

Bills of Lading in Banker's Hands: does Chinese legislation offer sufficient security?

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1. Introduction

Payment through letters of credit is regarded as a secure means for the seller to get paid under an international trade contract, since the payment is guaranteed by the bank as long as conforming documents are presented. The bank thus takes over the risk of the buyer's insolvency and failure of payment. Apart from getting funds in advance or making an alternative financial arrangement to secure the repayment,¹ the bank has to rely on the collateral security derived from the documents stuck in its hands.² The transport document, as one of the documents invariably required to be presented under a commercial letter of credit, 'serves as an objective and apparently enforceable assurance by a third party carrier that there are goods and that they have been shipped as indicated'.³ A bill of lading can not only demonstrate the status of the shipped goods, but also evidence the terms of the carriage contract and control the delivery. Furthermore, as a "document of title",⁴ it can transfer constructive possession to its holder.

It has been suggested that few banks nowadays would rely solely on the security of a shipping document; and deposits are generally requested by banks in order to cope with applicants' insolvency.⁵ However, bank deposits cannot remedy a situation when the bank has wrongly paid on discrepant documents. In other words, in circumstances of bank's default, the bank who is left without reimbursement has to turn back to seeking security offered by the retained documents, as any deposits would be returned to the applicant. Therefore, from the bankers' perspective, not only do they need to be concerned with the issue of whether the tendered documents would fulfil the requirements set out in the credit,

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¹ Sometimes, the bank may release the presented documents to its customer (the buyer) and rely on alternative financial arrangement to secure its right of reimbursement, such as using a trust receipt, which is out of scope of this chapter. Regarding arrangement of trust receipt, see Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 8.20 and Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 11.11

² The documents most commonly required under a letter of credit are transport documents and insurance documents. For the legal position regarding insurance documents under letters of credit, see Jingbo Zhang, 'Chapter 12 Cargo Insurance Documents in Letters of Credit' in Johanna Hjalmarsson and Dingjing Huang (eds), *Insurance Law in China* (Informa from Routledge 2014) pp.235-254

³ James Byrne, *The Comparison of UCP600 & UCP500* (ICC 2007) p.171 It should be noted that "transport document" is a broader concept than "shipping document". Shipping documents in this chapter are specifically tailored for the carriage which is wholly or partly involved by sea, including bills of lading, sea waybills and multimodal transport documents involved a sea journey. Transport documents might also include carriage by air, road, rail or inland waterway.

⁴ It has been referred as a "document of title" under common law and in global shipping practice. However, the Chinese legislation did not use this expression directly.

⁵ Richard King, *Guttidge & Megrah's Law of Bankers' Commercial Credit* (8th edn, Europa Publications 2001) para 8-01

but more importantly, they have to consider what actions can enhance the level of security brought by the shipping documents.

Although traditional bills of lading are gradually superseded by alternative forms of shipping documentation,⁶ bills of lading are still dominant in the maritime world and their features provide the point of reference of developing forms of transport document. Two main questions will be addressed in this chapter. First, how should a bank examine a bill of lading presented under a letter of credit? Secondly, if a bank was stuck with the documents, what level of security might different forms of bills of lading offer? As a background to answer these questions, the chapter will first briefly review the features of letters of credit transactions and the corresponding legal framework including the Uniform Customs and Practice for Documentary Credits (UCP)⁷ adopted by the Chinese law. Rather than reiterating the general criteria for document examination, the chapter will closely focus on analysing the special requirements addressed in the UCP regarding bills of lading. As will be seen, the UCP has touched upon the issue of security but has left plenty of issues to local law governing the letter of credit. Particular attention will be placed on the interaction between the UCP and Chinese maritime law which has heavily influenced the bank's position as holder of a bill of lading. It will be noted that on some points, neither the UCP nor Chinese law provide a clear and sufficient answer, giving rise to a need for some areas of law need to be considered and readdressed.

2 Letters of Credit and Bills of Lading under the Chinese Legal Framework

2.1 Letters of credit and the UCP under Chinese law

Letters of Credit, also referred to as Documentary Credits, are a primary instrument of payment in international trade transactions. In the context of international trade, a documentary credit stands for an unconditional payment promise made by an issuing bank to the beneficiary (normally the seller) according to the applicant's (normally the buyer's) instructions. As long as the beneficiary presents the satisfactory documents specified by a letter of credit, the bank will be obliged to provide an appointed payment without hesitation.

There are two fundamental principles in the operation of documentary credits, namely the principle of autonomy and the principle of strict compliance.⁸ The principle of autonomy is designed to ensure that disputes extraneous to the credit do not impair the realisation of the credit. Once a letter of credit is opened, it will be independent from the sale contract and any defences arising from the underlying sale contract will not affect the realisation of payment. Hence, the bank only needs to consider whether the documents constitute a complying presentation. To constitute a complying presentation, the presented documents must be on

⁶ Such as sea waybills, straight bills of lading and multimodal transport documents which involve more than one mode of carriage.

⁷ It is a set of international standard banking practice for regulating letters of credit transactions published by the International Chamber of Commerce in Paris. Details are in Part 2.1 below.

⁸ It should be noted that the principle of strict compliance is the traditional way for a bank to examine presented documents under a letter of credit. As discussed below, in order to be in conformity with the provisions in the UCP, the expression of "strict compliance" was not used in the Chinese legislation regarding letters of credit.

their face in compliance with the terms of the letter of credit and consistent with one another. These two cardinal principles, being precedent conditions for the operation of documentary credits, are not only established in international standard banking practice, but also reiterated in relevant Chinese legislation.⁹

With the increasing importance of letters of credit in international trade, the International Chamber of Commerce (ICC) has spared no effort to summarise and unify international practices and usages in relation to letter of credit transactions since 1920. Although these ICC products are not mandatory regulations, they have been used in about 95% of letter of credit transactions. The most recently published version, Uniform Customs and Practice for Documentary Credits Publication in 2008 (UCP600¹⁰), along with its supplementary International Standard Banking Practice for the Examination of Documents under UCP600 Publication No.745 in 2013 (ISBP745¹¹), have provided a new comprehensive framework for document examination under letters of credit. It is clear that the applicability of UCP is not in the nature of a legal or regulatory measure. As UCP itself states, the rules apply to any documentary credit when the credit expressly indicates that it is subject to these rules. Where it does, the rules will bind all parties unless expressly modified or excluded by the credit.¹²

China, as a civil law jurisdiction, had neither enacted any statutes nor adopted any unified judicial interpretations concerning letter of credit transactions until 2006.¹³ In fact, Chinese courts had to deal with letter of credit disputes by applying international practices directly.¹⁴ With the significant growth of letter of credit disputes and the pressure resulting from uncertainty, the Fourth Civil Division of the Supreme People's Court, which hears numerous foreign-related commercial cases, has taken the initiative of drafting a set of Chinese Letter of Credit Rules: *The Provisions on Several Issues Concerning the Trial of Disputes over Letters of Credit* (the "LC Judicial Interpretations").¹⁵ As the first Chinese statute on letter of credit, it provided a legal basis for letter of credit business in China.¹⁶

⁹ See UCP600 Article 4, 5, 14 and Articles 5-7 of the *Chinese LC Judicial Interpretations* as introduced next.

