

WHO IS AT RISK?

**Is a Carrier under a Straight Bill of Lading Entitled to Deliver Goods to the Named
Consignee without Presentation of the Original Bill of Lading?**

by

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Abstract

The bill of lading is the single most important legal document in the carriage of goods by sea, and hence in the international trading system as a whole. However, legislation and judicial opinion around the world on the issue of whether or not a carrier, under a straight bill of lading, is entitled to deliver goods to the named consignee without the presentation of the original bill is quite diverse.

It is generally accepted that a bill of lading performs three functions. It is a receipt for goods, evidence of a contract of carriage, and a document of title. There is much discussion and many arguments as to whether straight bills of lading should be documents of title in international trade and transportation.

Focusing on China, this study explains the problems concerning the carriage of goods by sea without straight bills of lading. It examines international approaches by presenting legislation and cases from several representative shipping countries and districts including the United States, the United Kingdom, Canada, Hong Kong, and Singapore, as well as China (including some cases in which the author acted for one of the parties). It goes on to identify the basic principles on delivery issues for Chinese legislation. Finally, this study explores approaches relating to the resolution of the issues pertaining to delivery of goods without bills of lading, and offers suggestions for improving Chinese legislation.

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Chapter I

Introduction

1.1 Background

Delivering goods without presentation of an original bill of lading has become commonplace today. Generally speaking however, it is an internationally recognized principle that under a negotiable bill of lading,¹ the carrier should only deliver goods to those presenting an original bill of lading. By doing otherwise, the carrier will be in tort, or in breach of the contract of carriage.

But on the issue of whether or not a carrier under a straight (also referred to as “straight consigned,” “named,” or “nominate”) bill of lading is entitled to deliver goods to the named consignee, without the presentation of the original bill, legislation and judicial practices in respective countries and districts are quite diverse. There is no representative or applicable international convention that is generally accepted in the international shipping industry.

For convenience, the term “non-presentation” hereinafter means that a carrier² delivers cargo to the named consignee under a straight bill of lading without presentation of the original bill of lading.

¹ The term “negotiable” or “negotiability” used in relation to a bill of lading means that the bill of lading is transferable. Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea*, Second Edition (Singapore: Butterworths Asia, 1994), at 264. In the judgement of *Kum and Another v. Wah Tat Bank Ltd.*, Mr. Justice Devlin wrote that “it is well settled that ‘negotiable’, when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title.” [1971] 1 Lloyd’s Rep. 439 at 446.

² The carrier here includes the contract carrier, the actual carrier, and their agents.

The classic definition of “bill of lading” is given in the *Hamburg Rules* as follows:

Bill of lading means a document that 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.³

According to the traditional bill of lading literatures and reported cases, it is generally accepted that a bill of lading performs three functions.⁴ First, it serves as a receipt for the goods described in it. Second, it is evidence of the contract of carriage.⁵ And third, it serves as a document of title⁶ in respect of the goods.⁷ In most circumstances, the bill of lading performs these three functions at the same time.⁸

³ The *Hamburg Rules*, Article 1. Samir Mankabady, *The Hamburg Rules on the Carriage of Goods By Sea* (Boston: A. W. Sijthoff, 1978). Bill of lading was not defined in the *Hague Rules*, or in the *Hague-Visby Rules*.

⁴ See E. R. Hardy Ivamy, *Payne and Ivamy's Carriage of Goods by Sea*, 12th Edition, (London: Butterworths, 1985), at 71. Ray August, *International Business Law* (New Jersey: Prentice Hall, 1993), at 499. Liangyi Yang, *Philip Yang on Shipping Practice*, edited by Y. M. Lin, (Dalian: Dalian Maritime University Press, 1995), at 203. See also *Barclays Banks v. Customs and Excise*, [1963] 1 Lloyd's Rep. 81. *The Sevonia Team*, [1983] 2 Lloyd's Rep. 640.

⁵ The bill of lading is merely evidence of the contract of carriage between shipper and carrier, as it is not a bilateral contract; yet in practice the bill of lading is sometimes treated as the contract itself. Martin Davies and Anthony Dickey, *Shipping Law* (Sydney: the Law Book Company Limited, 1990), at 198.

⁶ The bill of lading is equivalent to the actual goods. Yuanmin Lin, *Philip Yang on Shipping Practice* (Dalian: Dalian Maritime University Press, 1995), at 203.

⁷ 13 Am Jur 2d, Carrier § 336. *American Jurisprudence 2d*, Volume 13 (Danvers: West Group, 2000), at 618. See also Martin Davies and Anthony Dickey, *Shipping Law* (Sydney: the Law Book Company Limited, 1990), at 137.

⁸ Where a bill of lading is issued for goods on a chartered ship, it performs as both a receipt and a document of title to the goods shipped. Martin Davies and Anthony Dickey, *Shipping Law* (Sydney: the Law Book Company Limited, 1990), at 186.

Bills of lading are usually classified as straight bill of lading, order bill of lading, or bearer bill of lading. There are, however, two unique types of bills of lading under U.S. law: negotiable bill of lading and non-negotiable bill of lading.⁹

When an order bill of lading is issued, it must be endorsed and assigned. Upon production of the original bill of lading to confirm the person entitled to collect the cargo, the carrier then completes the delivery.

When a bearer bill of lading is issued, it can be assigned without endorsement. The carrier must deliver cargo upon production of the original bill of lading in order to confirm that the person collecting the cargo gets the bill of lading from the shipper. Both the order and bearer bill of lading may be transferred many times, indicating that the title to the goods can also be transferred.

However, a straight bill of lading cannot be transferred by endorsement. The question then arises: upon issue of a straight bill of lading,¹⁰ should the carrier deliver the cargo without presentation of the original bill of lading? Answers to this question are quite diverse in different countries and districts.

1.2 Tension: Security or Efficiency

The bill of lading originated from trade. It plays a very important role in international trade and transportation, and is the essential document in the “payment against documents” transaction. The bill of lading is also the foundational root of the documentary credit

⁹ R.H. Folsom, M.W. Gordon, and J.A. Spanogle, *International Business Transactions*, Fifth Edition (St. Paul, MINN.: West Publishing Co., 1996), at 122. See also: 13 Am Jur 2d, Carrier § 324. *American Jurisprudence 2d*, Volume 13 (Danvers: West Group, 2000).

¹⁰ Currently, straight bills of lading are widely used in ocean transportation. Peter Jones, “Straight Bill of Lading is ‘Similar Document of Title’ and under UK Law is Subject to COGSA”, online: Forwarderlaw Company <<http://www.forwarderlaw.com/Cases/rafaela.htm>>

system.¹¹ It is the key item in the list of documents provided under a letter of credit.¹² Almost all letters of credit require production of a commercial invoice and a bill of lading.

How does a bill of lading work in international trade and transportation? In a standard example, the seller arranges the transportation under a “CIF” term of a sales contract. When the seller consigns the goods to a carrier, the carrier issues a bill of lading as a receipt and evidence of contract of goods by sea. The seller has a vested interest in ensuring that the right to possession does not pass until he provides the consignee with an original bill. Alternatively, the seller could retain the original bill of lading to protect himself against the buyer’s insolvency and thereby require payment for the goods before delivery of the bill of lading. The buyer of the international sales contract obtains the bill of lading by paying the required price, which is described as “payment against documents.”

In international trade, goods are often sold several times while in transit at sea. A very important function of a bill of lading, therefore, is to enable the buyer to sell the goods in transit by transferring the title to a subsequent buyer. As possession of a bill of lading is equivalent in law to possession of the goods,¹³ the transfer of a bill in mercantile practice is equivalent to physical delivery of the cargo itself. If the goods are under threat of adverse claims or infringement, the holder of the bill of lading, by producing the bill, can claim his

¹¹ In the judgement of *The “Honda”*, Mr. Justice Neill said, “The case for the owners is based on the general principle that once a bill of lading has been issued only a holder of the bill can demand delivery of the goods at the port of discharge. It is because of the existence of this principle that a bill of lading can be used as a document of title so that the transfer of the document transfers also the right to demand the cargo from the ship at discharge.” [1994]2 Lloyd’s Rep.541, at 550.

¹² In documentary credit operations, all parties concerned deal in documents rather than goods. *Uniform Customs and Practice Documentary Credits*, Article 8.

¹³ E. R. Hardy Ivamy, *Payne and Ivamy’s Carriage of Goods by Sea*, Twelfth Edition (London: Butterworths, 1985), at 81. See also Martin Davies and Anthony Dickey, *Shipping Law* (Sydney: The Law Book Company Limited, 1990), at 222-223 and 13 Am Jur 2d, Carrier § 367, *American Jurisprudence 2d*, Volume 13 (Danvers: West Group, 2000), at 639.

right to the goods. Legal recognition of the bill of lading as document of title guarantees the performance of documentary transactions.

Because the bill of lading represents ownership of the goods, it is the international practice that a carrier must deliver goods against production of the original bill of lading, at destination. But in shipping industry practice, carriers often deliver goods without the presentation of original bills of lading.¹⁴ Delivery without bills happens still more often in the transportation of fresh cargo and oil. The bills issued in oil transportation are usually non-negotiable transportation documents; that is, straight bills or sea waybills.

Normally, there are three principle reasons for delivery of goods without original bills of lading. The first is that the bill of lading arrives at the destination later than the cargo.¹⁵ While the physical circulation of a bill of lading may be rather slow – affected as it is by processing of documents through banks, ways of payment, postal services, cooperation between parties, and other factors – modern technology helps to improve the speed of transportation. A bill of lading thus often arrives at its destination later than the cargo, especially in transactions involving shorter sea voyages, such as oil trade transportation.¹⁶ The second reason that goods may be delivered without a bill is that the consignee does not receive the bill of lading in time. For example, in the case of an L/C payment, the fact that

¹⁴ Releasing goods without original bill of lading is getting more and more serious. Yuanmin Lin, *Philip Yang On Shipping Practice* (Dalian: Dalian Maritime University Press, 1995), at 233.

¹⁵ In the case *The "Sormovskiy 3068"*, Mr. Justice Clarke said in trades, it was difficult or impossible for the bills of lading to arrive at the discharge port in time. [1994] 2 Lloyd's Rep. 266.

¹⁶ According to the statistics of CMI, 100% of minerals and oils are delivered without the original bill of lading. Yuzhuo Si, "An Attempt to Legislate on the Delivery of Cargo Without Original Bill of Lading-A commentary on the provision of the UNCITRAL draft Transport Law on the delivery of cargo without original bill of lading", paper presented to Maritime Law Seminar, Hong Kong, 2003, at 28. 50% of goods are released without original bills of lading in international trade. Liangyi Yang, "Guan yu ti dan de fa lv ji qi xin fa zhan" (The Law of Bill of Lading and its Recent Development), edited by Beijing University Law School Maritime Study Center, *Hai shang fa yan jiu* (Maritime Law Study), (Beijing: Law Press, Volume 1, 2000), at 266.

the consignee cannot pay the price of the goods will lead to his/her failure to receive the bill in time.

A carrier is therefore in something of a dilemma when he faces a consignee without an original bill of lading at the destination port. If he releases the goods to the consignee, he might be liable to the real owner who holds the original bill of lading. If he insists on releasing the goods upon production of the original bill of lading, he might be subject to serious costs, such as liability for demurrage, damage for detention, or loss of the next available charter.¹⁷ Thus, there may be a tension between security of title and efficiency of transaction, and it is often difficult for the carrier to determine how to strike the right balance within this tension. This is the pending issue.

1.3 The Importance and Purpose of this Study

Delivery plays an important role in the carriage of goods by sea. The responsibility for non-presentation is as uncertain in international conventions, as it is for individual nations, including the People's Republic of China (hereinafter referred to as "China"). It is particularly important for China to determine whether the carrier of goods should be liable for non-presentation. First, establishing the liability of non-presentation allows for the certainty of law and its authority. In the judicial context of China, the fact that there are no clear rules governing non-presentation restricts judges from exercising the power of discretion. Judicial power may be easily abused or misused. Second, establishing liability helps the parties that are involved in disputes foresee the possible consequence of their actions, and thus take correct measures once rights and liabilities are made clear. Third, a determination of the

¹⁷ John F Wilson, *Carriage of Goods by Sea* (London: Pitman Publishing, 1988), at 156.

liability of non-presentation helps prevent marine fraud, which has become a serious threat to Chinese international import and export trade.

A huge amount of research on bills of lading has emerged in China since 1993. However, very little study on the issue of non-presentation has been done so far. Previous research focused mainly on the non-negotiability of straight bill of lading, but ignored its function as a provider of security in international trade.

In this thesis, the economic analysis of law – also referred to as law and economics – is introduced to analyze the efficiency of existing legal rules. Additionally, increased attention is paid to comparative studies. It is essential for China's legal community to reach a broader understanding of the legislation and practice of other countries. It is also necessary to compare diverse approaches to find the best solution.

This research is also a comparative analysis designed to identify some of the similarities and differences of approaches based on a review of several nations and districts. The Chinese legal system and Western legal system differ greatly¹⁸, and it is always hard for both systems to fully understand each other. More comparative studies are needed to build common understanding. It is important for China's legal community to understand the theories and practices of other nations and districts. It is also necessary to compare many different approaches to find the best solution. Focusing on China, this study explains the problems involved with non-presentation. It examines international approaches by presenting legislations and cases of several representative shipping countries and districts including the United States, the United Kingdom, Canada, Hong Kong, and Singapore. Meanwhile, it proposes the basic principles on non-presentation issues for Chinese

¹⁸ Most people suggest that Western approach is man ruled by Laws; on the other hand, Chinese approach is laws ruled by man so judges have some flexibility in decision-making.

legislation. Finally, this study explores approaches to resolving the issues of non-presentation, and offers suggestions for improving Chinese legislation.

Chapter II

Problems Concerning Delivery of Goods without a Bill

Delivery of goods without bills is relatively common in Asian countries. The widespread use of containers has greatly shortened the transportation time of goods. Consequently, for short-distance transport between Asian countries, bills of lading usually arrive at the destination ports later than the corresponding cargo. If carriers insist on delivering goods against presentation of original bills of lading, they accept more responsibility and risk suffering losses.

In Asian countries and districts, the pressure of high warehousing fees pushes carriers to discharge their cargo as soon as possible, leading to the delivery of goods without bills. For example, 80%-90% of imported goods from China are released at Korean ports against letters of indemnity, instead of original bills of lading.¹⁹ In recent years, 70% of the imported goods in South-East Asia and 90% in Japan were delivered without presentation of original bills of lading.

2.1 Why Delivering Goods without a Bill Is Common in China

Cargo delivered without an original bill of lading is more common in China than in other Asian countries.²⁰ The number of non-presentation cases heard in Chinese Maritime Courts is increasing tremendously annually. For example, the number of non-presentation cases heard in Shanghai Maritime Court between January and September of 2001 was 46, a 50%

¹⁹ Desheng Mu, "Bao han ti dan" (Letter of Guarantee), online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/explore/exploreDetail.php?sId=538>>

²⁰ Haibao Xing, *Hai Shang Ti Dan Fa* (Bills of Lading Law), (Beijing: Publishing House of Law, 1999), at 523.

increase from the same period of the preceding year. 90% of such non-presentation cases involve foreign elements.²¹ The reasons that delivery of cargo without bills is so common in China can be outlined as follows:

2.1.1 Unprofessional Operations and Marine Fraud

Due to high competition in the shipping market, some carriers (most are freight forwarding companies) consider the release of cargo without bills a flexible operating method that is capable of attracting new clients while maintaining good relations with established clients.

Freight forwarders play a critical role in container transportation. Most shipping companies prefer to deal with freight forwarders rather than cargo owners, (especially small or middle-size cargo owners). If the cargo volume is too small to fill a container and needs consolidation, the freight forwarder can usually obtain more favorable freight from a shipping company than the cargo owner can. Consequently, in practice, shippers usually enter into contracts with freight forwarders instead of with shipping companies.

