

## Chapter 6

### Liabilities on the Carrier for Delivery without Production of B/L (2)

---

Chapter 5 explicates and underpins the bases for the presentation rule of the bill of lading for delivery and the normal liabilities on the carrier when he breaches this rule. However, as it has been pointed out, these liabilities are based on the hypothesis that there are no justifiable defenses for the carrier.

The carrier may be discharged from whole or part of his liabilities on various grounds when he has delivered the goods without the original bill of lading. Usually, the exemptions for the carriers are as follows, *inter alia*: the time for suit is barred; there is no causation between the loss suffered by the holder and the misdelivery; the delivery was authorized by the holder; the delivery without bill of lading complies with the statutory authorization<sup>1</sup> or the custom<sup>2</sup> of the destination; and the claimant has no right of suit against the carrier,<sup>3</sup> so on and so forth.

I will not deal with all the concerned defenses, however, I'd like to give a brief analysis of some exemplary Chinese cases, in which the courts have accepted or put forward some special defenses for the carrier to discharge his liabilities from the delivery without bill of lading.

Relating to the possible defenses for delivery without bill of lading, I will try to probe the effect of LOI, the application of the presentation rule to the straight bill

---

<sup>1</sup> See discussions on delivery authorized by applicable law in part 3.4 of Chapter 3.

<sup>2</sup> For example, in the *The Sornovskiy 3068*, the court observed if delivery to the CSP without production of bill of lading is the custom of the port, it would be justifiable for the carrier to do so, (1994) 2 LLR. 266, see also part 3.4 of Chapter 3.

<sup>3</sup> See *Wang's Countermeasures*, see also Du Jian-xing, *Defenses for the Carrier Against the Claims for Delivery Without Bill of Lading*, Annual of China Maritime Law, 2001, pp.117-188.

of lading, and the carrier's remedies when the bill of lading is declared to be lost.

## 1. Chinese cases and comments

### 1.1 The *Kota Maju* and carrier's defenses

The judgment of *The Kota Maju*<sup>4</sup> was aimed at the shipping agent, but the reasons for the decision can also be applied to the carrier for delivery without bill of lading. It is one of the earliest cases that exempted the carrier or the carrier's agent from the liabilities for the delivery without bill of lading and is very influential in China. Meanwhile, this judgment demonstrated some key issues that have universal meaning with respect to the carrier's liability for delivery without bill of lading.

#### 1.1.1 Facts and decisions

Briefly, the essential facts are as follows:

In May 1989, the plaintiff, Hong Kong Resources Textile Crude Material Co. Ltd (hereafter as "the Plaintiff"), made, as the seller, a sales contract with Imp. & Exp.(Group) Co. of Shenzhen Specific Zone (the third defendant, hereafter as "Shenzhen") on Sudan crude cotton. Because of the divergence of the documents under the letter of credit, the bank rejected the payment of the cargo and returned the documents to the plaintiff on 20 October 1989. The bill of lading is an order bill with the due endorsement of the shipper the carrying vessel is *The Kota Maju*.

After the discharging of goods, on 20 October 1989, the first defendant, Zhanjiang Shipping Agent agreed to release the goods to Shenzhen against an LOI signed by the second defendant, Zhanjiang Textile Co. After then, the goods were stored at the warehouse of the Harbor Authority Forwarding Co. by the third defendant, Shenzhen. After the rejection under the letter of credit, the plaintiff negotiated with Shenzhen on the quality of the goods and the payment of them, and went to the warehouse to make an investigation of the quality and the storage of the goods accompanied by the staff of the third defendant. In 1990, the plaintiff got part of the payment, but failed to meet an agreement on the balance. In May 1991, the plaintiff was told by the first defendant, Zhanjiang Shipping Agency that the goods had been removed from the port warehouse. So, the plaintiff brought a suit claiming for the delivery of the goods or the monetary compensation on the basis of the balance of the payment.

---

<sup>4</sup> *Hong Kong Resources Textile Crude Material Co. Ltd v. Zhanjiang Shipping Agency and others*, <http://www.ccmt.org.cn/hs/news/show.php?cId=1552>, 28 Feb., 2005.

The Maritime Court of Guangzhou observed, in the judgment, that, in this case, there were two legal relationships, one was the sales contract between the plaintiff and Shenzhen, and the other was the delivery and taking delivery of the goods without bill of lading. The court confirmed that when the goods arrived at port Zhanjiang, the plaintiff was the legal holder of the bill of lading and the owner of the goods. The delivery and taking delivery of the goods without bill of lading violated the international shipping practice of the presentation rule, infringed the legal statute of the bill of lading, and therefore constituted a tort.

However, the court thought that the negotiation on the payment under the sales contract and the investigation of the goods by the plaintiff meant a ratification of the delivery and taking delivery by the defendants without bill of lading. So, the plaintiff's action should be regarded as a voluntary continuation to perform the sales contract and a surrender of the right under the bill of lading. Considering, in particular, the consultation between the plaintiff and Shenzhen and their agreement to alter the method of payment, the bill of lading was no longer a document of title, but as an evidence of the carriage contract and a receipt of goods by the carrier. Therefore, the court rejected the claims by the plaintiff.

### **1.1.2 Comments**

To a great extent, the decision of this case has gotten support confirming that it was a reasonable result for the carrier,<sup>5</sup> and the viewpoints in it were invoked in other cases.<sup>6</sup>

Briefly, the reasons for the decision of *The Kato Maju* are only two, one is that the plaintiff had ratified the delivery of the goods and given up his right under the bill of lading, the other is that the bill of lading ceased to be document of title because of the conducts of the plaintiff. From this reasoning, three issues are raised: 1, the relationship between the sales contract and the bill of lading or a carriage contract; 2, ratification or approval of the delivery without bill of lading; 3, the function of bill of lading in the cases of such delivery.

#### **1.1.2.1 Sales contract and bill of lading or contract of carriage**

In China, the idea is not uncommon that the holder shall opt for the remedies under

---

<sup>5</sup> See Liu Yan, *On Carrier's Liability for Delivery of Cargo without Production of Original Bill of Lading, the Kota Maju* (hereafter as "*Liu Yan*"), *Lloyd's Maritime and Commercial Law Quarterly* 1996 (edited by F. D. Rose), LLP, pp.32-33 at pp.30-33. See also, Zhang Zhi-yong, *Brief Introduction of the Cases of Delivery Without Bill of Lading where the Carrier Succeeded*, *CMLA News Letter*, 2000,9, p.50 at pp.49-53. But in the latter article, the author made a reservation on the reasons for the decision.

<sup>6</sup> *Supra* fn., *Zhang Zhi-yong*, p. 49 at pp.49-53.

the bill of lading or the sales contract: If he exercises the rights under one relationship, he loses those related to the other. On this ground, it is even popular for a long period that delivering the goods to the buyer under the sales contract without the bill of lading was a right delivery to the right person. As a result, the risks under the sales contract, such as the loss of payment of goods, shall not be borne by the carrier.<sup>7</sup> In the appealing case of *The Xing Long*,<sup>8</sup> the High Court of Tianjin held that the carrier would not be liable for the delivery without bill of lading because the holder of B/L had claimed against the payment under the sales contract. The reason was similar to that of *The Kato Maju* case.

In my view, these opinions have mixed the relations under the contract of carriage or bill of lading and the sales contract. As is pointed out in Chapter 2, actually, the two kinds of relations are closely related, but primarily, they are independent from each other.

On the one hand, as it has been emphasized for several times in Chapter 5, delivery against the production of bill is both the duty and right of the carrier in the carriage relationship; he shall not know, and it is not necessary for him to know who is the buyer of the goods. And, the holder of the bill of lading has prevailing right to demanding the goods over the rights of the buyer or even of the owner of the goods unless there is otherwise arrangement. So, delivery to the buyer shall not be a defense for the carrier in general cases. When the carrier breaks the promise of presentation rule, he runs the risks, and, in most cases, the holder would prefer to claim against the carrier for the reason of the carrier's finance capacity and so on.

However, the holder, who also happens to be the seller, is entitled to recourse to the remedies under the sales contract against the buyer who gets the goods without the authorizations of the contract or law. Nevertheless, the option for the remedies in one relationship does not mean a surrender of those in the other. So, the reasoning in *The Kato Maju* is not justified, that the plaintiff's negotiation with the buyer after delivery constituted the ratification of the delivery by the carrier and the abandonment of the rights in carriage relationship.

It is important to limit the rights and obligations of the carrier to the scope of the contract of carriage and bill of lading, which may avoid the confusions in practice.<sup>9</sup> Undoubtedly, if the holder has been recovered in one relationship, for instance,

---

<sup>7</sup> Liu Yan, *ibid.*

<sup>8</sup> <http://www.ccmt.org.cn/hs/news/show/>, April 2004.

<sup>9</sup> In China, the confusions of the relationship between the contract of carriage and the sales contract often arise, not only on the issue of delivery but also on others. For example, a dispute arose in one case about the representations

on bill of lading. The carrier insisted on making remarks of the goods on the b/l based on his observation, but the shipper argued that the goods were in accordance with the sales contract and claimed for a clean b/l. In another case, the holder claimed for the damages of the contamination of the oil goods, but the carrier argued he would not be liable for this damage on the basis that there was no requirement of the color of the oil in the sales contract and thus, there's no loss to the holder. See quotations in *Guo Yu's Bill of lading*, p124.

having gained the whole payment from buyer, he shall not recourse to the other contract again, because he shall not obtain the compensation more than his actually damages, otherwise, it will be an unjust enrichment.

In addition, bill of lading is a mechanism to protect the seller (crossing both fields. The promise by the carrier of delivery on presentation of bill of lading makes the seller) maybe an intermediate seller) possibly control the goods on the international trading by holding a bill of lading. If the carrier had not delivered the goods to the buyer, the holder should still hold the control of the goods, and may either get the payment from the buyer, or re-sell them, or at least, hold the goods and kept the value of the goods. So the loss of the balance of the payment was the foreseeable and direct loss caused by mis-delivery. Taking liability for this loss is not an unfair transfer of the risks under sales contract to the carrier, but is his due liability.

However, arrangements in sales contract may well influence the duty of carrier on delivery. For instance, in the case of the *China Bank Hunan Province Branch v. Guangzhou Zhenhua Shipping Ltd. Co. and others* (hereafter referred to as “*The China Bank*”),<sup>10</sup> there was an express clause in the sales contract: “All the original documents shall pass through the bank, and the seller shall allow and assist the agent of the buyer in Hong Kong to take the delivery of goods in case there is no bill of lading.” With such kind of clause, it shall be taken as justifiable that the traders have abandoned the presentation rule of bill of lading on delivery, and that the bill of lading will not play a traditional role as document of title or the document for delivery between the seller and buyer. Therefore, even the bill of lading is still held by the seller or the buyer, the carrier is not liable to them for delivery without bill of lading.

Nevertheless, the agreement in a sales contract is effective between the counterparts, and it shall not infringe the rights of the *bona fide* holder of the bill of lading who is the third party to it and has no opportunity to know this clause) against the carrier under the bill. Yet, if the third party has known or should have known such kind of agreement in the sales contract, and still accepts the bill of lading, it seems he is not entitled to sue the carrier for delivery without bill of lading. In the former case of *The China Bank*, the plaintiff as the holder of bill of lading sued the carrier for delivering the goods without bill of lading. The court rejected the plaintiff's claim and observed: the plaintiff, as the opening bank of the letter of credit, had examined the sales contract and indicated in the application form for a L/C that he “has made an investigation of the background of the trade,” which shows he should have known the special agreement on the delivery; therefore, the holder had given up the right to the presentation rule and exempted the duty of delivery against the bill of lading on the carrier. I agree with this

---

<sup>10</sup> Jin Zheng-jia, *Annual of China Maritime Trial*, the people's communication press, 1999, pp.340-348.

decision.<sup>11</sup>

In addition, considering the holder's behavior, which illustrates his giving up the presentation rule, the carrier may also be excused from the delivery without B/L.

### 1.1.2.2 the ratification of the delivery

In *The Kota Maju*, the seller's negotiation with the buyer on the payment of the goods, in itself, shall not be a ratification or approval of delivery without bill of lading. Such negotiation was only the exercising of the plaintiff's right under the sales contract and should not offset his right under the bill of lading.

Similarly, in *The Ines*, the plaintiffs had brought proceedings in Belgium for the price, against the named consignee and the notify party under the bill of lading, who got the goods without bill of lading. The judge held that the assertion of a claim by the plaintiffs against the receivers of goods on "a different even inconsistent basis from that asserted against the carriers" does not "amount to a waiver, election or ratification upon which the carriers can rely."<sup>12</sup> In addition, in a Hong Kong case, *Rtafigura Beheer BV Amsterdam v. China navigation Co. Ltd.*,<sup>13</sup> the plaintiff, the holder of the bill of lading, concluded an agreement with the person who actually took over the goods. The court held that the action by the plaintiff should not be taken as an approval for the delivery without bill of lading or a waiver of the claims against the carrier either.