¹⁰ ICC Publication No.600, also referred to as UCP600. The UCP was revised in 1951, 1962, 1974 (UCP 290), 1983 (UCP 400), 1993 (UCP 500) and most recently in 2006 (UCP 600).

¹¹ ICC Publication No.745, also referred to as ISBP745. The previous versions include ISBP No.645 under UCP500 and ISBP No.681 under UCP600. The practices described in the ISBP aim to highlight how the UCP600 provisions are to be interpreted and applied. Although the ISBP is not formally referred by the main content of UCP600, it is intended to be integrated with the UCP 600 as a set of authoritative statements. See ISBP No.745, Preliminary Consideration para ii.

¹² See UCP600 Article 1 and UCP500 Article 1.

¹³ Unlike the UK, court judgments and arbitral awards are not considered as legal sources since China adheres to the civil law system, but they may be quite persuasive when no specific rule in relation to the disputable issue of concern can be referred to.

¹⁴ Chinese courts can apply international practices directly pursuant to Article 142 (3) of the *General Principles of the Civil Law of the People's Republic of China* (adopted at the Fourth Session of the Sixth National People's Congress and promulgated on 12 April 1986, further amended on 27 August 2009), which states: 'international practices may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.'

¹⁵ No.13 [2005] of the Supreme People's Court, adopted at the 1368th Meeting of the Trial Committee of the Supreme People's Court on 24 October 2005 and effective from 1 January 2006.

¹⁶ According to Article 5 of the *Provisions of the Supreme People's Court on the Judicial Interpretation Work* (No.12 [2007] of the Supreme People's Court 23 March 2007), the judicial interpretations issued by the Supreme People's Court shall have full legal force.

The *LC Judicial Interpretations* is to the greatest extent possible harmonised with international standard banking practices, especially the UCP. In Article 2 of the *LC Judicial Interpretations*, it is stated that in the adjudication of letter of credit related cases before a Chinese court, where the parties have agreed on the application of any international customs, usages and practices, such agreement shall prevail. Absent such an agreement, the UCP and other relevant international customs formulated by the ICC are to be applied.¹⁷ It is evident that the UCP is used as a set of default rules in the Chinese courts, even without express or implied agreement from parties, as long as there is no contrary agreement reached by the parties.¹⁸ However, certain issues, especially those which are not provided for in the UCP or other international practice, should still be governed by PRC law.¹⁹

2.2 References for examining a bill of lading

The general requirements for document examination can be found in Article 6 of the *LC Judicial Interpretations*, which stipulates that the relevant international customs, usages and practices or any other rules as agreed by the parties are to be applied in the process of examination. It follows that ‘absent such standards as agreed, determination shall be made as to whether the documents are on the face in compliance with the terms and conditions of the letter of credit and consistent with one another according to the UCP and other relevant standards as formulated by the International Chamber of Commerce.’²⁰ It is clear that the *LC Judicial Interpretations* endeavour to maximise the conformity with the standards used in the UCP.²¹

Nevertheless, apart from laying down the general rule of document examination, the *LC Judicial Interpretations* did not further specify the requirements in checking transport documents. Therefore, it means that without an agreement to the contrary reached by the parties, the UCP rules and relevant practices will be applied in the Chinese courts in terms of deciding the compliance of shipping documents under letters of credit. Due to the importance of shipping documents, special consideration has been given by the UCP.²² Specific requirements for examining the bills of lading can be found in the current UCP600 Article 20 and the recent ISBP745 Section E.

¹⁷ Article 2 of the *LC Judicial Interpretations* has laid down a general rule for letter of credit disputes; while in its Article 6, the standards of document examination have been especially concerned. The Supreme Court insists on the same principle, namely, absent an agreement from parties, the UCP and other relevant ICC standards should be applied.

¹⁸ It should be noted that in the UK, the UCP will not have the force of law unless the parties have expressly incorporated it into their contract. As a common law jurisdiction country, the English courts have established and developed case law to regulate letters of credit cases which do not incorporate the UCP.

¹⁹ Such as presentation of bills of lading, recognition of letter of credit fraud, and legal remedies. See Jin Saibo, *The Law of Letters of Credit in China* (ICC 2013) p.52

²⁰ Translated by the author.

²¹ The general standards for document examination are stipulated in the UCP600 Article 14.

²² See UCP600 Article 19-22, UCP500 Article 23-26 and UCP400 Article 25-34. All the corresponding ISBP revisions also specifically addressed the requirements for shipping documents.

In respect of shipping documents, the subject-matter discussed in this chapter, the *Chinese Maritime Code* (CMC)²³ as *lex specialis* has provided detailed provisions to regulate the issues arising from the contract of carriage of goods by sea and those evidenced on the shipping documents. Other general legislation, such as the *General Principles of the Civil Law*,²⁴ the *Contract Law*²⁵ and the *Law on Property Rights*,²⁶ will always apply if there are no provisions in the CMC for a specific issue. As we will see later, the whole system can effectively supplement the gaps left by the UCP requirements and the CMC would dominantly affect the bank's security in holding the bills of lading.

3 Examining Bills of Lading under Documentary Credits

According to CMC Article 71, a bill of lading is a document which serves as evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods. It follows from the definition that a bill of lading must have three functions: receipt of cargo, evidence of the carriage contract and proof of delivery.

Article 73 of the CMC stipulates the particulars a bill of lading must contain including a description of the goods, the name of the carrier and the vessel, the name of the shipper and the consignee, the ports of loading and discharge, the date of receiving the cargo and of issuing the bill, and the signature of the carrier or its agent. It goes on to state that the absence of one or more of these particulars does not affect the function of a bill of lading, provided that it meets the three functions laid down in the CMC Article 71.