International freight forwarders usually act as both the agent of the importer (to collect goods) and the agent of the exporter (for shipment). Some freight forwarders can also act as independent operators to issue bills of lading in their own names. Such freight forwarders are called NVOCC (No Vessel Operation Common Carrier), as they do not have their own vessels. NVOCC cannot undertake the carriage of goods by themselves but instead

²¹ Desheng Mu, "Lun wu dan fang huo" (Delivery of Goods Without Presentation of Original Bill of Lading), online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/explore/exploreDetail.php?slId=537>>

consign goods to an actual carrier.²² When the actual carrier delivers goods without a bill, the shipper is unable to claim losses against the actual carrier because the shipper does not have an original bill.²³

For example, in the case *Changjiang v. Yifeng*, the Defendant Yifeng, a freight forwarding company, issued a bill of lading as carrier. The Defendant's agent at the destination port released the goods under the bill. The court upheld that the Plaintiff Changjiang could claim losses only against the freight forwarding company, but not the shipping company, which had no actual contract with the Plaintiff.²⁴

In most circumstances, the freight forwarder issues separate "house" bills of lading that name the seller as shipper, and marks "to order" in the consignee column.²⁵ The actual carrier issues straight bills of lading that name the freight forwarder as shipper and marks the buyer as consignee. The seller can only use the "house" bills of lading to sue the freight forwarder as the seller does not hold the actual carrier's bills of lading, which means he has no title to sue in contract under the actual carrier's bills – he is not a party to the contract evidenced by the actual carrier's bill.

Without the cooperation of the freight forwarder, the seller's loss is hardly recovered from the actual carrier, particularly when the goods are released at a foreign destination port. Several cases were judged in favor of carriers who delivered goods without bills just because shippers could not provide key evidence to prove that the goods had been released at the

²² In most instances, the contracting carrier carries the goods to the destination by himself. Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (The Hague: Kluwer Law International, 2002), at 24.

²³ Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (The Hague: Kluwer Law International, 2002), at 25.

²⁴ Online: Chinese Commercial and Maritime Trial Involving Foreign Elements
<<http://www.ccmmt.org.cn/hs/news/show.php?cId=1314>>

²⁵ The "house" bill of lading is usually not acceptable in the letter of credit negotiation.

destination ports.²⁶ In Ganjiao vs. Pudong, the Plaintiff Ganjiao had to withdraw his claim because of insufficient evidence.²⁷

In most circumstances, sellers cannot recover their losses from the freight forwarding companies because most companies are not able to fully compensate sellers. Thus sellers cannot recover their losses from either actual carriers or freight forwarders.

The capacity of goods handled in Chinese ports has grown continuously, while considerable numbers of international freight forwarders have appeared in the Chinese shipping industry. However, non-licensed operations and supervision circumvention are incidental to the increasing number of international freight forwarders. For example, about 90% of freight forwarding companies in the Pearl River Delta region are non-licensed, which includes not only domestic entities but also those of Hong Kong and Macau.²⁸

After China's entry to the WTO, its shipping market has opened up. As we know, the international freight forwarding market has also opened recently, with a large number of foreign freight forwarders entering the profession. It is thus more difficult for the government to supervise these entities, most of which are only representative offices. These representative offices are not legal persons, which means they cannot independently enjoy civil rights or assume civil obligations in accordance with laws.

A typical example is the reported case of Guotai v. WEN-PANKER Logistics and SEAGATE Logistics (WEN-PANKER Logistics is a foreign company; SEAGATE Logistics

²⁶ Mu Desheng, "Lun Wu Dan Fang Huo" (Delivery of Goods Without Presentation of Original Bill of Lading), Online: Chinese Commercial and Maritime Trial Involving Foreign Elements
<<http://www.ccmt.org.cn/hs/explore/exploreDetail.php?sId=537>>

²⁷ Online: Chinese Commercial and Maritime Trial Involving Foreign Elements
<<http://www.ccmt.org.cn/hs/writ/judgementDetail.php?sId=1204>>

²⁸ Online: Chinese Commercial and Maritime Trial Involving Foreign Elements
<<http://www.ccmt.org.cn/hs/news/show.php?cId=4763>>

is a division of WEN-PANKER Logistics).²⁹ The Chinese Plaintiff Guotai had to withdraw the action because legal identities of the two defendants could not be verified from the registration department.

Marine fraud has caused great harm to the international shipping industry, the total loss resulting from which amounts to about US 13 billion dollars, with China one of the major victims.³⁰ In recent years, marine fraud has become a serious threat to Chinese international export trade. Some fraudsters are familiar with international trade and transportation operations, and take advantage of those exporters eager to do business.

A very typical example is foreign importer A reaching a sales contract with Chinese exporter B, in which the payment term is "documents against payment at sight." A straight bill of lading is issued indicating A as the consignee. After the cargo is shipped, A asks B to change the payment term to "document against acceptance." B has no choice, as the straight bill of lading cannot be transferred to a third party by endorsement. A then takes the cargo without an original bill of lading at the destination port, without paying the required price.³¹

In most circumstances, the carriers (most of whom are freight forwarders) and foreign consignees maliciously collaborate and conspire towards fraudulent delivery at the expense of Chinese shippers (sellers).³² Numerous Chinese export companies have become victims of

²⁹ Guotai v. WEN-PANKER Logistics and SEAGATE Logistics. Online: Chinese Commercial and Maritime Trial Involving Foreign Elements

<<http://www.ccmt.org.cn/hs/writ/judgementDetail.php?sId=1195>>

³⁰ Liangyi Yang, "Lun wu dan fang huo" (Comments on Delivering Goods without Original Bill of Lading), edited by Yuzhuo Si, *Zong guo hai shang fa nian kan* (Annual of China Maritime Law), (Dalian: Dalian Maritime University Press, 1994), at 16-19.

³¹ Shan Hong, "Yong D/A yu ji ming ti dan bian zhi de quan tao" (A trap made of D/A and straight bill of lading), online: international business daily

<<http://www.ibdaily.com.cn/%60Template/NewsTemplate.asp?newsid=55538>>

³² The modern trade and shipping markets are full of fraud. Liangyi Yang, *Wai mao ji hai yun zha pian huo wu suo pei xin fa zhan* (International Trade & Marine Fraud and the New Development of Cargo Claims),

this malicious non-presentation. It is noteworthy that in the past five years, most non-presentation cases were cases brought by Chinese shippers against foreign carriers and consignees. Ultimately, few of them recovered their losses because of insufficient evidence or because of inefficient judicial enforcement.

2.1.2 Consciousness of Risk

Delivery of an original bill of lading is a widely recognized international practice, and in most countries it is rare for the carrier to release cargo without affirming the original bill. In the case that a carrier needs to release cargo without the bill, the carrier usually takes every effort to secure his interests.

However, in most circumstances, carriers in China prioritize business relationships over legal consequences. Releasing cargo without the bill is a customary practice; this practice, however, does not recognize the possible harm resulting from it. Despite a highly competitive market, carriers often release cargo at the request of consignees.

Interpersonal relationships in transactions are of particular importance in China. While foreigners may take it for granted that the original bill is indispensable in the delivery process, it often works differently in China. The consignee often tries to find someone with whom he is familiar to persuade the carrier to release cargo without a bill. Carriers often agree in consideration of the relationship with port authority, customs, government and valuable clients. There is little available information for a carrier to judge if the consignee is an honest merchant. This situation inevitably puts the carrier at risk and sometimes results in disputes.

Low penalties for breach of contract also lead to irresponsible non-presentation. Lawsuits against freight forwarders or shipping companies usually take a long time to settle. Despite being involved in litigation, freight forwarders and shipping companies can still maintain their businesses and even continue the practice of non-presentation. Even when the plaintiffs win such cases, they are often left to deal with insolvent debtors.

2.1.3 Guiding Function of Decided Cases

In the Chinese courts, more and more cases concerning the release of cargo without bills are decided in favor of carriers. The carriers are not held liable for bill holders' losses.³³ Chinese courts hold that in some circumstances, straight, order, or bearer bill of lading will lose their function as documents of title.

A typical reported example is that after taking delivery of the goods, the consignee (buyer) does not pay the shipper (seller) the price of the goods. The shipper then negotiates with the consignee for payment and collects part of the value; however, the consignee refuses to pay the rest of the price. The seller then brings an action against the carrier based upon delivering cargo without bill for the purpose of being indemnified by the carrier for the outstanding payment. The Chinese court then holds that the conduct of the shipper – negotiating with the consignee and collecting a partial payment – indicates that the shipper had ratified the delivery of the goods without the bill. The bill of lading held by the shipper is no longer a document. The carrier is not liable for the loss.

Another example in the courts concerning non-presentation is after the consignee takes the goods, the shipper negotiates with the consignee and enters into a new agreement of

³³ Yuzhuo Si, *Hai shang fa zhuan ti yan jiu* (Study on Maritime Laws), (Dalian: Dalian Maritime University Publishing House, 2002), at 208-212.

settlement. The court holds that the new agreement of settlement demonstrates that the consignee does not need to “pay against the documents”, and indicates that the shipper has ratified the fact of non-presentation. The title of the goods is transferred to the consignee. The holder of the original bill – the shipper – cannot claim his right to the bill because the bill has lost its function as a document of title. Thus, the bill of lading is no more than the evidence and receipt for the cargo, and accordingly the courts deny the shipper’s claim of damages against the carrier.³⁴

Such precedents have given carriers the unfortunate example that they can escape liability when delivering goods without bills, and have made them feel protected when doing so. The release of cargo without a bill is unavoidable in the short term, and will undoubtedly persist for a considerable period of time. It is currently unrealistic to expect carriers to deliver goods only against the presentation of original bills of lading. However, the situation is getting out of control. Stricter norms are urgently needed to regulate the shipping market.

There are different practices regarding the non-presentation issue in different countries and districts. International parties routinely express surprise that similar legal cases lead to totally different results, notably in China. The main reason is that there are no clear precedents or standards.

2.2 Chaos – Similar Cases, Differing Results

Owing to historical context, rule of law is still not the governing principle in China. The overall quality of judges is not sufficient for fairly and effectively deciding maritime cases. There are no adequate judges with qualified professional ethics, psychological construction

³⁴ Si Yuzhuo, *Hai Shang Fa Zhuan Ti Yan Jiu* (Study on Maritime Laws), (Dalian: Maritime University Press, 2002), at 209-210.

and professional training. One reason is that there is no clear requirement in the process of appointment of judges, severely restricting the overall quality of the judges. The quality of maritime court judges is higher than that of most other local courts. Most maritime court judges have finished legal training or maritime knowledge training. As the threshold of entrance into legal profession is not high, the expertise and the foreign elements involved in maritime cases can hardly be satisfied in the adjudications.

Maritime courts are at the same level as the intermediate courts, the cases judged in maritime cases are those of first instance. As there are no maritime superior courts, every appeal of maritime case is heard in superior courts. The judges sitting in maritime appeal are not special maritime judges, their expertise and experience is not necessarily sufficient as required of such case. There exist differences in time of establishment of maritime courts, the economic status of their jurisdictions, and the quality of the judiciary, which leads to uncertainties in court decisions.

Though it is stipulated in the Constitution of the People's Republic of China (hereinafter referred to as "China Constitution") that "the courts independently exercise judicial power conferred by law without being affected by any executive institutions, social groups or individuals,"³⁵ invasion of judicial power is not unusual in China and hence it affects the fairness of adjudication.

The adjudication organization of China is part of the framework of the system of People's congress, but it is a secondary organization under the control of the congress.³⁶ The independency of judicial organization is compromised. The appointment and promotion of judges are under the control of many officials within and without the court. Their interests

³⁵ Constitution of the People's Republic of China, Article 126.

³⁶ Constitution of the People's Republic of China, Article 62 and 32.

make them subject to the authorities and deprived them of their capability of independent adjudication.

Ideally, legal norms should be clear, concrete, and easy to apply so that they can be enforced as standards of conduct. Unfortunately, laws in China are often vaguely defined. This leads to arbitrary interpretation on the part of judges, which may lead to erroneous judgment or judicial corruption.

The vague provisions in *Maritime Code of People's Republic of China* (hereinafter referred to as "*China Maritime Code*"), Articles 71 and 79, for example, have led to arbitrary interpretations. Every year, maritime courts handle a large number of cases concerning non-presentation. Given arbitrary interpretation, judges are entitled to favor any party they want, resulting in different decisions in similar cases. In such trials, there is an 80% likelihood that the losing party will appeal, because they know they may get a totally different (and possibly favorable) judgment from another court. This is waste of resources for both society and the parties involved.

Chapter III

International Conventions and Approaches

There are three existing international conventions governing bills of lading – the *Hague Rules*, the *Hague-Visby Rules*, and the *Hamburg Rules*.

The *Hague Rules* – the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* – is the oldest of the conventions for the carriage of goods by sea.³⁷ Aimed at the unification of maritime law among different countries, it was created by the Comité Maritime International (CMI) with the assistance of maritime law associations of many countries. It was signed in Brussels on 25th August, 1924, and codified most of the international rules applicable to bills of lading.

The *Hague Rules* unified for the first time laws concerning carriage of goods by sea, especially the provisions about bills of lading. It was the result of a compromise of interests between shippers and carriers. The *Hague Rules* are internationally accepted and have facilitated the development of international trade and the industry of shipping. They are the basis of domestic laws on the carriage of goods by sea for most countries, and have had profound influence on the relevant stipulations of bills of lading.

The *Hague-Visby Rules* – the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* – are to some extent an amended edition of the *Hague Rules*. They became known as the *Hague-Visby Rules* after being signed at Brussels on 23rd February, 1968.³⁸

³⁷ Ray August, *International Business Law*, (New Jersey: Prentice Hall, 1993), at 499.

³⁸ *Ibid.*

Most shipping nations are party to either the *Hague Rules* or the *Hague-Visby Rules*. For example, the U.K., the U.S.A., and Canada are parties to the *Hague Rules*. China is not a party to the *Hague Rules*, yet most legal provisions about liability distribution are rooted in them. Although internationally accepted, the *Hague Rules* and the *Hague-Visby Rules* deal only with the receipt function of the bill of lading and leave the other two functions (title of document and evidence of the contract of carriage) open.

The *Hamburg Rules* – the *United Nations Convention on the Carriage of Goods by Sea* – are stipulated by the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”). The *Hamburg Rules* were created with the intention of eliminating uncertainties inherent in the *Hague Rules* and the *Hague-Visby Rules*, as well as to reasonably distribute the risk between shippers and carriers.³⁹

Prior to the *Hamburg Rules*, there was no clear definition of bills of lading in international convention or domestic law. The *Hamburg Rules* clarify the definition and functions of bills of lading, but they have also failed to attract universal acceptance. The *Hamburg Rules* came into effect on November 1st, 1992, and most of its members are developing countries. Because the member numbers are rather fewer than those of the *Hague Rules* and the *Hague-Visby Rules*, the *Hamburg Rules* have less influence on the international shipping industry than the other two conventions.⁴⁰

³⁹ Samir Mankabady, *The Hamburg Rules on the Carriage of Goods By Sea* (Boston: A. W. Sijthoff, 1978).

⁴⁰ Xin liu, “Lun ti dan suo biao zhang de quan li” (On the Rights Represented by Bill of Lading”, edited by Beijing University Law School Maritime Study Center, *Hai shang fa yan jiu* (Maritime Law Study), (Beijing: Law Press, Volume 1, 2001), at 43.

3.1 Lacunae in International Conventions

The bill of lading is the core of the three existing maritime transport conventions. It is still a controversial matter whether or not the *Hague Rules* and the *Hague-Visby Rules* apply to a straight bill of lading. The *Hamburg Rules* apply to straight bills of lading but do not deal with the non-presentation issue. In other words, none of the three conventions clarify whether a carrier is entitled to deliver goods without surrendering an original, straight bill of lading.

The uncertain and unpredictable application of various domestic legislations brings a lot of confusion to people involved in the shipping industry when they are facing non-presentation issues.⁴¹ From the Chinese perspective, matters are made yet more difficult because related cases may have had totally different outcomes due to immature judicial practice.

Because shipping is essentially an international business, unification of law is expected in the field of carriage of goods by sea in order to bridge the gap between national laws and international conventions. Unification of maritime laws regulating bills of lading is unavoidable. A unified and transparent international convention is a precondition to pursuing fair competition in the sea transportation business.⁴²

⁴¹ Professor William Tetley suggested that law in any jurisdiction should be clear to people involved in international matters. Certainty and predictability of dispute results is very important. William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons, and Alternatives to International conventions-How to adopt an International Convention", online: Tetley's Law and other Nonsense <<http://tetley.law.mcgill.ca/maritime/uniformarlaw.htm>>

⁴² Jie Wang, "Lun ti dan zai yun shu he liu tong huan jie zhong de bu tong gong neng ji qi qu fen de zhong yao yi yi" (The Different Functions of Bill of Lading in Transit and Negotiation), edited by Beijing University Law School Maritime Study Center, *Hai shang fa yan jiu* (Maritime Law Study), (Beijing: Law Press, Volume 1, 2001), at 34.

