because he possesses “exclusive right to delivery”,<sup>149</sup> through the transfer of the bill. So, delivery to the holder upon the production of bill is also based on the transferability or negotiability of the bill. Meanwhile, it is also a protection for the carrier, because he may avoid the mis-delivery to a largest extent based on the presentation of the document.

I don not agree with the point that “the presentation rule on delivery is the mirror of the legal nature *in rem* of the bill of lading, but not the one of the obligation nature.”<sup>150</sup> On the contrary, the presentation rule is the obligatory undertaking under the bill, although the title function of bill may be related to it. Furthermore, the transferability of the bill of lading, which confers the holder of the document

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<sup>148</sup> In some works, the “document of title” is granted with new meaning, referring to the document of the different rights to the goods under various circumstances. See *Questions on “Bill of Lading is a Document of Title,”* vol.7, Annual of China Maritime Law 1996, pp.41-52, see also *Zhao De-ming’s Attributes in Rem.* Under this broader sense, I’d like to accept that bill of lading is also a document of title between the holder and the carrier, or a promissory note between them. But under the traditional property law meaning, I argue against that the feature of “document of title” will operates between them, see *supra* part 2 of this chapter.

<sup>149</sup> UNCTAD Secretariat, *The Use of Transport Document in International Trade, UNCTAD/SDTE/TB/2003/3*, 16 Nov. 2003, p. 6.

<sup>150</sup> *Xing Hai-bao’s Effectiveness in rem*, p.79 at pp.65-112.

the right to delivery and the right of controlling of goods against the carrier, further requires the insistence of presentation rule on delivery.

#### 4. Practices of delivery without presentation of bill of lading

Although delivery against the presentation of bill of lading is a merchant custom, even a statutory one, as commercial alternative, delivery without original bill of lading is a practice with a long history because of various reasons. It is still common in the modern shipping. In some special services, such as tanker carriages, it is estimated that the vast majority of the goods are delivered without production of bill of lading, though bills of lading have been issued.<sup>151</sup> And, numerous disputes arise resulted from the delivery without original bill of lading. The situation also is serious in China.<sup>152</sup> The measures for avoiding delivery without production of bill of lading when it has been issued and the liabilities of a carrier for his delivery without bill of lading are the hits in recent years.

Not only in China, but also in world wide, delivery without bill of lading has been drawing lot of attention. For instance, these problems are eye-catching again in Japan. At the Annual Conference of the Japanese Maritime Law Association in 2002, delivery without a bill of lading was a central issue.<sup>153</sup> Furthermore, the problem of whether and when goods may be delivered without bill of lading “remains a major challenge in international commerce.”<sup>154</sup>

What are the reasons for the desirability of delivery without original bills of lading?

##### 4.1 Reasons for delivery without production of bill of lading

Most of the cases result from the delay of the bill of lading.

The feature of bills of lading as the representation of goods and transfer the right to delivery against the carrier are generally premised on one of the assumptions that

<sup>151</sup> Clive M. Schmitthoff, *Select Essays on International Trade Law*, edited by Chia-Jui Cheng, 1st ed., Martinus Nijhoff Publishers/ Graham & Trotman Ltd, pp.377, 382.

<sup>152</sup> According to rough statistics by some judges, the actions on delivery without bill of lading account for more than 75% of the cases involved in the carriage of goods by sea.

<sup>153</sup> See Caslav Pejovic, *Delivery of Goods Without a Bill of Lading: Revival of an Old Problem in the Far East*, vol.9, JIML, Sept/Oct, 2003, p. 448 at pp.448-460.

<sup>154</sup> William Tetley, *Letter of Indemnity at Shipment and Letters of Guarantee at Discharge* (hereinafter as “Tetley’s Letter of Guarantee”), vol. XXXIX, Europeans Transport Law, (2004), 3, P.313 at pp.289-344. However, most countries make the presentation rule of bill of lading simple, and are inclined to put few defenses for the carrier against the violation of this rule, *ibid*, pp.316-320, see also the judgment of *The Sormovskiy 3068*, (1994) 2 Lloyd’s Rep. 266.

the documents will reach the consignee prior to the arrival of goods at the destination,<sup>155</sup> and that the consignee can get the goods in time. However, this is no longer always the case.

With the development of shipping technology, the carriages are sped up greatly, but the circulation of the bills of lading does not go so fast proportionately. The multiple transfers of the bills during the long string of sales usually take a relatively longer period, or, the credit terms under the sales contract may be longer than the voyage of the goods.<sup>156</sup> Under these circumstances, the documents may often reach the consignee later than the goods arrive at their destination.

It is estimated that there are about 50% of the cases in which the original bills of lading have not arrived at the destination when the goods are or have been discharged from the vessel,<sup>157</sup> or more detailed, in the liner shipping, it is in 15%, as high as 50% in charterparty trader, and the percentage may rise to a near 100% in the oil trade.<sup>158</sup> In the short sea carriages, this is almost the universal situation when a bill of lading has been issued.

In these circumstances, the buyers of the goods usually are eager to obtain the goods, especially if they have already entered into on-sales or on-carriage contracts, or when certain factories are waiting for the goods that are the necessary materials for their manufacturing, so on and so forth. Therefore, the buyers frequently exert the pressure on the carriers or the masters or their agents to turn over the goods to them after the discharging. On the other hand, the carriers, in most cases, do not wish to delay their voyages or to run the risk of breach for the next charterparty by waiting for the arrival of such documents. Or, they cannot find an appropriate place to store the goods, or they do not like to take the additional risks of the loss or damages to the goods while waiting for the documents when discharging under applicable laws shall not end the responsibility period. These all are the reasons that may push the carriers to deliver the goods without the original bill of lading, generally to deliver upon letters of indemnity addressed by a cargo receiver or others who may satisfy the carriers by promising to "remit original bill of lading as soon as it is received and to indemnify the carrier for any damages that the latter may sustain" for this delivery.<sup>159</sup>

<sup>155</sup> Paul Todd, *Modern Bills of Lading*, 2<sup>nd</sup> ed., Blackwell law, 1990, p.19. See also *Guo Yu's Bill of Lading*, p.137, *Yin & Guo's Carriage Law*, p.285.

<sup>156</sup> According to art. 14 of *Uniform Customs and Practice for Documentary Credits* (UCP 500), the general period of the examination of the documents for the issuing bank is 7 working days, which excludes the time for the post of the documents. And, the actual time is usually even longer than it when the time for mailing and the transactions among the advising and/or confirming banks are included. However, voyages of short sea carriage such as that between China and South Korea are usually less than one week.

<sup>157</sup> Yang Liang-yi, *Game Rules of International Business--English Contract Law*, 1<sup>st</sup> ed., Publishing House of China University of Politics and Law, 1998, p.246.

<sup>158</sup> *Draft Outline Instrument (Papers for the 37th CMI Singapore conference)*, CMI yearbook, 2000, p.160 at pp.122-171.

<sup>159</sup> *Tetley's Letter of Guarantee*, p.313.

Usually the delay of the document is the only reason, or the “root cause”,<sup>160</sup> demonstrated for the delivery without bill of lading; however, it is not always the case. Delay of documents is a very important reason but not the only one.

Sometimes, the financing arrangements also are the “spur” of delivery without bill of lading. For example, the original bill of lading has reached the opening bank at the destination, and the purchaser of the goods often may be informed to get the document from the bank on their payment of the goods. However, the purchaser cannot afford it or is reluctant to pay until he can resell the goods or there may be other considerations. This kind of situation is common in China in the past, and still not rare at present. Some small companies and some individuals with poor finance usually do hope to resell or dispose the goods as soon as possible, so as to pay the bank.<sup>161</sup> They may try to “borrow” the bill of lading from the bank with some security, and some of them may have succeeded in doing so in the past. But nowadays, few of the banks accept this kind of alteration. So, the receivers have to detour the bank and claim the delivery from the carrier.

In addition, it is also common that a period of the relating bill of exchange or of the L/C is longer than the voyage, and the buyer of goods will not pay the price to get the bill until the time expires.

Therefore, in most cases, they may show the carrier the contract of sales related to the shipped goods, the copy of bills of lading and others in order to prove they are the owner or proper purchaser of goods for demanding the goods. And the delivery without original bill of lading may occur.

To certain extent, the systems of customs clearance in most districts in China may add further the desirability of a sooner delivery of goods without bill of lading. In most districts of China, such as Shanghai, the importers have to surrender an original bill of lading or a delivery order issued by the carrier or his agents for the customs clearance.<sup>162</sup> When the original bills of lading are late, or the importer fails to get them from the bank for the reasons aforesaid, he usually will try to persuade the carrier to address him a delivery order for the purpose of customs clearance, and, it is also very often that the importer may take over the goods from a dock or warehouseman by such D/O. This situation also is not rare.