The UCP600, in comparison, directs a bank to check the particulars recorded in a bill of lading and stipulates that the absence of any particulars listed under the UCP600 Article 20 will lead to document rejection. However, the UCP is not particularly concerned with the functions of a bill of lading and the possible security interest provided by the bills of lading to the bank. In the following, the author aims to match the requirements under UCP600 Article 20 with the three functions stipulated in the CMC and examine what level of security a bill of lading can offer to the bank provided that it has met all the UCP requirements. However, it is appropriate first to address two conceptually preceding questions: what kinds of bills of lading are at issue, and who can issue such bills of lading?

3.1 Scope of the bills of lading under UCP600 Article 20

²³ Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on 7 November 1992, promulgated by Order No. 64 of the President of the People's Republic of China and become effective as of 1 July 1993.

²⁴ Adopted at the Fourth Session of the Sixth National People's Congress, and promulgated on 12 April 1986, amended on 27 August 2009.

²⁵ Contract Law of the People's Republic of China, adopted at the 2nd Session of the Ninth National People's Congress on 15 March 1999.

²⁶ Law on Property Rights of the People's Republic of China, adopted at the 5th session of the Tenth National People's Congress on 16 March 2007.

The CMC Article 71 stipulates that according to the consignee in the bill of lading, the goods might be delivered to a named person, to order, or to bearer. Therefore, the concept “bill of lading” employed in the CMC includes a straight bill of lading,²⁷ an order bill of lading and a bearer bill of lading. Although a straight bill of lading cannot be transferred to another person by endorsement or delivery, the CMC is still applicable according to its general rules.

Similar to the CMC, the UCP did not attempt to distinguish the bills of lading in terms of their transferability. UCP600 Article 20 addresses its application to a general bill of lading, *however named*,²⁸ without specifying more details.²⁹ Nevertheless, the ISBP No.745 Section E12 stipulates that when a credit requires a bill of lading to evidence that goods are consigned to a named entity, i.e. a straight bill of lading, the bill of lading should not contain the expression “to order” preceding or following the named entity, whether typed or pre-printed.³⁰ Furthermore, Section E13 (b) provides, when a credit requires a bill of lading to evidence that goods are consigned to “order of (named entity)”, a bill of lading which is only consigned to a named entity will not be acceptable. It is submitted that these ISBP provisions strongly indicate that UCP600 Article 20 covers both negotiable³¹ and straight bills of lading.

Charterparty bills of lading, however, are excluded by Article 20.³² The UCP600 Article 20(a)(vi) stipulates that a bill of lading under this article should not contain any indication that it is subject to a charterparty. A transport document stipulating “freight payable as per charterparty”, will be treated as a charterparty bill of lading under UCP600 Article 22, since it is subject to or makes reference to a charterparty. By contrast, it is suggested that a bill of lading with an associated charterparty heading, such as “Congenbill” or “Tanker Bill of Lading”, will not necessarily fall outside the domain of Article 20 as long as there is no further reference to that charterparty.³³ Substance rather than title determines whether a transport document will belong to Article 20.

3.2 Who can issue the bills of lading under UCP600 Article 20?

²⁷ For a general introduction to straight bills, see Guenter Treitel, ‘The Legal Status of Straight Bills of Lading’ (2003) 119 LQR 608

²⁸ A bill of lading can be named as “marine bill of lading”, “ocean bill of lading”, “port bill of lading” or words of similar effect. The ISBP No.745 Section E2 emphasises that even when the credit so names the required document, the bill of lading is not necessary to bear the same title.

²⁹ The ISBP No.745 Section E1 further explains that Article 20 is to be applied only if a credit is calling for a transport document merely covering a “port-to-port shipment”, i.e. “a credit that contains no reference to a place of receipt or taking in charge or place of final destination.” The port here should mean an ocean port, rather than an inland waterway port, since an inland waterway bill will fall within UCP600 Article 25.

³⁰ The same provision is shown in the ISBP No.681, para.101

³¹ For achieving both academic and practical consistency, the author uses the word “negotiable” to describe transferable bills of lading, although the real meaning is “transferable” rather than “negotiable” in law, since a transferor cannot transfer a better title than he has.

³² The issue concerning charterparty bills is also specifically clarified in the CMC Article 95 under the section of “Special Provisions Regarding Voyage Charterparty”.

³³ ISBP No.745, Section G3. A Congenbill with the heading “Bill of Lading to be used with Charter Parties” will be considered as a charterparty bill; however, if a Congenbill is presented without this reference, it will be examined under Article 20. See Collyer G and Katz R (eds), *ICC Banking Commission Opinions 2005-2008* (ICC Publication No.697, ICC 2008), R648.

UCP600 Article 20(a)(i) requires a bill of lading to indicate the name of the carrier. It is suggested that the name of the carrier not only needs to appear on a bill of lading, but that the name must also be identified as the carrier's.³⁴ In other words, the capacity of "carrier" must be linked to the name of the company shown on the bill of lading. Article 20(a)(i) further stipulates that a bill of lading must be signed by the carrier, the master or a named agent on behalf of the carrier or the master and the signature must demonstrate for which capacity it is signing. However, it should be noted that a bank is not obliged to investigate the legal status or the authenticity of the signing party. A bill of lading may be issued by any party other than an actual carrier or master provided that the transport document meets the requirement of Article 20.³⁵

It is common in international trade to engage a freight forwarder in the process of arranging for carriage of goods by sea and it may issue a bill of lading in its own capacity rather than as the carrier's agent. It is however very difficult to tell from the appearance of the bill of lading in whose capacity a freight forwarder has signed it, since it depends entirely on the facts of each case and the arrangements between the parties. Therefore, the ISBP No. 745 Section E4 stipulates that the term "freight forwarder's bills of lading are not acceptable" or words of similar effect "has no meaning in the context of the title, format, content or signing of a bill of lading unless the credit provides specific requirements detailing how the bill of lading is to be issued and signed".³⁶ It is clear that as long as a bill of lading can pass through the two tests under Article 20(a)(i), i.e. identifying the carrier and following the rule of signature, it would be accepted by the banks in respect of the issuing party.