3.2 UNCITRAL Draft Transport Law

In the globalization of the world economy, more maritime cases involve foreign elements. Reducing the divergences of maritime law among countries and districts on an international level is practically and theoretically important. To achieve greater uniformity, UNCITRAL has established a group to work on Transport Law. This group has drafted a document, the so-called “*Preliminary Draft Instrument on the Carriage of Goods by Sea*” (hereinafter referred to as “the Draft”), which attempts to provide some general rules on delivery issues.⁴³

The Draft establishes some principles, which are different from the previous legislation and practice, for the issue of delivery. One principle is to allow the carrier to deliver the cargo without the original bill of lading in certain circumstances. Article 10.3.1 of the Draft states:

If no negotiable transport document or no negotiable electronic record has been issued: (i) The controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee. (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee’s production of proper identification.⁴⁴

This means that when a straight bill of lading, a non-negotiable transport document, is issued, the carrier can deliver the goods to the named consignee at the destination port without presentation of the original bill of lading, once the identity of the consignee is confirmed.

⁴³ The Draft states that “existing national laws and international conventions had left significant gaps regarding issues such as the functioning of bills of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and buyer of the goods and the legal position of the entities that providing financing to a party to the contract of carriage.” United Nations Commission on International Trade Law, “Preliminary draft instrument on the carriage of goods by sea”, New York, 2002, at 3, online: United Nations Commission on International Trade Law

<http://www.uncitral.org/english/workinggroups/wg_3/wp21e.pdf>

⁴⁴ *Ibid.*

The Draft has expanded the possibilities for carriers to release cargo without presentation of original bills of lading, and therefore has caused a lot of discussion. The author doubts its reasonableness and whether it can ultimately solve the non-presentation problem.

In the last ten years, developing countries have been appealing to impose liability upon carriers. The *Hamburg Rules* reacted positively to this request, but the developed countries declined it and it was not universally accepted. In the author's opinion, the increasing prosperity and influence of the developing countries will eventually, and inevitably, impose liability on carriers. As to the non-presentation issue, the author believes that the obligation shall be imposed on the carriers.

3.3 Approaches Review

A lot of disputes have occurred concerning the non-presentation issue. The most controversial issues focus on the following questions: is a straight bill of lading negotiable or transferable? is a straight bill of lading a document of title? can cargo be released without the presentation of a bill of lading? We shall now review the prevailing theories and practices concerning non-presentation in different countries and districts.

3.3.1 United States of America

U.S. maritime laws are derived from those of the U.K. American law and English law started to diverge following America's independence from the U.K. The U.S. is party to the *Hague Rules* but has not ratified to the *Hague-Visby Rules*.

The existing statutes applying to international sea transportation include the *Federal Bills of Lading Act 1916* (also known as *Pomerene Act 1916*),⁴⁵ and the *Carriage of Goods By Sea*

⁴⁵ It was recodified in 1994.

Act, 1936 (also known as *COGSA*). *Pomerene Act 1916* clearly defined a straight bill of lading as a “bill in which it is stated that the goods are cosigned or destined to a specified person”.⁴⁶

Pomerene Act 1916 stipulated that a straight bill of lading must be marked “non-negotiable” on its face and that it is not a document of title. A carrier must deliver goods to the consignee named in a non-negotiable bill of lading.⁴⁷ The carrier is entitled to release cargo without production of the straight bill once the carrier’s identity of consignee has been confirmed. Delivery of goods against the production of an original bill of lading is only required under order bill and bearer bill.⁴⁸

Under *Pomerene Act 1916*, a straight bill of lading is the same as a sea waybill.⁴⁹ It is worth noting that *Pomerene Act 1916* applies only to outbound straight bills of lading issued in U.S., but not to inbound straight bills of lading. In other words, it applies to export goods transportation but not to import goods transportation. In addition, if the bill holder brings an action against the carrier on the grounds of tort, the stipulations of *Pomerene Act 1916* are a defense for the carrier. If the bill holder brings an action against the carrier on the grounds of breach of contract, the carrier cannot use *Pomerene Act 1916* in defense.

⁴⁶ *Pomerene Act 1916*, Section 2.

⁴⁷ 13 Am Jur 2d, Carrier § 460. *American Jurisprudence 2d*, Volume 13 (Danvers: West Group, 2000), at 710. See also Article 80103(b) of *Pomerene Act 1916*.

⁴⁸ *Pomerene Act 1916*, Section 6 and 9.

⁴⁹ Professor William Tetley calls the straight bill of lading under it “a hybrid” that has certain qualities of a document of title. William Tetley, *Marine Cargo Claims*, the Fourth Edition, Chapter 45, Waybills, at 65, online: Tetley’s Law and other Nonsense <<http://tetley.law.mcgill.ca/maritime/ch45.pdf>>

Under *Pomerene Act 1916*, a carrier is liable for non-presentation of goods to the named consignee if he is informed that the named consignee has no title to goods, or if he is requested not to deliver goods to the named consignee.⁵⁰

Under *Pomerene Act 1916*, a non-negotiable bill can be transferred, but the transferee must give notice to the carrier before the goods are released. Otherwise, the carrier is not liable for any resulting loss.⁵¹ The unpaid shipper is entitled to exercise the right of stoppage in transit even after the straight bill of lading has been transferred to the named consignee.⁵²

The *Carriage of Goods By Sea Act, 1936* governs both import and export goods transportation.⁵³ However, it does not clarify whether a carrier under a straight bill of lading can deliver goods without an original bill.

Under the *Uniform Commercial Code*, the title of the goods was transferred to the named consignee at the time of shipment. That the shipper holds an original straight bill of lading does not mean that he is the owner of the goods.⁵⁴

The U.S.A. is one of a few countries having clear instruction in domestic laws guiding the non-presentation matter. The carrier, under a straight bill of lading issued in the U.S.A., can deliver goods without surrender of the original bill. The American approach differs significantly from other countries.

⁵⁰ 13 Am Jur 2d, Carrier § 481. *American Jurisprudence 2d*, Volume 13 (Danvers: West Group, 2000), at 618. *American Jurisprudence 2d*, West Group, Volume 13, 2000, at 725.

⁵¹ *Pomerene Act 1916*, Section 32. See also Michael D. Bools, *The Bill of Lading: A Document of Title to Goods-An Anglo-American Comparison*, (London and Hong Kong: LLP,1997), at 97 and 169.

⁵² *Uniform Commercial Code*, Section 2-705(2)(d) and *Pomerene Act 1916*, Section 32.

⁵³ William Tetley, *Marine Cargo Claims*, Third Edition, (Montreal: International Shipping Publications, 1988), at 1101.

⁵⁴ *Uniform Commercial Code*, Section 2-505 (1). Michael D. Bools, *The Bill of Lading: A Document of Title to Goods-An Anglo-American Comparison*, (London and Hong Kong: LLP,1997), at 223. See also 13 Am Jur 2d, Carrier § 365. *American Jurisprudence 2d*, Volume 13 (Danvers: West Group, 2000), at 637.

3.3.2 United Kingdom

The United Kingdom is party to the *Hague Rules* and the *Hague-Visby Rules*. The U.K. and the U.S. are common law nations, but unlike in the U.S., the non-presentation issue remains undetermined in the U.K.⁵⁵

Under the U.K.'s *Bills of Lading Act 1855*, the nominate bill of lading is a document of title but is not negotiable.⁵⁶ The named consignee needs to surrender the bill in order to take the goods.⁵⁷ The *Bills of Lading Act 1855* was replaced by the *Carriage of Goods by Sea Act 1992 (COGSA 1992)*.

The U.K. *COGSA 1992* does not actually consider a straight bill of lading a bill of lading, because it is incapable of transfer by endorsement.⁵⁸ Transferability is the most important characteristic of a bill of lading under *COGSA 1992*. *COGSA 1992* refers to a straight bill of lading as sea waybill, a non-negotiable receipt.⁵⁹

In the academic sector, most English scholars recognized that a straight bill of lading is not a document of title. Michael D. Bools states that it is very difficult to pin down what is meant by the phrase "document of title." He contends that a straight bill of lading is not a bill

⁵⁵ A "straight" bill has no English law definition, but the term derives, it appears, from earlier U.S. legislation referring to a "straight" bill as one in which the goods are consigned to a specific person as opposed to an "order" bill where the goods are consigned to the order of anyone named in the bill or bear. The "Happy Ranger", [2002] 2 Lloyd's Rep. 357 at 363.

⁵⁶ In the case *Kum and Another v. Wah Tat Bank Ltd*, Mr. Justice Devlin stated that "there appears to be no authority on the effect of a non-negotiable bill of lading. [1971] 1 Lloyd's Rep. 439 at 446.

⁵⁷ William Tetley, *Marine Cargo Claims*, Third Edition, (Montreal: International Shipping Publications, 1988), at 183.

⁵⁸ Carriage of Goods by Sea Act 1992, Section 1 (2). Michael D. Bools, *The Bill of Lading: A Document of Title to Goods-An Anglo-American Comparison*, (London and Hong Kong, LLP, 1997), at 201. See also Liangyi Yang, *Wai mao ji hai yun zha pian huo wu suo pei xin fa zhan* (International Trade & Marine Fraud and the New Development of Cargo Claims), (Dalian: Dalian Maritime University Publishing House, 1994), at 286. See also COGSA, 1992 now define "straight" bills not bills of lading at all but as seaway bills. The "Happy Ranger", [2002] 2 Lloyd's Rep. 357 at 363.

⁵⁹ The Carriage of Goods by Sea Act 1992, Section 1 (3).

of lading because it cannot be transferred by endorsement.⁶⁰ The famous book *Benjamin Sale of Goods* supports the position that under a straight bill of lading a carrier is entitled to deliver goods to a named consignee without production of an original bill of lading.⁶¹ But Professor Schmitthoff stated that even though a straight bill of lading is non-transferable, it is still document of title.⁶²

As case law still dominates the English system, we should note some recent cases in the U.K. After 1992, straight bills were usually considered non-transferable, and not documents of title.⁶³ Formerly, English courts held that without submission of an original bill of lading, a carrier was entitled to deliver goods to the nominated consignee in lieu of any risk. However, in recent years some change has occurred with respect to this. The straight bill of lading is now considered by some judges as a document of title, meaning that the carrier is not entitled to deliver goods under a straight bill of lading without surrender of the original bill.

The decision of J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co S.A. (The "Rafaela S") was delivered on April 16th, 2003, by the English Court of Appeal.⁶⁴ In this case, one of the basic questions was whether a straight bill of lading could be defined as a "bill of lading or other similar document of title." Initially, the interim final arbitration award dated May 30, 2001 held that straight bill of lading was non negotiable and was not therefore a document of title in the accepted sense.⁶⁵ The claimant MacWilliam appealed to the

⁶⁰ Michael D. Bools, *The Bill of Lading: A Document of Title to Goods-An Anglo-American Comparison* (London and Hong Kong, LLP, 1997), at 168-169.

⁶¹ *Benjamin Sale of Goods*, Fifth Edition (London: Sweet & Maxwell, 1997).

⁶² Clive Macmillan Schmitthoff, *Export Trade-The Law and Practice of International Trade*, Ninth Edition (London: Sweet & Maxwell, 1993), at 593.

⁶³ William Tetley, *Marine Cargo Claims*, the Fourth Edition, Chapter 8, "Who May Claim and Sue", at 5, online: Tetley's Law and other Nonsense<<http://tetley.law.mcgill.ca/maritime/ch8.pdf>>

⁶⁴ [2003] 2 Lloyd's Rep.113.

⁶⁵ [2002] 2 Lloyd's Rep. 403.

Commercial Court. The judge agreed with the arbitrators.

MacWilliam went to the Court of Appeal, which overruled the former judgment and held that negotiability is not a necessary requirement of a "bill of lading." A straight bill of lading was defined as "a bill of lading or similar document of title" within the *Hague Rules*, or the *Hague-Visby Rules*' definition. The Court clarified that the *Hague Rules*, or the *Hague-Visby Rules* should apply to straight bill of lading. The straight bill's presentation was thenceforth required in order to obtain goods from a carrier.⁶⁶

This case has already attracted tremendous controversy and caused considerable academic debate in the U.K. The court's decision has been appealed to the House of Lords, and interested parties await the final result.

The U.K. is a traditional shipping nation. The principles of the bill of lading developed under English law have a respected position in the international shipping industry. Most people regard these principles as a guide towards what the law should be. Because in the past, the legal nature of a straight bill of lading was firmly fixed, it is therefore not surprising that the above judgment caused a great deal of attention in the international shipping industry.

The author notes that U.K. laws and judicial practices concerning the non-presentation matter are quite inconsistent. The fact that *COGSA 1992* does not treat a straight bill of lading as a bill of lading does not mean that a straight bill of lading is not a document of title. *COGSA 1992* does clarify that carriers are entitled to deliver goods without presentation of an original straight bill of lading. Such points lead to variable interpretations.

⁶⁶ [2003] 2 Lloyd's Rep.113 at 142.

3.3.3 Canada

Canada is also a common law country,⁶⁷ and is party to the *Hague Rules* and the *Hague-Visby Rules*. The *Canada Shipping Act* and *Bills of Lading Act* are national laws in Canada regulating the shipping business. The portions of the above two acts relevant to bills of lading do not deal with issue of the non-presentation.

In his famous book *Marine Cargo Claims*, Professor William Tetley, a leading maritime authority in Canada, outlines the bill of lading rules as follows: an order or bearer bill of lading is fully transferable and a document of title as well; a straight bill of lading is not transferable but still a document of title, and a sea waybill or non-negotiable receipt is neither transferable and nor a document of title.⁶⁸

Professor William Tetley is of the view that “if the goods are delivered to someone who does not present the original bill of lading, even if that person is the named consignee, the carrier will be responsible for any resulting loss. In common law jurisdictions, the carrier will be liable in tort for conversion.”⁶⁹ He observes that agreeing to a carrier delivering goods without a straight bill of lading overlooks the role of the bill as a document of title. He therefore suggests that the named consignee must surrender the bill to the carrier to obtain the goods. He concludes that “the majority of the standard-form the bill of lading in use around the world continue to require the presentation of bill of lading to the carrier as a pre-condition of delivery, without distinguishing the order from the nominate bill in this regard.”⁷⁰ This

⁶⁷ Some scholars state that Canada has mixed legal system because Quebec inheres civil law.

⁶⁸ William Tetley, *Marine Cargo Claims*, Fourth Edition, Chapter 45, “Waybills”, online: Tetley’s Law and other Nonsense <<http://tetley.law.mcgill.ca/maritime/ch45.pdf>>

⁶⁹ William Tetley, *Marine Cargo Claims*, Third Edition, (Montreal: International Shipping Publications, 1988), at 985.

⁷⁰ William Tetley, *Marine Cargo Claims*, Fourth Edition, Chapter 8, “Who May Claim and Sue,” at 4-5, online: Tetley’s Law and other Nonsense <<http://tetley.law.mcgill.ca/maritime/ch8.pdf>>

view reflects the majority opinion in Canada. Canadian Courts appear to approach the matter in a simple way – non-presentation is prohibited.⁷¹

From interviews with more than ten people working for shipping companies, freight forwarding companies, and shipping agencies in Vancouver, the author concludes that in Canada a letter of credit is not frequently used in the process of selling and purchasing goods, and that parties usually request carriers to issue straight bills of lading or sea waybills. Where a sea waybill is issued, the carrier can deliver goods to the consignee without actually producing the waybill. However, in the case of a straight bill of lading, goods can only be delivered after the original bill is collected. In the Canadian shipping practice, carriers deliver goods against collection of the bill, without distinguishing bearer bill, order bill or straight bill – just as observed by Professor Tetley.

3.3.4 Hong Kong

The *Carriage of Goods by Sea (Hong Kong) Order 1980* is the domestic legislation concerning bills of lading in Hong Kong. Laws in Hong Kong do not clarify whether or not carrier is entitled to deliver goods without production of original straight bill of lading.