However, if the holder of bill of lading knows the delivery by the carrier in advance or during the delivery but does not protest against it or try to stop it, or even takes part in the delivery, usually, his action shall be deemed as an approval or ratification of the delivery without bill of lading. For example, in *China Light Industry Crude Materials Corp. v. Hualian Shipping Co. and Shantou Shipping Agent*,<sup>14</sup> the representatives of the plaintiff and of the shipper were at the spot and didn't raise any objection during the process of delivery without bill of lading. It should be deemed that the plaintiff had approved the delivery without bill of lading and then he was not entitled to claim for this delivery against the carrier.

In addition, the agreements in advance — like the one made in the sales contract

---

<sup>11</sup> However, I cannot totally agree with some of the reasons in this judgment. The court regarded the bank as the *pledgee* of the bill of lading and observed that the delivery without bill of lading had been approved by the *pledgee*. In my view, since the bill of lading would not represent the goods any longer with the agreement between the seller and the buyer, it is doubtful whether depositing the bill may confer the pledge of the right to the goods under the bill and whether the bank was an effective *pledgee* of the bill. As to the effect of a pledge under a similar situation, see the decision of English case *The Future Express*, (1993) 1 Lloyd's Rep. 542.

<sup>12</sup> Mr. J. Clarke's observation, (1995) 2 Lloyd's Rep, 156 at 144.

<sup>13</sup> (2000) HKCU 1, cited in *Wang 's Countermeasures*, p.449.

<sup>14</sup> Jin Zheng-jia (chief editor), *Annual of China Maritime Trial*, the people's communication press, 2000, pp.509-510.

in *The China Bank* or the ones made in other ways so as to put forward mechanisms other than the presenting of bill of lading on delivery — will also be sufficient evidence for the approval of delivery without bill of lading, and the carrier shall not be liable for the parties of such agreements.

Under common law, these agreement or action by the plaintiff who is the holder of bill of lading shall constitute an “estoppels”, which may exempt the carrier from the liabilities for the delivery without bill of lading.<sup>15</sup> However, the usual conditions for the application of estoppels are severe.<sup>16</sup>

### 1.1.2.3 Exhaustion of bill of lading as a document for delivery

In *The Kota Maju*, it was observed that the bill of lading ceased to be a document of title when the plaintiff negotiated with the consignee on the payment of the goods after the delivery, and therefore, the plaintiff was not entitled to claim for his loss against the carrier's agent and others under the bill of lading.

The conclusion that the bill of lading ceased to be the document of title in this judgment is not very convincing.<sup>17</sup> In my view, the negotiation of the bill after the delivery of goods is not a sufficient reason to deny the bill of lading a continuing function of the document of title. Even the court are right in claiming that the property had been transferred to the buyer by the negotiation on payment,<sup>18</sup> it does not eventually deny the holder the right to the goods under bill of lading as it has been emphasized in Chapter 5.

In this case, the holder, after the negotiation with the buyer, might loose the right to claim for the goods themselves on the ground of good faith, but, at least his right for the compensation for damages caused by the misdelivery was still maintained under the bill of lading.

Nevertheless, *The Kota Maju* is one of the first cases in China which took consideration of the connection between the rights to the goods under the bill of lading and the rights of suits against the carrier under similar circumstances, and put forward the possibility and occasions when the bill of lading's certain function may cease. So, in this point, *The Kota Maju* Case is very enlightening in China.

As we know, a particular status of the bill of lading is the ability to facilitate, by endorsement and delivery of the document, the passing of the constructive

---

<sup>15</sup> See *Yang's Bill of Lading*, pp.143-145.

<sup>16</sup> *Yang's Bill of Lading*, *ibid.*

<sup>17</sup> Some authors have argued against this conclusion too, see Zhang Zhi-yong, *Brief Introduction of the Cases of Delivery Without Bill of Lading where the Carrier Succeed*, CMLA News Letter, 2000,9, p.51 at pp.49-53, Wang's *Countermeasures*, p.447 at pp.437-487.

<sup>18</sup> The transferring of property shall be determined by the sales contract and property law. Without other evidence, it shall not determine that the property was transferred just because the seller and the buyer held the negotiation on payment.

possession of the goods or the right to the delivery of the goods. When a bill of lading ceases to have these functions it becomes “exhausted” or “spent”.<sup>19</sup> When a bill of lading is exhausted, usually, it does not confer his holder the right to demanding the goods.<sup>20</sup> According to traditional opinions, the “exhaustion” is limited to the document of title, but this function is not the only ground for the holder’s right to the delivery, so my analysis will survey the broader legitimate function of the bill of lading to the right to demanding the goods.<sup>21</sup> The ceasing of these functions of the bill of lading is a complicated issue. Under some English case law, the bill of lading is exhausted when the cargo was delivered to the person who is entitled to it.

In *The Delfini*,<sup>22</sup> the goods were delivered by LOI, and in addition, there are agreements between the traders that the documents may be negotiated after the delivery, and the property would pass to the buyer without bill of lading. The plaintiffs got the bill of lading after the goods were released. The court rejected the right of suit of the plaintiffs for the short delivery against the carrier. Mustill LJ, cited from the *Meyerstein v. Barber*, emphasized that “when the goods have been actually delivered at destination to the person entitled to them, or placed in a position where the person is entitled to immediate possession, the bill of lading is exhausted and will not operate at all to transfer the goods to any person who has either advanced money or has purchased the bill of lading.”<sup>23</sup>

*The Delfini* was heard before the enforcement of the COGSA 1992 OF UK, so it mainly took consideration of the property of goods and the function of bill as a document of title. Nevertheless, with the abolishing of the *Bill of Lading Act 1855*, the property of goods is no longer the ground for the right to delivery and right of suit under a bill of lading, so, the reasoning in this case may face a difficulty in logic: who is the person entitled to the delivery or to the immediate possession?

---

<sup>19</sup> *Gaskell*, 14.57, p.432. In traditional theory, the “exhaustion” or “stale “ or “spent” refers to the ceasing of the bill functioning as a document of title, or the ceasing of being the representation of the goods. As I have pointed out in Chapter 5, the title function is not always the basis for the presentation rule of the bill, but when the bill of lading is spent, the right to the delivery under it may also be exhausted, so I’d like to use the broader but not very traditional term “document for the delivery”.

<sup>20</sup> Even a bill of lading losses the function with respect to the right to the delivery, it may still keep those as an evidence of contract of carriage or a receipt of goods by the carrier.

<sup>21</sup> As to whether the rights for the damages of short delivery or damages of goods etc are “spent” simultaneously, the theory and present law are still vague. Limited by the scope of this dissertation, I will avoid the discussion on these issues and focus on the right to the delivery of goods.

<sup>22</sup> *Enich Anic SpA v. Ampelos Shipping Co. Ltd* (1990) 1 Lloyd’s Rep., 252.

<sup>23</sup> *Ibid.*, 269 at 252.

But another main reason for the rejection of Holder’s right of claims was: in taking the bill of lading, the shipper were acting as agents for the charterers and f.o.b. buyer, and the governing contract was the charterparty, and the shipper, or the consignor was not entitled to the short delivery of the goods. see *ibid* at 252. But I do not agree with the point that FOB seller holds the bill of lading on behalf of the buyer, when the former is the shipper under the bill of lading, or gets it through due course. So, I do not agree with this reason.

The COGSA 1992 UK provides the legal holder with rights of suit against the carrier under the carriage contract. So, if the contract or the bill of lading is the ground for the right to the goods in the carriage contract, the abovementioned reasoning in *The Delfini* will suffer from a lack of legal basis.

Also under common law, it is otherwise concluded that until the contract is discharged, the bill remains a document of title, and can enable the transfer of property rights by endorsement and delivery,<sup>24</sup> while the contract “is not discharged by performance until the shipowner has actually surrendered possession ... to the person entitled under the terms of the contract to obtain possession of them.”<sup>25</sup> In *The Future Express*, the cargo was delivered without bill of lading. The court of first instance held that the bill of lading was not exhausted by such releasing and remained as a valid document of title, because under the bill of lading, the others including the seller or buyer, had no right to claim the goods “without having first deleted the name of the bank as consignee.”<sup>26</sup>

According to these conclusions, the delivery without bill of lading shall not make the bill of lading spent. So far, there is no identified standard of the exhaustion of bill of lading.

In my view, the delivery of goods shall bring about the exhaustion of the bill of lading as the document legitimating the right to delivery. Because when the carrier parted the possession of the goods, he will no longer hold the goods for the bill's holder, and usually the transfer of the bill of lading after the delivery will not confer the right to the delivery of the goods on the transferee.

As a general rule, the right under the bill of lading shall be protected only if the holder gets the bill before the carrier releases the goods. However, this rule shall have exceptions.

If a legal holder of bill of lading abandons the function of bill of lading as a document for the delivery, waives his right under the bill of lading, or approves or ratifies the delivery without bill of lading like those discussed in the former parts 1.1.2.1 and 1.1.2.2, he will no longer be entitled to claim for the delivery or for the compensation against the carrier for delivery without bill of lading.

There is also another exception: even if the holder gets the bill of lading after the delivery of goods (without bill of lading), he may still be entitled to the rights under the bill. Usually, when the holder gets the bill with good faith, or in line with the statutory authorizations, he may still enjoy the rights under the bill of lading. For example, according to sect 2 (2) of the COGSA 1992 UK, when the lawful holder of a b/l becomes the holder after possession of the bill no longer gives a

---

<sup>24</sup> *Gaskell*, 14.63, p.434.

<sup>25</sup> *Barclays Bank Ltd v. Customs and Excise*, cited in *Gaskell's*, 14.62, p.433.

<sup>26</sup> (1993) 1 Lloyd's Rep. P. 543 at 542.

right (against the carrier) to possession of the goods under the bill, he shall still be vested in the right of suit against the carrier under the carriage contract, only if “he becomes the holder by virtue of prior transactions (e.g. a sale contract, pledges and so on) before the “spent” of the bill, or as a result of rejection “by another person of goods or documents” (e.g. the rejection under a letter of credit).<sup>27</sup>

However, even in the case of transfer of the bill of lading by virtue of prior arrangements, it remains doubtful whether the bill of lading would keep its value as document of title. As in *The Future Express*<sup>28</sup> the bank had known about the delivery without bill of lading, and agreed to extend the period of the letter of credit upon the requirement of the buyer. Then, when the bill of lading together with other documents was negotiated to the bank, almost one year elapsed since the delivery of the goods. The holder should have well known that the bill of lading had been deprived of all values, and was “no longer used as the key to the warehouse.”<sup>29</sup> Under such circumstances, it is not fair to maintain the value of the bill of lading and put the carrier liable for the delivery without bill of lading.

There is a similar case in China. In *Shuangyao Co. Ltd.v. Xiaogang Industrial Material Co, China shipping Agent Guangzhou and others*,<sup>30</sup> after the delivery of goods without bill of lading, the plaintiff had investigated the goods at the consignee’s warehouse and didn’t raise an objection of the delivery. When the consignee failed to pay for the goods, the plaintiff paid his seller and got the bill of lading. This happened ten months after the delivery of the goods. In this case, it is also difficult to say that the bill of lading is still valid for the right of delivery.<sup>31</sup>

Another question arises as to the holder’s right under the bill of lading when he gets the bill after the delivery of goods, “by virtue of prior transactions.” Is he entitled to both the right to demanding the goods and compensation for damages or only to the right against the damages? It remains controversial. From the wording of the COGSA 1992, it is very likely that the holder is only entitled to the compensation for the damages, because “the possession of bill no longer gives the possession of the goods”.<sup>32</sup> But the Chinese law and other countries’ legislations provide no clear answer.

Indeed, the exhaustion that relates closely to the right and the liability of the delivery without bill of lading needs more attention and discussion.

---

<sup>27</sup> See also *Gaskell*, 14.69,p.435.

<sup>28</sup> In this case, the claims by the plaintiff were rejected by the court for the reason that there was no effective pledge on the bill of lading or atonement by the carrier.

<sup>29</sup> (1993) 2 Lloyd’s Rep, p. 545 at 542.

<sup>30</sup> Jin zheng-jia (chief editor), *Annual of China Maritime Trial*, the people’s communication press, 1999, pp.335-339.

<sup>31</sup> The court rejected the claims by the plaintiff on the ground that from the former co-operations between the plaintiff and the consignee, it could be concluded that the plaintiff had ratified the delivery without bill of lading, so his losses was from the risks under the co-operation contract but not the delivery by the carrier.

<sup>32</sup> See Sect. 2(s) of COGSA 1992.

## **1.2 *The He Tian* and the consignor's right to delivery**

The main issue in *The He Tian*,<sup>33</sup> i.e. *Beijing Wenyang Imp. & Exp. Co. v. Shanghai Shipping Co.*, concerns with the right of suit of the person who sends the goods to the carrier. The unique repeating procedures of the trials made it famous and showed the divergences on this issue.

### **1.2.1 Facts and Decisions**

The plaintiff, Beijing Wen-yang Import & Export Company was a seller under an FOB contract. After he delivered the goods to the carrier, he got the whole set of three originals of bill of lading from the carrier on the loading port. In the bill of lading, the "shipper" was the buyer, and the consignee was "to order". However, the plaintiff was indicated as "the consignor" or "sender" in the packing sheet, certificate of original place of products, certificate of quarantine and other documents. When the goods arrived at the destination, there was no holder of original bill of lading claiming for the delivery, and according to the port authority's rules, the captured cargos were not allowed to be stored in the warehouses at the dock. Under such circumstances, the goods were delivered to the buyer without bill of lading.