Apart from the carrier itself, the CMC Article 72 permits the person who gets the carrier's authorisation and the shipmaster to sign the bill of lading.³⁷ Hence, the situation only becomes tricky if the freight forwarder signs a bill of lading without the carrier's authorisation. Accepting a freight forwarder's bill of lading by the bank; however, does not necessarily leave the cargo interest without remedies under Chinese law. According to Article 4 of the *Provisions of the Supreme People's Court Regarding Certain Issues in the Trial of Cases of Disputes over Freight Forwarders*,³⁸ if a freight forwarder issues a bill of lading in its own name or in the capacity of the carrier's agent but without carrier's authorisation, it needs to undertake the same responsibilities as a carrier. Although a freight forwarder who issues a bill of lading without the qualification as a non-vessel operating common carrier will violate the *Regulations of the People's Republic of China on International Maritime*

³⁴ See ISBP No.681, para.94 and ISBP No.745, Section E5.

³⁵ ISBP No.745, Section E3; also cf. UCP600 Article14(l)

³⁶ On the other hand, the ISBP No.745 Section E3 (b) states that if a credit contains "freight forwarder's bill of lading is acceptable" or words of similar effect, a bill of lading may be signed by a freight forwarder in its own capacity, without the need to identify the capacity in which it has been signed or the name of the carrier.

³⁷ CMC Article 72 further stipulates that a bill of lading signed by the shipmaster is deemed to have been signed on behalf of the carrier.

³⁸ It was adopted at the 1538th Meeting of the Judicial Committee of the Supreme People's Court on 9 January 2012, and came into force as of 1 May 2012.

*Transportation*³⁹ and be subject to a penalty from the transport administrative department,⁴⁰ the bill of lading itself as a transport document remains valid.⁴¹

3.3 Cargo receipt function

UCP600 Article 20(a)(ii) stipulates that a bill of lading must “indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit”.⁴² In the absence of the contrary statement in the credit, a received-for-shipment bill of lading will not be accepted by the bank, since it cannot evidence that the cargo has actually been shipped on board.

UCP600 Article 27 mandates a bank to accept only a clean transport document unless otherwise indicated in the credit. “A clean transport is one bearing no clause or notation *expressly* declaring a defective condition of the goods or their packaging”.⁴³ Since Article 27 only focuses on the condition and packaging of the goods, clauses concerning the weight and quantity of goods will not make the bill unclean.⁴⁴ Clauses such as “weight and quantity unknown”, “shipper’s load and count” and “said by shipper to contain” are still acceptable.⁴⁵

The UCP transport provisions however do not mention any particular requirements for the description of the goods recorded on a bill of lading. For a generic document other than the commercial invoice, the description of the goods, *if stated*, may be recorded in general terms not conflicting with their description in the credit.⁴⁶ Clearly, the UCP has adopted a relaxed attitude towards document examination. The standard of compliance has been relaxed to the level of non-conflict. Use of the expression “if stated” serves to indicate that in the most extreme cases, the bank may accept a bill of lading even without any description of the goods.⁴⁷

³⁹ It was adopted at the 49th Executive Meeting of the State Council on 5 December 2001, come into force on 1 January 2002, and further amended on 18 July 2013.

⁴⁰ See Article 14 of the *Provisions of the Supreme People’s Court Regarding Certain Issues in the Trial of Cases of Disputes over Freight Forwarders*.

⁴¹ See the *Reply from the Supreme People’s Court Regarding the Validation of the Carriage of Goods by Sea Contract Made Between the Freight Forwarder without Qualification as A Non-vessel Operating Common Carrier and the Shipper and the Validation of the Bill of Lading Issued under Such Carriage Contract*, No.19 [2007] of the Supreme People’s Court, 28 November 2007, <<http://shlx.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=105782>> accessed on 15 September 2015.

⁴² There are two ways to satisfy the requirement for a shipped bill of lading, i.e. by pre-printed wording or by an on board notation indicating the date of shipment and the name of the vessel. See the CMC Article 74.

⁴³ UCP600 Article 27. The CMC Article 76 holds the same position.

⁴⁴ The quantity and weight of the goods as a part of data on the transport document is still restricted by the UCP600 Article 14(d), which must not conflict with data on the other documents or the credit.

⁴⁵ See UCP600 Article 26(b). In comparison with the CMC Article 75, a bill of lading with “unknown clause” is possible to be counted as an unclean bill of lading. Under the provision of unclean bills of lading, it states: “...if he [the carrier or the other person issuing the bill of lading on his behalf] has had no reasonable means of checking, the carrier or such other person may make a note in the bill of lading specifying...the lack of reasonable means of checking.”

⁴⁶ UCP600 Article 14(e).

⁴⁷ The relaxation in the UCP does not cause conflict with the CMC. As stated above, the CMC Article 73 permits one or more elements missing in a bill of lading provided that they will not affect the nature of a bill of lading.

By contrast, the CMC endeavours to offer protection to the cargo interest against the carrier. Article 77 of the CMC explicitly stipulates that the description of the cargo recorded in the bill of lading is the *prima facie* evidence between the carrier and the shipper, and furthermore, the description becomes conclusive evidence between the carrier and the consignee or a *bona fide* third party.⁴⁸ Therefore, the bank, who is stuck with the bill of lading in its hands, can rely on the description of goods recorded on the bill of lading to sue the carrier for any loss or damage of the goods. Nevertheless, an unfortunate situation will arise where the bank has accepted a bill of lading containing an insufficient description of the goods and cannot avail itself of the protection conferred by the CMC.

3.4 Contract of carriage function

The CMC Article 78 stipulates that the relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be pursuant to the clauses of the bill of lading. The bill of lading accordingly plays a crucial role in the hands of a third party⁴⁹ given that it can be construed as the contract of carriage between the carrier and the bill of lading holder. In the following, we consider the bank as bill of lading holder, with the silent assumption that the bill of lading is the only carriage contract between the bank and the carrier. The UCP600 has realised the function of a bill of lading as evidence of the carriage contract by inserting Article 20(a)(v), which requires that a bill of lading must contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (for short form or blank back bills of lading). Article 20(a)(v) further underlines that the terms and conditions of carriage will not be examined by the bank, whether or not they are contained in the bill of lading.