Professor Philip Yang suggests that, under FOB, if there is no stipulation such as “payment against document” in the sales contract *and* the straight bill of lading was issued, it might be viewed that the shipper does not reserve the title to the goods. That is, the title is transferred when the goods are boarded on ship.

Professor Chan of University of Hong Kong agrees that a straight bill of lading is a document of title. If the carrier delivers goods without a straight bill, he would invade an

⁷¹ Canadian Cases specifically related to non-presentation are difficult to find. The author notes that there are so few disputes arising from it.

unpaid vendor's lien on goods.⁷²

In "The Brij," Mr. Justice Waung held that a straight bill of lading is not negotiable, and that the shipper is entitled to deliver to the named Consignee without presentation of the bill. This decision followed the ruling in the contract that the carrier need not deliver goods on collecting the original bill.⁷³

Mr. Justice Waung held that it was clearly expressed in the contract that the bill of lading was not viewed as document of title. In the contract of the above case, the terms explain that the carrier can deliver goods to the nominated consignee without collecting the original bill. It is clear that the real intention of the parties is to deliver goods to the nominated consignee.⁷⁴

3.3.5 Singapore

Singapore is party to the *Hague-Visby Rules*. The domestic legislation governing bills of lading is the *Carriage of Goods by Sea Act 1972*. Singapore's position on the non-presentation issue is uncertain.⁷⁵ In his article, "Delivery of Cargo Without Production of An Original Bill of Lading: the Potential Risk,"⁷⁶ Ernest Tai Ming Yang argues that to use the concept of "document of title" to describe and define the functions of a bill of lading can be misleading. For Yang, possession is just one component of property rights. A party with

⁷² Felix W. H. Chan, "Unpaid Vendor's Lien on Goods Carried by Sea", edited by Yuzhuo Si, *Zong guo hai shang fa nian kan* (Annual of China Maritime Law), (Dalian: Dalian Maritime University Press, 2000), at 174.

⁷³ [2001] 1 Lloyd's Rep.431, at 434.

⁷⁴ *Ibid.*

⁷⁵ Michael Lai, "Delivery of Cargo Without Production of the Original Bill of Lading", online: Forwardlaw Company <<http://www.forwarderlaw.com/cases/vossstrai.htm>>

⁷⁶ Ernest Tai Ming Yang, "Delivery of Cargo Without Production of An Original Bill of Lading: the Potential Risk", conference paper presented at the Fourth International Conference on Maritime Law, Shenzhen, 2000.

property rights to shipped goods will also have possessive rights, but a party with the right to possess the shipped goods may not have property rights over them. Another scholar Tan Lee Meng states that an order bill of lading may be regarded as a document of title, but a straight bill of lading is not negotiable and is not a document of title.⁷⁷

In the case “Voss v. APL”, Mr. Peer Voss, an auto dealer in Germany, sold a Mercedes Benz to the Seohwan Trade Company in Korea. The carrier APL issued a bill of lading marked Seohwan as the consignee. APL released the vehicle to Seohwan without presentation of any of the 3 original bills at Pusan. Mr. Voss asked that APL pay the balance of the purchase price, after he failed to recover the price from Seohwan. APL stated that they were not obligated to release the car to Seohwan without recovering one of the original bills. Mr. Voss then entered into litigation against APL in the Singapore High Court.

The High Court Judge held that APL had no right to release the car to the nominated consignee, and that APL was liable for the loss. The judge also held that the contract of carriage of goods by sea, evidenced by the bill of lading, was both a storage contract and a transport contract. As such, the carrier may accept the cargo from the shipper, transport it to the destination, and deliver the cargo to the party entitled by the contract. The contractual obligation is therefore discharged only when the carrier delivers the goods to the contractually entitled party. Before performance of the contract is completed, the bill of lading functions as a document of title that can be shifted by means of endorsement or bill delivery. Once the bill of lading (or other order that concerns the contract of carriage of goods by sea) is issued, the carrier may not deliver the goods to anyone other than the party that can produce the original bill of lading, whether it is a nominated consignee or not. In

⁷⁷ Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea*, Second Edition, (Singapore: Butterworths Asia, 1994), at 264.

short, the goods should not be delivered unless the original bill is produced. The principle of delivery against surrender of a bill is implied in all contracts for the carriage of goods by sea.⁷⁸

APL appealed the Court of Appeal. The Appeal process distinguished the sea waybill from the non-negotiable bill of lading, holding that they are not the same, and implying that the parties involved could choose either of the bills. The fact that the parties had issued straight bills of lading suggested that they intended to reserve the characteristics of straight bills of lading. While straight bills of lading are non-negotiable, the parties did not give up other rights concerning the bill of lading such as the obligation of delivery against the bill. Even for straight bill submission, an original bill is the precondition of delivery. The court disagreed with APL's view that if a bill is non-negotiable, then the original bill of lading is not necessary for goods delivery. The court held that such a view greatly damages the security of payment recovery by a shipper who chooses to use a non-negotiable bill of lading. The advantage of bills of lading over sea waybills is that the shipper remains safe from the contractual breach by the consignee, while the consignee can be assured that the goods are loaded before paying the fee. What Mr. Voss believed to have occurred in this case was recovery of a payment before the carrier had delivered the car. On the contrary, a sea waybill is no more than a transport contract. With a sea waybill, the carrier delivers goods to the party that the shipper designated. A sea waybill is a receipt but not a document of title and cannot secure the shipper's obligation to recover the goods' price. For a straight bill of lading, the carrier cannot release goods without recovering the original bill of lading. APL had no

⁷⁸ [2002] 2 Lloyd's Rep.707.

legal argument against the claim by Mr. Voss and so the appeal was dismissed.⁷⁹

It is worth noting that the trial judge's conclusion that indisputable evidence demonstrated that tendering of an original bill of lading is the precondition for goods delivery. This matches the common agreement between parties of transport contracts.

Still, it is clear that there exists a difference between countries as to whether a carrier is entitled to deliver goods without surrendering the original bill of lading. The traditional view is that international convention should balance the interests of shipping countries and trading nations, while domestic legislation should balance the interests of shippers and carriers. Thus, shipping-developed countries often protect the interests of carriers in domestic legislation, while the trade-developed countries usually protect the interests of shippers.

From the above study, we can see that in most countries and districts, that it is hard to say whether domestic legislation and judicial practice clearly protect the interests of one party. The reason is that, on the one hand, few countries can be classified as purely shipping countries or trading countries; for example, both America and China are shipping and trading nations. On the other hand, national protectionism is not as attractive for domestic legislation and jurisdiction as fairness of law.

From reviewing laws and court decisions of different countries and districts, the author concludes that whether a carrier is entitled to deliver cargo without surrender of a straight bill of lading is still an uncertain matter in most jurisdictions. The majority of interested parties, however, are of the view that a straight bill of lading is a document of title.

⁷⁹ [2002] 2 Lloyd's Rep. 707 at 715.

Chapter IV

The Chinese Approach

No one can ignore the influence of China on the world shipping industry. It has become a significant economic force. 3.01% of the world's gross value of imports and exports in 1998 was from China, and the tonnage of Chinese commercial vessels in 1997 was 3.98% of the world total.⁸⁰ In 2002, the total tonnage of mainland China's international seagoing vessels was the 5th biggest in the world, while Hong Kong ranked 7th (Taiwan ranks 9th).⁸¹ In 2003, the total container capacity of Chinese ports increased 32% from 2002 to 50 million TEU, which ranked number one in the world. The total container capacity is expected to reach about 110 million TEU in 2010. It is forecasted that the goods handling capacity of Chinese ports will amount to 4 billion tons in 2010.⁸² With its coastline of over 18,000 kilometers, 90% of China's import and export goods are accomplished by ocean carriage.

Ten Maritime Courts have been established, in Dalian, Tianjin, Qingdao, Shanghai, Wuhan, Guangzhou, Haikou, Xiamen, Ningbo, and Beihai, expanding the role of China in maritime judicial practice in the Asia-Pacific region.

China, though developing, is already an important trading and shipping nation.⁸³ What is the position of China concerning the non-presentation issue?

⁸⁰ Yuzhuo Yu, *Hai Shang Fa Zhuan Ti Yan Jiu* (Study on Maritime Laws), (Dalian: Dalian Maritime University Press, 2002), at 20.

⁸¹ Commercial Bureau of China in Hamburg, "Current Situation and Future Development of World's Shipping Industry", online: Commercial Bureau of China in Hamburg
<http://hamburg.mofcom.gov.cn/article/200309/20030900124685_1.xml>

⁸² *Nan Fang Du Shi Bao*, Shenzhen, 2004/05/12, at C 108

⁸³ Ben Beaumont & Philip Yang, *Chinese Maritime Law and Arbitration*, (London: Simmonds & Hill Publishing Ltd., 1994), at 76.

4.1 Historical Review of Chinese Maritime Laws

China is not a party to the *Hague Rules*, the *Hague-Visby Rules*, the *Hamburg Rules*. However, as a major shipping nation, stipulations in the *China Maritime Code* concerning the contract of carriage of goods by sea borrow a lot from these three international conventions.⁸⁴ For example, the definition of a bill of lading – that it represents a balance of interests between shipper and carrier⁸⁵ – is almost the same as that in the *Hamburg Rules*.⁸⁶

China has civil law origins but is strongly influenced by today's common law. Common law rules have been introduced into the *China Maritime Code*; the bill of lading is a product of this.⁸⁷

It is also noteworthy that before the promulgation of the *China Maritime Code*, the maritime laws in the U.K., the leading shipping country in the world, had great influence on maritime law legislation and adjudication in China.⁸⁸ However, today Chinese maritime laws are witnessing the increasing influence of the United States.

4.2 Statutes

The history of maritime laws in China is very short. The laws that mainly apply in maritime adjudication are the *China Maritime Code 1993* and the *Special Maritime Procedure*

⁸⁴ Chuanli Wang, *Guo Ji Mao Yi Fa* (International Trade Law), (Beijing: China Politics and Law University Press, 1999), at 186.

⁸⁵ Ben Beaumont & Philip Yang, *Chinese Maritime Law and Arbitration*, (London: Simmonds & Hill Publishing Ltd., 1994), at 76.

⁸⁶ See *China Maritime Code*, Article 71 and *The Hamburg Rules*, 1.7.

⁸⁷ Zhengjia Jin, *Hai shi sheng Pan* (Selected Works on Maritime Trial), (Guangzhou: Guangzhou Maritime Court, 1999), at 10.

⁸⁸ China's Maritime Law draws heavily from similar legislation in the United Kingdom. Ben Beaumont & Philip Yang, *Chinese Maritime Law and Arbitration* (London: Simmonds & Hill Publishing Ltd., 1994), at 61.

Law of the People's Republic of China 2000. Statutes play a very important role in China, a civil law country. Chinese maritime laws are in accordance with the principles and ideas of civil and commercial law.

The body of law known as maritime law normally derives from civil and commercial laws, civil procedure laws, and other maritime-related laws and regulations. The *Contract Law of the People's Republic of China 1999* (hereinafter referred to as "*China Contract Law*") is the general law governing contractual relationships. Under the Chinese legal system, general principles of civil law have been applied and adapted to meet the special features of bills of lading. The *China Maritime Code* is a special law. According to the general theory of law, the special law prevails over the basic law. But if there are no provisions in the special law, the basic law shall be applied. The problem is that the main principles of the *China Maritime Code* come from the common law system, while other basic laws such as civil law and contract law are based on the civil law system.

The provisions of the *China Maritime Code* on the bill of lading are largely borrowed from the *Hamburg Rules*. Once judges cannot find a specific provision in *China Maritime Code*, they have to adopt the principles from those basic laws of the Civil law system. For example, the application of the *China Contract Law* began on October 1st, 1999. It is more advanced and practicable than the *China Maritime Code*, which came into effect on July 1st, 1993. The *China Contract Law* covered some of the shortcomings in the *China Maritime Code*. For the first time, the *China Contract Law* defined a debtor's right to submit the subject matter of an obligation to competent authorities, meaning that a carrier could deposit goods if the carrier had insisted that goods could not be released without the original bill.

This allowed carriers to avoid potential losses.⁸⁹

In addition, Article 308 of the *China Contract Law* determines that the shipper can ask the carrier to stop the transportation of goods, the return of goods, the change of destination, or delivery of goods to another person. The “Stoppage in transit” provides the buyer in the sales contract a safeguard against anticipatory breach of contract, such as when the buyer is not able to pay the price of the goods. The concept of “stoppage in transit” is from the common law. Under the US *Uniform Commercial Code*, Section 7-303, the carrier under a straight bill of lading is bound by the stoppage in transit. There is no such stipulation in the *China Maritime Code*.

Since its enforcement on July 1st, 1993, the *China Maritime Code* has played a significant role in protecting the legal interests of parties involved in maritime cases, and in ensuring the order and development of the shipping industry market. As the first maritime law in China, the *China Maritime Code* leaves something to be desired due to the lack of judicial practice at the time of its legislation. Furthermore, because the *China Maritime Code* borrows a lot from international conventions recorded in English, its expression from interpretation and translation leads to much inaccuracy.

As to the non-presentation issue, the provision in the *China Maritime Code* is far from clear and can hardly be of help in adjudication. It is stipulated in Article 79 of the *China Maritime Code* that a straight bill of lading is non-transferable. But there is no clear provision that a straight bill of lading is a document of title.

Article 71 of the *China Maritime Code* 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

⁸⁹ *China Contract Law*, Article 101 and 316.

the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

It does not clarify whether a carrier must deliver goods when presented with an original bill of lading only, or with all kinds of bills of lading.

The ambiguous expression of Article 71 and 79 led to a lengthy controversy in China on whether a carrier can deliver goods without presentation of a straight bill of lading. No consensus has been reached on this issue in either the judiciary or academic sectors. Amendment to the *China Maritime Code* is therefore necessary to affirm the legal status of a straight bill of lading and to provide clear legislative authority for judicial practice.

The *China Maritime Code* stipulates that international practice may be applied where there is no provision in the relevant Chinese laws.⁹⁰ International practice refers to the long-standing norms of conduct compiled by non-governmental organizations. The practice in international private law – for example, maritime international law – mainly regulates the private legal relationship between civil legal entities.

In an environment of economic globalization and following China's entrance into the WTO, the Chinese government, judicial institutions, and industries have realized the importance of international practice. As most maritime cases involve a foreign element, the tendency for Chinese courts is to handle maritime cases at an international level and follow international practice. Yet little study has been done concerning the international practices applied to the non-presentation issue, leading to abuse of international practice in adjudication.

⁹⁰ *China Maritime Code*, Article 268,

4.3 Cases

The role of cases is not recognized in Chinese law, and cases are not considered a precedent for future adjudication. However, some cases, especially those held by the Supreme People's Court, do play a significant role in the process of adjudication of local courts. Substantial and procedural constructions by the Supreme People's Court as to the problems in complicated maritime cases are legal principles that govern the adjudication.

Legal solutions concerning non-presentation disputes are inconsistent in China. In judicial practice dealing with non-presentation cases, based on Article 71 and 79, past judges of Chinese courts tended to simplify things by holding that a carrier must deliver goods to the person named in a straight bill of lading against presentation of the original bill of lading, and that the carrier is liable to the holder of the bill for loss caused by non-presentation. In such cases, Chinese courts regarded the plaintiff's mere possession of the bill as sufficient to maintain an action for non-presentation,⁹¹ due to the fact that the *China Maritime Code* did not clarify if delivery against original bill of lading applied to all kinds of bills of lading. Therefore, under a straight bill of lading, the bill is still required for the carrier to deliver goods to the consignee.