Meanwhile, the plaintiff sent the complete documents including the bill of lading to the bank of L/C and endorsed it. The negotiation bank deleted the endorsement with a cross "X", which means it was a void endorsement, and returned the documents to the plaintiff for reason of the expiration of the L/C. 13 April 1993, the plaintiff brought a suit against the Shanghai shipping company for the damages of the value of the goods and others.

Tianjin Maritime Court, the first instance court rejected the claims on the grounds that this was a "to order" bill of lading without due endorsement, so the plaintiff could not prove he was the legal holder of the bill of lading. Therefore, there is no relationship of rights and obligations between the plaintiff and the defendant, the plaintiff had no right of suit against the defendant.

The plaintiff appealed to the High Court of Tianjin, but the court maintained the decision made by the first instance court on the similar grounds.

The plaintiff applied for a re-trial to the Supreme Court of China. The Supreme Court concluded that Wen-yang Company got the bill of lading from the agent of the carrier, so he held them via due course. Before the payment settlement, he held the complete set of bills of lading and his right of suit should be protected. The

---

<sup>33</sup> See [www.86148.com/anlihuijian/shownews.asp?id=169](http://www.86148.com/anlihuijian/shownews.asp?id=169), 11 March 2005.

Supreme Court dismissed the decisions both made by the High Court of Tianjin and the Tianjin Maritime Court, required the Tianjin Maritime Court to re-try this case.

Tianjin Maritime Court denied the effect of the bill of lading when they were in the hand of the plaintiff and further observed that the delivery of the goods to the shipper in such case was right. So, the claims were rejected once again. In addition, in December 1999, the High Court of Tianjin rebutted the appeals, and the judgment of the maritime court was reserved.

### 1.2.2 Consignor's right of suit for delivery without B/L

*The He Tian* has given references for some other cases with similar facts.<sup>34</sup> Meanwhile, it has brought criticisms on different theoretical bases.<sup>35</sup> The main focus of the controversy is whether the consignor in such case has the right of suit against the carrier for delivery without bill of lading. Adhering to this problem, the essence is whether the consignor is entitled to the delivery of the goods, when he holds the bill of lading, but he is not the “shipper” on the bill, nor does he get it by due endorsement. In practice, the disputes on this issue usually arise in the FOB trading,<sup>36</sup> and the definition on the shipper in the CMC adds complexity.

Some scholars or judges reversed the decision under *The He Tian* and support the claims brought by the consignor who is in a similar situation. However, their theoretical bases vary. One is based on the legal status of the second shipper in the carriage contract. The judgment in *Ningbo Electronics Imp. & Exp. Co. v. NYK CO.* on delivery without bill of lading<sup>37</sup> reflected this reasoning. Under CMC, the person who concludes the carriage contract with the carrier and who sends the goods to the carrier are defined as the “shipper.”<sup>38</sup> In the abovementioned case, the plaintiff was

<sup>34</sup> E. g., *Shanghai Daily Glassware Company v. U. S. General Air Freight Consolidators Inc.*, in Zheng Zhao-fang (chief editor), *Selected International Maritime Cases ---- Judgments and Comments*, 1<sup>st</sup> ed., Shanghai People's press, 2004, pp.38-41, pp.241-247.

<sup>35</sup> See Wang Gang-qiao, *On Legal Status of the Second Shipper in International Carriage Contract of Goods*, *Review of Maritime Law*, vol 5, 2001, 2, Law Press, pp. 94-103, Guo Guo-ting, “The Obligation of the Issuance of the Bill of Lading under FOB Contract,” (hereafter as “*Guo Guo-ting*”), in Jin Zheng-jia (chief editor), *Annual of China Maritime Trial*, the people's communication press, 2001., pp.14-30; Yu Xiao-han, *Suggestions on Modification of “Shipper,”* (hereafter as “*Yu Xiao-han*”), www.ccmt.org.cn/hs, 12 Jan. 2005.

<sup>36</sup> The FOB contracts may be further divided into three categories in practice, the straight FOB contract, the classical and the extended ones. In the classical one, usually the ship is nominated by the buyer and the seller concludes the carriage contract on account of the buyer, and the seller is usually indicated as the shipper in the bill of lading. Under the extended one, the seller concludes the carriage contract and is usually the shipper in the bill of lading too. While in the straight fob, the buyer is the shipper under the carriage contract and usually the bill of lading is issued directly to him or via the seller unless otherwise instructed. See *Debattista*, pp. 8-12. In China, most of the disputes arise under a straight fob trading, which is the typical one the INCOTERMS describes.

<sup>37</sup> The in-house material, Research Institute of Ningbo Maritime Court, *Selected Maritime Cases*, 2001, 11, pp.89-94.

<sup>38</sup> Article 42, paragraph (3), “‘shipper’ means: a) The person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier; b) the person by whom or in whose

the seller under an FOB contract. But on the bills, the “shipper” was the buyer, and the “consignee” is a third party.<sup>39</sup> The plaintiff got the bill from the vessel without endorsement. After the delivery of goods at the discharge port without bill of lading, the unpaid plaintiff claimed for the damages resulted from this delivery. Ningbo Maritime Court ratified the right of suit of the seller. The judges expounded that the plaintiff was not the shipper indicated in the bill of lading, nor is he the holder via endorsement by the shipper, but he was the person who actually sent the goods to the carrier, and is the shipper within the definition of article 42, 3, (b). Therefore, he had the right against the carrier as a party of the carriage contract.<sup>40</sup>

Apart from the statutory definition, Wang Gang-qiao regarded the consignor as the second shipper on the theory “for the benefit of the third party (i.e., the seller is the beneficiary third party under an FOB contract),” and confirmed that the consignor is entitled to the rights under a contract of carriage and rebutted the decision of *The He Tian*.<sup>41</sup>

From another angle, some authors affirm the right of the suit for the consignor: the bill of lading must be issued to the person who sends the goods to the carrier, therefore, only the seller under a sales contract, no matter a CIF, CFR or an FOB one, is entitled to get the bill of lading from the carrier.<sup>42</sup>

The definition of the shipper or the obligation of the issuance of the bill of lading is beyond the scope of this dissertation. However, even if these theories or assumptions are right,<sup>43</sup> they are not well argued to confer on the consignor (if he is not the party in a bill of lading) the right to the delivery of the goods against the carrier. When a bill of lading is issued, usually and implicitly, the right to the delivery shall be legitimated by the document. This is the legitimate function of the

---

name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.” This article is made a reference to the Hamburg Rules, art. 1,3, but without the conjunctive “or” between a) and b) like the latter does. So it is normally concluded that under an fob sale, there are two shippers against the carrier.

<sup>39</sup> That was a straight bill of lading, and was rejected by the foreign traders. However, the reasons in the judgment does not merely deal with a straight bill of lading, it can also be applied to the order bill.

<sup>40</sup> However, the claims were rejected for the reason of time barred.

<sup>41</sup> Supra fn35, Wang Gang-qiao's, pp.100-102.

<sup>42</sup> For example, Guo Guo-ting, *ibid*.

<sup>43</sup> The double definition of the shipper under the CMC has brought great confusions in the shipping practice and jurisdiction, the callings for the modification of this definition are the hits in these years. Most of the authors agree that even two shippers co-exist, such as the seller and the buyer in an fob sale, there are distinctions of the rights and obligations between the contracting shipper and the consignor, see Yu Xiao-han, *ibid*, see also Guo chun-feng, *On the Definition of the Shipper under CMC and the Modifications of Related Provisions*, Maritime Trial, 1998,2, pp.3-8 and so on.

As to the theory that the bill of lading must be issued to the consignor concerned, I don't agree with this view. In my opinion, the carrier shall follow the instructions of the shipper under the contract of carriage. Even when fob contracts which are emphasized by these authors are under consideration, in the classical and extended fob shipments, usually, the bill of lading are issued in accordance with the instruction of the consignor, who is the shipper in the contract, while in a straight fob, the bill of lading is usually issued to the contracting shipper directly.

bill of lading. Even under the theory of the “beneficiary third party”, it should be noted that the beneficiary third party to the delivery would be determined by the bill of lading. Only a physical retaining or possession of bill of lading, even it is allowed by the law, shall not always give the possessor the right to the delivery except when the bearer bill is concerned. In a Netherlands case, *Heliopolis Shipping Co. v. Damco Maritime BV* (“*The Heliopolis Star*”),<sup>44</sup> the bill of lading marked “van Meer” as the shipper and the order of a bank as consignee. Because of disputes with van Meer on earlier services, the freight forwarder, Damco Maritime BV, retained the bill of lading according to the Article 19 of general forwarding conditions. After the goods had been delivered on the instruction of the shipper, the suit arises. The Supreme Court reversed the decisions made by the first and second instance courts and rejected the claims by the freight forwarder. It observed, “Although the bill of lading were physically in the hands of the Damco (the plaintiff), it was not the ‘rightful holder’ thereof.” The situation of the freight forwarder in this case is similar to that of the consignor in *The He Tian*, though is not same.

As a conclusion, only a party who is legitimated by the contents of the bill of lading as the holder is entitled to delivery under the bill of lading. In addition to the physical possession of the document, it needs further conditions, for instance, the bill of lading has been duly endorsed or the person is indicated as the consignee in the bill of lading. As the UNCITRAL Draft Instrument defines, “the holder” is the person for the time being in possession of the negotiable documents, whether he “is identified in it (the document) as the shipper or consignee,” or the person “to whom the document is duly endorsed.”<sup>45</sup> So, even a shipper who concludes the carriage contract with the carrier may have no right to the delivery if he is not well legitimated by the document. Therefore, I agree with the decision of *The He Tian*, though the consignor got the bill of lading from the carrier in accordance with the usual practice, he is not entitled to the delivery because he is not a party in the bill of lading.

There is another situation: the consignor or other person is indicated in an order bill of lading as the “shipper”, but the box of consignee on the bill is stated as “to order of bank” or of someone else. In such case, the question arises once more: is the shipper under the bill of lading, who holds the bill, entitled to the delivery of goods when there is no endorsement by the specified consignee in the bill? CMC does not answer this question very well with the provision such as “a provision in the document stating that the goods are to be delivered to the order of a named person, or to order ...constitutes such an undertaking.” According to the COGSA

<sup>44</sup> Noted by Michiel van Leeuwen, *International Maritime Law*, 1996,4, pp. 127-128.

<sup>45</sup> Art. 1 (f) in WP.32, Sect. 1.12 in WP.21.

1992 of UK, the holder is only the person “with possession of the bill who is the named consignee in the bill, or as a result of the completion, by delivery of the bill, of any endorsement of the bill, of any other transfer of a bearer bill.”<sup>46</sup> Under these legislations, the holder of the bill of lading has a narrow meaning.

These provisions shall not eliminate the rights of the shipper under the bill of lading. Before the transfer of the bill of lading to the specified receiver or the consignee, the shipper of the bill of lading still holds the control of the goods, and he has the right to the goods against the carrier for the performance of the contract of carriage. He has the option to retain or transfer the right under bill of lading by transferring this document. In a broader sense, the shipper mentioned in the bill of lading had to be regarded as the legal holder vis-à-vis the carrier “as long as he had not yet handed over the documents to the receiver.”<sup>47</sup> The UNCITRAL Draft Instrument accepts the broader definition of “the holder,” which includes the shipper in the bill when he possesses the document.<sup>48</sup>

And in certain jurisdiction of China, the shipper's right to delivery is protected. For instance, in *Wenzhou Imp. & Exp. Co v. Qiaoyun International Shipping Ltd* on Delivery without B/L,<sup>49</sup> the plaintiff held the bill of lading without the endorsement by the consignee but he was indicated as the “shipper” on it. The court supported his main claims against the delivery by the carrier without bill of lading. If the consignor in *The He Tian* had been the “shipper” in the bill of lading, he should have the right of suit against the carrier as is in this case.

In addition, there're some innovations in theory about the right of suit of the FOB seller. As some authors have stated, if the FOB seller holding the bill of lading is not the shipper in it, nor does he get the bill duly endorsed, he is not entitled to exercise the rights under the bill of lading according to the maritime law; but the consignor shall have the recourse under the civil law, viz, he can claim on a tortious cause against the carrier for delivery without bill of lading.<sup>50</sup>

I disagree with this opinion. Indeed, delivering the goods against the bill of lading is a promise made by the carrier, but the promise is made only against the shipper in the contract of carriage and the legal holder of the bill of lading. But when the person who holds the bill has no right under the document, the carrier shall not be bound by this promise. Under this circumstance, the carrier is entitled

---

<sup>46</sup> See Section 5 (2) (a) (b) COGSA 1992.

<sup>47</sup> *Supra* fn 44, *The Heliopolis Star*, p. 127.

<sup>48</sup> “‘Holder’ means a person that is for the time being in possession of a negotiable transport document or has the exclusive (access to) (control of) a negotiable electronic record, and either: (i) if the document is an order document, is identified as the shipper or the consignee, or is the person to whom the document is duly endorsed ...” Art. 1 Definition (f) in the Wp.32.