Furthermore, the regulations at the port countries on delivery may be another reason. For example, in 1980s, the Ministry of Communication of PRC with two other competent authorities, Leading Group of ports of the State Council and Ministry of Foreign Economy & Trade of P. R. China jointly issued a document

<sup>160</sup> Wang Wei, “Countermeasures for Delivery Without Presentation of Bills of Lading” (hereafter as “Wang’s Countermeasures”), in *Forum of International Economic Law*, edited by Chen An, vol. 6, 1<sup>st</sup> ed., Law press, 2002, p.477.

<sup>161</sup> It is also probable that some companies with fraudulency never pay the bank when they get the goods or get the money by selling the goods.

<sup>162</sup> See spura part 5, Chapter 3.

requiring the shipping companies to deliver the goods on presentation of a copy bills of lading for speeding up the dispatching of vessel from the ports in order to resolve the serious congestion of the ports in that period.<sup>163</sup> While in some South American countries, such as Chile, Venezuela, the goods are required to be delivered to the port authority or customs or other competent agencies, and these authorities often release the goods without bills of lading.<sup>164</sup>

Moreover, the loss of bill of lading,<sup>165</sup> the fraudulency of the cargo receivers, or the collusion by the carrier with others all may result in the delivery without original bill of lading.

## **4.2 Solutions for practices of delivery without bill of lading**

From the introductions above, we can find that the carriers are usually in a very awkward position. If they deliver the goods without the bill of lading, they may run the legal risks; if they do not, they also may suffer bad commercial pressure. So, on the one hand, the carriers are looking for the solutions to this dilemma. On the other hand, the delivery without bill of lading is so common that it may harm the order of international trade to some extent. Therefore, not only the shipping companies, but also the scholars, legal practitioners and legislators are all seeking for the solutions for this practice.

Generally, the fundamental measures are based on the two purposes, one is to speed up the circulations of bills of lading, and the other is to change or give up the presentation rule by the innovation of the system of transport documents.<sup>166</sup>

### **4.2.1 General suggestions**

Based on the two former theories, the electronic bill of lading and sea waybill are usually suggested for solution.<sup>167</sup> According to some scholars, they can help prevent "delivery without bill of lading from the original source."<sup>168</sup>

Actually, these system and document are very useful to some extent; however, they are not the sufficient solutions for the problem of delivery without bill of lading in all circumstances. As to the e-bill of lading and other similar registry system, or paperless cargo movement, indeed, they can speed up the transactions of bills of lading in most cases, but it is still far from being universally adopted. In addition, this can only resolve the delivery without bill of lading for the reason of

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<sup>163</sup> Document no.: (83) guo gang no. 06.

<sup>164</sup> See *Supra* part 3.4 Chapter 3.

<sup>165</sup> For further study see part 4 , Chapter 6 below.

<sup>166</sup> *Wang's Countermeasures*, p.486.

<sup>167</sup> See Yang's *Bill of Lading*, p. 150, *Wang's Countermeasures*,p.486, pp.478-480, see also *Wilson*, pp.163-170.

<sup>168</sup> *Wang's Countermeasures*, p.486.

the delay of the document, but not for other reasons above mentioned.

A sea waybill may avoid using the rule of presentation, but with its limitation of functions as discussed in Chapter 4, it can not take the place of bill of lading altogether.

#### 4.2.2 Solutions in practice

Considerable traders choose to avoid the presentation rule in delivery by provisions under a contract of carriage or a bill of lading.

For example, many charterparties include a standard clause that the carrier shall deliver the goods without production of bills of lading but on the instruction of the charterer only, or against the letter of indemnity provided by the charterer.

Connected with the former cases, on the face of some bills issued under charterparty, it even may be indicated that one of the bills of lading shall be retained with the master on board and the goods shall be delivered at the destination on the instruction of the shipper in the document.

When the bill of lading is transferred to a third party other than the original charterer, those clauses under a charterparty but not in the bill of lading usually can not be availed by the carrier to discharge his obligation of delivery against the bill of lading, if the holder has no opportunity to know the clauses in a charter.

In certain cases, English courts rejected to incorporate charter clauses into a bill, which allowing for delivery on the basis of an indemnity as defense for wrongful delivery.<sup>169</sup> It is further emphasized that the charters are generally not entitled to force the shipowner to deliver the goods without bill of lading. In *The Houda*, the Appeal Court of UK confirmed that “there’s no distinction between delivery under a time charter, a voyage charter, or a bill of lading contract and that the shipowner cannot be forced to deliver without production of a bill of lading in the absence of a clause requiring it.”<sup>170</sup>

In China, the carrier can’t make successful defense against the holder on such clauses in charter party, either. For instance, in *An Steel International Trade Co. v. Woodtrans Navigation Corp., Sunwai Navigation S. A.*, court of the first instance held that the charterer was not entitled to give the master the instruction of delivery without b/l, this instruction also breached the compulsory obligation of “delivery against original bill of lading” on a carrier.<sup>171</sup>

<sup>169</sup> See *Gaskell*, 14.38, p.425.

<sup>170</sup> (1994) 1 LLR. 541. See also *Gaskell*, 14.48, p.425.

<sup>171</sup> See *Retrial Case on Delivery without Production of Bill of Lading among Woodtrans Navigation Corp. Sunwai Navigation S. A. and An Steel International Trade Co*, doc. no: fa gong bu (2003) no. 3, in Gazette of the Supreme Court of P. R. China, 2002, 1, pp.35-37. The key issue of this retrial case is about the liability of an actual carrier on delivery without bill of lading, so the retrial court did not deal with the effect of such clauses. Due to the limited scope of this thesis, I will not make detailed discussion on the liability of

However, if such a clause is made on the face of the bill of lading, the document shall cease to bear the feature of the bill of lading as a document presented for delivery. Instead, it runs just as a receipt of the goods and an evidence of the contract of carriage. In the latter case, a shipowner or carrier may avoid the presentation rule of the delivery.

Furthermore, not from the provisions under charterparty, carriers may also invoke the provisions in contracts of carriage or back terms of bills of lading to discharge his liability on the presentation rule. These provisions are usually formed as the “responsibility period”, or cesser of liability clause or “before and after clause” and so on. For example, the clause of the bill of lading in *Sze Hai Tong Bank Ltd.*<sup>172</sup> However, most of the judgments in English cases denied that the carriers were protected by such clauses when they delivered the goods without the original bill of lading.<sup>173</sup>

As to the validity of these clauses, it has been discussed in Chapter 2, and the responsibility clause shall not relieve the carrier of his liability on proper delivery. Even further, the provisions in bills of lading expressly discharge the carrier from the liabilities of “miss-delivery”, it is difficult to be regarded as valid, at least under Chinese law. According to theory in China, the terms in the back side of bill of lading are deemed as standard terms, and the carrier shall remind the party who accepts the bill to take care of the clauses of exclusion or restriction of its liabilities,<sup>174</sup> and the standard terms exempt the carrier from his liabilities, weights the liabilities of the holder or other parties shall be “null and void.”<sup>175</sup> Therefore, without the statutory authorization, the validity of the exemptions for the carrier of his mis-delivery in the bills is very doubtful.

In recent years, the usage that carriers hold the bills of lading during the carriage of goods has increased in order to resolve the delay of the document, which is a common practice in some oil trades.<sup>176</sup> The bill may be made out either to the named consignee or “to order”. However, this practice is not a satisfactory solution, and may run great risks. On the one hand, the carrier may use the original bill of lading to converse or dispose of the goods; on the other hand, it also increases the

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an actual carrier.

<sup>172</sup> (1959) 2 Lloyd's Law Report, 114. Art. 2 of the bill of lading terms provides: “... the responsibilities of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom.”

<sup>173</sup> For example, *Then Ines*, (1995) 2Lloyd's Rep. 144, *The Antwerpen* (1994) 1 Lloyd's Rep. 213, see also *Gaskell*, 14.27, pp.421-422, *Yang's Bill of Lading*, pp. 139-141.

<sup>174</sup> See Art. 39 of CLC, Where standard terms are adopted in concluding a contract, the party which supplies the standard terms “shall... request the other party to note the exclusion or restriction of its liabilities in reasonable ways, and explain the standard terms according to the requirement of the other party.”

<sup>175</sup> Art. 41 of CLC, “When the standard terms are under the circumstances ... or the party which supplies the standard terms exempts itself from its liabilities, weights the liabilities of the other party, and exclude the rights of the other party, the terms shall be null and void.”

<sup>176</sup> See *Wilson*, p. 170.

opportunity for fraudulent endorsement of the other bills. More importantly, keeping the bill by the carrier will make the bill cease to be a document presented for delivery, or cease to possess its features by which distinguish it from other documents.