For example, in "Hengxing v. Yuancheng," the court held that the *China Maritime Code* stipulated a bill of lading as the document for the carrier to deliver goods, while not distinguishing between a straight bill of lading and an order bill of lading. Furthermore, there was no provision to entitle the carrier to transfer goods to the nominated consignee without retrieving the original bill of lading. Therefore, even under the straight bill of lading, the carrier was required to deliver goods against the original bill. The damages for the plaintiff

⁹¹ M.Q. Zhu and Xiaoping Shen, "Defenses of Carrier on Misdelivery", conference paper presented at the Fourth International Conference on Maritime Law, Shenzhen, 2000.

lie in the fact that he/she is unable to recover the payment for goods due to the breach of contract on the part of the defendant. The conduct of the defendant leads to the plaintiff's loss of control over the goods. Because the damages were the result of the breach of contract by the defendant, the plaintiff can claim damages against the defendant. The claim of the defendant that a straight bill of lading is an exception to delivery against the original bill is not the law of China, and the defendant in this situation was held liable for the plaintiff's loss. International practice does not apply in this case because there is clear provision in Chinese law.⁹² Similar adjudication can be found in the cases "Guangdian v. Zhengli,"⁹³ "Fangzhi v. Huaxia,"⁹⁴ and "Changjiang v. Yifeng."⁹⁵

4.3.1 New Trend: Exempt Circumstances

Significant change has taken place in recent years. Chinese courts have begun to abolish the conclusive approach on dealing with cases concerning releasing goods without bills.⁹⁶ Several judgments made by Courts indicate that under some special circumstances, even transferable bills of lading will no longer have the function of document of title. The holders of original bills of lading are not entitled to sue carriers. The issue of what kind of circumstance will lead to the bill of lading's failure to be a document of title appears to

⁹² "Hengxing v. Yuancheng," online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/news/show.php?cId=1406>>

⁹³ "Guangdian v. Zhengli," online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/writ/judgementDetail.php?sId=1282>>

⁹⁴ "Fangzhi v. Huaxia," online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/writ/judgementDetail.php?sId=1264>>

⁹⁵ "Changjiang v. Yifeng," online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/news/show.php?cId=1314>>

⁹⁶ In 1993, the case of "Kada-Mazhu" conclusively changed the position of the bill of lading as a document of title in China. Zhengjia Jin, *Zhong guo dian xing hai shi an li ping xi* (Comments on Chinese Typical Maritime Cases), (Beijing, Law Publishing House, 1998), at 284.

generally depend upon a judge's understanding. There is no standard or clear rule, and there are gaps between practice and legislation with similar cases having different results at different Chinese Maritime Courts.

In the case "Qirong v. Chuandai,"⁹⁷ in which the author was counsel, the court held that the original bill was not sufficient evidence to represent ownership of the cargo. In this transaction, the shipper who held the original bill, after knowing the cargo had been collected, negotiated with the consignee about the method of payment and accepted partial payment for goods. The court held that the activities of the shipper indicated that the true intention was to deliver the goods to the consignee. A debtor-creditor relationship had already been established between the shipper and the consignee, and the debt was partly repaid. For these reasons, the bill of lading held by the shipper was no longer a document of title according to the court.

In cases concerning delivery of goods without bills, if the carrier can prove that delivery is with the shipper's consent – which is deemed to be a waiver of the shipper's right to demand delivery against an original bill of lading – the carrier is not liable for any losses. In some circumstances, delivering cargo without a bill is with the implied consent of shippers. Expressed consent is usually easy to identify. Implied consent needs a judge to infer the intention of the parties on the basis of objective facts.

The author's opinion is that in the above-mentioned case, the shipper's activities did not indicate implied consent of delivery of goods without the bill. The act of the shipper to contact the consignee is nothing more than an available remedy for the shipper. Additionally, this occurred after the goods were released. The intention of the shipper to negotiate the

⁹⁷ "Qirong v. Chuandai," (1999) Yuefajingerzhongzidi52hao or (1999) 粤法经二终字第 52 号.

method of payment cannot be interpreted as the very intent of the shipper to admit delivery without bill, or to renounce his claim against the carrier. The real intention of the shipper was to recover losses and to avoid increasing his loss. Negotiation, while sometimes a method of mitigating losses, is not an excuse for the carrier to escape the liability of breaching a contract by delivering without a bill. Most of the decisions handed down by Chinese maritime courts do not include a legal basis or its related reasoning, hence making them far from persuasive.

Mr. Philip Yang, a Hong Kong maritime law expert, expressed his deep worry about the decisions in the above-mentioned cases. He contends that such decisions do little to protect the reputation and reliability of bills of lading and run counter to the principle of discouraging carriers from delivering without bills. He also insisted that shippers should be permitted to negotiate payment with consignees when goods are delivered without bills. This is not what common law calls ratification because there is no inducement – an essential element of ratification – before non-presentation. Upholding the standards of the bill of lading is the foundation and basic principle of maritime law, according to Yang.⁹⁸

In non-presentation cases, Chinese judicial practice is quite inconsistent. The following typical case can illustrate the changing positions of the judges on this. The case had its first hearing at the Guangzhou Maritime Court, its second in the High Court of Guangdong Province, and its rehearing at the Supreme People's Court. The three courts used different laws and theories to support their decisions.

⁹⁸ Liangyi Yang, *Ti Dan Ji Fu Yun Dan Ju* (Bills of Lading and other Shipping Documents), (Beijing: China Politics and Law University Press, 2001), at 122 and 143-145.

4.3.2 Wanbao v. APL⁹⁹

This was an action by the plaintiff Wanbao (Group) Guangzhou Feida Electronic Factory (hereinafter referred to as “Wanbao”) against the defendant American President Lines Limited (hereinafter referred to as “APL”), Feili (Guangzhou) Industry Ltd., and China Great Wall Industry Guangzhou Company. The action was in respect to the alleged wrongful delivery of cargo without the presentation of an original straight bill of lading.

APL issued straight bills of lading for two shipments of goods sold by Wanbao to GB Lighting Supplier (hereinafter referred to as “GB”) in Singapore. GB is the named consignee in the bills of lading. After the goods arrived at Singapore, GB took delivery of the goods from APL without production of the original straight bills of lading. However, GB failed to pay the value of the goods after delivery.

Wanbao sued APL in the Guangzhou Maritime Court and claimed damages in respect of the alleged non-presentation of the cargo. The release without Wanbao’s consent forced Wanbao, who held the two sets of original bills of lading, to relinquish control over the cargo. There was a non-presentation in tort contained in or evidenced by the bills of lading, and Wanbao suffered loss as result.

APL argued that American law should be applied. In American law, the carrier should deliver cargo to the consignee named in the straight bill of lading. The plaintiff was not entitled to claim the loss because the straight bill of lading that the plaintiff held was not the document of title.

After reviewing the evidence, judges of the Guangzhou Maritime Court held that the paramount clause of the bill of lading relevant to this case indicates clearly that the US

⁹⁹ “Wanbao v. APL,” (1998) Jiaotizidi3hao or (1998) 交提字第 3 号, *The Gazette of the Supreme People’s Court of the People’s Republic of China*, Vol. 5, 2002.

Carriage of Goods by Sea Act 1936, or the *Hague Rules*, should be applied concerning the delivery of goods. In the court's view, the case did not violate the public interests of the People's Republic of China, and therefore should use the US *Carriage of Goods by Sea Act, 1936*, or the *Hague Rules*. However, there was no clear provision in the US *Carriage of Goods by Sea Act, 1936* or the *Hague Rules* stating that a carrier can deliver goods to the named consignee without presentation of a straight bill of lading. Therefore the court decided that Chinese law and relevant international practices be applied.

The court of the first hearing held that a bill of lading is evidence for the carrier to deliver goods and for the consignee to pick up goods. The carrier, APL, after verifying the identity of the consignee, is still responsible for releasing goods against the original bill of lading, based on international practices. However, in delivering goods without retrieving the original bill of lading, the carrier, without the consent of the shipper, breached its fundamental obligation and caused damages to the entitled bill holder. Based on international practice, Article 71 of *China Maritime Code* and Article 106 and 117 of *General Principles of Civil Law of the People's Republic of China* (hereinafter referred to as "*China Civil Law*"), the court supported Wanbao's claim against APL.

APL appealed to the Higher People's Court of Guangdong Province. This court held that tort law should govern the case. According to Article 146 of the *China Civil Law*, the law of the place where a tort action is committed shall apply in handling compensation claims for damages of infringement. Accordingly, Chinese law was judged as applicable to this case, since China was the place of the result of tort action, and, as Chinese law has clear provisions, international practice was not to be applied. According to the *China Maritime Code*, it is the carrier's obligation to deliver goods upon production of original bills of lading, to the

consignee named in the straight bill of lading. Wanbao was holding the original bills of lading, and so in the court's view Wanbao was the owner of the goods. APL delivered the goods to GB without Wanbao's consent, and therefore APL was judged responsible for the resulting loss to Wanbao. The appeal of APL was dismissed.

APL went to the Supreme Court of the People's Republic of China to request a re-hearing. The Supreme Court overruled the first and second judgments and stated in the final judgment that the straight bill of lading in this case did not function as a document of title.

The Supreme Court held that tort law should not be applied to this case. Wanbao had accepted the bills of lading issued by APL, apparently indicating that the US *Carriage of Goods by Sea Act, 1936* or the *Hague Rules* should be applied. However, the *Hague Rules* only apply to shipping documents that are documents of title, and straight bills of lading in this case are non-negotiable shipping documents, and not documents of title. Dispensing with the *Hague Rules*, the Supreme Court judged that the US *Carriage of Goods by Sea Act, 1936* should apply. According to Article 3.4 of the *Carriage of Goods by Sea Act, 1936*, Article 2 and 9 (b) of *Pomerene Act 1916*, straight bills of lading are non-negotiable shipping documents and are not documents of title. The Court adjudged that it was reasonable for the carrier to deliver the goods to the consignee named in the straight bill of lading without surrendering an original bill of lading. Wanbao failed to give notice to APL not to release the goods to GB before the goods arrived at the destination port, and therefore he should bear the commercial risk for not collecting the payment of the goods. The claim of Wanbao against APL was finally dismissed.

We should note that the decision made by the Supreme Court supported the view that a carrier has no obligation to deliver goods against the presentation of original straight bills of

lading, as in U.S. law. Thus, the decision of the Supreme Court does not clarify whether, under *China Maritime Code*, a carrier can deliver goods without production of a straight bill of lading.

The author argues that in this case the parties involved in the dispute had effectively chosen to follow the US *Carriage of Goods by Sea Act, 1936*, or the *Hague Rules*. But when the Supreme Court finally applied the *Pomerene Act 1916*, it did not explain why it should apply. The author cannot see any reason to apply a law that the parties involved did not choose, and which has no close connection with the case. This judgment of the Supreme Court is not very convincing. To the question of “shall the carrier be liable to the shipper who holds a straight bill of lading, for delivering cargo without the original bill of lading,” the answer of the Supreme People’s Court is that, according to *China Maritime Code*, a straight bill of lading cannot be endorsed or assigned. The shipper who holds the straight bill of lading can exercise the claim of stoppage in transit, or negotiate with the consignee to modify the context of the bill of lading, before the cargo is delivered. Once the cargo is delivered to the named consignee, the shipper, according to the bill, has no right to the cargo. Thus, the law does not support the claim of shippers who hold original straight bills of lading against carriers who deliver cargo to the named consignee without the original straight bill of lading.¹⁰⁰

4.4 Academic Sector

In the academic sector, Chinese scholars cannot reach agreement on whether carriers can

¹⁰⁰ The question was discussed at the Quan Guo She Wai Min Shang Shi Hai Shi Shen Pan Gong Zuo Zuo Tan Hui (Commercial and Maritime Trial Involving Foreign Elements Conference) held in August, 2002. Yuzuo Si, *Hai Shang Fa Zhuan Ti Yan Jiu* (Maritime Law Study), (Dalian: Dalian Maritime University Press, 2002), at 207-208.

deliver goods to named consignees without presenting an original straight bill of lading. The central question is: does a straight bill of lading function as a document of title?

The first debate is how to legally define the term of "document of title." In Western countries, few people question the bill of lading's functions as a document of title.¹⁰¹ But in China, whether bills of lading, order bills, or even bearer bills of lading are documents of title causes a lot of discussion, especially when they are transport documents. Different opinions exist on how to interpret the definition of "document of title."

There is no definitive system and no definition of "document of title" in existing Chinese laws.¹⁰² There is also no clear provision as to whether the bill of lading is a document of title. A great deal of discussion on this topic has taken place among scholars in China. Most Chinese scholars agree that the term "document of title" indicates the document of ownership of goods. Some think that the bill of lading is not, and need not be, a document of title in the process of transportation.¹⁰³ The best-known expression of this opinion is Mr. Hai Li's controversial article,¹⁰⁴ in which he argues that describing bills of lading as documents of title is a historical mistake. He stated that there is no authoritative definition of "document of title" to goods in common law. Mr. Hai Li maintains that the possession of the bill of lading

¹⁰¹ A bill of lading is a document of title, without which delivery of the goods cannot normally be obtained. In no case does a bill of lading fail to function as a document of title. E R Hardy Ivamy, *Payne and Ivamy's Carriage of Goods by Sea*, Twelfth Edition, (London: Butterworths, 1985), at 71.

¹⁰² Yuzhuo Si, *Hai Shang Fa Zhuan Ti Yan Jiu* (Maritime Law Study), (Dalian: Dalian Maritime University Press, 2002), at 246.

¹⁰³ Some scholars attempt to deny the bill of lading's function as a document of title in the area of transportation. Yuzhuo Si, Jie Wang, Moquan Zhu, Xiaoping Shen, "Guan yu wu dan fang huo de li lun yu shi jian" (Theory and Practice on Delivery of Cargo without Bills of Lading), edited by Yuzhuo Si, *Zong guo hai shang fa nian kan* (Annual of China Maritime Law), (Dalian: Dalian Maritime University Press, 2000), at 28.

¹⁰⁴ Hai Li, "Guan yu ti dan shi wu quan ping zheng de fan si" (Reconsideration on Bill of Lading as Document of Title), edited by Yuzhuo Si, *Zong guo hai shang fa nian kan* (Annual of China Maritime Law), (Dalian: Dalian Maritime University Press, 1996), at 41.

does not mean possession of goods. That means the holder of an original bill of lading is not necessarily the lawful owner of the goods under the bill. A straight bill of lading has no power of document of title, nor does a bearer or order bill of lading. As far as the necessity of international trade is concerned, Mr. Hai Li maintains that it is enough to define a bill of lading as evidence for the carrier to deliver goods, or for the holder to pick up goods. His assertion is that to view bills of lading as documents of title is not in accordance with existing law or the practice of international trade.¹⁰⁵

On the non-presentation issue, the mainstream view in Chinese law circles is that a straight bill of lading is not a document of title, and therefore that the carrier can release goods without retrieving the original bill of lading. Because the carrier cannot deliver the cargo to anyone except the named consignee, it would be superfluous to necessitate that carriers require presentation of the original bill of lading before releasing cargo to the named consignees. A straight bill of lading is nothing more than the evidence of the holder's right against the goods under the bill, and does not need to be defined as document of title, or anything else. In Chinese law circles, negotiability is an important determiner of document of title. Only negotiable bills of lading have the function of documents of title. Straight bills of lading are non-negotiable.¹⁰⁶

Dr. Haibao Xing holds that a straight bill of lading is non-transferable by means of endorsement, and hence it is not, from the perspective of international trade, a document of title. It is not a bill of lading in essence, but something closer to a non-negotiable receipt. The

¹⁰⁵ *Ibid.*

¹⁰⁶ Jie Wang, "Lun ti dan zai yun shu he liu tong huan jie zhong de bu tong gong neng ji qi qu fen de zhong yao yi yi" (The Different Functions of Bill of Lading in Transit and Negotiation), edited by Beijing University Law School Maritime Study Center, *Hai shang fa yan jiu* (Maritime Law Study), (Beijing: Law Press, Volume 1, 2001), at 37-38.

title of the goods is transferred to the named consignee when the goods are shipped. The ownership of the goods under a straight bill of lading belongs to the nominated consignee.¹⁰⁷

Mr. Yongjun Song holds that the straight bill of lading being considered document of title is certain to put a burden on the carrier. The carrier has to then be cautious about the inspection of goods, the shippers, the endorsees, the identity of bill holders, and even the validity of the bill's transfer.¹⁰⁸

Professor Yuzhuo Si, a leading authority on Chinese maritime law, maintains that a straight bill of lading does function as a document of title in transportation.¹⁰⁹ He argues that when a straight bill of lading is issued, the carrier shall deliver the cargo without the original bill of lading.¹¹⁰

The author notes that the above views have had significant impact on the recent decisions of Chinese courts concerning non-presentation. But some scholars believe that the courts should not judge a case on the basis of whether the bill of lading is a document of title because there is no unanimous decision about it.

¹⁰⁷ Haibao Xing, *Hai Shang Ti Dan Fa* (Bills of Lading Law), (Beijing: Law Press, 1999), at 99-101 and 186.