<sup>49</sup> “Judgment of (2002) yong hai wen chu zi No. 74, in Tang Neng-zhong (chief editor), *The Theory and Practices of Maritime Jurisdiction*, 1<sup>st</sup> ed., Law Press, 2002, 442-448.

<sup>50</sup> *Yu Xiao-han, ibid.*

to deliver the goods in compliance with instructions of the contractual shipper or the consignee. Therefore, the consignor shall not claim on the basis of tort against the carrier in most cases.

In summary, the shipper indicated by a bill of lading is entitled to the delivery of the goods when he possesses the bill of lading. A party shall be purported the right to delivery under an order bill of lading via three ways when he takes the possession of the document: 1) he is the shipper in the bill of lading; or 2) he is named as the consignee in the bill, 3) if neither of the former occasions, he is the legal holder of the bill with due endorsement. In order to control the goods under bill and avoid the risk of losing the payment, the seller of an FOB contract shall try his best to be the shipper, or the named consignee to whose order in the bill of lading.

## **2. Letter of indemnity at delivery**

A letter of indemnity or letter of guarantee (hereafter called “LOI”) is usually given to the carrier by a consignee claiming for the delivery of goods when he is unable to surrender original bills of lading for various reasons. In practice, delivery against an LOI is a common alternative of delivery against a bill of lading; even more, almost 100% of the oil trade is delivered on LOI. An LOI may be surrendered case by case, or may be surrendered in accordance with a long-term cooperation agreement on delivery without bill of lading between the carrier and his customer.<sup>51</sup> When requesting the carrier or the shipping agent to deliver the said cargo without production of bill of lading, in most standard forms,<sup>52</sup> the consignee (the requestor) undertakes to indemnify the carrier and his servants or agents if they will suffer any loss or liability resulted from the delivery, or to provide sufficient funds on demand to defend the proceedings or a bail or other security if the ship or property is arrested or detained or otherwise. In addition, the requestor may promise that as soon as all the original bills of lading for the said cargo shall have come into their possession, they will surrender them to the carrier. Moreover, most LOIs are countersigned by banks or any other third party with good reputation as required by the carrier.<sup>53</sup>

---

<sup>51</sup> Usually, such customers are those big merchants with good reputation and great financial power and have had long- term cooperation with the carrier.

<sup>52</sup> See P&I club standard form letter “A”: “letter of indemnity to be given in return for delivering cargo without production of the original bill of lading.”

<sup>53</sup> See P&I club standard form letter “AA”: letter “A” and “ incorporating a bank’s agreement to join in the letter of indemnity”, see also COSCO’S standard letter of indemnity for delivering without bill of lading and etc.

## **2.1 Effects of an LOI**

Generally, a valid LOI requesting for delivery without B/L may bring the following effects:

### **2.1.1 Effecting the delivery of goods under a contract of carriage**

During the delivery of the on an LOI, the carrier may maintain his rights and obligations on the goods. For examples, he is entitled to retain the goods as a lien for the unpaid freight or other charges on the goods, and he is also liable for the damages to the goods caused during the transit. In addition, delivery against an LOI may effect the delivery under the contract of carriage and brings the end of the contract. The carrier may be relieved from the liability for the damages to the goods (especially container goods under the Chinese law) after such delivery. However, this relationship on the delivery just effects between the carrier and the requestor who takes the goods. And, there is an important precondition: no other legal holder of bill of lading claims for the goods or exercises the rights under a bill of lading later, otherwise, it will be a wrong delivery.

Generally, the carrier is not obliged to accept an LOI even though there may be a clause in a charterparty to require that the carrier shall deliver the goods on the instruction of the charterer and against an LOI. Delivery against production of bill of lading is the obligation upon the carrier, and, the case laws in recent years usually indicate that there is no compulsory duty on the carrier to accept an LOI. For example, in *The Houda*, Neill L. J. observed that “it does not seem to me that the existence of the practice or the right to a letter of indemnity can impose on the owners a contractual obligation which does not otherwise exist,” though the practice is so common and the reasons for this practice are various.<sup>54</sup>

### **2.1.2 No affection of the rights of the bona fide holder of B/L**

As we all know, an LOI is just an agreement between the carrier and the issuer, it shall not affect the liability of the carrier for delivery without bill of lading when he faces a legal holder of the original bill of lading unless the latter has given up the right under the bill of lading or there are other facts that make the bill of lading exhausted as discussed in Part 1.1.2.3. As the legal holder of bill of lading is concerned, delivery against an LOI does not operate as the delivery of the goods, it's a wrongful delivery, and the carrier runs the risks on himself.

The issuance and the words in it exactly indicate that the consignee and the

---

<sup>54</sup> *Kuwait Petroleum Corporation v. I&D Oil Carriers Ltd.*, (1994) 1 LLR, 551 at 541.

carrier know clearly of the liabilities on the carrier and almost no carrier would invoke the LOI as an excuse for his liability.

### 2.1.3 Providing security for the carrier

However, when a carrier compensates the legal holder of a bill of lading or on the liability of the wrongful delivery, is he able to pursue his damages against the issuer of an LOI as they have promised in the LOI?

As to the effectiveness of an LOI, there is controversy in Chinese judicial practice. Although most of the judges recognize that delivery against an LOI is a common practice, some of them hesitate to make an LOI effect. According to the *General Principles of Civil Law* of China and CLC, a legal act or arrangement with an illegal purpose or is a malicious collusion shall be null and void<sup>55</sup>, therefore, some judges believe that an LOI shall be void because delivery without bill of lading is the violation of obligation under a contract and is a possible infringement to the right of the holder of bill of lading.

However, as I have already pointed out in the former parts, the absence of the bill of lading is so common at the destination when the goods have arrived, and, LOIs are practical solution for this absence to a great extent and relieve the carriers from great commercial pressures. Usually, the carriers are very prudent: for example, they will require the requestor to provide the sales contract, copy of bill of lading and packing list or invoice of the payment of the goods, so on and so forth, to prove he will be the consignee, who will finally become the legal holder of the bill of lading. So, in most cases, surrendering and accepting an LOI for delivery is not with the intention of fraud or violation, but with the purpose to protect the carrier when bills of lading have not arrived on time or have been lost.<sup>56</sup> So, the right of the carrier under an LOI shall be protected. This is also the prevailing point in general situations,<sup>57</sup> and the courts may incline to support the claims by the carrier against an LOI<sup>58</sup> in general cases.

<sup>55</sup> See Article 58 of General Principles of Civil Law of china: “the legal actions, *inter alia*, shall be null and void ... (7) hiding an illegal object with an legal formal ...”. Art. 52 of CLC, “ A contract shall be null and void under any of the following circumstances: ... (2) Malicious collusion is conducted to damage the interests of the State, a collective or a third party; (3) An illegitimate purpose is concealed under the guise of legitimate acts; ...”

<sup>56</sup> William Tetley, *Letter of Indemnity at Shipment and Letters of Guarantee at Discharge*, European Transport Law, vol. XXXIX, 2004,3, p. 322 at pp.289-344.

<sup>57</sup> See Weng Zi-ming, *On the Legal Natures and Effectiveness of the Letters of Indemnity in Shipping*, (hereafter called “Weng Zi-ming’s LOI”) Annual of China Maritime Law, vol. 2, 1991, pp.157-158 at pp.154-165.

<sup>58</sup> For example, in *Dazhong Shipping Co. Hongkong v. Medical Imp. & Exp. Co. of Zhuhai & China Industry and Commerce Bank Zhuhai, Nanshan Branch*, the plaintiff won the claims against the consignee and the guarantor, the bank under a LOI, see [www.ccmt.org.cn](http://www.ccmt.org.cn), 1 May 2004. See also the quoted case in *Weng Zi-ming’s LOI*, p.158 at pp.154-165.

When an LOI is merely issued by the person who takes the goods. However, this kind of LOI cannot provide the carrier sufficient protection. So, in most situations, the carrier shall require a bank or other third parties to incorporate into the indemnity. In these cases, the third party shall be a guarantor for the indemnity to the carrier.

In addition, whether it is a general guaranty or a joint and several one provided by an LOI shall be determined by the wording of the letter and the applicable laws. In most standard forms, it is indicated that the bank or other guarantors shall undertake the promises under an LOI jointly. In such case, the carrier is entitled to claim for the compensation against the guarantor or the consignee or both of them. On the contrary, if an LOI states that the guarantor shall indemnify the carrier when consignee fails to compensate the carrier (for the reason of insolvency or other reasons), it shall be a general guaranty, and the guarantor shall refuse to take the liability until the carrier have exercised recourse to the consignee and the latter fails to fulfill his obligation in the LOI. Furthermore, not uncommonly, some LOIs are just countersigned by banks or other third parties as the guarantors without further statement. In China, these third parties shall undertake the duty of joint and several guaranties. Because under the Collateral Law of China, if there is no agreement on the ways of the guaranty or the agreement is not clear, the guarantor shall undertake the joint and several guaranty.<sup>59</sup>

However, the effect of an LOI is relative. As a common sense in China, if the carrier accepts the LOI with bad faith, or as a fraud, for example, he colludes with the person who takes over the goods, or he knows that the person is not the buyer of the said goods and so on, the LOI shall be null and void, and the carrier is not entitled to claims against the person who takes over the goods according to an LOI.<sup>60</sup> In theory, this point is right, but whether the carrier is in good faith or not shall be a matter of fact and is difficult to determine in practice.

#### **2.1.4 The “Privity” of the LOI**

The “*privity*” of an LOI mentioned here is just related with two aspects when the guarantor in the LOI is concerned: first, the guarantee is only covered by responsibilities under the contract of carriage of carriage and not those under the sales contract unless agreed otherwise. The guarantor shall indemnify the carrier's damages resulted from the delivery without bill of lading and usually the scope of compensation does not go beyond the liabilities borne by the consignee for his taking over of the goods.

---

<sup>59</sup> Art. 19 of the *Collateral Law* of P. R. China.

<sup>60</sup> *Weng Zi-ming's LOI*, pp.158-159 at pp. 145-165.

Second, also closely connected to the first aspect, the guarantor is generally not responsible for the damages suffered by the holder of a bill of lading. But in most cases in China, the holders of bill of lading are inclined to sue against the carrier together with the consignee and the guarantor for the delivery without bill of lading. For example, in *The Kota Maju*,<sup>61</sup> *Shuangyao Ltd v. Xiaogang Industrial material co. and others*,<sup>62</sup> the guarantors were in the list of the defendants. In *The Kota Maju*, the court held that the guarantor and the consignee and the shipping agency had jointly infringed the title of the holder, and constituted a joint tort. But in the *Shuangyao Ltd v. Xiaogang Industrial Material co. and others*, the court observed that providing a security did not constitute a tort. I agree with the opinion in the latter case. A guarantor just promises to protect the carrier if the latter suffers losses, and he is not the conductor of the delivery. In addition, like the carriers usually do in good faith, the guarantors would generally not intend to assist in a fraud. His providing of security doesn't constitute a tort. So, the guarantor shall not be liable directly to the holder unless there is sufficient evidence that he takes part in a fraud or collusion and so on.

## **2.2 Suggestions for the carrier**

When a carrier prepares to accept an LOI for delivery, he shall be very cautious and pay more attention to the following issues:

### **2.2.1 Reputation of the consignee and the guarantor**

Nowadays, most of the carriers are very prudent and will accept the LOI only if it is signed by the parties with good reputation and great financial power. In China, the bank is not allowed to be the guarantor for companies or persons, so the carriers would like to require a guarantee provided by big entities such as PICC, or other great Import and export companies. This prudence may avoid risks on the part of the carriers in most cases. In China, few of the litigations were brought by the carrier against the guarantor under an LOI. As the shipping companies and agencies explained, most LOIs were well fulfilled: either the original bills of lading were surrendered later or, if they failed to do so, the guarantors would compensate the damages of the carriers resulted from such delivery in amicable ways. This is mainly for the reason that these LOIs are signed by companies with good reputation, and have been fulfilled well.

---

<sup>61</sup> Supra fn5.

<sup>62</sup> Jin Zheng-jia (chief editor), *Annual of China Maritime Trial*, the people's communication press, 1999, pp. 335-339.

### **2.2.2 Wordings of an LOI**

Clear wordings of an LOI may reduce confusions and disputes between the carrier and the guarantor. The scope of the secured *debets*, the secured parties, the maximum amount of the guarantee, period etc. shall be written clearly. The provisions under the P&I Club standard forms are clear and complete, so shipowners would like to accept an LOI with wordings in line with the Owner's P & I club.

In addition, the type of the guarantee, a joint guarantee or a general one shall also be stated clearly in the LOI. In real practice, banks may sign without any further statement or just indicate to verify the signature and declaration of the issuer. These signatures will bring about disputes on the bank's status in these LOIs. In an Australian case, *Pacific Carrier Ltd v. BNP Paribas*,<sup>63</sup> the defendant officer's signature came immediately below that of the issuer of the LOI, which led to the argument that the "bank was doing no more than to verify the director's signatures" in the LOI.