Moreover, the “telex-releases” and other ways are also used to resolve the delay of document and avoid the presentation rule. I will discuss the main problems of this practice.

#### 4. 2. 3 Telex-release in China

In short sea carriages of China, almost 100% of the deliveries of goods are made under the way of “telex-release”. The purpose of this releasing is mainly to resolve the inconvenience caused by the delay of bill of lading.

Under this manner, the carrier shall request the shipping agency at the destination to deliver the goods to the designated person. Since at the beginning of this practice, the instructions were made by telex, so it's called “telex-release.” But nowadays, fax, e-mail or other EDI transactions are the common means for sending the instructions.

In fact, carrier's instructions on releasing the goods are those made by the shipper. Therefore, the carrier and the shipping agent are just making delivery complying with the instructions of the shipper.

Telex-release is chosen in both liner shipping and tramps carriage. When the carrier and shipper or charterer agree to deliver the goods in this way.<sup>177</sup> Upon such agreement, the carrier may not issue a bill of lading after the goods have been loaded on board. Or more often in China, the carrier issues bill of lading to the shipper who shall send the copy of the original bill of lading to the consignee by fax, after which, the shipper shall return the whole set of bills to the carrier. In addition, in China, a letter of indemnity by the shipper usually is required. This kind of LOI generally contains the clauses as the follows: “We (full name of the shipper) confirm and hereby authorize a telex release of the above mentioned containers/cargos for which we surrender all sets of original b/l (duly endorsed) and you are to release the cargo (containers) to: (full name and address and other necessary corresponding ways). we accept full responsibility and all consequences for this release of the container/cargo in this manner...”<sup>178</sup> In addition, the Chinese shipping agencies will require the consignee to provide another LOI on demanding the delivery without production of the original bill of lading and will take all the

<sup>177</sup> Usually, the shipper shall apply for the ‘telex-releasing’ in written forms. In China, and most of the shipping companies have made their own standard forms for the application.

<sup>178</sup> E. g., the form of LOI made by COSCON.

risks, liabilities and losses aroused by the delivery in this manner.

However, because of the un-uniformity of the understandings of this delivery and the lack of guidance by statute, there are some confusions or problems arising from the “telex-release.” Even this is a practice with a long history, the shipping companies and shipping agencies are still not sure about their positions on delivery under this manner.

The main confusions have to do with two respects: one is the necessity of the production of the fax copy of the bill of lading, the other is whether the shipper is entitled to change the consignee.

At the ports of China, among the Chinese companies, it is a common practice that the consignee shall surrender the fax copy of the bill of lading in addition to the proper identity of himself for the delivery of goods. Without the fax copy of the bill of lading, the carrier or the shipping agencies will not issue the delivery order to the consignee. As to the reason of this practice, certain shipping companies explain that because they are not sure whether the presentation rule of the bill of lading can be excused in this manner, so for the sake of the security, they require the fax copy. Some other companies deem the fax copy of bill of lading with the stamp of the consignee as a receipt of the goods from the carrier.

Under the telex-releasing, when a bill of lading is returned to the carrier, it does not play the role of being the document for delivery anymore, it is just a receipt of the goods by the carrier, and the shipper is the controlling party on the carriage against the carrier. So in this case, following the instruction of the shipper, merely the proper identity of the consignee is necessary for the delivery. The presentation rule of the bill of lading shall not be effective any more. In addition, a fax copy is not a genuine transport document, which is worthless for the delivery in my view.<sup>179</sup> Indeed, the fax copy surrendered by the consignee may be used as the receipt of goods by him. But a receipt can be made in other manners. Therefore, the carrier shall not refuse to deliver the goods to the consignee designated by the shipper if he fails to present the fax copy of bill.

As to the second confusion, most Chinese companies think that the shipper is not entitled to change the consignee. In addition, most of them insist that only straight bill of lading can be altered into the usage of telex-release if bill of lading has been issued. When the shipper re-nominates the consignee, most of shipping companies choose to refuse to follow this re-instruction.

As it has been discussed in Chapter 4, when no bill of lading is issued, the shipper is the controlling party in the contract of carriage, and he is entitled to redirect the consignee before the delivery of the goods, or before the former

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<sup>179</sup> Whether the fax copy of a bill of lading has the effect of being a receipt of goods by the carrier and evidencing the conditions of the goods on board is another issue, which shall not be discussed in this thesis for the limitation of the scope.

consignee claims the delivery, which depends on national laws, and the carrier shall follow the new instruction of the shipper. When the bill of lading has been returned to the carrier by the shipper, the situation is the same. The shipper is still entitled to the right of control and the bill of lading has lost his usual function under the carriage and delivery.

In addition, theoretically, the right of applying for telex-release shall not be limited to the shipper as most shipping companies do. When a bill of lading has been issued, legal holder is the only controlling party, who is entitled to give instruction on delivery. So the holder, no matter whether he is the shipper or not, is entitled to apply for a telex-release. Furthermore, not only the straight bill of lading but also the order and bearer bill can be altered in this manner. The Holder of the bill may apply for telex-release by surrendering the bills to the carrier.

However, when a bill of lading (especially negotiable bill of lading) has been issued, the carrier must insist that the whole set of the bills of lading come back. Surrendering of whole set of bill is a condition for exercising of the right of control by the holder, as well as for avoidance of the possible fraudulent transfer of the bill after the new arrangement for delivery has been made. If the holder fails to surrender whole set of bills, at least one of the original shall be presented, and the carrier had better require a LOI from the holder for any risk and liabilities against the third party. Nevertheless, this surrendering of one part of original bill of lading and an LOI shall not prejudice the right of the *bona fide* holder of other parts of the bills for value.

The confusions in the practice of telex-release once again call for the clarity on the obligations of the carrier on delivery under the contract of carriage and different documents, in addition, it reflects the desire for clear provisions on right of control of goods and controlling party under contract of carriage in various cases.

#### 4.2.4 Innovation by UNCITRAL Draft Instrument

Since the non-availability of bill of lading is so common in practice,<sup>180</sup> the UNCITRAL Draft Instrument of Transportation Law is intending to provide an *ad hoc* solution for the carrier, and to change the long established position that the presentation rule usually is one-sidedly on the shoulder of the carrier.

If the holder of negotiable document does not claim delivery from the carrier after their arrival at the place of destination, the carrier is able to fall back on his

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<sup>180</sup> The non-availability of document results from various factors, such as delays in the documentary process, structural causes of trade as discussed in the preceding part; in addition, it may also result from the intentional problems, e.g. the consignee is not interested in the goods because they have a negative value, he wants to reject the goods under the sales contract and so on. See also *Draft Outline Instrument* (papers for the 37<sup>th</sup> CMI Singapore conference), CMI Yearbook, 2000, pp.159-160 at pp.122-171.

contractual counterpart.<sup>181</sup> The carrier shall advise according to the controlling party or, if, after reasonable effort, it is impossible to identify or find the controlling party, the shipper. Or when the carrier fails to find either of the former two, the person indicated as the "shipper" in the document shall be taken as the shipper. And the controlling party or shipper shall give the carrier instructions in terms of the delivery of the goods.<sup>182</sup> When the carrier delivers the goods in accordance with the instruction of the former party, he is discharged from his obligation to deliver the goods under the contract of carriage "irrespective of whether a negotiable transport document has been surrendered."<sup>183</sup>

The main object of these provisions is trying to resolve the problems on the carrier when no holder of the negotiable transport documents claiming for delivery.<sup>184</sup> But the words of them do not distinguish the causes of the disappearance of the holder, therefore, these provisions may also be applicable to the situation when negotiable documents are non-available on the arrival of the goods at the destination. When presentation rule of the bill of lading or other negotiable transport documents can not be followed up, it shall provide the carrier with the alternative and discharge him from the obligation of delivery under the contract of carriage.

From the inherent value of this innovated mechanism, in my view, it is making effort to maintain the balance of the obligations on delivery between the carrier and his counterparts. The consignee is not obliged to take the delivery,<sup>185</sup> but this shall not put too heavy a burden on the carrier after the goods arrive at the destination. This provision firstly push the intermediate holder, such as a banker holding the bill of lading as a security, or the shipper to take care of the arrival of the goods and distribute certain duty on them about the delivery. Compelling the controlling party or the shipper to give instruction is also in line with the essential feature of delivery: delivery the goods in accordance with the contract of carriage, as I emphasized in Chapter 4.

The Draft Instrument makes a further consideration of the holder's right under the document after the delivery of goods by the carrier. If the carrier has delivered the goods complying with the instructions made by the controlling party or shipper, he shall be discharged from the liability of delivery under the contract of carriage,<sup>186</sup> so the holder is not entitled to claims for the delivery against the carrier.