¹⁰⁸ Yongjun Song, "Qian tan dui ti dan wu quan ping zheng de reng shi" (On the Cognizance of B/L to be Document of Title), *Annual of China Maritime Law*, Vol.8, (Dalian: Dalian Maritime University Press, 1997), at 349-354.

¹⁰⁹ Yuzhuo Si, *Hai shang fa zhuan ti yan jiu* (Study on Maritime Laws), (Dalian: Dalian Maritime University Publishing House, 2002), at 245 and 270.

¹¹⁰ Professor Yuzhuo Si is a well known Chinese maritime law expert. He is one of the main drafters of the *China Maritime Code* and has participated in the discussion of the UNCITRAL draft.

Chapter V

Analysis

5.1 Principles for Ascertaining Liability

When non-presentation liability is determined, the international practice will be reconciled with the status of the Chinese shipping market. It is herein determined, by comparing laws about non-presentation among different countries and districts, that there is no common international practice. Though China should refer to the experience of other nations, the particular context and circumstances of China need to be carefully considered.

The laws of each country are the result of its complex circumstances. International practice that is acceptable to most other jurisdictions is one factor to consider in the legislative process, but at the same time the shipping market and the present chaos in certain jurisdictions should also be taken into account. Legislation should improve the development of the international shipping industry and trade, and sustain the certainty of legal results.

One purpose of maritime legislation is to protect state interests. It cannot be simply stated that China is a shipping nation or a trading nation. As far as the balance between import / export trade and the shipping industry are concerned, the former plays a more important role in the Chinese economy. As the author mentioned in Chapter Two, marine fraud has become a serious threat to Chinese import and export trade. Most cases concerning the delivery goods without bills were launched by Chinese shippers against foreign carriers and consignees. But it should be noted that in some maritime cases Chinese courts intentionally favored the foreign party and thus inappropriately chose to apply foreign laws. For example, in the previously mentioned case of *Wanbao v. APL*, the Supreme Court wrongfully chose to

apply U.S. laws rather than Chinese laws, and thus the claim by the Chinese plaintiff was denied. The plaintiff Wanbao chose to bring a tort action rather than covenant against the defendant APL. There was no reason for the Supreme Court not to apply tort law.¹¹¹

Some people doubt that the existing *China Maritime Code* intends to protect the interests of carriers. The *China Maritime Code* was drafted by the Ministry of Communication, which is a subordinate body of the State Council. Most of the shipping companies are state-owned and ministry-administered, so to some extent the *China Maritime Code* is directed to protect the interests of carriers. It is stipulated in the *China Civil Law* that state-owned enterprises undertake civil liability and financial liability without any privilege when conducting civil activities. State-owned enterprises must act within their capability limitation and are treated as equal civil entities.¹¹² Chinese courts also hold that both foreign and domestic parties should be equally protected in adjudication. Following China's entry in the WTO, the Chinese government is trying to establish a fair international image and create a favorable investment environment, strengthening the confidence of foreign investors in the Chinese judicial system.

The author suggests that improving the investment and trading environments is not a substitute for ignoring the interests of the domestic parties. There are two standards to test whether or not the liability of non-presentation is reasonable. One is to determine if the risk sharing amongst carriers, shippers, and consignees is fair. The other is to determine if it promotes the development of international trade and the shipping industry. The line between

¹¹¹ Another typical case is Jiangshu Qinggong v. Jiangshu Huanqiu, Meiguo Bolian. The decision of the case was criticized by some Chinese scholars because it was not based on Chinese law but on U.S. law. It was said that giving up jurisdiction is not consistent with the world trend of expanding the jurisdiction of domestic laws. Online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/news/show.php?cId=700>>

¹¹² *General Principles of the Civil law of the People's Republic of China*, Article 3, 41, 48.

right and wrong action in the eyes of the law is very fine. The questions are: who is to be given protection? Why?

5.2 Why A Carrier is Entitled to Deliver Goods without a Bill

The majority of interested parties in China argue that straight bills of lading are not documents of title, and that carriers should be able to release goods without presentation of the original bill of lading. Combining their own ideas with the opinions of foreign scholars, the reasons for Chinese parties to support non-presentation can be summarized as follows:

5.2.1 Bill of Lading must be Transferable

Unlike bearer or order bills, the straight bill in most countries and districts is not transferable. Transferability of title to the goods is an essential characteristic of document of title. The power of a bill of lading as document of title comes from its transferability. L/C settlement and credit financing are indispensable to the negotiability of the bill of lading. For most Chinese, a straight bill of lading is non-negotiable and the ownership of goods is transferred to the named consignee at the time of shipping. The consignee only needs to provide the carrier with reliable evidence that he is the party entitled to receive the goods. Accordingly, the carrier only needs to properly identify the party claiming delivery as the consignee before the delivery occurs.

Three functions are necessary for all bills of lading. A straight bill of lading does not function as a document of title because of its non-negotiability; therefore, it is not a bill of lading under Article 71 of the *China Maritime Code*. Requesting carrier to deliver goods against bill in Article 71 does not bind straight bill of lading. Chinese scholars further argue

that there is no difference between a straight bill of lading and a sea waybill, and that straight bills of lading should be abolished in the future.

5.2.2 Loss is not Caused by Non-presentation

In non-presentation cases, losses are not caused by the carrier's conduct of non-presentation but by the buyer's breach of the sales contract. In most cases, from the very beginning, shippers laid themselves open to non-presentation. The shippers recover payment from the consignees first, and then, if the payment cannot be recovered from the consignees, they choose to sue the innocent carriers instead of bringing an action against the consignees. To require the carrier to deliver goods against the original bill of lading is to make the carrier bear the risk in the process of trading. The shipper's intent to transfer the trade risk to the innocent carrier is unfair to the carrier. The named consignee under the straight bill of lading is the one to whom the shipper intended to deliver the goods, which means the carrier cannot deliver the cargo to anyone except the named consignee. As such, the delivery of goods by the carrier to the consignee is not a breach of the contract. The shipper can claim damages only against the consignee.

There is no causal relationship between non-presentation by the carrier and the shipper's loss. The beneficiary is not the carrier but the consignee, while the injured party is the bill holding shipper. The reason that the shipper cannot recover payment is not non-presentation, but the consignee's breach of the contract.

5.2.3 Facilitation of Commercial Transaction

The purpose of the carrier in delivering goods without producing the original bill of

lading is to accelerate the circulation of goods. There is not necessarily any malice on the part of the carrier, who should not be required to bear the responsibility of non-presentation. Non-presentation maximizes the efficient disposition of material resources and shall not be prohibited.¹¹³ One important purpose of law is to promote commercial efficiency. Requiring carriers to deliver goods under an original bill of lading hinders the commercial transaction and should be abandoned.

5.3 Why the Carrier is not Entitled to Deliver Goods without Bill

The author is one of a minority of people who support the view that a straight bill of lading should be a document of title, and that carriers should release goods only against original bills of lading.¹¹⁴ Unfortunately, little published material can be found to support this view. The author summarizes the reasons for imposing the non-presentation liability on carriers as follows:

5.3.1 Security of Payment and Prevention of Marine Fraud

The right to control the goods is covered by a straight bill of lading. A consignee has no property in the goods before he pays the value of the goods covered by the contract of sale signed with the owner, who is generally the actual shipper.

¹¹³ The most basic notion in the economic analysis of law is efficiency. M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, Seventh Edition (London: Sweet & Maxwell LTD, 2001), at 557. Efficiency is an important standard for evaluating existing laws. Nicholas Mercuro & Steven G. Medema, *Economics and the Law*, (New Jersey: Princeton, 1997), at 75. See also Wenxian Zhang, *Fa li xue (Jurisprudence)*, (Beijing: Law Publishing House, 1997), at 311. See also Zheng Yang, *Ying mei qi yue fa lun (Anglo-American Law of Contracts)*, Third Edition, (Beijing: Beijing University Press, 2003), at 255.

¹¹⁴ In the case *Changjiang v. Yifeng*, Mr. Shouqing Li agreed with the court that the carrier must deliver goods against production of the straight bill of lading. Online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/news/show.php?cId=1314>>

A straight bill of lading has a special function in international trade. First, the legal significance of issuing a straight bill of lading is that the bill holder keeps it as a secure record of the price of delivery. The consignee of the straight bill of lading is often the purchaser of the sale contract. The bank accepts non-negotiable documents, so when the consignee cannot or will not pay for the goods, the bill holder can recover them. The second function of issuing a straight bill of lading is that the characteristic of non-negotiability makes entitlement to the goods (covered by the straight bill of lading) non-transferable by endorsement, avoiding considerable fraud.

The purpose of the law requiring carriers to deliver goods against the original bill of lading is to enforce delivery of goods to the correct person, and to protect the right enjoyed by the holder of a bill of lading. Such a law also protects the parties of the contract in the event of non-performance. In the case of a straight bill of lading: if the carrier delivers goods to the consignee of the bill without recovery of the original bill, such delivery makes the shipper lose the guarantee of recovering payment, and thereby lose control over the goods. Therefore, even in the case of a straight bill of lading, release of goods without recovery of the original bill of lading infringes on the owner's right to the goods and makes it possible for the consignee to escape the obligation of payment. A straight bill of lading is not an exception to rule of delivery against the original bill of lading.

The ownership of goods under an order bill of lading belongs to the endorser. The order bill of lading is the most common type in international trade. The ownership of goods under a bearer bill of lading belongs to the bill holder. The bearer bill of lading can be transferred without endorsement. Anyone who holds a bearer bill of lading can pick up goods from a carrier. The risk accompanying a bearer bill of lading is great when it is stolen or lost;

therefore what is used under L/C payment is often a straight bill of lading or an order bill of lading.

The main cause of non-presentation is the buyer's inability to receive the original bill of lading through settlement. Under the straight bill of lading of a trade contract, there are two common methods of settlement: direct payment by the consignee before the bill of lading is sent to the consignee, and payment against documents. It is prescribed in *Uniform Customs and Practice for Documentary Credits* that banks may accept non-negotiable documents.¹¹⁵ While the former method is relatively safe, the latter often brings about disputes.

There are various types of marine fraud.¹¹⁶ A common type of marine fraud that may involve a carrier in liability is committed by the consignee and the third party. In documentary transactions, the issuing bank uses strict compliance standards to examine the tendered documents. About 80% of L/C payment is not completed because of discrepancies between documents and terms of a credit. Such nonconformity can result from various causes. For example, mistaken punctuation may be the reason that the bank dishonors a bill.¹¹⁷ If the consignee is permitted to pick up the cargo without producing the original bill of lading, it is a short step towards fraud by the joint actions of the consignee and the issuing bank. The consignee takes the cargo and pays no price. The shipper has almost no preventative measures against such fraud. For these reasons, the original bill of lading is necessary for cargo pickup, regardless of the type of bill of lading.

It is easier for the carrier to distinguish an original bill from a forged one than to

¹¹⁵ *Uniform Customs and Practice for Documentary Credits* 400, Section 25.

¹¹⁶ Paul Todd, *Contracts for the Carriage of Goods by Sea* (Oxford: BSP Professional Books, 1988), at 226.

¹¹⁷ The sale with the original bill of lading was refused by the bank.. (2003) Huhaifashangchuzidi526hao. (2003) 沪海法商初字第 52 号.

distinguish a defrauder from the real consignee. In some circumstances, consignees have submitted forged banks' signatures in letters of indemnity.

Tolerance of non-presentation contributes to malicious conduct and maritime fraud. Bills of lading are important documents in shipping and trading. In the 20th century, maritime fraud has increased with the increasing value of cargo, and hence many countries attach great importance to the function of the bill of lading's function as document of title. Marine fraud occurs mainly in countries with less severe laws. The lenient decisions of Chinese courts, as well as the opinions expressed in academic circles, contribute to China's increase in fraudulent non-presentation.

The author suggests that because China is in the early stages of a market economy, advocating good faith is essential for the whole society. It is better for the law to encourage and supervise the carrier to perform his obligation than to allow the release of goods against original bills of lading. At present, freight forwarders perform much of the cargo transportation. They make cargo transportation contracts with various shippers in the name of the carrier and then send the consolidated goods to the actual carrier. The actual carrier issues a bill of lading, but the shippers are actually the freight forwarders. The freight forwarders then issue house bills of lading to every shipper. Freight forwarders conduct most deliveries of goods without bills. Given the circumstances of incomplete laws and the imperfect management of cargo transportation in the agency market, laws encouraging or permitting non-presentation will greatly damage the order and the moral standard in the shipping industry.

If a consignee can pick up cargo under a straight bill of lading with only identity documents, it increases the burden of the carrier in distinguishing the real consignee from a

substitute. It is often rather difficult for the carrier to identify the real consignee, and it is quite easy to forge identity documents.

As great difference exists among certain countries and districts over the legal characteristics of straight bills of lading, it is impossible for carriers to be familiar with all the relevant laws of all countries and therefore to have informed opinions about the legal owner of the cargo.

Releasing goods only against an original bill of lading can prevent, or at least decrease, malicious non-presentation and marine fraud. It may also lead to carriers giving up their trust in simple luck, and hence protect the legal interests of the holders of bills of lading. Releasing goods against the original bill of lading is a step toward a stable maritime market and the healthy development of international trade by sea.

The author's understanding is that where a bearer or order bill of lading is issued, the cargo owner can endorse the bill and deliver it to the bank to receive payment. But where a straight bill of lading is issued, the cargo owner cannot endorse the bill and receive payment from the bank. He can only receive payment from the buyer. The only security of payment is the original straight bill of lading. Thus, under a straight bill of lading, the carrier must deliver goods only to the named consignee and against the original bill of lading. These requirements on carriers for delivering goods are stricter than those under a bearer or order bill of lading.

Since the September 11, 2001, terrorist attacks, U.S. customs has carried out stricter measures of inspecting imported goods. One such measure is requiring the carrier to report the actual consignee. American customs has decided that if the bill of lading is a "to order" one, the consignee field must contain the actual name of the bank, shipper, address, and etc.,

and the first notify field must contain the actual consignee with a U.S. name and address. Similar measures have also been taken by Canadian customs since April 19th, 2004. It appears that standard usage of straight bills of lading will be expanding.

5.3.2 The Difference between Straight Bill of Lading and Sea Waybill

A sea waybill is a document, issued by a carrier, to evidence the transportation between a carrier and shipper. It is usually applied in short voyage transportation where, in order to pick up the goods, the consignee does not need to produce the original bill of lading but merely identify himself as the consignee. As a sea waybill is not a bill of lading under the U.K. *Carriage of Goods by Sea Act 1992*, the *Hague Rule* and the *Hague-Visby Rule* do not apply, nor is there is a definition of a sea waybill in *China Maritime Code*.

It is commonly accepted that both a straight bill of lading and a sea waybill are receipts of goods and evidence of transportation, and that they are non-negotiable. "Non-Negotiable" is often annotated on the surface of a sea waybill.

There are sharp differences between a sea waybill and a straight bill of lading. As a sea waybill is not a document of title, the ownership of goods transfers to the purchaser when the shipper consigns goods to the carrier. The shipper has no right of stoppage in the transit of goods. By contrast, the shipper of a straight bill of lading, by its very characteristic of being a document of title, has the right of stoppage. The consignee of a sea waybill is not party to the contract of carriage of goods by sea, while the consignee of a straight bill of lading is party to the transportation contract (once he receives the bill upon payment). It is erroneous to confuse a sea waybill with a straight bill of lading.

International trade and transportation need straight bills of lading to function as

documents of title. Generally speaking, the issuing of a sea waybill is based on long-term trade and mutual trust between the shipper and consignee, or based on the good reputation of the consignee. In this respect, the shipper and the consignee need not mortgage the document of the transportation in order to acquire the payment. But in most circumstances, it is hard for the shipper and seller to judge if the consignee, the buyer, is an honest purchaser. Therefore, the shipper prefers to get a straight bill of lading in order to keep control of the delivery of goods. Failing this, he might ask for a sea waybill. It is clear that to permit the carrier to release goods without retrieving the straight bill of lading runs counter to the intention of the shipper.

In addition, straight bills of lading can provide greater protection for the consignee. An issued straight bill of lading confirms the fact that the goods indicated in the sales contract have been shipped, before the consignee pays the fee for them. In the case of a sea waybill, the carrier may unknowingly release goods to a fraudulent receiver. In the case of such a delivery, it is not certain whether the consignee can be compensated. Because the consignee of a sea waybill is not party to the transportation contract, whether or not he can sue the carrier to recover losses due to the mistaken delivery depends on the world's varying domestic laws.¹¹⁸ The straight bill of lading, however, entitles the consignee the rights of a bill of lading. As soon as the consignee pays in full and gets the bill of lading, he acquires all the rights under the transportation contract, including the right of claim for delivery or damages. The consignee can then sue the carrier for the wrong delivery, or for goods lost.