I agree with the points of the court of Appeal and High court which state that, according to usual practice, a carrier would expect a bank to act as indemnifier unless made expressly clear. However, in order to avoid such kind of disputes, the carrier shall be keen on the clarity of the wordings.

### **2.2.3 Genuine authority of the guarantor**

When a guarantor is incorporated into an LOI, his agent or representative may sign it. When a letter is signed by an agent, the carrier shall confirm the authority between the guarantor and the agency. If there is no effective authority letter between the principal and the agent, or the principal expressly denies the entrusted relationship, the carrier shall not accept such LOI.

However, when a staff member or an office or body of the guarantor signed the LOI on behalf of the named guarantor, the carrier will usually believe in the authority of the signature for their relationship with the guarantor, so the carrier shall be protected and the named principal shall be liable under the LOI. In the former *Pacific Carrier Ltd v. BNP Paribas*,<sup>64</sup> the LOI was co-signed by the BNP Paribas office in Sydney, and the defendant, BNP Paribas argued he is not bound because the Sydney office had no authority to issue the LOI. The Appealing court of Australia accepted the argument by the defendant for the reason of the unauthorized acts of the office. However, the High Court of Australia disapproved

---

<sup>63</sup> (2004) HCA 35, High court of Australia (5 August 2004), commented in JIML, vol. 10, 2004,6, pp. 487-489.

<sup>64</sup> *Ibid.*

this decision, and upheld the appealing by the plaintiff.

In my view, the decision of the High Court and their reasoning are convincing. The key is whether the respondent, the receiver of an LOI in this case, had been persuaded to believe that the bank had indeed made the representation. The bank officer had signed and stamped the letters of indemnity, which clearly persuaded the plaintiff to believe in the authority of it. In addition, the consequent authority in the previous LOIs and other facts may also persuade the respondent to believe in the authority of the signer, the *agency by estoppel* is then constituted,<sup>65</sup> and this may bind the principal, unless expressly stated in advance.

However, in some other countries, it may be difficult to accept the *agency by estoppel*, so, the carriers shall always be prudent on the authority of LOI.

In addition, the carrier shall be cautious about the authenticity of the signature. One Chinese Oil Shipping Company delivered the cargos in Bombay against an LOI issued by the India National Bank, which was so indicated from the face of the letter. But the company failed in the litigation against the bank because the signature of the representative was forged.<sup>66</sup>

#### 2.2.4 Period of Guarantee

In practice, most guarantors are unwilling to take the responsibility of the security for a long period of time, so, in China, certain LOIs indicate the guarantee period as one year, or even shorter, dated from the issuance of the letter. Very possibly, such shortness of time will bring risks to the carrier. Disputes between the carrier and the holders will be resolved usually in a time much longer than one year from the date of delivery. When the carrier claims on the LOI after he has compensated the holder of bills of lading, generally, the LOI has expired. Even if the carrier brings the claims against the guarantor as soon as he was claimed by the holder, it may also be very dangerous for the carrier because the holder usually brings his claims at the end of the one year time bar<sup>67</sup> from the date of the delivery, and the procedures dealing with the claiming by the court or by the carrier need some time.

---

<sup>65</sup> “Agency by *estoppel*” is resulted from the apparent authority or ostensible authority. Though there is no actual authority by the named principle, but the respondent believes in the authority by the principle and concludes the contract or is involved in certain actions with the agency based on this reasonable belief. Under this circumstance, it will be deemed as the existence of the actual agent, and the named principle shall be bound to the contract or other promises made by the apparent agent, see Liang Hui-xing, *Generally on Civil Law*, 1st ed., Law Press, 1998, pp.230-233.

<sup>66</sup> As have promised to the concerned Oil Shipping Company, I don’t disclose the name of the counterparts in this case nor the further details of it.

<sup>67</sup> Under the CMC, the limitation period for claims “against the carrier with regard to the carriage of goods by sea is one year, counting from the day on which the goods were delivered or should have delivered by the carrier”, art. 257. Now this is common idea in China that the one-year time limitation also applies to the claims for delivery without bill of lading, see part 6, Chapter 5.

So, nowadays, most of the shipping companies or shipping agencies prefer to introduce a longer period, such as two years or three years even longer into the LOI in order to get more sufficient security.

Some LOIs do not specify the period of the guarantee. Under such circumstance, the applicable law will determine it. When Chinese law is applied, the carrier shall claim against the requestor within six months from the date he has or should have paid the damages suffered by the holder of the bill of lading in the case of general guarantee in the LOI, or claim against the guarantor within the same six months in the case of joint guarantee.<sup>68</sup>

### **2.3 Trader's LOI**

The delay of the bill of lading may bring forth not only the aforesaid LOI at the delivery but also an LOI between the seller and the buyer. For the purpose of distinction, the former and more common one may be called "a carrier's LOI" or "a shipping LOI", while the latter may be called "the Trader's LOI".

In a short voyage or a long string of on-sales, the parties to the sales contracts may anticipate the unavailability of the shipping documents (in particular the bill of lading) to the buyer when the payment of the price of the goods becomes due. So, the parties may agree that the payment may be made against a trader's LOI. Such kind of LOI is not as common as the shipping LOI, but is popular in the chain of the sales, especially in the oil trades. There is no standard form of trader's LOI. But usually, in addition to the brief particulars of the goods and the concerned sales contract, the essential elements of a trader's LOI include: the document will not arrive at the buyer when the payment is due; against the payment of the buyer, the seller warrants that he has the right to sell and the unencumbered title to the goods and the buyer will enjoy quiet possession of the goods; the seller will indemnify the buyer against any claims, losses, costs or damages incurred by the buyer resulted from the seller's warranty. Moreover, the seller will usually undertake to deliver the shipping documents to the buyer as soon as possible. Some of the LOIs further indicate that when the shipping documents arrive at the buyer, the LOI will become null automatically or be returned to the seller.

In practice, one trader's LOI or a string of trader's LOIs in the chain of sales are usually combined with the shipping LOI, and the seller or charterer will usually issue a letter of indemnity to the carrier requiring the latter to deliver the goods to

---

<sup>68</sup> According to the Collateral Law of P. R. C, the period of the guarantee is six months from the expiration of the performance of the principal-*debet*, no matter in the case of a general guarantee or of a joint one. Under a general guarantee, the *creditor* shall bring a suit or arbitration against the debtor in such time, and the period of guarantee shall be suspended by such claim; while in a joint guarantee, the *creditor* shall claim against the guarantor in this period, article 25, 26.

the receiver of a trader's LOI without original bill of lading. Under the circumstances, the transfer of the right to the property or right to the delivery of the goods shall be completed by the payment and the agreement in the trader's LOI. Hence, the bill of lading may not act as a document of title under the sales contract or as a document to the delivery of the goods between the parties of this trader's LOI for the reasons that has been discussed in Part 1.1.2, unless the trader's LOI is cancelled and the parties invoke the bill of lading.

Indeed, trader's LOI is a solution for the delay of the bill of lading in the international trade. However, the issuing of trader's LOIs shall not infringe the right of a *bona fide* legal holder of bill of lading to the delivery as I have emphasized.

Moreover, trader's LOI may bring a series of difficulties, such as the legal basis of the claimant against the carrier on the damages to the goods, the rights and obligations and remedies under the trader's LOI and sale contract especially when there is a long string of the LOIs. Limited to the range of this dissertation, I will not discuss these interesting issues here.

### **3. Presentation rule and Straight bill of lading**

As it has been mentioned in Chapter 4, under a straight bill of lading, generally, the goods shall be delivered to the named consignee in the bill. However, there is no consensus on the issue of whether the carrier is justifiable to deliver the goods to the named consignee without the bill of lading. Or from other angle, whether the carrier is obligated to deliver the goods to the named consignee of the bill even without the production of the bill of lading? The presentation rule to the straight bill of lading becomes one of the controversial hits in recent years.

#### **3.1 Conflicts of legislations and theories**

##### **3.1.1 National legislations and theories**

USA and the Nordic countries are among the very few countries that provide rules on delivery and the delivery under a straight bill of lading.

In contrast with the order or negotiable bills to which a presentation rule is applied,<sup>69</sup> in the *Pomerene Act* of USA, the goods shall be delivered to the named

---

<sup>69</sup> Section 9 (c) of *Pomerene Act*, "A carrier is justified, ... in delivering goods to one who is: ... (c) a person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his

consignee without further requirement on the production of bill of lading.<sup>70</sup> Furthermore, it is the duty on the carrier to deliver the goods upon a demand made by the consignee named in the straight bill of lading, in the absence of some lawful excuse.<sup>71</sup> These principles are remained to the non-negotiable bill of lading under the USCA TITLE 49. So, under the American legislation, as the delivery is concerned, a straight bill of lading is not distinctive from a sea waybill.<sup>72</sup>

Contrarily, the Nordic countries provide a clear rule that delivery shall be made against the bill of lading including a straight bill. "A bill of lading may be made out to a named person, to a named person or order, or to bearer,"<sup>73</sup> and the consignee is entitled to demand the goods only if he deposited the bill of lading. After the delivery of all the goods, the bill of lading, "duly received, shall be surrendered to the carrier."<sup>74</sup> Furthermore, they provide the definitions and requirements on delivery for the sea waybill,<sup>75</sup> which enables to distinguish the straight bill of lading from a sea waybill.

In UK, from the very early stage, the distinction between the straight bill of lading (may be it is not so called) and an order or bearer bills had drawn attention by the courts. In *Henderson v. Comptoir d's Escompte de Paris*,<sup>76</sup> the bill of lading was made out to the named consignees without more words. Sir R. P. Collier, delivering the judgment of the Privy Council, said: "It appears that a bill of lading, which is in the usual form, with this difference, the words 'or order or assigns' are omitted ... undoubtedly the general view of the mercantile world has been for some time, that in order to make bills of lading negotiable, some such words as 'or order or assigns' ought to be in them. For the purpose of this case, in the view their lordships take, it may be assumed that this bill of lading was not a negotiable instrument."<sup>77</sup> However, whether presentation rule applies to this kind of bill remains unclear.

At present time, in UK, no act deals directly with the delivery of the goods. In the COGSA 1992, in its definition of "bill of lading", only order and bearer bill are included. Under this circumstance, some authors think there is not suitable name

---

order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

<sup>70</sup> Section 9 (b) of *Pomerene Act*, "A carrier is justified... in delivering goods to one who is: ... (b) the consignee named in a straight bill for the goods..."

<sup>71</sup> See section 8 of *Pomerene Act*.

<sup>72</sup> Under USA legislation, there's no definition of "sea waybill", so, very likely, the sea waybill may be included in the straight bill or non-negotiable bill of lading.

<sup>73</sup> E.g. sect. 42 of *Finnish Maritime Code*.

<sup>74</sup> See sect. 54 of *Finnish Maritime Code*.

<sup>75</sup> See sect.58 of *Finnish Maritime Code*.

<sup>76</sup> (1873) L. R. 5 P. c. 253,259, quoted in *Carver's Carriage by Sea*, 1598, p.1114.

<sup>77</sup> *Ibid.*

for a bill of lading if it is not the order or bearer one,<sup>78</sup> and they even regard the straight bill of lading as the same as the sea waybill.<sup>79</sup> Then, it can be inferred that the presentation rule does not apply to the straight bill for the rule is not applicable to a sea waybill. Nonetheless, from the practice and the wordings on the face of the straight bills of lading, some authors find there is no apparent distinction between the bills made out to order and those consigned “straight” to a named consignee.<sup>80</sup>

Briefly, before the decision of the case of “*The Rafaela S*” (which will be introduced later),<sup>81</sup> the nature of the straight bill of lading and whether the presentation rule applies to it were not very clear under English law.<sup>82</sup>

### 3.1.2 International legislations

The international conventions in maritime field provide no answer to this issue either. The *Hague* and *Hague-Visby Rules* do not deal with the delivery under the bill of lading, nor do they provide the definition of the bill of lading and its various types.<sup>83</sup> *Hamburg Rules* only concerns about the order and bearer bills of lading excluding a straight one.<sup>84</sup>

### 3.1.3 Chinese controversies

CMC deals with all types of bills of lading, *inter alia*, the straight bill of lading,<sup>85</sup> and further states that: “A straight bill of lading is not negotiable.” But whether the presentation rule is applied to the straight bill of lading did not meet the consensus for a long period.<sup>86</sup>

<sup>78</sup> *Caver on Bills of Lading*, 1-008, p.5.

<sup>79</sup> *Benjamin's Sale of Goods*, 18-009, p.972

<sup>80</sup> *Gaskell*, 14.25, p.420.

<sup>81</sup> *JJ MacWilliam Co Inc v. Mediterranean Shipping Co SA*, (2002) EWCA Civ556, in (2003) 2LLR. 113.

<sup>82</sup> This case is full of leading significance, but it's still early to conclude that the judgment will bring a final uniformity on the issue of presentation rule on the straight bill of lading.

<sup>83</sup> The absence of the definition of the bill of lading and its various types raises the disputes in *The Rafaela S* that whether the straight bill of lading falls within the convention.

<sup>84</sup> Art. 1.7 of *Hamburg Rules*, “‘Bill of lading’ means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.”

<sup>85</sup> See art. 71 of CMC.