3.4.1 Should carriage terms and conditions be truly ignored?

Clearly, the intention behind the last part of Article 20(a)(v) is to release the bank from the onerous task of reading the small print on the back of the bill of lading and also to deter the bank from calling for the incorporated documents which contain the carriage terms and conditions. Unfortunately, as we will see below, Article 20(a)(v) cannot achieve these aims by failing to define the scope of the carriage terms and conditions. The UCP has divided carriage terms into two categories, namely “special terms” required to be checked by the UCP and “general terms” left out by the UCP.⁵⁰ “Special terms” stipulated in the UCP include notably shipment and transshipment clauses⁵¹ and on deck cargo clause⁵² among others. Broadly speaking, “general terms” falling into the scope of Article 20(a)(v) are terms

⁴⁸ Article 77 of the CMC states: “Except for the note made in accordance with the provisions of Article 75 [unclean bill of lading] of this Code, the bill of lading issued by the carrier or the other person acting on his behalf is *prima facie* evidence of the taking over or loading by the carrier of the goods as described therein. Proof to the contrary by the carrier shall not be admissible if the bill of lading has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods contained therein.”

⁴⁹ Third party means the bill of lading holder is neither the charterer nor the shipper.

⁵⁰ James Byrne, *UCP600: An Analytical Commentary* (IIBLP 2010) 895

⁵¹ See the UCP600 Article 20(b) – (c)

⁵² See the UCP600 Article 26(a)

which are customarily stated on the back of a bill of lading or by reference to another document.

However, confusion is added to the situation if the general carriage terms appear on the face of the bill of lading.⁵³ Since there is no clear borderline between special terms and general terms, unless general terms have been specifically indicated within the layout of the text, it would be extremely difficult for the bank to extract those carriage terms under Article 20(a)(v) in the process of reviewing the front of a bill of lading, especially when those terms are linked with the letter of credit requirements.⁵⁴ The tension is enhanced when the general carriage terms contradict the letter of credit terms, or render the required terms in the bill of lading meaningless.

In ICC Opinion R646,⁵⁵ the credit required presentation of a bill of lading marked “freight pre-paid”. The presented bill of lading was so marked, but contained pre-printed wording which qualified the “freight pre-paid” statement. The qualification, though stated on the face of the bill of lading, was still classified as one of the general carriage terms and conditions by the ICC Banking Commission. Accordingly, the qualification term was not to be examined and the bill of lading was not discrepant. Another example can be found in ICC Opinion R758.⁵⁶ The credit stipulated that “bills of lading that on their face indicate that goods may be released without presentation of an original bill of lading are not acceptable”. However, the tendered bill of lading contained a delivery clause which distinguished between the negotiable form and the non-negotiable form. It stated the same presentation rule as the credit did for the negotiable form, but contained an inconsistent rule for the non-negotiable form, where the carrier might give delivery of goods to the named consignee upon reasonable proof of identity. The Banking Commission considered the delivery clause on the face of the bill of lading to constitute terms and conditions of carriage so that it would not be examined according to Article 20(a)(v).⁵⁷

Although the conclusion reached by the ICC Banking Commission seemed reasonable for the above cases, the analysis leading to the conclusion was vague and difficult to extrapolate into a general rule. First, nothing in the UCP has attempted to grant Article 20(a)(v) paramount status over the bespoke terms in the credit. When there is a conflict between a bespoke term and an incorporated term from the UCP, the bespoke term in the credit should prevail. Secondly, as stated above, in order to constitute a compliant presentation, data in a document must not conflict with data coming from the same document, data in any other stipulated document or the credit.⁵⁸ If the credit explicitly requires one thing, the term in the transport

⁵³ Collyer G and Katz R (eds), *Unpublished Opinions of the ICC Banking Commission 1995-2004* (ICC Publication No.660, ICC 2005), R576

⁵⁴ For example, R758 in the Collyer G and Katz R (eds), *ICC Banking Commission Opinions 2009-2011* (ICC Publication No.732, ICC 2012) concerned whether or not the bank should examine the “delivery clause” shown above the carrier’s signature on the front of the bill of lading, which was also linked with the letter of credit requirement in respect of delivery.

⁵⁵ *ICC Opinions 2005-2008*, R646

⁵⁶ *ICC Opinions 2009-2011*, R758

⁵⁷ Since the bill of lading in the case was issued in a negotiable form, there was no discrepancy for that specific bill of lading.

⁵⁸ UCP600 Article 14(d)

document must not conflict with it and state another. Thirdly, it sounds rather arbitrary that the bank is only entitled to examine particular carriage terms mentioned within the UCP regime rather than any other terms, especially when both types of terms are written in the same pre-printed paragraph.⁵⁹

It is true that the bank is not intended to take on the onerous task of examining all the carriage terms and conditions on the bill of lading; however, it is not sensible to ignore all the terms and conditions, especially those especially required by the credit and vital to the parties' security.⁶⁰ Generally, the bank never intends to receive the goods. The paramount interest of the bank is having the right to take delivery of the goods and the right to claim damages against the carrier for misdelivery. At the same time, the bank does not wish to become liable to pay freight, demurrage and other costs generated under the carriage contract.⁶¹ Without keeping an eye on the carriage terms and conditions, the bank can neither satisfy its customer's mandate nor realise its position against the carrier. Although it is unrealistic to suggest that the bank should scrutinise all the small print on a bill of lading, the application of Article 20(a)(v) does urgently need to be clarified. It is this author's opinion that Article 20(a)(v) should be taken only to cover the general carriage terms and conditions which have not been specifically requested by the credit. It should be incumbent upon the bank, which is highly dependent on the bill of lading as security, to ensure that the necessary carriage terms, such as carriage costs, delivery rights and carrier's liabilities, have been clearly stipulated in the letter of credit.

3.4.2 Transhipment and carrier's liability

It is common in practice for bills of lading to contain a clause conferring on the carrier a right of transhipment. Transhipment is routinely performed in the container trade where containers are often transferred between different vessels. In recognition of current practice, Article 20(b)-(d) of UCP600 specifically address transhipment issues. UCP600 Article 20(b) defines transhipment as "unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit".⁶² UCP600 Article 20(c)(i) stipulates that banks should accept bills of lading which "indicate that the goods *will or may* be transhipped provided that the *entire carriage* is covered by one and the same bill of lading". Article 20(c)(ii) further states that even if transhipment is expressly prohibited by the credit, where the goods evidenced in the bill of lading have been shipped in a container, trailer or LASH barge, a bill of lading indicating that transhipment *will or may*

⁵⁹ See *ICC Opinions 2009-2011*, R758, in which the delivery clause was stated in the same pre-printed paragraph with the status of shipment and the number of bills of lading. The statement for the latter two elements was examined by the bank without doubt.

⁶⁰ For example, as stated in the ISBP No.745 section E6(d), the bank needs to examine whether the on board statement on the bill of lading is for the pre-carriage from the place of receipt to the port of loading.