A straight bill of lading is evidence of the contract of shipment, a receipt for the goods, and a document of title. These three functions make a straight bill of lading entirely different

¹¹⁸ Haibao Xing, *Hai Shang Ti Dan Fa (Bills of Lading Law)* (Beijing: Law Press, 1999), at 580-584.

from a sea waybill. A straight bill of lading is still written in the form of a classic bill of lading. It should be insisted that in no case does a bill of lading fail to function as a document of title. There is no need for another, similar bill of lading to operate exactly like a sea waybill.¹¹⁹ It is Otherwise, it is unnecessary and meaningless to define a straight bill of lading that will simply cause confusion and misconception. If a straight bill of lading is not a document of title, its distinction from a sea waybill is blurred. A non-negotiable receipt should be referred to as a sea waybill. A non-negotiable bill of lading is still a bill of lading. It is a mistake to treat the straight bill of lading as a sea waybill.

That bills of lading function as documents as title is a fundamental concept in international trade. In practice, however, most traders and shippers are ignorant of the distinction between a straight bill of lading and the other two types of bills of lading, largely due to the fact that straight bills of lading remain on the forms for standard bills of lading. Not treating a straight bill of lading as a document of title confuses many of the parties involved in international trade.

The author therefore consents that as far as the liability of non-presentation is concerned, there is distinction between bearer bill of lading, order, and straight bill of lading. The difference between a sea waybill and a straight bill of lading is that a straight bill of lading is a document of title. The responsibility of the carrier to release goods against the original bill of lading should be stressed. A straight bill of lading cannot be replaced by an order bill of lading, a bearer bill of lading, or a sea waybill.

¹¹⁹ Mr. Justice Rix LJ. stated in the judgement of "The Rafaela S" that it was undesirable to have a different rule for different kinds of bills of lading. [2003] 2 Lloyd's Rep.113.

5.3.3 The Non-Negotiability of Straight Bill of Lading

Much attention is paid to the non-negotiability of straight bills of lading in the debate on whether they are documents of title. The author argues that whether or not a straight bill of lading functions as a document of title is not determined by its negotiability.

First, the author argues that a straight bill of lading has limited transferability. Straight bills of lading are not negotiable, which means that the ownership covered by them cannot be transferred by endorsement. However, it can be transferred by delivery of the straight bill of lading, accompanied by agreement.¹²⁰ It may be transferred by delivery at least once, from the shipper to the consignee.¹²¹ The counsel for MacWilliam also argued this point in “The Rafaela S.”¹²²

Second, it is wrong to conclude that a straight bill of lading is non-negotiable and accordingly not a document of title. Not all documents of title are transferable. On the other hand, not all transferable documents are documents of title.

Third, the negotiability of a straight bill of lading and its significance to the bill of lading are in trading, settlement, and circulation, rather than in the process of transportation.¹²³ The aim of the non-negotiability of the straight bill of lading is to protect the title of the consignees. The holder of a straight bill of lading cannot resell the goods under the bill of lading. Only the consignee of the straight bill of lading can collect the goods under the bill.

¹²⁰ William Tetley, *Marine Cargo Claims, the Fourth Edition*, at 67, online: Tetley's Law and other Nonsense <<http://tetley.law.mcgill.ca/maritime/ch45.pdf>>

¹²¹ Some scholars hold that the non-negotiability of the straight bill of lading is not absolute in that the consignee can still transfer the bill of lading in accordance with civil law. In English law, even the straight bill of lading is negotiable, but the method is not endorsement but in the way of transfer in common law.

¹²² [2003] 2 Lloyd's Rep.113.

¹²³ Jie Wang, “Lun ti dan zai yun shu he liu tong huan jie zhong de bu tong gong neng ji qi qu fen de zhong yao yi yi” (The Different Functions of Bill of Lading in Transit and Negotiation), edited by Beijing University Law School Maritime Study Center, *Hai shang fa yan jiu* (Maritime Law Study), (Beijing: Law Press, Volume 1, 2001), at 41.

Though it is not negotiable, a straight bill of lading is still a document of title.

The function of the negotiability of a bill of lading is in financing. In L/C payment regarding sales contracts, the shipper and consignee, under an order bill of lading or bearer bill of lading, can mortgage the bill to banks in order to borrow money. The settlement bank or financing bank can therefore obtain the bill of lading and enjoy its entitlements.

The transferability of the bill of lading helps to transfer the title of the goods during the process of transportation. It is convenient for the bill holder to sell the goods so that the purchaser can pay before actual possession, facilitating the sale of goods under the bill of lading.

However not all sellers in sales contracts are willing to allow the goods to be resold, and usually the purchaser of an international trade contract is the final purchaser. Therefore, if the parties of the bill of lading do not need to resell the goods and do not require negotiability in financing, they can choose a non-negotiable straight bill of lading. In practice, the parties usually chose straight bills of lading when they are concerned about the safety of goods.

The negotiability is irrelevant to the carrier's obligation to deliver goods against the bill of lading. The obligation is provided by the contract of cargo transportation by sea. Delivery against the bill of lading applies to straight bills of lading as well as to order and bearer bills of lading, unless there is a special agreement in the transportation contract. It is a quite illogical conclusion to state that a straight bill of lading is not a document of title because it is not transferable.

5.3.4 Norms of Chinese Law and International Conventions

Chinese law and international conventions do not negate the function of the straight bill of lading as a document of title. In section 71 of the China Maritime Code, the straight bill of lading is not excluded in the regulation of obligation for carriers to deliver goods against an original bill of lading.

The *Contract Law of the People's Republic of China*, Article 308, reads:

“Before the carrier delivers the goods to the consignee, the consignor may ask the carrier to stop the transportation, return the goods, change the place of destination, or deliver the goods to another consignee. However, the consignor shall compensate for the losses thus caused to the carrier.”¹²⁴

The very reason that a shipper can require the carrier to suspend transportation, to return the goods, to change destination, or to change the consignee, is his possession of the straight bill of lading, which represents the title of the goods. This again demonstrates that it is necessary to view a straight bill of lading as a document of title.

A similar description can be found in *Convention on Contracts for the International Sale of Goods*, Section 77, which stipulates that if it is possible for a consignee to lose the ability to pay, or that he is expected to breach the contract, the shipper can prevent the goods from being delivered to the consignee.¹²⁵ In the transportation of goods, the shipper can exercise such a right only through the carrier. If the characteristics of the straight bill of lading, as document of title, are not recognized and the carrier is entitled to deliver goods without recovering the original bill of lading, then the right of the shipper who is the bill holder to control the goods is illusory.

¹²⁴ *Contract Law of the People's Republic of China*, Article 308. *Civil Law* (Beijing: China Legal Publishing House, 2003), at 235.

¹²⁵ China is a party to the *Convention on Contracts for the International Sale of Goods*.

5.3.5 Intention to Transfer Title

The UN *Convention on Contracts for the International Sale of Goods* and International Chamber of Commerce *INCOTERMS* defined the point in the delivery process at which the risk of loss passes from seller to buyer, but it did not define the point at which the property of goods passes from seller to buyer. Under English law, passing of the property of goods depends on the parties' expressed or implied intentions, and their specific conduct. Under Chinese laws, the property of goods passes from seller to buyer when the goods are delivered.

A contract of carriage of goods by sea is a bilateral contract signed by the carrier and the shipper. The right to take delivery of goods is the shipper's. However, by the sales contract, the shipper and seller can assume that the consignee will pay for the goods before picking them up. That is why the shipper indicates the purchaser as the consignee in the straight bill of lading. However, this does not mean that the right to take delivery of goods transfers to the consignee. The point at which the title of goods transfers is when the consignee obtains the bill of lading after payment. The consignee is bound to pay the price for obtaining the bill of lading. The title under the bill does not change until the payment is made. The carrier has no knowledge of whether the consignee has paid the price of goods, but there is one thing the carrier can ascertain – the original bill of lading. The carrier should comply with the transportation contract and release goods against an original bill of lading. By virtue of the straight bill of lading as document of title, where the contract of carriage of goods by sea is silent, the moment at which goods are passed as property is the time when the consignee receives the original straight bill of lading.

Consideration is an essential element of a contract in common law.¹²⁶ A contract without consideration is void, except for a contract under seal, past consideration, moral obligation, commercial contracts, or written contracts.¹²⁷ Consideration is necessary for the named consignee to acquire the right under the bill of lading. In other words, the named consignee must pay for the goods and obtain the straight bill of lading before he can acquire its rights, unless the bill holder has a special agreement with the named consignee.

There is no concept of "consideration" in civil law. In a bilateral contract, consideration should be a consideration of mutuality, meaning that either both parties, or neither, are bound to the obligation.¹²⁸

The moment of the passing of entitlement cannot be fixed by law. It is normally determined by the parties involved and specified in the sales contract.¹²⁹ For example, in a case decided by the Maritime Court of Wuhan,¹³⁰ the documents in the L/C, the agreed method of payment, did not require an original bill of lading. The bill of lading is released to the agent of the consignee, which indicates that the plaintiff does not need to produce the original bill of lading when negotiating with the bank. The bill of lading in this case is not a document for negotiation. If there are no specified terms, then the case is determined by the statute. Chinese law stipulates that the title is transferred when the goods are delivered.

The author contends that when a straight bill of lading is issued, ownership of the goods is

¹²⁶ According to traditional English theory, no one should benefit without cause. Consideration is the foundation of the legal right and liability between parties. Jia Lin, *Foreign Civil and Commercial Law* (Beijing: China People University Press, 2000), at 91.

¹²⁷ Zheng Yang, *Ying mei qi yue fa lun* (Anglo-American Law of Contracts), Third Edition, (Beijing: Beijing University Publishing House, 2003), at 99-100.

¹²⁸ Zheng Yang, *Ying mei qi yue fa lun* (Anglo-American Law of Contracts), Third Edition, (Beijing: Beijing University Publishing House, 2003), at 79 and 117.

¹²⁹ U.K. Sale of Goods Act 1979, Section 18 & Section 19, and U.S. Uniform Commercial Code 1972, Section 2.

¹³⁰ (1996) Wuhaifashangchuzidi66hao or (1996) 武海法商初字第 66 号.

transferred to the named consignee once he receives the bill. If it is agreed upon that a bill of lading is not the precondition for delivery of goods, the title transfers at the time of consignment for shipping. Unless agreed otherwise by contract, delivery against the bill of lading is the legal means to acquire the title of goods under a straight bill of lading. From the perspective of the present international trade and the carriage of goods by sea, delivery against the bill of lading will lose its significance if a straight bill of lading is not a document of title.¹³¹

5.3.6 Contractual Liability

One of the key provisions of the straight bill of lading is the promise not to deliver cargo without receiving an original bill of lading in return. Carriers should not use the bill of lading form if they want to deliver goods without the original bill of lading. They should invite shippers to employ a sea waybill instead.

In most countries, delivering goods against bills of lading is considered an implied term in a transportation contract.¹³² It is commonly accepted that a bill of lading is a document evidenced by the cargo transportation contract.¹³³ Both academics and the judiciary in China are inclined to consider non-presentation a breach of contract.¹³⁴ Article 78 of the China

¹³¹ Jie Wang, "Lun ti dan zai yun shu he liu tong huan jie zhong de bu tong gong neng ji qi qu fen de zhong yao yi yi" (The Different Functions of Bill of Lading in Transit and Negotiation), edited by Beijing University Law School Maritime Study Center, *Hai shang fa yan jiu* (Maritime Law Study), (Beijing: Law Press, Volume 1, 2001), at 41.

¹³² Mr. Justice Leggatt held in the "Houda" that delivering goods against bill of lading is included in a transportation contract only in rare cases, and that non-presentation, even to the nominated consignee, is a breach of contract.

¹³³ It is stipulated in article 71 of the China Maritime Code that a bill of lading is evidence of the contract of carriage of goods by sea.

¹³⁴ *Xixiashi Hengxing Wuye v. Yuancheng*, online: Chinese Commercial and Maritime Trial Involving Foreign Elements <<http://www.ccmt.org.cn/hs/news/show.php?cId=1406>>

Maritime Code stipulates the rights and obligations of carriers, consignees, and bill holders. The relationship between shipper and carrier is controlled by the contract of carriage of goods by sea, and evidenced by the bill of lading. Once the consignee receives the bill of lading, the relationship between him and the carrier is established. It is one of the basic clauses that surrender of an original bill of lading is the precondition for release of cargo. As previously mentioned, a straight bill of lading still uses the standard bill of lading form, which includes an attestation clause like "in witness whereof [the number], one of the signed bills of lading must be surrendered in exchange for the goods or delivery order." This is quite different from a standard sea waybill form, and indicates that surrender of the sea waybill is not necessary. In return for payment of the freight charge, carrier under a straight bill of lading guarantees the goods for the bill holder. This is the fundamental characteristic of the law concerning bills of lading. Delivery against the bill of lading is the legal obligation of the carrier. Only after the carrier retrieves the original bill of lading is he free of this contractual obligation. The bill of lading is to ensure that the carrier will release cargo to the legal holder. Non-presentation is a breach of the carrier's obligation to the shipper. Non-presentation infringes on the contractual obligations of the carrier, resulting in a breach of contract.¹³⁵

The reason for the misunderstanding that delivery against original bills of lading is not required for straight bill of lading is that the cargo transportation contract is confused with the sales contract. They are actually two independent contracts. The obligation of the carrier to release goods against the original bill of lading is rooted in the cargo transportation contract. Unless agreed upon or ordered otherwise, the carrier is obliged to perform this obligation or he is in breach of the contract. The carrier cannot and need not affirm that the cargo has been

¹³⁵ Yuzhuo Si, *Hai shang fa zhuan ti yan jiu* (Study on Maritime Laws), (Dalian: Dalian Maritime University Publishing House, 2002), at 244-245.

paid off. Only the shipper is entitled to decide whether the original bill of lading is consigned to the consignee, and the only thing that the carrier requires in order to deliver cargo is the original bill of lading. International transportation serves international trade. Delivery against the original bill of lading is to protect the normal order of international trade.

Some disputes arise between parties who have long-term trade relationships. If previous disputes exist, non-presentation provides an opportunity for the consignee to refuse to pay or to negotiate with the shipper. One example is VOSS vs. APL. In this case, the consignee refused to pay simply because between the two parties were other lingering disputes, irrelevant to the contemporary case.¹³⁶

The carrier's breach of contract is the direct cause of the shipper's loss. After taking goods from the carrier without an original straight bill of lading, the named consignee refuses to pay or pay in full, the cargo price, which leads to the dispute. It can be said that non-presentation by the carrier is the direct cause for the bill holder to lose control over the cargo.

5.3.7 Cost-Benefit Analysis

Transaction cost analysis is an economic approach. When we talk about "efficient breach," the issue of what legal consequences arise from breaching a contract is very important.¹³⁷ Even today, the economic effects of non-presentation have not been taken into consideration. One of the purposes of law is to decrease disputes and to protect fair order of transactions with the lowest possible social and economic costs. Applying cost-benefit analysis, we will find that non-presentation accelerates the circulation of goods in appearance,

¹³⁶ Online: Chinese Commercial and Maritime Trial Involving Foreign Elements
<<http://www.ccmt.org.cn/hs/news/show.php?cId=3522>>

¹³⁷ Nicholas Mercuro & Steven G. Medema, *Economics and the Law*, (New Jersey: Princeton, 1997), at 75.

but in reality increases the social cost and destroys the normal order of international trade.

Social cost-benefit analysis can be applied to evaluate which practice of non-presentation is preferable. Reducing the transaction cost is one goal that all parties want to achieve. Legislation is supposed to maximize the social benefit, so comparing cost and benefit for parties involved in non-presentation disputes is quite necessary. If the cost exceeds the benefits, non-presentation should be banned. Let us compare the benefits for and costs to the involved parties when undertaking non-presentation.