<sup>86</sup> The different understandings of the article 71 of CMC result the diversity of opinions of the relation of the presentation rule and the straight bill of lading. Art. 71 states: “A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and *based on which* carrier undertakes to deliver the goods (emphasis added). A provision in the document stating that the goods are to be delivered to the named person, or to order, or to bearer, constitutes such an undertaking.” As to whether the wordings of “based on which” mean delivery against the presentation of all kinds of bill is still controversial in jurisdiction and shipping practices. However, the officially published English version of this article is a little different from the original Chinese one, which added “against surrendering the same (bill of lading)” to the first sentence, but deleted the provision of

Before the publishing of the judgment of the re-trial on the dispute on delivery without bill of lading between the Guangzhou Fei Da Electronics Co. and APL (hereafter referred to as "*Feida v. APL*"),<sup>87</sup> the controversy on the presentation rule of straight bill was not so protruding. Viewed from the decisions of most cases on the delivery without the original straight bill of lading in that period, the general opinion held that the delivery on the production of bills of lading was the obligation of the carrier, and there was no distinction of the straight or order bills of lading; the focus was usually on the legal nature and causes of actions of such kind of mis-delivery. For example, the famous case of *Yuehai Co v. Cangma Co and others*<sup>88</sup> dealt with a straight bill of lading, but the central conflicts among the courts revolves only around the legal nature of the delivery without bill of lading; they all agreed that delivery without such straight bill of lading was a breach of carrier's obligation.

In *Feida v. APL* re-trial disputes,<sup>89</sup> APL, the defendant at the first instance, had issued a set of straight bill of lading. After APL released the goods to the named consignee in the bill (who is the buyer of the related cargos) at Singapore without the returning of the original bills, the seller who held the original bills claimed against the carrier for damages to the price of the goods and the related interests. On the back side of the captured bill of lading, there was a "paramount clause" providing that all disputes resulted under the bill shall be governed by the US COGSA 1936 or *Hague Rules* 1924. Guangzhou Maritime Court, the first instance court, held that the delivery on the production of the bill of lading is an international custom, and APL should be liable for the damages suffered by the plaintiff as a result of such a misdelivery. APL appealed to the High Court of Guangdong Province and argued: US COGSA 1936 or *Hague Rules* would be applicable law, delivery to the named consignee in a straight bill of lading was a proper delivery under US Laws. The court of appeal regarded the delivery without bill of lading a tort, so, the law of the place where the result of the tort occur will be one of the proper laws,<sup>90</sup> thus the Chinese law was applied. They rejected the appeal based on Art. 71 of CMC. However, the Supreme Court of P. R. China rejected the former judgments and upheld the argument by APL.

---

delivering to "the named person" in the second sentence, see the appendix of the extracted CMC to this thesis. Personally, I do not think the English version of article 71 is very reliable for the understanding of it.

<sup>87</sup> The Supreme Court (1998) jiao ti zi No. 3, in Gazette of the Supreme Court of P. R. China, 2002,5, pp.175-178.

<sup>88</sup> See part 6.1-6.2 of Chapter 5.

<sup>89</sup> Supra fn 87.

<sup>90</sup> See paragraph 1, art.146 of *General principles of Civil Law of PRC*: "The compensation for the damages caused by tort shall be governed by *lex loci delictus*..." See also Sect. 187 of the *Legal Views on Certain Problems of the Implements of the General Principles of Civil Law*: "*Lexi loci delictus* includes the law of the place where the tort is carrier out or the law of place where the result of tort is occurred. When they are not identified, the People's court is entitled to opt either of them for the application."

Though the main point of its decision was the effectiveness of the paramount clause and the application of the US laws,<sup>91</sup> the Supreme Court further observed: “The bill of lading in this case is the non-negotiable straight bill of lading, and does not have the function as a document of title,” therefore, “the delivery without production of bill of lading is not a mis-delivery.”

This case had brought great repercussion and raised the discussion on the delivery under a straight bill of lading. In the draft document of the “*Answers to the Maritime Judicial Practice* (for discussion)” issued in 2002 by the Supreme Court of PRC, it was suggested that the shipper was not entitled to claims against the carrier for delivery without bill of lading when he holds the straight bill.”<sup>92</sup> Many scholars and practitioners as well as judges accepted the point that the production of the bill is not required for the delivery under a straight bill of lading,<sup>93</sup> their main logic is: a straight bill of lading is not negotiable and the consignee is designated by the shipper and the shipper is entitled to redirect the consignee, so, delivery in accordance with the designation or instruction is the undertaking on the carrier but not on the production of the bill. Furthermore, some of them support this view for the reason that the straight bill is not a document of title, so the presentation rule is not necessary.<sup>94</sup>

However, opposing voices always exist. For example, almost at the same time in the same court, the judgments for the two similar cases are contrary. December 2002, in *Jiang xi Food and Oil Imp. & Exp. Co. v. Kawasaki Kisen Kaisha Ltd.*, Guangzhou Maritime Court held that delivery of goods to the named consignee under the straight bill of lading without production of it was proper, and they rejected the plaintiff’s claims. However in the *Shenzhen Gaoke Electronics Ltd. Co. v. Wanhai Shipping Corp. and of Beijing Huihang International Freighter Forwarder Ltd. Co, Shenzhen Branch* on delivery without original bills of lading,<sup>95</sup> both Guangzhou Maritime Court and the appealing court, the High Court of Guangdong Province insisted the presentation rule to the delivery under a straight bill of lading. This divergence reflects the confusion on this issue.

In 2003, the Commission of Legislation Affairs of the Standing Committee of

---

<sup>91</sup> However, the paramount clause just put forward the US COGSA 36 will be the applicable law, which does not deal with the delivery under bill of lading. Whether this clause can affect the application of *Pomerene Act* or USCA TITLE 49 is to be queried.

<sup>92</sup> It was also drafted that the shipper under a straight bill of lading was entitled to redirect the consignee or to exercise the right of stoppage, however, after the goods had been delivered, (even there is no production of the bill), the shipper would lose these rights.

<sup>93</sup> See Chu Bei-ping, *Again on Delivery without Straight Bill of Lading*, the awarded thesis of “Sino-trans Cup” Maritime Law thesis competition 2003; Qu Tao, *Researches on the Delivery without Presentation of Straight Bill of Lading*, CMLA News Letter, vol.71, 2004,3, pp.9-15; Xie Zhen-xian, *Be Alert of Potential Danger of Straight Bill of Lading*, Shipping Exchange Bulletin, 2004,6, p.15, and others.

<sup>94</sup> *Ibid.*

<sup>95</sup> Jin Zheng-jia (general editor), *Annual of China Maritime Trial*, 2002, pp.505-512.

the National People's Congress, the main legislative agency in China, suggested that Chinese courts apply the presentation rule to all the bills of lading, no matter it is a negotiable bill or just a straight one.

At the same time, with further research on this issue and influences from Singapore and English case laws, which will be introduced later, more people support insistence on the presentation rule under a straight bill of lading.<sup>96</sup>

In the final version of *Answers to the Foreign Related Commercial and Maritime Judicial Practice* issued in April 2004, the Supreme Court held that the legal holder of bills of lading is entitled to claim against the carrier for delivery without bill of lading. However, the guiding document does not provide clear and specific provisions with respect to the straight bill of lading. Or, it may be inferred from the wording that the legal holder of a straight bill is also entitled to claim since the document does not exclude this type of bill. During the 13<sup>th</sup> National Seminar on Maritime Judicial Practice in September 2004, this vagueness was eliminated. Delivery under straight bills of lading was one of the key topics and a consensus was reached among the judges from maritime courts, high courts and the Supreme Court of China: in the global scope, delivery under a straight bill of lading shall be adjusted by national laws, and under China's maritime system, presentation rule should be applied.<sup>97</sup> A decision in a seminar does not have any official legal effect, but this one did provide a leading principle for judges and will guide judicial practices in China.

However, even a consensus has been reached among the courts in china, conflicts on the issue on the worldwide scale still cause problems. For example, a Chinese carrier in the Sino-USA trade may be put into a dilemma when he is obliged to deliver the goods to the named consignee at the destination under American law, for he may be liable for the delivery without bill of lading under the Chinese regime.<sup>98</sup>

Moreover, the High Court of Hong Kong Special Administrative Region decided in *The Brij*<sup>99</sup> that a straight bill of lading is "not negotiable and the contractual mandate is to deliver to the named consignee without production of the original document." This was a judicial support for the position taken by *Bejamin's Sale of*

---

<sup>96</sup> E.g., Chen Ping-ping, *Researches on Several Issues of Straight Bill of Lading*, CMLA News Letter, vol.75, 2004,12, pp.8-15; Huang Qin-nan, Gong Xin-qiao, *Comments on Disputes on Delivery Without Bill of Lading*, Maritime Law Review, 2003, 4, pp.228-233.

<sup>97</sup> [www.ccmf.org.cn/](http://www.ccmf.org.cn/), 2 October 2004.

<sup>98</sup> This problem is partly caused by the rules of conflict law. If the applicable law for the right of the named consignee under carriage contract happens to be the same one for the right of holder of bill of lading under the bill relationship, this conflict may be avoided. However, conflicts between different national laws will bring forth uncertainty of the carrier's responsibility on delivery and of the functions of the straight bill of lading.

<sup>99</sup> (2001) 1 Lloyd's Rep. 431.

*Goods and Carver on Bills of Lading*.<sup>100</sup> Therefore, in China, a conflict may arise between the mainland and Hong Kong if they will not change the decisions on similar cases in the future.

## 3.2 New development of Case law

### 3.2.1 Voss Peer v. APL Co Ltd.

*Voss Peer v. APL Co.Ltd.*<sup>101</sup> in Singapore is an important and influential decision, and has drawn wide attention. The shipping line APL issued a straight B/L bore the consignee's name for the carriage of a motorcar from Hamburg to Pusan, South Korea. The set of three original bills of lading were issued to and held by the shipper, the plaintiff, but the goods were released to the named consignee without the production of bill of lading. The unpaid seller, the shipper sued APL for this misdelivery.

In this case, the debate of the parties and the attention of the courts are mainly focused on the comparison between a straight B/L and a sea waybill and the question of whether the presentation rule is applied to the straight bill. Both the High Court and the Court of Appeal of Singapore upheld the plaintiff's claims and affirmed that even under a straight bill of lading, the production of bill is required for the delivery. The main reasons for this decision made by the Court of Appeal which have been cited frequently in later works and practices are as follows: 1) the confusion in this field is caused by the misunderstanding of the COGSA 1992 of UK. As to the understanding of judges, the Act only deals with the right of suit, it defines the bill of lading limited to the negotiable bill and does not mentions about the production of straight bill of lading for the delivery; 2) while a straight B/L is substantially similar to a sea waybill in that both are devoid of the characteristic of negotiability, that is not to say that they are the same; and although a straight B/L cannot transfer the constructive possession of goods by endorsement, it does not necessarily follow that it does not impose a contractual term obligating the carrier to require its production for the delivery; 3) clear words must be presented to imply that the parties intended the straight B/L to be treated, in all respects, as if it were a sea waybill and that its production is unnecessary for delivery, if the presentation rule is intended to be avoided; 4) the usage of sea waybill or bill of lading is the

---

<sup>100</sup> Because of its historical tradition and "one country two systems" policy after 1997, Hong Kong Special Administrative Region still falls within the common law systems. The High Court of this district is the final court of the appealing and the case laws remain as the main resource of the law.

<sup>101</sup> (2002) 3 SLR 176 Singapore High court, (2002) 4 SLR 481, Singapore Court of Appeal, (2002) 2LLR, 707, see also Michael Lai, *Delivery of Cargo Without Production of the Original Bill of Lading*, vol. 9 JIML, 2003,3, pp.284-287.

choice of the parties, if they are willing to accept it as the bill of lading, the Court shall not treat the document deviating from their original intention. In addition, the judgment quoted numerous English cases to support that delivery on the production of document is the common characteristic of the bill of lading, and there is no difference on the obligation on delivery by the carrier even though the types of bills of lading may vary.

### 3.2.2 *The Rafaela S*

The English Court of Appeal in *The Rafaela S* took a similar view as the former one.<sup>102</sup>

I can say that the decision in *The Rafaela S* is even more influential. As a comment says, "it adds to the growing contemporary international jurisprudence relating to the status and legal implications of a straight bill of lading."<sup>103</sup> Though the disputes was not directly related with the delivery under a straight bill of lading, the final decision of the Court of Appeal put the presentation rule to the straight bill of lading, and the straight bill of lading, is treated similar to other bills.

In this case, Coniston (the seller) sold printing machinery on CIF Boston terms to Macwilliam (the buyer and the plaintiff) who was the named consignee in the bill of lading. The carrier was MSC (Mediterranean Shipping Co. SA) and the goods were transshipped at Felixstowe to Boston on board *Rafaela*. The printing machinery was badly damaged on the second voyage. The main dispute between the concerned parties was on the limitation of the liability and the relevant applicable law. The carrier argued for the limitation regime of US COGSA, while the buyer/consignee argued for the more liberal limitation of the Hague-Visby regime. In addition to other key issues,<sup>104</sup> the answer to this question turned out to be whether the English COGSA 1971, which gave the force of law to the *Hague-Visby Rules*, applied to the transit of the second voyage. And, the question eventually boiled down to be whether a straight bill of lading fell within the scope of "bill of lading or other similar document of title",<sup>105</sup> which was the application scope of the UKCOGSA 1971.