<sup>181</sup> Art. 10.3.2. (b) in WP.21, Art. 49 (b) in WP.32, see also G.J. van der Ziel, *The UNCITRAL/CMI Draft for a new Convention Relating to the Contract of Carriage by Sea* (hereafter as "Van der Ziel's UNCITRAL Draft"), Transportrecht (Germany), 7/8, 2002, p.274 at pp.265-277.

<sup>182</sup> Sect. 10.3.2. (b) in WP.21, Art. 49 (b) in WP.32.

<sup>183</sup> Sect. 10.3. (c) in WP. 21, Art. 49 (c) in WP.32.

<sup>184</sup> For the remedies for the carrier when he faces the obstacles to delivery the goods see Chapter 7.

<sup>185</sup> Sect. 10.1 in WP.21, Art.46 in WP.32. See also to *Van der Ziel's UNCITRAL Draft*, p.274 at pp.265-277.

<sup>186</sup> Sect. 10.3.2 (c) in WP.21, Art. 49 (c) in WP.32.

In addition to the former delivery, if the holder of the document becomes a holder of the document after the carrier has delivered the goods “to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage” without production of bill of lading, he will acquire the rights under the contract of carriage only if the passing of the document “was effected in pursuance of contractual or other arrangements made before such delivery of the goods.”<sup>187</sup> In addition, of a person acquires a negotiable bill of lading after delivery of goods by the carrier, he “did not have or could not reasonable have had knowledge of such delivery” at that time,<sup>188</sup> otherwise, “he has received a document that is worthless vis-à-vis the carrier.”<sup>189</sup>

However, this new system brings also questions or worries. One of them is: Whether the controlling party or the shipper is also entitled, under the sales contract or other, to give instruction on the delivery of the goods. In addition, will the shipper abuse this right when he makes the instruction?

Under negotiable document, generally the holder of the document is the controlling party, who enjoys the exclusive rights to the goods under the documents. So, the instructions made by him usually will not bring conflicts with others on the rights to delivery. At the ends of shipper, theoretically, it is possible that he may abuse this right. However, if the shipper abuses this right under the contract of carriage, generally, he will be liable under a sales contract or other arrangements. So, in most cases, prudent shippers will not put themselves into the liabilities under the contracts other than the carriage one. In my view, most likely, a shipper is reluctant to give instructions on delivery when he has no more interest in the goods, or when the bill of lading is during a long string of trade so that it is difficult to make a proper instruction. Under this situation, the carrier has to shift to other remedies under the law.

Though the controversies or doubts on this system still exist, at least, this system will spur the holder of bill of lading to be alert to the arrival of the goods, which may relieve the carrier from the additional burden when no consignee to receive the goods. And, to some extent, as a draftsmen says, “it is reasonably in line again with the established practices in certain trades and that it underpins that practice with some certainty of law.”<sup>190</sup>

From the above introductions, it may be found that every method has its applicable range as well as the limitation. Until now, there is no perfect or versatile solution for delivery without bill of lading. Relatively, the innovation to the system

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<sup>187</sup> Sect. 10.3.2 (d) in WP.21, Art. 49 (d) in WP.32.

<sup>188</sup> *Ibid.*

<sup>189</sup> *van der Ziel's UNCITRAL Draft*, p. 275 at pp. 265-277.

<sup>190</sup> *Ibid.*

of bill of lading by law as discussed above which discharge the carrier from presentation rule under special case may bring a powerful protection to the carrier, though its usages may also be very limited.

Nevertheless, under the present regimes, the decision on whether to deliver the goods without bill of lading or not is the choice made by the carrier (assuming he is an experienced or rational one) based on the consideration of commercial sense, or, in other words, on the balance between the commercial interests and the legal risks. Some carriers may make delivery without bill of lading only if the consignee is with good reputation, or if there is long-term cooperation between him and the consignee, or if the consignee has provided a satisfactory security to protect the carrier for this delivery, so and so.

However, even a very reliable consignee or a satisfactory letter of indemnity cannot relieve the carriers from the potential legal risks for the liabilities to the legal holders of a bill of lading.

Therefore, from the angle of the legal system, on the one hand, it shall provide the carrier with innovations or systems by which the carrier can be relieved from the presentation rule when it has become an unreasonable burden on him. On the other hand, the law shall also clarify the systems of carrier's liabilities when he violates the presentation rule and delivers the goods without bill of lading.

## **5. Causes of action for delivery without production of bill of lading**

Causes of action against the carrier for delivery without bill of lading may result from the legal nature of the carrier's act. In China, the legal nature of the delivery without production of B/L is not consented yet.

### **5.1 Legal nature of the delivery without bill of lading**

The opinions of the legal nature of delivery without bill of lading are connected closely to the understandings and the discussions of the rights represented by a bill of lading.

In China, delivery without bill of lading, in a long period, is deemed as a tortious act by the carrier. Based on the theory that bill of lading is a document of title, the holder enjoys the property (or title) of the goods under the bill, so delivery of goods to person other than the holder is a infringement to the titles by the holder and constitutes a tort, considerable Chinese cases were resolved on a tortious basis.<sup>191</sup> For example, in *Shuangyao Ltd., v. Xiaogang Industry Crude Materiel Co.*,

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<sup>191</sup> See the examples *infra*.

*Shipping Agency Co. Guangzhou and others*,<sup>192</sup> *Choushao Import and Export Co. Fujian Province v. Yanfeng (China) Ltd. Co., Jieteke Shipping Co.* on delivery without bill of lading,<sup>193</sup> *Heilongjiang Baoxiang Import & Export Ltd. Co. v. Shipping Agency Guangzhou and Singapore Taping shipping (private) Ltd. Co.*,<sup>194</sup> the disputes are all regarded as having tortious nature, and resolved on the rules of tort law.

The Trial case of “the disputes on delivery without bill of lading among Yuehai Electronic Co.Ltd. and Cangma Transport Co. of Merchant Holdings and others” by the Supreme Court of PRC in August of 1996<sup>195</sup> is a landmark of the contractual resolution for these kinds of cases. In the judgment, the Supreme Court totally changed the judgments at the first and second instances by Guangzhou Maritime Court and the High Court of Guangdong Province, which had treated the delivery without bill of lading by Cangma Transport Co. as a tortious act. Instead, The Supreme Court resolved the dispute on the basis of the breach of the contract between the carrier and the holder of a bill.<sup>196</sup>

This judgment was published in *The Supreme Court Gazette*, it is very influential, and more and more maritime courts have adopted the contractual approach to resolve the disputes on delivery without bill of lading.<sup>197</sup> Some scholars support for this viewpoint that delivery without bill of lading is a breach of contract, too.<sup>198</sup>

In addition, according to some other authors, delivery without bill of lading constitutes a concurrence of the actions of tort and breach of contract.<sup>199</sup> An English case illustrates this well: “The contract is to deliver, on the production of bill of lading, to the person entitled under the bill of lading … The shipping company did not deliver the goods to such a person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading to a person who is not entitled to receive them. They are therefore liable in conversion unless

<sup>192</sup> Jin Zheng-jia (chief editor), *Annual of China Maritime Trial*, The People’s Communication Press, 1999, pp.335-339.

<sup>193</sup> *Ibid*,pp.405-409.

<sup>194</sup> Jin Zheng-jia (chief editor), *Annual of China Maritime Trial*, The People’s Communication Press, 2000, pp.402-407.

<sup>195</sup> <http://www.com-law.net/anli/wudanfanghuo.html>, 12 Jan., 2005, see also *Gazette of The Supreme Court of PRC*, 1997,1, pp. 30-39.

<sup>196</sup> As the author’s opinion, the relationship between the carrier and the holder of bill of lading is mixture of a contract of carriage and an instrument of value, see Supra part 3 of this Chapter. But the disputes can also be resolved on a contractual base.

<sup>197</sup> But this case did not bring the uniformity on the legal nature of this kind of mis-delivery, the judgments that come later than it (see also fn 191, 192, 193) are the illustrations.

<sup>198</sup> See *Si Yuzhuo’s Delivery Without Bill of Lading*, pp.26-27 at pp.18-29, Lei Ting, *Legal Nature of Delivery without Original Bill of Lading and the Liabilities*, in *Annual of China Maritime Trial*, 2000, pp.123-130, Liu Xinpings’ Comments of the judgment of “ *Choushao Import and Export Co. Fujian Province v. Yanfeng (China) Ltd. Co., Jieteke Shipping Co.* on delivery without bill of lading”, supra fn. 192.