By non-presentation, the carrier can avoid possible charges such as the expense of discharging goods into warehouses or other appropriate places, the demurrage charge for the extended use of containers, the extra charge for the extended use of a container yard, and unpaid freight. But the costs for disputes arising out of non-presentation are far greater, especially when a carrier's seagoing ships are arrested upon a shipper's application. Once the case is judged against the carrier, the compensation that the carrier needs to pay is tremendous when compared with the cost of freight paid by the shipper. Even if the person picking up the cargo offers security, the carrier cannot affirm the creditability of the consignee. The surety is in an unsafe position. If the carrier loses a case, he should first bear the loss of the bill holder. To file a lawsuit will cost a great deal of money. It also takes quite a long time for the carrier to sue a consignee or guarantor, and the carrier then has to face the uncertain results of the case. Even worse, he may lose the protection of limitations of liability under the international convention and the liability insurance provided by his Protection and Indemnity (P & I) Club. This is because non-presentation is a deliberate breach of his contractual obligations.¹³⁸ In theory, the possible losses to the carrier can be

¹³⁸ John F. Wilson, *Carriage of Goods by Sea*, (London: Pitman Publishing, 1988), at 156.

recovered from the shipper because the shipper is, according to the contract of cargo transportation by sea, responsible for timely pickup of the goods at the destination port. Otherwise, under the laws of most countries, the shipper is liable for the any loss to the carrier caused by delayed delivery.¹³⁹ In addition, the carrier can keep the goods as lien for his loss. From this analysis, there is no reason for a carrier to breach the contract by delivering goods without the original bill of lading. Delivering cargo without a bill is not an efficient breach for the carrier.¹⁴⁰

The significant beneficiary of the non-presentation is the consignee. When the bill holder loses control over the cargo, the consignee usually requires a discount or a payment respite, and may even refuse to pay entirely after he acquires the cargo. The consignee obtains the contractual benefit though it does not perform his contractual obligation.

In addition, non-presentation increases disputes between the parties and burdens them (as well as society in general) with greater cost, while upsetting the order of fair and reasonable trade. A tremendous number of cases concerning non-presentation are brought into courts every year. It is a waste of social resources, and a waste of resources for the parties' involved. From the above analysis it is clear that the costs of non-presentation exceed the benefits of non-presentation. Legislation is necessary to prohibit the conduct of non-presentation. By releasing goods only against original bills of lading, the reasonable and fair order of trade and the shipping industry can be protected with the least social and economic cost. Requiring carriers to release goods against an original bill of lading is not an extra burden for the carrier.

Even the benefits of non-presentation exceed the cost of non-presentation; the author

¹³⁹ *China Maritime Code*, Article 86.

¹⁴⁰ Theory of efficient breach: if a party gets more benefit than the expectation benefit received by performing the obligation promised to the other party, and damages against the first party are confined to the expectation benefit, it becomes an incentive for the other party to breach the contract.

argues that at the present stage of Chinese legal development in a market economy, the purpose of law should be to protect the order of transactions rather than the efficiency of the individuals. Even if the breach of contract is efficient for one of the parties, it will destroy order amongst transactions. The economic approach to law is sometimes criticized for ignoring "justice".¹⁴¹ In the author's opinion, Chinese law relating to the non-presentation issue should give greater weight to security of title than efficiency of transaction.¹⁴²

¹⁴¹ Richard A. Posner, *Economic Analysis of Law*, Fifth Edition, (New York: Aspen Law & Business, 1998), at 30.

¹⁴² American law has given greater weight to security of transaction than security of title. By contrast, English law's treatment of the bill of lading has significantly reduced the safety of transactions. Michael D. Bools, *The Bill of Lading: A Document of Title to Goods – An Anglo-American Comparison*, (London and Hong Kong: LLP, 1997), at preface.

Chapter VI

Possible Solutions

There are no simple and perfect solutions to the non-presentation problem. The following suggestions are appropriate measures to reduce risk to the relevant parties.

6.1 Sea waybills

Under a sea waybill, a non-negotiable receipt, the carrier should release goods to the consignee, who provides the proper identity document. This method avoids the risks of non-presentation. The sea waybill, not being a document of title, has the advantage of a speedy transmission. The sea waybill's non-negotiability makes it a safe document that can be handled easily and without fear of theft and loss. The sea waybill is also subject to considerably less fraud. But a shipper undertakes the risks of a sea waybill that the consignee may fail to pay after picking up the cargo. Therefore a sea waybill is highly recommended if the cargo does not need to be transferred, and if the payment does not need to be secured by a bill of lading (especially when the consignee is the shipper's overseas agent, or is of a subsidiary or associated company). The chaos and dispute caused by different laws relating to non-presentation will not appear in the sea waybill transaction. Using the sea waybill is one of the best measures for solving the non-presentation problem. A traditional paper bill of lading is not capable of reflecting the changing intentions of parties during the process of transaction. More shipments will be transported under a sea waybill in the future.

6.2 Electronic bills of lading

As part of the development of paperless business transactions, the Internet is now a part of the shipping industry. Telecommunications technology can provide electronic messages that perform the main functions of the paper bill of lading – a receipt, transport contract, and document of title. Compared with a paper bill of lading, the electronic bill of lading is faster and safer and will speed up the trade finance process. Through the central registry,¹⁴³ carriers can use their secret passwords to access the system and know to whom they should deliver goods. Even though the holder of the electronic bill of lading may be changed several times, carriers can still know the latest owner since every transfer has a traceable record. Thus, there is no need to worry that the bill of lading will arrive later than the goods. The electronic delivery of the bill of lading allows a buyer to take delivery of the goods once he/she has arrived at the destination. The seller gets paid more quickly and the buyer receives the cargo sooner. The electronic bill can also reduce the risk of potential errors and reduce the costs related to manual document preparation.

New technology has brought new possibilities for the electronic bill of lading. Development in modern shipping practices challenges the law to respond to these changing circumstances. A unification of law in the field of carriage of goods by sea should occur in order to bridge the gap between national laws and international conventions regarding issues such as the functioning of the electronic bills of lading. UNCITRAL promulgated *The UNCITRAL Model Law on Electronic Commerce* in 1996, the purpose of which is to offer a

¹⁴³ Bolero (Bill of Lading Electronic Registry Organization) has been described as a system to replace paper trade documentation and paper transactions with electronic messages. Bolero is a closed system, based on a contract. Because the Bolero bill of lading does not need to be mailed, there is no delay of delivery. The holder of the bill has enough time to pick up the cargo, conclusively solving the traditional non-presentation problem. However, the challenge of the Bolero system is that it cannot find support in present laws and there is no regulation regarding its function as document of title.

feasible method for domestic electronic commerce legislation of various countries. However, electronic bills of lading also have to face some technical and legal problems, such as the feature of negotiability, signature of documents, security of the Internet, standard data format, gaps between different systems, and admission of the evidence. Electronic bills of lading also have to meet certain statutory and formal requirements before they become legally enforceable. Before rules on electronic L/C are applied in international trade, widespread application of the electronic bill depends upon the potential combination of electronic bills of lading and L/C, which has not yet been resolved. Therefore, the traditional paper-based bill of lading will not be replaced in the near future. Even if it should come into effect, it takes time to build people's confidence in using electronic technology in place of traditional systems. In China, many shipping companies and their agents are not eager to adopt the expensive EDI network. But once the remaining technical concerns regarding security and authentication have been resolved, and a period of gradual acceptance passes, the electronic bill of lading will eventually be accepted throughout the world. The application of an electronic bill of lading can completely solve the problems of non-presentation; however, until a reliable solution arrives, the paper-based bill of lading will still play its role. Every party involved in the shipping industry needs to be prudent.

6.3 Remedies and Measures for Carriers, Consignees, and Shippers

6.3.1 Carriers

When non-presentation is necessary, the carrier can require the consignee to produce photocopies of the straight bill of lading and letter of indemnity to lower its risk. The shipper

is usually the seller in international trade, the consignee the purchaser. When the shipper obtains the straight bill of lading from the carrier, he faxes it to the purchaser so that the purchaser is ready for cargo pickup. The photocopy of the straight bill of lading is therefore required for cargo pickup, in the case of non-presentation.

In the international shipping practice, one way to reduce or recover a carrier's loss, arising from delivering cargo without original bills of lading, is to ask the consignee to surrender a letter of indemnity. The author suggests that the carrier should use the owner's P & I Club standard form letter of indemnity, to be given in return for delivering cargo without presentation of a bill of lading. This requires a creditworthy bank, an insurance company, or a large storage company as guarantor.¹⁴⁴

Some Chinese scholars question the legality of the letter of indemnity because the security of claim is secondary to the claim itself, and the effect of the security depends upon the principal claim. Because non-presentation is essentially illegal, security is not relevant in the principal claim. Security harms the legitimacy of the bill of lading and causes loss to the bill holder.¹⁴⁵

In the author's opinion, cargo pickup by letter of indemnity accelerates the flux of goods. The view that the letter of indemnity is, in effect, void exempts the guarantor from its security liability, while the carrier may have to accept a double penalty. On the one hand, the carrier has to compensate the shipper because of non-presentation; on the other hand the carrier is

¹⁴⁴ Requiring delivery against an original bill of lading might result in losses at the wharf itself. The crowdedness of the wharf makes it difficult for vessels to dock and unload. In China, the warehouse and wharf companies are often willing to offer a letter of indemnity for shippers.

¹⁴⁵ Regularly using letter of indemnity will threaten the basic notion of the bill of lading as a vehicle for the transfer of title from one party to another. CM Schmitthoff RM Goode, eds., "International Carriage of Goods: Some Legal Problems and Possible Solutions," *The International Commercial Law Series, Volume 1*, Centre for Commercial Law Studies, 1988, at.7.

not entitled to recourse against the guarantor because of the void letter of indemnity. This is clearly unfair to the carrier. So the letter of indemnity should be considered valid unless the non-presentation is malicious. Even though there is a lot of debate on this issue, the judicial practice in Chinese courts take the letter of indemnity as a valid independent contract between a guarantor and carrier. Such a guarantee will not affect the claim of the holder of the original bill of lading against the carrier. The carrier shall still bear any loss caused by non-presentation.

The other remedy available for the carrier is to exercise lien in a timely manner. In the event of any costs arising from a transportation contract, the shipper's defaulting will allow the carrier the right to retain the property of the shipper, and be paid with the money converted from the property, or proceeds from sale or auction of the property.¹⁴⁶

The shipper is the only one who is entitled to give the carrier instructions concerning the goods. Carriers can deliver goods to the named consignees without production of the original bill of lading if shippers give carriers clear instructions. The most important measure to protect the carrier is to obtain the bill holder's consent of non-presentation before delivering goods to a consignee without a bill of lading. Carriers should understand that such consent must be written, as the spoken word is hard to prove in case any dispute arising in the future. As the laws and practices concerning non-presentation vary greatly in different countries, it is recommended that clauses concerning applied laws should be dealt with. The carrier shall choose the most favorable law to apply. According to the China Maritime Code, Article 269, the parties to a contract may choose the law applicable to the contract. Where the parties have not made a choice, the law of the country having the closest connection with the

¹⁴⁶ *Guaranty Law of the People's Republic of China 1995*, Article 84 and 82.

contract shall apply.

Passing of the property of goods under a sales contract is a very complicated issue. It is impossible for the carrier under a contract of carriage of goods by sea to identify who the true owner of the goods is. The carrier can only judge the owner of the goods by the bill of lading, a document of title. When the carrier is not sure about the related laws of the destination country, the prudent method is to release goods only against an original bill of lading.

The safest method for a carrier is to clarify his liability in the clauses of a straight bill of lading, such as: "Upon surrender to the carrier of any one non-negotiable bill of lading, all others to stand void"; or, "Where a straight bill of lading is issued, the carrier is entitled to deliver the goods to the named consignee without surrender of an original bill of lading."

6.3.2 Consignees

The consignee, who is the purchaser in the sales contract, can regulate in L/C the time limit for the seller to submit the bill of lading to the bank to avoid its late arrival.

6.3.3 Shippers

Buyers (shippers) should deal only with reputable sellers (consignees). Another possible form of protection for shippers is exercising the right of stoppage in transit. Upon the standard terms and conditions of the bill, the shipper has the right to instruct the carrier to deliver goods to someone other than the named consignee at the destination port. The carrier has an obligation to follow the bill holder's notice. Therefore, the shipper should give clear instructions to the carrier not to release the cargo to the named consignee if he does not receive the payment from the consignee. The note shall be presented to the carrier before the

goods are delivered. In addition, shippers shall choose reputable freight forwarders and shipping companies.

6.4 Recommendations for Legislative Reform

Chinese civil law has no concept of “document of title”¹⁴⁷, and academics and the judicial branch have wide-ranging understandings of the function of the bill of lading as a document of title. It is necessary to clarify the concept of document of title, which will then help Chinese maritime law define the legal characteristics of a straight bill of lading. Additionally, the China Maritime Code should clarify whether the carrier should release goods against an original straight bill of lading.

The UNCITRAL draft Transport Law attempts to unify the legislation and practice of delivering cargo under a non-negotiable transport document. Before it is universally accepted and adopted by most countries and districts, the author suggests that China should insist that carriers deliver cargo upon an original straight bill of lading.

¹⁴⁷ The newly emerged Communist China declared in 1949 that all assets belonged to the state, and that no private property existed in law. Not until 1999 were the clauses that protect private property added to the new *Constitution*. One important function of law is the recognition of rights in private property. The law protects the transfer of property from one person to another and maintains social and economic order. Martin Partington, *Introduction to the English Legal System* (Oxford: Oxford University Press, 2000), at 16.

Chapter VII

Conclusions

To protect the still immature international trade in China, strict liability concerning non-presentation should be imposed on carriers. The author believes that the shipper, who does not receive payment from a named consignee, should be protected. If the named consignee can prove he has paid the value of the goods, the consignee is entitled to collect the goods without producing the straight bill of lading.¹⁴⁸

In the study of the legal nature of the straight bill of lading, we shall not be restricted in the area of transportation and will also consider the chains of sale and payment. The function of a straight bill of lading as document of title serves documentary transactions rather than transportation. The basis of this is that a straight bill of lading can be a substitute for real goods in delivery and security.

In an international sale contract of goods, a straight bill of lading is an effective method of exercising the right of control over goods. Where a straight bill of lading is issued, the moment when the nominated consignee obtains the document against payment is the moment of title transfer, unless it is agreed otherwise in the contract. Parties agreeing to issue straight bills of lading rather than sea waybills mean that the seller intends to keep control over the goods. To negate the function of straight bills of lading as documents of title runs counter to the intention of the parties, to business practice, and to any logical basis.

¹⁴⁸ In the case *Motis Exports v. Dampskibsselskabet AF 1912*, Mr. Justice Rix said, "If one of two innocent people must suffer for the fraud of a third, it is better that the loss falls on the ship owner, who responsibility it is both to look to the integrity of his bills and to care for the cargo in his possession and to deliver it alright, rather than on the true good's owner who holds a valid bill and expects to receive his goods in return for it." [1999] 1 Lloyd's Rep. 837.

The straight bill of lading is the security of payment and is indispensable for the release of goods. Laws protect the title under a straight bill of lading and no one can infringe this right without compensation. Releasing goods to a named consignee without a bill infringes the property right of the bill holder. In other words, the carrier is not entitled to deal with the goods, to which the bill holder is entitled.

A straight bill of lading has all three characteristics of a bill of lading: 1) receipt of goods, 2) evidence of contract, and 3) document of title. To maintain the status of the bill of lading, carriers must be required to release goods against an original bill of lading, or indeed any type of bill of lading.

The prevailing view of Chinese academics and the courts that the carrier can release goods under a straight bill of lading to one who is not in possession of the original bill is detrimental to the documentary transaction system.

Permission of non-presentation by the Chinese court is certain to harm its rapidly developing import and export trade, because from non-presentation arises more marine fraud. The disputes caused by non-presentation are bound to weaken the competitiveness of the Chinese shipping industry and international trade.

The carrier's obligation to release goods against the original bill of lading is recognized by the laws of most countries. It is preferable for China to choose laws that most countries abide by in order to avoid conflicting laws. The strict liability of non-presentation should be clear in Chinese law. The strict liability of non-presentation by the carrier can protect the interests of Chinese traders and is beneficial for the development of transportation by sea and international trade.

As the title of goods in transportation is liable to various conditions, the best way for the

carrier to protect himself is to release goods only against an original bill of lading. This is also the essential measure to avoid being victimized by the named consignee who may be a "professional" fraudster.

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