⁶¹ The CMC Article 78(2) stipulates that neither the consignee nor the holder of the bill of lading shall be liable for the demurrage, dead freight and all other expenses in respect of loading occurred at the loading port unless the bill of lading clearly states that such expenses shall be borne by the consignee and the holder of the bill of lading.

⁶² Transhipment may have another meaning in the context of Article 19 regarding multimodal transhipment. As the ISBP No.745 section E17 provides, when a bill of lading does not indicate unloading and reloading between loading port and discharge port, it is not transhipment in the context of the credit and UCP Article 20.

take place is still acceptable. Lastly, UCP600 Article 20(d) stipulates that clauses in a bill of lading stating that the carrier *reserves the right* to tranship will be disregarded.⁶³

UCP600 is evidently intended to accommodate the nature of modern transportation in which containerised shipment frequently involves transshipment. The default position of UCP600 is that transshipment is permitted unless expressly prohibited by the letter of credit. Even though the credit has prohibited transshipment, it is still entirely possible for the goods to be transhipped. The main problem for the UCP600 transshipment rules is that they have failed to achieve harmony either within the section itself or with other sections. First, both Article 20(c) and Article 20(d) cover the situation when the transshipment *may* happen, either by express words indicating that the transshipment may take place or by a liberty of transshipment clause in the bill of lading. The overlap causes unnecessary confusion here: should the bank disregard the possibility of transshipment according to Article 20(d), or examine it pursuant to Article 20(c)? It unfortunately leaves the risk of construction to the bank.

The other major problem is the implication behind the words “*entire carriage covered by one and the same bill of lading*” in Article 20(c)(i).⁶⁴ Does this requirement simply mean that the bill of lading must literally cover the entire carriage route, despite the fact that the goods will or may be transhipped? If this is the case, the requirement of complete coverage in Article 20(c) seems to nothing more than what has been already stipulated under Article 20(a)(iii), i.e. that the bill of lading must indicate shipment from the port of loading to the port of discharge as stated in the credit. Alternatively, the requirement of complete coverage may indicate that the issuing carrier must accept liability for the whole voyage, even if several carriers have been involved on different legs of the route. If this is the case, the bank needs to make sure that there is no clause disclaiming the carrier’s liability before or after transshipment. However, this process will inevitably involve examination for the general carriage terms and conditions contained in the bill of lading, which are supposed to be avoided by Article 20(a)(v).

This author considers that it is inappropriate to literally read the requirement of “covering the entire carriage” as “showing the complete physical route on a bill of lading”, since a bill of lading which does not provide continuous documentary cover will inevitably impair the quality of the bank’s security against the carrier. The bank, who has stuck with the documents, may find that it has no recourse against the issuing carrier if the damage or loss occurred on a leg of the journey not performed by the issuing carrier. Therefore, it is submitted that the alternative interpretation of “entire liability coverage” is better adapted to practice as well as consistent with sound legal analysis.⁶⁵ Under the CMC, Article 46 sets out the carrier’s responsibilities with regard to the goods starting from the time that the carrier takes over or

⁶³ The UCP however does not provide the meaning of “disregard”. It may signify that no attention should be paid to what is being disregarded and liberty of transshipment clause may not be a basis for refusal of a presentation.

⁶⁴ A full discussion for this point can be found in Charles Debattista, ‘The New UCP 600 - Changes to the Tender of the Sellers's Shipping Documents under Letters of Credit’ [2007] JBL 329, pp.344-350

⁶⁵ Under English law, a sound bill of lading must provide a continuous documentary cover during the whole journey. The principle was stated in *Hansson v Hamel and Horley Ltd*[1922] 2 AC 36, where the House of Lords decided that the bill of lading issued by the subsequent carrier who only undertook liability regarding the second part of journey, without any complementary promises to bind the prior carriers, was a bad tender under a CIF contract.

loads the goods at the port of loading, until the goods are delivered or discharged at the port of discharge.⁶⁶ For the situation where the performance of the carriage or part thereof has been entrusted to an actual carrier, the CMC Article 60 states that the contractual carrier is nevertheless to remain responsible for the entire carriage.⁶⁷ However, CMC Article 60 continues to permit an exception to the default position; thus the contractual carrier and the shipper can agree in writing in the contract of carriage that the contractual carrier is not to be liable for loss or damage occurring while the goods are under the control of the specified actual carrier.

One should therefore be slow to conclude that a bill of lading containing a transshipment clause which exempts the carrier's liability for part of the voyage will violate Chinese law. The bank will seek to protect its security by becoming the holder of a bill of lading which evidences entire liability coverage. The issue then again becomes how to construe the requirement of "entire liability coverage" under the UCP600 Article 20(c). If the concept is construed in line with the default position, a bill of lading seeking to disclaim the carrier's responsibility after transshipment should be rejected;⁶⁸ but how can a bank assess the coverage of carrier's liability without scrutiny of carriage terms and conditions? The tension between the requirement of continuous liability coverage and a liberty not to read and assess carriage terms under Article 20(a)(v) can never be quite eradicated, since in nature, the transshipment terms are carriage terms *per se*.

3.5 The proof of delivery function

The CMC Article 71 stipulates that the carrier undertakes to deliver the goods according to the bill of lading. It follows that a clause on a bill of lading indicating that the goods should be delivered to a nominated consignee, to the order of a nominated person, or to the holder of the bill of lading, constitutes the carrier's undertaking to deliver the goods. This links with the CMC Article 79, which divides bills of lading into three types in terms of their transferability: non-transferable straight bills of lading; order bills of lading which can be transferred by way of endorsement to order or endorsement in blank; and bearer bills of lading which can be transferred without endorsement. As mentioned in Part 3.1, Article 20 of the UCP600 does not attempt to exclude from its scope of application to bills of lading in terms of transferability. As stipulated by the ISBP No.745 Section E12, the bank should not accept a "to order" bill of lading if the letter of credit requires a straight bill of lading, or *vice*

⁶⁶ CMC Article 46 distinguishes container shipping from bulk carriage, so different words have been used in describing the period of carrier's liability.