<sup>199</sup> See Yang’s *Bill of Lading*, p.123, Li zhang-jun, “On Legal Natures of Bill of Lading”, in *Practice and Theory of Maritime Justice*, edited by Tang Neng-zhong, 1<sup>st</sup> ed., law press, 2002, pp.70-72 at pp. 47-76.

likewise so protected.”<sup>200</sup>

I agree with this viewpoint under certain condition. In most cases, not always, delivery without bill of lading is a concurrence of a tort and a breach of the obligation under contract of carriage and/or bill of lading instrument because a bill of lading generally represents both the title (at least the possession) to the goods and the obligatory right or contractual right to the delivery of goods,<sup>201</sup> and the holder is the only person entitled to demand the goods. Although the bill of lading may not run as a document of title in the process of the carriage of goods, it shall not deny the fact that a delivery without bill of lading usually infringe the holder's title to the goods, *inter alia*, the right of possession to the goods. And an obligatory relationship between the carrier and holder will not diminish the tort of the act.<sup>202</sup>

However, the concurrence arises just in the normal cases that the bill of lading reaches his holder before the delivery, or the bill of lading still operates effectively as a document of title and the document entitling demanding delivery. If the traders of the goods have opted for another arrangement to replace the bill of lading during the transactions of goods, or the bill of lading does no longer play the traditional role for delivery,<sup>203</sup> delivery of goods by the carrier without bill of lading may be a proper delivery, and there will be no tort, or even no breach of contract by the carrier. The carrier may not be liable to the holder of the bill for delivery without bill of lading.<sup>204</sup> Or, sometimes, the transfer of bill will not transfer the title to the goods but only the right to delivery, such as the title to the goods is still retained by the transferor. In these cases, there will be only the breach of contract by the carrier, but not a tort. Therefore, the legal nature of the delivery without bill of lading will be various and the concurrence of liabilities is just the usual case.

However, the following analysis of the causes of action will be based on the assumption that the bill of lading is effective and the delivery of goods by the carrier without production of bill of lading is a wrongful delivery.

## **5. 2 Causes of action**

Even under the point of the concurrence of the liabilities of the carrier for delivery

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<sup>200</sup> *Sze Hai Tong Bank Ltd .v. Rambler Cycle Co. Ltd.*, (1959) 2 LLR, p.114.

<sup>201</sup> Though the relation between the carrier and the holder of bill of lading is a mixture of contract of carriage and an instrument relation, the pith is the rights and obligations *in personam*, and can be dealt with by the theories of contract.

<sup>202</sup> See *Shi's Specific Obligation Law*, p.622, see also Wang Ze-jian, “Concurrence of Contractual Liabilities and Tortious Liabilities,” in *Researches on Theories and Cases of Civil Law*, 1<sup>st</sup> ed., Publishing House of China University of Politics and Law, 1998, vol. 1, pp.369-389.

<sup>203</sup> This may be called as the exhaustion of bill of lading as a document for delivery. For further discussion on the exhaustion of bill of lading see part 1 Chapter 6.

<sup>204</sup> For exemptions for carrier when he delivers without bill of lading see part 1 of Chapter 6.

without bill of lading, one still needs to distinguish the causes of action against the carrier for such mis-delivery. Whether the holder of bill of lading is entitled to choose the cause of an action, whether there is any limitation for his choice, these are not so clear under present Chinese regime.

Though the relation between the carrier and the holder of bill of lading is a mixture of contract of carriage and instrument of value, delivery to the holder against production of bill of lading includes the obligatory undertaking and the promise by the carrier under either of them. So, if lacking of sufficient provisions under CMC on carrier's liabilities for delivery without bill of lading, the laws and theories of contract may be applied to the bill of lading relationship, or be of reference to it.

According to contract of law of China, in the situation of concurrent liabilities, the aggrieved party has the freedom to sue the other party on either contractual or tortious or other relevant cause, "In case that the breach of contract by one party infringes upon the other-party's rights, the aggrieved party shall be entitled to choose to claim the assumption by the violating and infringing party of liabilities for breach of contract according to this Law, or to claim the compensation by the violating and infringing party of liabilities for infringement according to other laws."<sup>205</sup> So under the CLC, the holder of an original bill of lading is entitled to sue the carrier depending on the obligatory relationship of the bill of lading under CMC, or to sue based on tort law; in the latter case, the *General Principles of Civil Law* will be the applicable law.

However, the vagueness of the understanding of para.1 article 58 of CMC makes the former situation uncertain. According to this article, the defense and limitation of liability in Chapter 4 of CMC shall apply to "any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea," "whether the ...action is founded in contract or in tort." If this article does not cover the case of mis-delivery, the holder of the bill of lading shall still have the freedom to choose the cause of action as aforesaid. However, if this article applies to every situation of the disputes related to the carried goods, including mis-delivery, the actions of the latter one will be resolved on the basis of the contract or the bill of lading relationship under the CMC.

In my view, the maritime law shall be the identified system that is applied to the mis-delivery, no matter what cause of action the claimant may choose for. I support it based on following reasons:

**Firstly**, from the words of article 58, it is not well argued for that it excludes the mis-delivery of goods. When the loss suffered by a holder of a bill of lading is

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<sup>205</sup> Art. 122 of CLC.

concerned, there is no obvious distinction between the totally or partially physical loss of the goods and the failure to get the goods when the carrier delivers them to another person and cannot get them returned. The CMC provides no definition to the “loss of and damage to the goods,” so they are not limited to the physical damages of goods. On the contrary, in practice, considerable holders of bill of lading choose to sue for the loss of goods in order to avoid the burden of proof that the goods were mis-delivered by the carrier even when the goods are actually delivered by the carrier without the bill of lading. So, though the defenses in the CMC are not dealing with the delivery directly, it is difficult to say that the article 58 does not apply to the misdelivery under a contract of carriage or a bill of lading relationship.

**In addition**, this article is making a reference to the *Hague-Visby Rules*<sup>206</sup> and *Hamburg Rules*.<sup>207</sup> The purposes of the integration of tort and contract bases are to provide a uniform solution and certainty of the system of the rights and liabilities of the parties, especially of the carrier, and strengthen the effect of the laws and the legal values behind them.<sup>208</sup> Though there is no comprehensive provision on the issue of delivery under these conventions and the CMC, these purposes and legal values of the integration of system on carriage of goods by sea shall not be abandoned.

As we know, on the contractual and tortious bases, the principles of choice of law, time bar, burdens of proof, the scopes of the liabilities very possibly are different. In the cited trial case of “the disputes on delivery without bill of lading among Yuehai Electronic Ltd. Co. and Cangma transport Co. of Merchant Holdings and others,”<sup>209</sup> these aforesaid differences brought a totally different result to carrier’s liabilities for delivery without bill of lading, who was excused from the liability to the holder in the trial judgment because the time was barred under the bill of lading contract.<sup>210</sup>

If let the holder choose the cause of action freely, the liabilities of the carrier on mis-delivery will be very uncertain, the legal system established by maritime law shall deadly be weakened. Moreover, the principle of the proper law will be

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<sup>206</sup> Art. 4 bis. 1 *Hague-Visby Rules*.

<sup>207</sup> Art. 7 *Hamburg Rules*. Article 58 of CMC is the same as in this article.

<sup>208</sup> See CMI, *The Travaux Preparatoires of the Hague Rules and of the Hague-Visby Rules*, p.596. In the 1963 Stockholm conference, it was explained that “in order to avoid the possibility of by-passing the contract and the legislation based on the convention the subcommittee to the CMI recommends that the following new article (article 4 of Hague-Visby Rules) be adopted...”

<sup>209</sup> Supra fn. 195.

<sup>210</sup> At the first and second instances, the time bar is concluded as 2 years according to the *General Principles of Civil Law* on a tortious base, but the Supreme Court dealt with the disputes on the base of bill of lading contract, and recognized the applicable law clause of the bill of lading, and the 1 year bar under *The Hague Rules* is accepted. However, taking consideration that China is not a party country of the Hague Rules, it is not so convincing to justify the clause of choice of law by the Chinese parties, which is applying this convention to the bill of lading.

varied. All these disadvantages shall destroy the order of international trade and shipping to certain extent, and bring another chaos to the practice in addition to un-uniformity of the present maritime regimes.

**Furthermore**, the modern development of the theory of concurrent liabilities also supports that a contractual system may exclude the tortious liabilities in some special cases. For example, when the infringement occurs because of the breach of one of contractual obligations, if the law mitigates the liabilities for compensation (on the contractual relationship), the tortious liabilities will be excluded.<sup>211</sup> These modifications reflect the strengthening of the value under the contract law system in the modern society.

**Another reason** is that there may be no title under the bill of lading, thus avoiding the confusion for identifying the rights or titles under the bill of lading, and treating it as the contractual one will be simple and safe.