The arbitrators decided that the shipment was governed by one contract of carriage and that a straight bill of lading did not come within COGSA 1971. The judge of the commercial court during the first instance of appealing upheld that

---

<sup>102</sup> (2003) 2 LLR. 113.

<sup>103</sup> See *Analysis and Comment*, vol. 9 JIML, 2003,4, p.326 at pp. 324-328.

<sup>104</sup> The main questions were whether there was a single contract of carriage governing the entire transit or two contracts of carriage, and if there were two contracts, whether the UK COGSA 1971 apply to the second part of voyage and so on.

<sup>105</sup> Art.1 (4) of COGSA 1971 of UK, see also art. 1 (b) of the *Hague-Visby Rules*.

COGSA 1971 did not apply to a straight bill of lading and dismissed the appeal. While, the Court of Appeal allowed the appeal, and expressly confirmed that COGSA 1971 did apply to contracts of carriage of goods covered by a straight bill of lading. In deciding the application of the COGSA 1971, the court made thorough examinations to the background and the *travaux préparatoires* of *Hague* and *Hague-Visby Rules*, and the attestation clause of bill and the practical function of the straight bill of lading. It concluded that a straight bill of lading is a bill of lading and the “similar document of title” under *Hague* and *Hague-Visby Rules*, in addition to the UK COGSA 1971. Particularly, the court observed that a presentation of the captured straight bill of lading was required for delivery (as the attestation clause says), which was even one of the reasons that this straight bill of lading was a document of title. Since then, the decision of this case and the observations by the judges, especially by Rix LJ, is deemed as the dictum to a great extent.

### 3.3 Presentation rule applies

In most of the previous works or practices, including some Chinese judgments,<sup>106</sup> usually the question of whether a straight bill of lading is a document of title was the reasoning basis<sup>107</sup> in deciding whether the presentation rule applies to a straight bill of lading. But in my view, whether the production of a straight bill of lading is necessary for delivery is not determined by the function of document of title.

First of all, as is demonstrated by the name of “bill of lading”, a straight bill of lading is within the scope of bills of lading together with order bill of lading and bearer bill. From the introduction of the history of presentation rule in Part 1 of Chapter 5, a straight named consignee was always one of the types of the statement on consignee in bills. Presentation rule was established by the merchant customs and commercial intentions, there is no evidence that a straight bill of lading is distinctive from the others, except that some national law, e.g. *Pomerene Act* of USA, excluded the presentation rule.

Furthermore, most of the bills of lading, regardless of negotiable or non-negotiable ones, bear such attestation clauses expressly requiring “one of the Bills of Lading must be surrendered and duly endorsed in exchange for the goods (or delivery order).” So, the production of bill on delivery is required by the carriers. Such clauses were also one of the essential reasons for the decisions in *Voss Peer v. APL* and *The Rafaela S*. In addition, the viewpoint in *The Rafaela S* that the words “duly endorsed” in such an attestation clause shall be interpreted as

<sup>106</sup> E.g. *Feida v. APL* retrieval dispute, supra fn.86.

<sup>107</sup> Usually, the answer is negative on the basis that a straight bill of lading is not a document of title.

“duly endorsed as applicable” is convincing for the reason that “even if the bill had been a classic negotiable bill made out to a named consignee ‘to order’, there was nothing to require it to have been endorsed where it is simply transferred to the consignee.”<sup>108</sup> And, “there is no reason to restrict the application of the clause to negotiable bills when it is well known that the forms could be easily used as non-negotiable documents, e.g like straight consigned bills.”<sup>109</sup> So, delivery on the presentation of a bill of lading is an undertaking by the carrier under a contract of carriage when he agrees to issue a bill of lading.

And similar to negotiable bills of lading, the presentation rule on a straight bill originates from a separate characteristic of bill of lading and not from the function of document of title. So, without other regulations or agreements between the carrier and the shipper, the presentation rule will be insisted.

Though not rarely a straight bill of lading is deemed as same as a sea waybill,<sup>110</sup> the history of the sea waybill demonstrates the distinction between the two kinds of documents. If the presentation rule is not applied to straight bills of lading and if there is no distinction between them, it would not be necessary to introduce sea waybills in order to resolve problems rising from the delay of document at the destination and other shortcomings of the bill of lading.

Furthermore, the presentation rule under the straight bills is common in practice in a wide range, unless it has been expressly excluded. For example, the English COGSA 1992 excludes straight bill from the definition of bill of lading for the purpose of the Act, but its interpretation document issued by Law Commission indicated that the presentation rule is applied to a straight bill of lading but not to a sea waybill.<sup>111</sup> And through a large-scale investigation, it is found that the majority of the national laws or conventions show clear difference between them, and it is even commented that “the clear practical difference between a straight bill and a waybill is that the straight B/L has limited use as security for payment, a waybill does not.”<sup>112</sup> This “limited security” is guaranteed by the presentation rule that enables the unpaid seller, ie. the shipper in the bill, to retain this bill, or a creditor banker to hold it for a financial arrangement with the promise that the goods will not be taken over by others if the carrier complies with the aforesaid rule.

However, the decision of *The Rafaela S* leaves a question unanswered—the question of whether a presentation rule is still applicable when a straight bill of lading lacks the aforesaid attestation clause, which requires the production of bills

---

<sup>108</sup> (2003) 2 LLR. 136 at 113.

<sup>109</sup> *Gakell*, 14.25, p.420.

<sup>110</sup> E.g, *Benjamin's Sale of Goods*, 18-009,p.972.

<sup>111</sup> *Rights of Suit*, para 2.50.

<sup>112</sup> 51% of the respondents replied that there was clear difference between these two kinds of documents under national laws, see UNCTAD Secretariat, *The Use of Transportation Documents in International Trade*, UNCTAD/SDTE/TLB/2003/3, box 3.

on delivery. In my view, the presentation rule applies to bills of lading, even when there is no such kind of statement. The presentation rule has been one of the characteristics of bills of lading. Considering the general commercial intention, the choice of a straight bill of lading over a sea waybill may be usually because the parties would like to be favored by the functions of the bill (but not the chain of sales) and obtain the limited security of the goods by this document. However, the English law leaves much uncertainty with regard to this issue. In order to extinguish the confusion, the court of Appeal of *Voss Peer v. APL* observed that a presentation rule would apply unless the clear words is presented to imply that the parties intended the document to be treated as if it were a sea waybill and that “its presentation by the named consignee is not necessary.”<sup>113</sup> In addition, the P& I Club suggested, “If a non-negotiable document is sufficient, a sea waybill will usually be most appropriate. If a sea waybill can not be issued, it is suggested that the straight bill should also contain the words ... such as ‘where non-transferable/negotiable, the carrier is entitled to deliver the goods to the named consignee without surrender of the original bill of lading, and is obliged to do so unless the shipper requests otherwise before delivery takes place.’ ... In the case of doubt, cargo under straight bills should not be delivered without production of the original bill, unless a written consent has been issued from the shipper.”<sup>114</sup> Therefore, in order to avoid legal risks,<sup>115</sup> carriers had better insist the presentation rule under a straight bill if there is no expressly agreement or laws otherwise.

### 3.4 Limitation of straight bill of lading

After all, a straight bill of lading is a special document; its combined characteristics even make it resemble a hybrid of a bill of lading and a sea waybill. Compared with these two documents, the straight bill of lading has its limitations during the transactions and on the delivery.

#### 3.4.1 Holder of straight bill of lading

Compared with order or bearer bill of lading, the most significant difference of the straight bill of lading is its non-negotiability. Beyond the shipper and the named consignee, the bill is not transferable<sup>116</sup>, and the delivery and endorsement of the

<sup>113</sup> (2002) 2 LLR , p.721 at 707.

<sup>114</sup> Gard, *P& I Club Loss Prevention Circular 13-02*, cited in James Marissen, *Is Using a “Straight” Bill of Lading Still Straight forward? The Decision in The Rafaela S*, vol.10, JIML, 2004, pp.274-290.

<sup>115</sup> Of course, this cannot avoid risks in all the cases since a carrier may be obliged to deliver to the consignee even without the production of bill, such as under the American law.

<sup>116</sup> In *The Rafaela S*, the court observed that a straight bill of lading is also transferable, though it is limited to one time transfer from the shipper to the consignee.

bill shall not entitle the possessor of the document to the delivery and the rights against the carrier. In other words, in the hand of the party other than the shipper and the named consignee, a straight bill will no longer be a document conferring the right of delivery. The legitimate function of bills of lading also works on straight bills, and the legal holder of a straight bill should be the shipper or consignee in the bill. Otherwise, without statement in the bill or without the agreement by either of the former two parties, any third party holding the document, even he gets it via legal process, does not have the right to the goods, nor does he have right of suit against the carrier for disputes under the bill. For example, a bank that gets the bill because of the process of an L/C, is generally not entitled to demand the delivery of the goods or to claim against the carrier for delivery without bill of lading if there is no further evidence of his rights. A straight bill of lading shall not provide sufficient security for the bank if there is no further express arrangement or notice to the carrier. The assignment of rights under contract of carriage or to the goods will be discussed in the next section. In a summary, a straight bill is different from the negotiable bills; along with the production of the straight bill, the holder's identity should be examined upon delivery to make sure that he is the shipper or the named consignee

### **3.4.2 Redirection of consignee**

In consideration of the commercial arrangement, the redirection of consignee may always be desired no matter what kind of transport document is issued. I don't agree with the viewpoint that if a bill of lading is stated as "non-negotiable" the carrier will be convinced that the consignee shall not be changed.<sup>117</sup> Though usually the consignee is certain when the bill is issued, there is no reason to forbid the changing of the consignee when it is so required. Even under a sea waybill, the shipper is able to re-nominate new consignees under most of the regimes.

Usually, under a straight bill of lading the shipper is entitled to redirect the consignee. But the right of redirection ceases since the shipper transfers the bill to the consignee. However, when the bill has been transferred to the consignee, there is no clear conclusion on the question of whether he is entitled to direct another one to take the delivery. In my view, as far as the nominated consignee is concerned, "redirect" may not be the appropriate word, but the assignment of the right under the contract of carriage is permitted by civil law. And some national laws and theories also protect this transfer of right.<sup>118</sup>

---

<sup>117</sup> See Chu Bei-ping, *Again on Delivery without Bill of Lading under Straight Bill of Lading*, Awarded thesis of the "Sino-trans Cup" Maritime Law thesis Competition, 2003.

<sup>118</sup> Such as USA, see the below.

For example, American law provides a precise rule on the transfer of right under non-negotiable bill. According to Title 49 of USCA, the holder of a bill of lading may “transfer the bill without negotiating it by delivery and agreement to transfer title to the bill or to the goods represented by it. Subject to the agreement, the person to whom the bill is transferred has title to the goods against the transferor.”<sup>119</sup> When a transferee notifies the common carrier that a non-negotiable bill of lading has been transferred under the former section, “the carrier is obligated directly to the transferee for any obligations the carrier owed to the transferor” unless the right to acquire the obligations of the carrier is defeated.<sup>120</sup> Therefore, the transferee from the former named consignee may be entitled to claim delivery directly against the carrier by the agreement and the convey of the document. In addition, within a long period in France, “the person named as consignee on such a bill may however transfer his title to the goods by transferring the bill when such transfer is accompanied by an act of cession.”<sup>121</sup> In summary, the right to “redirect” the consignee, as a principle, shall be held by the legal holder of the bill.

However, different from negotiable bill of lading, the direction of consignee of a straight bill shall not be completed by the transfer of the bill itself. So, a notice or an attestation of this redirection shall be presented to the carrier upon or before demanding for delivery. But, on the other hand, the presentation rule of straight bill makes it different from a sea waybill. The shipper under a sea waybill is entitled to redirect the consignee just by giving a notice to the carrier before the cease of the right of control. But under a straight bill, only a notice to the carrier is not sufficient and surrendering of the bill is also required. The provisions under the US law have demonstrated this difference.

As a proper and prudent procedure, the redirection of the consignee under a straight bill of lading may follow the four steps: first, the shipper or consignee assigns the right of delivery (usually accompanied with other rights and obligations under the contract of carriage of goods) to a third person; second, the shipper or the former consignee shall notify the carrier of this assignment and the name of the new one; third, they shall surrender the straight bill of lading to the carrier; fourth, as is required in the usual procedure, the carrier shall change the name of the consignee in the document and return it to the new consignee. The consequent assignments may occur following these procedures too. However, in some special cases, for instance, the goods has arrived at the destination and the new consignee

---

<sup>119</sup> §80106 “Transfer without negotiation” (a), USCA, title 49.

<sup>120</sup> §80106 (c) of USCA , title 49. But, according to this section, before the carrier is notified, the transferee’s title to the goods and right to acquire his obligations of the carrier may be defeated by (a) garnishment, attachment, or execution on the goods by a creditor of the transferor; or (b) notice to the carrier by the transferor or a purchaser from the transferor of a later purchase of the goods from the transferor.