⁶⁷ Article 313 in the PRC *Contract Law* reflects the same position: 'Where two or more carriers jointly carry the goods by the same means of transportation, the contractual carrier who has made a contract of carriage with the shipper shall be responsible for the whole course of carriage. Where the losses occurred at a particular segment, the contractual carrier and the actual carrier for such segment are jointly liable for the loss.' (translated by author)

⁶⁸ *Jack* suggests that a bank should reject a bill of lading indicating that the goods will be transhipped but the carrier will cease being liable after transshipment. See Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel Publishing 2009) para 8.101; also see Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010) 254, which also tends to give the meaning of entire liability coverage.

versa.⁶⁹ UCP600 Article 20 is designed as inclusive to cover all the three types of bills of lading.

3.5.1 Presentation rule and delivery

The language of CMC Article 71 may appear at first sight to focus on designating the person who has the right to obtain delivery from the carrier under a bill of lading, rather than on how to achieve delivery. In order to resolve lasting disputes arising from deliveries of goods without production of an original bill of lading, the Fourth Civil Division of the Supreme People's Court drafted the *Provisions of the Supreme People's Court on Certain Issues concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Production of an Original Bill of Lading* (in the following referred to as the *Bill of Lading Judicial Interpretations*).⁷⁰ Article 2 provides that when the carrier delivers the goods without production of an original bill of lading (including a straight bill of lading⁷¹), he will incur civil liability⁷² to the bill of lading holder who suffers loss as a result of his actions. Accordingly, the carrier would be deprived of the right to limit liability under CMC Article 56 in such circumstances.⁷³ However, when the bills of lading have been issued in multiple copies, the carrier's liability arising from the cargo delivery would be exempted as long as he has delivered the cargo to the first person who surrenders an original bill of lading.⁷⁴

The UCP600 does not directly mention the delivery issue. Instead, the UCP600 Article 20(a)(iv) requires the beneficiary to present the full set of original bills of lading as issued or the sole original bill of lading if only one was issued.⁷⁵ It is clear that the condition precedent for obtaining delivery from the carrier under Chinese law is to surrender an original bill of lading. This follows the common law rule that "*the one being accomplished, the others to stand void*".⁷⁶ It appears therefore that by holding the entire set of bills of lading, the bank can effectively control the delivery of the goods and reduce the risk of fraud under letter of credit transactions. It is submitted that the above conclusions apply to straight bills of lading as well, given that they are covered both by the UCP Article 20 and the *Bill of Lading Judicial Interpretations*.

3.5.2 Delivery clause in a bill of lading

⁶⁹ ISBP No.745, Section E12 and E13 (b)

⁷⁰ It has been adopted at the 1463rd meeting of the Judicial Committee of the Supreme People's Court on 16 February 2009 and come into force on 5 March 2009.

⁷¹ Article 1 of the *Bill of Lading Judicial Interpretations* defines bills of lading as including straight bills of lading, order bills of lading and bearer bills of lading.

⁷² Article 3 of the *Bill of Lading Judicial Interpretations* provides that the bill of lading holder may require the carrier to accept liability for breach of contract or liability in conversion if the holder is in possession of the property.

⁷³ Article 4 of the *Bill of Lading Judicial Interpretations*.

⁷⁴ Article 10 of the *Bill of Lading Judicial Interpretations*.

⁷⁵ ISBP No.745 section E11 even requires a bill of lading to indicate the number of originals that have been issued. It is suggested that if a bill of lading is not an original document, it will not be regarded as a transport document under the UCP600 at all.

⁷⁶ Under common law, the carrier need not await all original bills before delivery, nor need he take further steps to ensure that the presenter is in fact the person entitled. See *Glyn Mills & Co v East and West India Dock Co* (1882) 7 App Cas 591.

Apart from the full set requirement in the UCP600 Article 20(a)(iv), the ISBP No.745 Section E28 further enhances the bank's control over delivery by providing that, unless all of the referenced bills of lading form part of the same presentation under the same credit, a bill of lading should not expressly state that goods covered by that bill of lading will only be released upon its surrender together with one or more other bills of lading. The intention behind this long-winded sentence is to achieve effective control over the cargo through the presented bills of lading alone. However, the ISBP does not specify whether the bank is entitled to reject such a bill of lading, or even so, how the delivery clause in the bill of lading can be detected without careful consideration of the carriage terms and conditions.

As mentioned under Part 3.4.1, in the ICC Opinion R758, the Banking Commission considered the "delivery without production" clause on the face of the bill of lading as the terms and conditions of carriage within the scope of Article 20(a)(v) and therefore to be ignored. According to the Banking Commission, a bill of lading containing a clause giving the carrier liberty to deliver the goods to the named consignee upon reasonable proof of identity would be acceptable to the bank, even though the letter of credit had expressly prohibited bills of lading containing a "delivery without production" clause. Since a negotiable bill of lading was issued in this case, the presentation rule was still followed and no real conflict with the letter of credit requirement was triggered by the bill of lading delivery clause. Nevertheless, the fundamental issue remains: should the bank accept a bill of lading containing the "delivery without production" clause? The answer should be no, as such a clause will make the requirement of Article 20(a)(iv) regarding full sets of bills of lading ineffective and more importantly, it will undermine the bank's security generated by the bills of lading. The ICC Banking Commission, which was eager to relieve the bank's burden in documentary examination, presumably overlooked the fundamental damage caused by enlarging the scope of Article 20(a)(v) in terms of bank's security.

According to CMC Article 44, any stipulation in a bill of lading derogating from the provisions of this Chapter⁷⁷ is to be null and void, but such nullity will not affect the validity of other provisions of the bill of lading. As the *Bill of Lading Judicial Interpretations* are intended to specify the position of transport documents under Chapter IV, it is suggested that the delivery clause in a bill of lading would violate the CMC and become null and void. It was held by the Supreme People's Court in an earlier judicial interpretation⁷⁸ that the carrier will be exempted from liability for delivery without production of an original bill of lading if the carrier can sufficiently prove that the bill of lading holder has accepted such delivery.⁷⁹ A delivery clause in the bill of lading may be thought to constitute conclusive proof that the bill of lading holder has permitted delivery without the bill of lading. However, this provision has

⁷⁷ That is, Chapter IV Contract of Carriage of Goods by Sea of the CMC.

⁷⁸ *Notification by the Supreme People's Court regarding Distribution of the Second National Foreign Commercial and Maritime Related Judicial Committee Meeting Summary* (referred as the *Notification*), No.26 [2005] of the Supreme People's Court on 26 December 2005.

⁷⁹ Article 110 of the *Notification*.

not been listed in the *Bill of Lading Judicial Interpretations* as a qualified exception⁸⁰ and therefore in the author's opinion, the legal status of such a delivery clause is uncertain.