Therefore, for the certainty and clarity of liability systems of the carrier and his counterparts, as well of the bill of lading and contract of carriage by sea, causes of action on delivery without bill of lading (including other misdelivery) must be identified under maritime law. In other words, the disputes should be resolved on a single legal basis, which is of the contract of carriage or bill of lading relationship. The time bar,<sup>212</sup> choice of law, compensation of damages and other issues shall be determined by the unified Maritime Law.

In order to avoid the divergent interpretations of the wording, in the probable modification of CMC in future, the expression of article 58, paragraph1 shall make a reference to the UNCITRAL Draft Instrument as “the defenses and limits of liability provided for in this act and the responsibilities imposed by this act apply in any action against the carrier for the loss of, damage to, or in connection with the goods covered by a contract of carriage in any event, whether the action is founded in contract, in tort, or otherwise.”<sup>213</sup> In addition, of course, this integration desires a perfecting of the legislations on the delivery in maritime field, not only in the national field but also in the international one.

However, if it can prove that the carrier delivers the goods with fraud, in the policy of punishment, the defenses in a contractual relationship may not be applied, and a law of tort may be invoked.

<sup>211</sup> *Shi Shang-kuang's Specific Obligation Law*, p.622.

<sup>212</sup> Art. 257 of CMC provides: “The limitation period for claims against the carrier with regard to the carriage of goods by sea is one yeas, counting from the day on which the goods were delivered or should have been delivered by the carrier …” However, there was controversy in a long period in China, on the point that the one year time bar will be applied to claims against delivery or not, see Jin Zheng-jia (chief Editor), *Analyses and Comments on Chinese Typical Maritime Cases*, 1<sup>st</sup> ed., Law press, 1998, p. 312, see also Yin & Guo's *Carriage Law*, pp.161-162. Nowadays, the majority is applying this rule to the disputes on delivery, see Li Zhang-jun, *Research on Liability System of International Shipping Carrier*, Doctorate dissertation of Eastern China University of Politics and Law, May 2005, pp.190-191.

<sup>213</sup> Sect. 6.10 in WP.21, Art.21 in the WP.32.

## **6. Liabilities of the carrier for delivery without bill of lading**

When the carrier breaches his duty and delivers the goods to a person other than the holder of bill of lading without production of the document, usually, the categories of his liabilities will be: 1) specific performance; 2) compensation for the damages suffered by the holder.<sup>214</sup> In other words, these are the remedies for the holder of bill of lading against the carrier, and he is entitled to opt for either or both of them. In the litigations against the carriers, the plaintiffs, i. e. the holders of bill of lading usually claim for “1) delivery of the goods under the bill of lading No. XXXX; or/and 2) compensation for the plaintiff's losses, *inter alia* … amount to XX.”

### **6.1 Specific performance**

Generally, the legal holder of the bill of lading is still entitled to claim for the goods, in other words, the obligation of the carrier to deliver the goods against the bill of lading will not be discharged by his wrongful delivery. Therefore, a specific performance is a justifiable remedy for the holder.

In order to exercise the specific performance, the carrier shall get the goods returned from the person who has taken them without bill of lading. In some cases, obtaining of the good by the person from the carrier with no bill of lading may constitute an illegal enrichment for lacking statutory or contractual authorizations and he is not entitled to the possession of the goods. As the legal ground for the carrier's returning claiming is concerned, maybe some difficulties lie here because there is no bill of lading or contract as the ground for the carrier.<sup>215</sup>

In my view, the carrier may claim for the restitution of the “physical possession” of the goods. The physical possession of the goods by the carrier comes from the authority of contract of carriage, and it will be discharged only by the fulfillment of the conditions under the contract or bill of lading or under the law, i.e. to deliver the goods in accordance with the terms in the bill of lading against the production of the bill. Therefore, in the case of misdelivery, the carrier was deprived of the physical possession of the goods (though the carrier delivered the goods voluntarily with no compulsory duty to do so, but maybe with commercial pressure), and the carrier is entitled to the restitution of this possession.

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<sup>214</sup> Article 107 of CLC provides, “Where one party to a contract fails to perform the contract obligations or its performance fails to satisfy the terms of the contract, the party shall bear such liabilities for breach of contract as to continue to perform its obligations, to take remedial measures, or to compensate for losses.” In respect of misdelivery, the continuation to perform or to compensate for losses shall apply.

<sup>215</sup> This point does not take consideration of the delivery against a letter of indemnity. In addition, even in a LOI, the claims by the carrier are for the compensation for the losses incurred by the misdelivery but not the claiming for the returning of the goods.

According to the CLC, even the holder demands for the goods, the carrier may be discharged from the liability of specific performance, if “it is unable to be performed in law or in fact.”<sup>216</sup> And it seems that the courts in China never issued an order or injunction to force the carrier to actually deliver the goods to the holder when the goods had been released without bill of lading.

However, if the holder has claimed for either the delivery of the goods or compensation for damages in one litigation, is he entitled to reject this specific performance later? Neither CLC nor CMC deals with this issue. But in my view of point, if the goods become deliverable again to the plaintiff, it seems no sufficient reason for him to reject the goods under this situation unless the new delivery is not proper. So, based on the principle of honesty and good faith, the holder shall accept the specific performance.

In another case, the problem arose from the other angle. In *Zhejiang Ji'engshi Garments Group Corp. v. Fancheng International Freight Forwarder* on delivery without bill of lading, the plaintiff claimed for the compensation of price of the carried leather jackets, which had been released by the carrier without bill of lading.<sup>217</sup> The defendant carrier had parts of the goods returned, but the court upheld that the plaintiff is entitled to reject the goods but to the compensation of damages. The decision needs a further consideration.

Whether the holder is entitled to reject the specific performance of delivery shall be determined by holder's right to reject the goods under the contract of carriage. But Chinese law does not provide a clear attitude.

## 6.2 Compensation for damages

In the disputes of misdelivery, more often, the final liabilities by the carrier's fall in the compensation for the plaintiff's damages caused by that. However, the scope of the recoverable damages still needs further discussion.

### 6.2.1 Foreseeable damages

Under both the civil law and common law, the rules are similar under the contract law that when one party breaches a contract, he will be liable for the damages which have been foreseen or should have been foreseen by the party at the time

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<sup>216</sup> Article 101 of CLC, where one party to a contract fails to perform the non-monetary debt or its performance of non-monetary debt fails to satisfy the terms of the contract, the other party may request it to perform it except under any of the following circumstances: “it is unable to be performed in law or in fact...”

<sup>217</sup> *Selected Cases of the People's Court*, 2002, 2, see also Feng Guang-he, *Focus on Liability for Releasing of Cargo without B/L*, Shipping Exchange Bulletin, 2003,15, p.49.

when the contract is concluded.<sup>218</sup> This is called the foreseeability rule of damages of contractual liability. The CLC introduces this rule to the liability system, and provides that the amount of compensation for losses shall be "equal to the losses caused by the breach of contract, including the interests receivable after the performance of the contract, provided not exceeding the probable losses caused by the breach of contract which has been foreseen or ought to be foreseen when the party in breach concludes the contract."<sup>219</sup>

However, the foreseeable damages mean those that can be contemplated by the duly prudent party with general level in usual conditions. As some special damages are concerned, they are recoverable only if they have been indicated or the party in breach should have known about them when the contract was made. Therefore, the foreseeability rule also is called reasonable foreseeability rule. Although this rule may not be put forward directly in the maritime law, it still applies to the contract of carriage and bill of lading.<sup>220</sup>

According to this rule, as matter of general principle, the measure of damages for non-delivery of goods under a bill of lading is the estimated loss directly and naturally resulting, in the ordinary course of events, from the non-delivery.<sup>221</sup>

In addition to this rule, as the supplements, the actual damages or the *restitutio in integrum* are also the rules to the measures of the amount of the recoverable damages to some extent<sup>222</sup>, the *General Principles of Civil Law of PRC* also provides that the compensation liability of the party in breach shall amount to the loss the other party suffered there from.<sup>223</sup> For example, the damages of goods usually shall make some appropriate deductions for the saving of costs that become unnecessary when the goods are damaged or lost.

Furthermore, in some regimes, in case of delict or fraud or bad faith, damages need only direct and immediate result, and foreseeability is no longer necessary.<sup>224</sup> This is referential for Chinese jurisdiction.

### 6.2.2 Damages to the goods

First of all, to the holder of the bill of lading, the depriving of the goods themselves is the obviously natural and foreseeable result of the misdelivery, which is the loss of the goods from the angle of the holder.

<sup>218</sup> William Tetley, *Marine Cargo Claims* (hereafter as "Tetley's *Cargo Claims*"), 3<sup>rd</sup> ed., Blais, 1988, pp.319-323.

<sup>219</sup> Paragraph 1 article 113 of the CLC.