<sup>121</sup> *Tetley’s Cargo Claims*, p.220.

has claimed for the delivery, in my view, the carrier does not have to change the name in the document and return it to the new consignee. The notice of the assignment by the former holder of bill, the surrendering of the bills to the carrier, the proper identity of the new consignee and the receipt of taking over the goods signed by the new consignee may be a sufficient protection for the carrier.

### **3.5 Calling for uniformity**

Though the new development by case law has provided guidance to the delivery under the straight bill of lading, the uncertainty and the conflicts of laws on this issued is still striking. The conflicts between different regimes make the carrier uncertain about his obligation and bring forth confusion in practice. In order to extinguish the risks of the carrier, certain shipping companies have opted for sea waybills in lieu of straight bill when no negotiable document is required, or expressly excluded the presentation rule on the face of the document as the P& I Club suggested. But this kind of practical approach can't remove the conflicts between different regimes. Another efficient way is the uniformity of the laws. UNCITRAL Draft Instrument provides a unified rule to the delivery under transport document. But the draft uses the term of "non-negotiable document" to comprehend waybills, straight bills or any other similar document that are stated with a named consignee without further word of "to order".<sup>122</sup> Under a non-negotiable document, the goods shall be delivered on the proper identity of the consignee.<sup>123</sup> So, if the new draft comes into force, the presentation rule will be eliminated to a straight bill of lading. Whether the rule is insisted or removed, the uniformity of laws shall be the final way to eliminate the conflicts and the confusion on this issue.<sup>124</sup>

## **4. When a bill of lading is lost**

### **4.1 Usual requirements by merchant party**

It is not very rare that a set of original bills of lading may be lost or stolen. They may be lost during mailing, or when the situation gets chaotic, such as in the case

---

<sup>122</sup> Sect. 1. 16 in wp.21, art.1(m) in WP.32.

<sup>123</sup> Sect.3.1 in WP.21, art. 48 in WP.32.

<sup>124</sup> In addition, in my view, the suggestions by the P&I club or the future possible application of the UNCITRAL Transport Convention will probably bring forth the disappearance of the straight bill in its present form, or the integration of the straight bill and the waybill.

of *The Houda*,<sup>125</sup> where the whole set of bills of lading issued at a port of Kuwait disappeared during Iraq's invasion. Furthermore, the bills may be lost because of the negligence of the merchants as well as of the carrier or the shipping agency. For instance, a shipping agency in Shanghai once mailed a whole set of original bills of lading to a wrong shipper together with other bills. Fortunately, the friendly receiver returned the bills to the shipping agency and they were sent to the right shipper later, otherwise, the bills of lading would be lost.

When bills of lading are lost or stolen, the shipper may usually choose to bring up one of the two requirements. First, the shipper who claims the lost of the bills may ask for a new set. Prudent carriers or shipping agencies will usually refuse to do so in order to avoid two or more identical sets of original bills of lading in circulation. Even if a shipping company is willing to issue a second new set, they may require for a letter of indemnity. For example, the "K" Line American Inc. requires that a shipper may obtain a second new set of original bills of lading by furnishing a letter of indemnity signed by the shipper and counter-signed by any reputable bank so that the shipping companies will not be held responsible if the first set is found and surrendered.<sup>126</sup>

The second and also the more common requirement is asking the carrier to deliver the goods without the original bill of lading.

#### **4.2 The carrier's remedies for claims on delivery**

As is mentioned above, delivery against bill of lading is both the right and the obligation of the carrier and the carrier usually refuse to breach the presentation rule unless it has been proved that the claimant is actually entitled to the right of delivery.

The proceeding for the claimant to prove his right to the delivery may take a relatively long period of time, and the practice is not feasible for both the claimant and the carrier, especially the liner carrier. Therefore, in practice, some carrier may discharge the goods to appropriate places to wait until the right of the claimant is ascertained.

However, warehousing may not be a suitable solution in all situations, for example, when the discharging port is in bad order, and the carrier is not confident of the security of goods at these ports, or when there is no appropriate place to keep the goods that requires special storage conditions, so on and so forth. In *The Lycaon*, the master dared not to discharge the goods at the discharging port, but limited by the liner schedule of the vessel, he had to carry the goods back to the

---

<sup>125</sup> (1994) 2 Lloyd's Rep.541.

<sup>126</sup> See the "frequently asked questions and answers" in [www.kline.com/Howdoi/BLs.asp](http://www.kline.com/Howdoi/BLs.asp), 8 Nov. 2004.

loading port until the English court determined who is entitled to the goods.<sup>127</sup>

Furthermore, under some circumstances, the carrier may deliver the goods against the letter of indemnity by the claimant or by the third party as is discussed before. But, as we know, an LOI will not relieve the carrier from the liabilities to the holder of the original bill of lading in most cases.<sup>128</sup> So this is still not a so safe remedy for the carrier.

As a common rule, the proper course is for the claimant to apply a court order to release the goods on the evidence that he had the title to the goods and to explain the reasons or the process of the loss.<sup>129</sup> The USCA<sup>130</sup> and The Scandinavian Maritime Code 1994<sup>131</sup> provide similar remedies to the consignee. On the other hand, this is also the remedy for the carrier.

In China, the carriers' practices under the same circumstance are usually the warehousing, waiting or delivering the goods against an LOI. In addition, the claimant may publish a statement in the newspaper or through other media, declaring the loss of the bill (including the number and the particulars in the bill), claiming he is the actual holder of a bill of lading and the only consignee, and announcing the nullification of the said bills of lading. And sometimes carriers will deliver the goods on this announcement as well as against an LOI. However, it is common sense in theory that a unilateral announcement of the title and of the ceasing of the effectiveness of the document by the claimant will not be valid. So, the carrier delivering the goods against such announcement may run risks.

In China, the claimant may also resort to legal procedures to prove his right to the goods. According to Art. 100 of the *Maritime Procedure Law* of the P. R. China (hereinafter referred to as "MPL"), a holder of a bill of lading or similar documents for taking delivery of the cargo may apply to the maritime court for public interpellation at the place of the cargo when such documents are out of control or lost.

Except in this article, the MPL does not provide any more information on this "public interpellation" procedure, so the rules in the *Civil Procedure Law* of P.R. China (hereinafter referred to as "CPL") will apply. According to Article 198 of the CPL, the public interpellation is the procedure for a holder of an instrument to apply to the court for a public notice when that negotiable instrument has been stolen, lost or destroyed. After preliminary examination of the application and the supporting evidence, the court may decide to issue a public interpellation urging

---

<sup>127</sup> *Elder Dempster Lines v. Zaki Ishag*, (1981) 1 LLR, 92, (1983) 2 LLR., 548.

<sup>128</sup> For the effectiveness of an LOI see part 2. of this chapter

<sup>129</sup> *Yang's Bill of Lading*, p.89.

<sup>130</sup> §80114 USCA, TITLE 49.

<sup>131</sup> Such as section 54 of the *Finnish Maritime Code*.

interested parties to declare their rights to the documents<sup>132</sup> in the required period of no less than 60 days.<sup>133</sup> Meanwhile, within three days of acceptance of the application, the court shall notify the payee to stop to pay for the instrument.<sup>134</sup> And the court shall notify the carrier to stop the delivery of the goods even when a bill of lading is presented. If no other party makes declaration of the rights or interests to the document, the court will declare the instrument invalid.<sup>135</sup> And the carrier may deliver the goods to the applicant. If any other party declares his right to the instrument, the public interpellation procedure is then terminated and the suit between the applicant and the person who also declares his right will be brought in the court.

No matter what will be the result in the abovementioned situations, the carrier has to wait for a long time to decide to whom he should make the delivery. Even there is no more declaration of the rights, the sixty-day suspension will be too inconvenient for the carrier, and may influence the vessel's operation. So, As the maritime cases are concerned, the procedure of the public interpellation should be adapted to the features of the shipping practice better either by shortening the period of the public notice or granting other remedies for the carrier during this period, such as warehousing the carried goods in appropriate places or depositing the goods by the order of the court,<sup>136</sup> either of which will relieve the carrier's obligation of personal delivery.

The USA and the Scandinavian countries authorize the carrier to delivery on a security offered by the claimant. When an application has been filed for nullification of a lost bill of lading, the applicant, after the court has issued a public summon, may require the delivery of the goods against the security he has furnished for compensation enough to cover the carrier's possible liability arising from such delivery.<sup>137</sup> The USCA Art.80114 provides that when a negotiable bill of lading is lost or stolen or is destroyed, a court may order the carrier to deliver the goods if the person claiming for the goods surrenders a surety bond approved by the court in order to "indemnify the carrier or a person injured by delivery against liability under the outstanding original bill of lading." In addition, the court may also order payment for reasonable costs and attorney's fees to the carrier.<sup>138</sup> These solutions may be of great reference to Chinese legislation.<sup>139</sup>

---

<sup>132</sup> Art.194 CPL.

<sup>133</sup> Art.194,195 CPL.

<sup>134</sup> Art.194 CPL.

<sup>135</sup> Art.197 CPL.

<sup>136</sup> Such remedies will be discussed in Chapter 7 below

<sup>137</sup> Section 55 of the Finnish maritime Code

<sup>138</sup> § 80114 (a), USCA , title 49.

<sup>139</sup> But these procedures do not relieve the carrier from the liabilities to the legal holder of the original bill of lading in good faith, see, e.g., § 80114 (b) of USCA, title 49.

Furthermore, when the applicant claiming the loss of the bill of lading and the holder of the bill itself are showing up at the same time, an interpleading may be brought too.

## **5. Conclusions**

### **5.1 Defenses for carrier for delivery without B/L**

The carrier may be relieved from the liabilities to his delivery of goods without bill of lading for various reasons. From the analysis of the Chinese cases, it is concluded that the delivery without bill of lading may be a proper delivery under the following circumstances (but I have not tried to summarize all of the reasons or defenses for the carrier): the holder of the bill of lading ratifies the delivery without bill of lading; the holder and other parties give up the usual functions of the bill of lading including the presentation rule on the delivery through the agreement under sales transaction, financial arrangement and so on; the bill of lading exhausts as a document for the delivery. However, only the fact that the holder of B/L has recourse to the remedies under the sales contract will not automatically discharge the carrier from the liabilities for such mis-delivery.

### **5.2 Right of suit**

The right of suit against the carrier for delivery without bill of lading shall be purported by the legal holder of the bill of lading. A legal holder of a bill of lading is the person who possesses the bill and he, either, 1) is the shipper indicated in the document; or, 2) is the named consignee in the bill; or 3) gets the bill duly endorsed, when it is an order bill of lading; or 4) is the bearer of the document when it is a bearer bill. When the seller of an FOB contract is the consignor of the goods but not the shipper in the bill, nor does he get the bill via one of the abovementioned three other ways, he will then have no right of suit under the bill of lading against the carrier for delivery without it.

### **5.3 LOI**

Delivery against LOI is the usual alternative to delivery against the bill. An LOI shall not discharge the carrier from liabilities to the legal holder of bill of lading in good faith, but I am in favor of the recognition of the effectiveness of LOI between the carrier and the guarantor. Nevertheless, the carrier shall act prudently when he

accepts an LOI, especially he shall make certain of the good reputation of the guarantor, the clarity of the wordings of LOI, its genuine authority, the valid and sufficient period of guaranty and other relevant issues.

#### **5.4 Presentation rule and Straight bill of lading**

Whether the presentation rule applies to the straight bill of lading is still under controversy. In my view, without the statutory provisions or contractual agreement otherwise, this rule shall still be insisted. The main supporting argument is that the presentation rule is the merchant custom established during the history of the bill of lading, and is also a promise by the carrier as a statement in all types of bills of lading. Moreover, delivery against the presentation of bill is a common practice widely adopted. In addition, the common usage of the straight bill of lading as limited security for the sales of goods requires the presentation rule. Under a straight bill of lading, the possessor of the bill, either the shipper indicated in the bill or the named consignee in the document, is entitled to the delivery of goods and to the claims against the carrier for delivery without bill of lading. Otherwise, the document will not confer the right to the goods on other party even he holds the bill. Nevertheless, the redirection of consignee or the assignment of contractual rights under a straight bill of lading still operate via follow general steps: 1) the shipper or consignee assigns the right of delivery (usually accompanied with other rights and obligations under the contract of carriage of goods) to a third party; 2) the shipper or the former consignee shall notify the carrier of this assignment and the name of the new one; 3) they shall surrender the straight bill of lading to the carrier; 4) as is required in the usual procedure, the carrier shall change the name of the consignee in the document and return it to the new consignee.

However, the provisions under the UNCITRAL Draft Instrument and other national legislations, which abandon the presentation rule under a straight bill of lading, in addition to the limitation of the functions of this type of document, make the future of the straight bill of lading uncertain. The uniformity of laws on straight bill of lading and on the delivery under such document is necessary.

#### **5.5 Solutions when bill of lading is lost**

When bill of lading is lost, judicial procedures will help to discharge the carrier from the obligation of delivery against the bill of lading. In China, a better solution for the difficulties arising from the missing of the bill is improving the public interpellation procedures so that they can be geared better to the shipping practice by making reference to the laws of the USA or Nordic Countries and others.