<sup>220</sup> Sometimes, the rule may be limited to some special systems in maritime law, e.g. the limitation of the amount of compensation, the exclusion of some kind of losses, for example, see 6.2.4 below.

<sup>221</sup> Gaskell, 16.6, pp.500-50. But the scope of damages under *Hague-Visby Rules* is not so clear.

<sup>222</sup> *Tetley's Cargo Claims*, pp. 321-322.

<sup>223</sup> Art. 112, paragraph 1.

<sup>224</sup> *Tetley's Cargo Claims*, p. 322-323.

To a wide range, the Arrived Sound Market Value (A. S. M. V.) Rule is the common measure for the damages of the goods.<sup>225</sup> If the cargo is damaged or lost, the claimant “should be recompensed for the value of the damaged or lost cargo at the time and place of the delivery or when it should have been delivered.”<sup>226</sup>

The *Hague-Visby Rules* accepts this measure for the damages in connection with the goods, that the amount recoverable “shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship…or should have discharged,” and this value shall be fixed according to the commodity exchange price, or if there is no such price, the market price, or if there is no such market price, by reference to the normal value of the goods of the same kind and quality.”<sup>227</sup> The UNCITRAL Draft Instrument adopts the same rule, except using the time and place of “delivery” instead of “discharge.”<sup>228</sup> In addition, article 312 of the CLC provides the market price at the place and time of delivery for the amount of the damage to or destruction of the goods under a contract of carriage.<sup>229</sup>

However, the CMC provides for a different rule. The amount of the indemnity for the loss of the goods shall be calculated “on the basis of the actual value of the goods,” and the actual value shall be “the value of the goods at the time of shipment plus insurance and freight.” In addition, the necessary deduction shall be made if the expenses had been reduced or avoided by the loss of the goods.<sup>230</sup>

This provision causes two problems; one is whether it applies to the case of misdelivery, and the other is whether it is a reasonable measurement for calculation of the loss of goods.

As the first issue is concerned, because the CMC does not deal with the issues of delivery, nor does this provision use the words such as “any loss of or damage to or in connection with the goods” which are used in *Hague-Visby Rules*, some judges and practitioners consider this rule inapplicable to the situation of misdelivery. Or some of them think that the article 312 of CLC shall be applied to the delivery without bill of lading.<sup>231</sup> Indeed, in the present situation of the China Maritime

<sup>225</sup> Ibid, pp.323-326.

<sup>226</sup> Teltey's *Cargo Claims*, p.323, see also Gaskell, 16.13, p.503.

<sup>227</sup> Art. 4 paragraph 5 (a) (b) *Hague- Visby Rules*.

<sup>228</sup> Art. 17, paragraph 1,2 in WP.32.

<sup>229</sup> “The amount of damages for the damage to or destruction of the goods shall be the amount as agreed on the contract by the parties where there is such an agreement. Where there is no such an agreement or such agreement is unclear, nor can it be determined according to the provisions of Article 61 of this law, the market price at the place where the goods are delivered at the time of delivery or at the time when the goods should be delivered shall be applied …” Article 61 of CLC provides the price or remuneration etc. shall be determined by the contract, supplementary agreement or context of contract or transaction practices.

<sup>230</sup> Art. 55, CMC.

<sup>231</sup> Zhou Hong-kai, “Influences on the Systems of International Carriage of Goods By Sea by the Contract Law,” in *Annual of China Maritime Trial*, Jin Zheng-jia (chief editor), the people's communication press,

Law, it is not clear whether a mis-delivery is included in this article; but, it is also difficult to say the misdelivery shall be excluded from it. As mentioned above, without the expressive distinction, from the surface, the holder deprived of goods is another kind of loss of goods.

This vagueness of CMC also brings confusions to the judicial practices in China on the disputes of delivery without bill of lading. The clarity of law is desired well.

With the application of this article left aside, the measures of damages on actual value are not always reasonable. First of all, the value of the goods at the time of shipment lacks clarity. In practice, usually, the invoice price is deemed as the value of goods at the time of shipment, and the CIF value of goods is generally regarded as the actual value of the goods.<sup>232</sup> However, the invoice price may be different from its actual price in the transaction, that is, it is possibly lower or higher than the actual transaction price for different reasons. The controversy between the plaintiff and the defendant about the actual loss of goods often arises during the proceeding.

In addition, according to the rule of *restitutio in integrum*, the compensation shall indemnify the claimant making the restitution of the original position if there was no such breach by the carrier. In most cases, the original position is, if the carrier does not deliver the goods without bill of lading, the holder shall still keep the goods, or he may dispose the goods at the place of delivery, so the A. S. M. V. will be closer to the actual value of the goods if there is no misdelivery, and is more reasonable than the present rule in CMC.

However, the A.S.M. V. rule is just a *prima facie* measurement of damage, which is subject to the rule *restitutio in integrum* or actual losses. In the English case *The Ines*,<sup>233</sup> the cargo of telephone was delivered by the carrier (through a port authority) without bill of lading. The judges held that the amount of the damages shall be calculated by the invoice price, which was lower than the wholesale price at the destination. On the ground that if the cargo were not delivered, the buyer very likely would pay the cargo because he had paid some of the payment, the assumed original position of the plaintiff was what he would have obtained the payment under the sale contract without such mis-delivery. And, if there is no evidence of the market price, a CIF invoice price also may be accepted as a quick settlement.<sup>234</sup> Therefore, to some extent, the way to calculate the damages shall be flexible, but the principles of the damages under contract law must be held.

### **6.2.3 Consequential/economic loss**

In the field of contractual liabilities, consequential losses usually are defined as

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<sup>232</sup> 2000, p.273 at pp.265-274.

<sup>233</sup> *Interpretation of CMC*, p.46.

<sup>234</sup> (1995) 2 Lloyd's Rep. 144.

<sup>234</sup> See *Gaskell*, 16.13, p.503.

non-physical damage, such as the future business interests and loss of reputation.<sup>235</sup> Nowadays, economic loss usually used is also similar to the consequential loss.<sup>236</sup>

According to the general principles of the reasonably foreseeable damages and the others abovementioned, these non-physical losses are recoverable. However, it does not meet uniformity under the maritime laws.

In the *Hague Rules*, the consequential loss is not prohibited.<sup>237</sup> However, the *Hague-Visby Rules* excludes this kind of losses, because in the damages in connection with the goods, the “total amount recoverable” shall be the aforesaid A. S. M. V.<sup>238</sup> Whereas, from the phraseology of the *Hamburg Rules*, “the carrier shall be liable for *loss from loss of or damage to the goods*, as well as from delay in delivery” (emphasis added), such kind of losses shall be included. The UNCITRAL Instrument Draft excludes this kind of losses.<sup>239</sup>

In the CMC, except in the case of delay of delivery, the economic losses are not expressly included. Conversely, in article 55, the amount of indemnity for the loss of or damage to the goods shall be calculated on the basis of the actual value or the difference of value of the goods. From the wording, in my view, CMC is very likely to exclude the economic losses in most cases. However, it is often argued that this article just provides the means for calculation of the physical loss of the goods, rather than determine the scope of the compensation. And even in some cases of the damage and short delivery of the goods, the court held that the inspecting charges, additional handling charges to the damaged goods in addition to the physical damages of the goods shall be compensated.<sup>240</sup> In addition, there is express opinion that this article does not apply to misdelivery, and the potential interests such as the reduction of the customs duty<sup>241</sup> shall also be reimbursed by the carrier.<sup>242</sup>

Whether the economic losses are recoverable or not will depend on the applicable law. However, in view of the fairness and adequate compensation for the claimant, they shall be included under the principles of foreseeability of damages, *restitutio in integrum* and so on.

<sup>235</sup> *Tetley's Cargo Claims*, p. 333.

<sup>236</sup> As a traditional view, economic loss is used in the case of tort and delict apart from the physical damages, while the consequential loss is used in a breach of contract, see *ibid*, pp.332-333. But under modern maritime law, there is no such distinction, such as for the loss of delay in delivery, economic loss is the general term.

<sup>237</sup> Article 4(5) of *Hague Rules* limits the liability in any event for “any loss or damage to or in connection with good.”

<sup>238</sup> Article 4 (5) (b) *Hague- Visby Rules*.

<sup>239</sup> See Art. 17 in WP.32, Art. 6.2 in WP.21.

<sup>240</sup> See *The Keyaze*, in Jin Zheng-jia (general editor), *Annual of China Maritime Trial*, the people's communication press, 1999, p.321.

<sup>241</sup> In China, when the goods have been exported, the seller is entitled to certain reduction of the v.a.t. of the goods.

<sup>242</sup> Zheng Zhao-fang (general editor), *Selected international Maritime Cases ---- Judgments and Comments*, 1<sup>st</sup> ed., Shanghai people's press, 2004, p.45.

#### **6.2.4 Limitation of liability**

The limitation of liability is one of the distinguishing characteristics of the maritime law and other transportation laws. But, whether this limitation shall apply to the liabilities of the carrier in a case of misdelivery is still un-uniformed.

From the previous discussion of the regulations, the limitation in the *Hague Rules*<sup>243</sup> and *Hague-Visby Rules*<sup>244</sup> shall apply to the case of misdelivery, and the *Hamburg Rules*<sup>245</sup> very likely applies to it too. And, if consequential losses are covered in the system of carrier's liabilities, the amount will apply to both the loss of the goods themselves as well as the consequential losses.

For the same reason as being pointed out in the former parts, because of the vagueness of the phraseology, whether the limitation under CMC<sup>246</sup> covers the case of misdelivery is also under controversy. It will depend on the interpretation of the "loss of the goods" at present time. Nevertheless, in the judicial practice, most of the judges think the provisions of limitation and the loss of the limitation shall be applied to the cases of misdelivery.

In China, it is a common sense that when a carrier delivers the goods without bill of lading, he shall be deprived of the right to the limitation on the ground that "the carrier is with intention or reckless"<sup>247</sup> to make the loss to the holder of bill of lading.<sup>248</sup> In other regimes, such as in Scandinavian countries, the carrier shall lose this defense.<sup>249</sup>

However, some people argue that the carrier shall be entitled to the limitation in these cases because he is usually in good faith to believe the person claiming the goods is entitled to them and the commercial pressure and the limitation of other remedies<sup>250</sup> Therefore, it is unfair to deem he is with the intention or reckless to cause the loss of the holder.

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<sup>243</sup> Art.4 (5) *Hague Rules*.

<sup>244</sup> Art. 5 (5) (a) *Hague-Visby Rules*.

<sup>245</sup> Art. 6, 1(a) *Hamburg Rules*, "The liability of the carrier for loss resulting from the loss of or damage to goods ... is limited to an amount equivalent to 835 units ..."

<sup>246</sup> Article 56 CMC, " The carrier's liability for the loss of or damage to the goods shall be limited to an amount equivalent to 666.67 Units of account per package or other shipping unit, to 2 Units of Account per kilogram of the gross weight..."

<sup>247</sup> Article 59 of CMC deals with the loss of the right to limitation.

<sup>248</sup> At the first instance of the case of *Wooedtrans Nav. v. Anshan Steel Group*, the court held that delivery without bill of lading should deprive the carrier (and actual carrier) of the right to the limitation and other defenses, see *Gazette of the Supreme Court of PRC*, 2002, 2, p.36.

<sup>249</sup> "If the carrier goes along with delivering the cargo without presentation of a bill of lading ...the carrier is unable to defend himself because of an intentional deviation from the 'rules of the game' ...the carrier cannot rely on contractual exemptions or limitation clauses, nor do the statutory rules help him." See Thor Falkanger and others, *Scandinavian Maritime Law, the Norwegian Perspective*, 2<sup>nd</sup> ed., Universitets Forlaget, 2004, pp.322-323.

<sup>250</sup> See the reasons in *supra* part 4.

Indeed, most of the carriers do not cause the loss of the holder intentionally, most times they are likely confident that the receiver of the goods is the right person entitled to the delivery under contract of carriage, or, at least when they get a reliable letter of indemnity.<sup>251</sup>

However, carriers should have realized the potential risks of the holder, and it is difficult to say they are totally “innocent” from the “intention” or “recklessly doing.” So, the views of carrier’s right to limitation also are determined by the values behind the legislations.

I prefer to deprive the carrier’s right of limitation of liability in general cases, in order to keep the security of the right under the bill of lading, and avoid too much tolerance in the misdelivery. But it does not mean that I haven’t noticed the dilemma of the carrier in these situations. In my point, this deprivation of the limitation of liability is based on a balance between the carrier’s liabilities and their pressure. The laws shall make effort to create this balance. And, the alterations, or the innovations by laws such as the rules in the UNCITRAL Draft Instrument above mentioned are necessary to discharge the carrier’s duty of delivery against bill of lading in some special cases.

## 7. Conclusions

### 7.1 Presentation rule

The presentation rule of bill of lading on delivery is both the right and obligation on the carrier. In short, this rule is established on the basis of the merchant custom. At the beginning, the main function of this rule is to tell the carrier to whom shall the goods be delivered. In addition, the presentation rule becomes the undertaking by the carrier under the contract of carriage and the bill of lading. In certain regimes, it is even a statutory obligation on the carrier. These factors sufficiently justify the insistence of this rule.

I don not agree with the opinion that the function of the bill as a document of title is the reason for presentation rule. Contrarily, in my view, it is the presentation rule of the bill that helped to accomplish the title function of this document. Title function of the bill runs in the transactions of sales contracts, the financial arrangement and others. The bill of lading it does not operate in relation with the title to goods in the contract of carriage, but only the contractual contents.

However, the possession of the bill may represent the right of possession to the goods or other titles to the goods, these titles may prevail over the ownership to the

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<sup>251</sup> For the effect of the LOI, see part 2, Chapter 6.

goods. So, even if the holder is not the owner of the goods under the bill, he may be entitled to the possession of the goods, which is the prevailing right.

The presentation rule promotes the sale of goods and transfer of bill of lading during the transit, but the title function of the bill strengthens the necessity of presentation rule in delivery.

In addition, in my view, the relationship among the shipper, the carrier and the holder of the bill of lading is the combination of the contract of carriage, which is a contract of third party's benefit and the relation of instrument of value. The allocation of rights and obligations among them shall be resolved in accordance with these theories. The negotiability of the bill of lading makes the bill closer to the instrument of value.

The transfer of the bill usually results in two effects, the transfer of the title and the transfer of the obligatory rights and obligations on the holder, including the right to delivery. However, the title effect is not always the result. Even without the title to the goods accompanied with the bill, the legal holder is still entitled to the obligatory right for delivery based on an effective transfer. In addition, transferability of bill of lading confers the exclusive right to delivery of goods and right of controlling goods on the legal holder of the bill.

In summary, the presentation rule, document of title and the negotiability of bill are the independent and separate functions of the bill of lading. Presentation rule is the contractual undertaking by the carrier, but the title function and the transferability of the bill strengthen the necessity of the presentation rule on the delivery.

## **7.2 The future of presentation rule**

Delivery without bill of lading is very common in practice and brings risks to both the traders and carriers. The measures to resolve this practice shall be based on two approaches: speeding up the circulations of bill of lading, and, giving up presentation rule on delivery by innovation in the system of transport documents.

Until now, there is no perfect or versatile solution applied to all the cases for this practice. But as a primary principle, the presentation rule shall be insisted in general cases, though in certain fields, the bill of lading and/or the presentation rule may be weakened.

Every mechanism, no matter the contractual authorization or "telex-release", shall have its limitation and the application will be respected. For the balance of the rights and obligations of the carrier and his counterparts in respect of delivery, it will be justifiable to discharge the carrier from the obligation of delivery against the production of bill of lading when the presentation rule cannot be followed up.

The innovation by the UNCITRAL Draft Instrument to take the place of the presentation rule by the instructions of the controlling party, or the shipper on delivery in the special cases when there is no holder claims for delivery, is a good trying, though it still needs further improvement and testing.

### **7.3 Liabilities on the carrier for delivery without bill of lading**

The liabilities of the carrier for delivery without bill of lading are based on the hypothesis that the legal holder of the bill is entitled to these claims and there is no excuse for the carrier.

The legal nature of the delivery by the carrier without bill of lading will be various depending on the effects represented by the document. If the transfer of the bill can confer the legal holder both the obligatory right for delivery and the titles such as right of possession or the ownership or others to the goods, the delivering the goods by the carrier to a person other than the legal holder without original bill of lading will constitute the concurrence of a breach of contract and a tort.

Even under the concurrence of the acts, I argue for that the claims against the carrier for this mis-delivery shall be based on the identified contractual or bill of lading cause.

As to the liabilities of the carrier for such mis-delivery, the carrier shall be liable for the specific performance, and, more usual, for the compensation for the damages suffered by the holder.

When measures of damages of the goods are concerned, I suggest the basis of the ASMV (arrived sound market value) to replace the “actual value” under the present CMC.<sup>252</sup> In addition, the Economic losses shall be included in the measurement of the damages. However, the measures of damage shall be subject to the rules of “reasonably foreseeability” and the *restitutio in integrum*.

In my view, the carrier shall be deprived of the right of limitation of the liabilities with the improvement of the system of bill of lading and the statutory authorities for delivery without bill of lading.

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<sup>252</sup> Art. 55 CMC.