3.5.3 Title to claim delivery

With the full set of bills of lading in its hand, the bank can effectively control the physical delivery of the goods to the buyer. This does not necessarily mean that the bank can take delivery of the goods by itself or be entitled to claim against the carrier for misdelivery. With reference to CMC Article 71, the carrier only undertakes to deliver to a qualified bill of lading holder, including the consignee under a straight bill of lading, the endorsee of an order bill of lading and the holder of a bearer bill of lading. Hence, unless the bank ensures that it is named as one of the persons above, it would not be entitled to delivery and the title to sue against the carrier for misdelivery.⁸¹ Since there is no requirement as to the form of the bill of lading in the UCP,⁸² the bank needs to consider the issue at the application stage and include express stipulation in the letter of credit.

4. Document of Title and Bank's Security Interest

Banks in most circumstances are not interested in taking delivery of the goods and instead prefer to obtain title under the documents and realise the documents by resale. Among the types of shipping documents, negotiable bills of lading regarded as "documents of title"⁸³ are best suited to the banks' needs. As documents of title, negotiable bills of lading function as "a key to the warehouse"⁸⁴ under common law and can transfer constructive possession of the goods to their holder.⁸⁵ However, the function of "document of title" has not been explicitly adopted by the CMC, as the CMC almost exclusively approaches bills of lading from the perspective of the contract of carriage of goods by sea, leaving the legal nature of the bills of lading undefined. It has long been argued in academia whether a transferable bill of lading can confer proprietary rights on its holder, as implied by the concept of "document of title".⁸⁶ Admittedly, the transfer of bills of lading can reasonably indicate an intention to transfer the property; however, it would be a mistake to conclude that property always passes together

⁸⁰ The *Bill of Lading Judicial Interpretations* have listed three exceptions of carrier's liability in Article 7-9. Article 7 refers to delivery without a bill of lading according to the local law of discharge port and Article 8 is for disposal by customs or courts after the lapse of period. Article 9 provides that the carrier's liability to the consignee under a straight bill of lading will be exempted, if the carrier has suspended carriage, returned cargo, changed the destination, or delivered to other person according to shipper's instructions. In the author's view, this article is quite problematic here, since it will undermine the presentation rule for straight bills.

⁸¹ According to the *Bill of Lading Judicial Interpretations* Article 11, the original bill of lading holder can request the carrier who delivers goods without the original bill of lading and the person who collects goods without the original bill of lading to undertake the joint liability for the compensation.

⁸² For example, whether a bill of lading should be made out to bearer or to order, and if it is the latter, to whose order.

⁸³ However, there is no authoritative definition of "document of title" at common law. See Michael Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet and Maxwell 2010) para 18-007

⁸⁴ *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327

⁸⁵ It was established in *Sewell v Burdick* (1884) 10 App Cas 74 that transfer of a bill of lading is not necessary to transfer the property of the goods, because the property could only be passed when the parties intended to do so.

⁸⁶ See Si Yuzhuo and Chu Beiping, 'A review on the controversy about character of right in rem of bill of lading from the aspect of delivery of cargo without production of bill of lading' (2006) 16 (1) *Annual of China Maritime Law* 1

with the transfer of bills of lading, given that passing of property depends on the intention of the parties, rather than being an automatic consequence of the endorsement or delivery of a bill of lading.

Although the bank does not generally obtain property in the goods by holding the bills of lading, it can create a pledge which constitutes a special legal title on the goods. The PRC *Law on Property Rights*⁸⁷ and the *Law of Guarantee*⁸⁸ have now recognised that the security arising from possession of bills of lading operates as a pledge of rights.⁸⁹ The bill of lading becomes pledged to the bank when it is delivered in pursuance of the terms of a credit.⁹⁰ The pledge gives banks an independent right of sale so as to secure the amount which they have advanced. As pledgee, the bank can retain the documents until it is paid and, if not paid in accordance with the terms agreed, the bank is entitled to take possession of the goods and sell them to reimburse itself from the proceeds.⁹¹

The pledge would not appear to add anything further to the bank's security when the bank is already qualified as a bill of lading holder under the CMC, namely, where the bills of lading are drawn to order of the bank or indorsed to the bank. Complexity ensues where the bills of lading are drawn to order of the buyer or other consignee. In such a situation, the bank, which can still become a pledgee of documents in principle⁹² based on the agreement with the pledger, will be left with an ineffective power of sale. Moreover, given that the bill of lading itself does not designate the bank as the party entitled to take delivery, it is unlikely that the bank will be able to convince the carrier that he is entitled to take possession of the goods under the framework laid down by the CMC.

As the CMC only concentrates on regulating the bills of lading from the perspective of carriage contracts, the issues generated by the law on pledges have been largely overlooked. In the result, the form of a bill of lading and the person to whose order it must be made out are still decisive of the bank's rights of security. Regrettably, without sufficient legal guidance provided by the *Law of Guarantee* and the *Law on Property Rights*, the security generated by a pledge is not as powerful as it might appear. Due to the special nature of bills of lading, it would be necessary to consider them as an independent subject-matter and endeavour to harmonise the possessory elements with the CMC reform.

⁸⁷ Adopted at the 5th session of the Tenth National People's Congress on 16 March 2007 and came into force from 1 October 2007.

⁸⁸ Adopted by the Standing Committee of the Eighth National People's Congress at the Fourteenth Session on 30 June 1995.

⁸⁹ See Article 75 of the *Law of Guarantee* and Article 223 of the *Law on Property Rights*. Again, there is no distinction between negotiable bills of lading and straight bills regarding pledge in the Chinese legislations. The straight bills have not been traditionally regarded as documents of title under common law and therefore cannot generate pledge of the goods by constructive delivery.

⁹⁰ See Article 76 of the *Law of Guarantee* and Article 224 of the *Law on Property Rights*. According to Article 64 of the *Law of Guarantee* and Article 210 of the *Law on Property Rights*, the parties must conclude the right of pledge in a written contract. The pledge is usually expressly stated in the agreement between the issuing bank and the applicant contained in the application form. However, the written requirement will cause difficulty for the intermediary bank, as a pledge is normally implied by the English law when it pays or negotiates documents presented to it by the seller.

⁹¹ See Article 77 of the *Law of Guarantee* and Article 225 of the *Law on Property Rights*.

⁹² There is no clear guidance from the Chinese legislations on whether the bill of lading can be pledged to the bank without drawing to order of or endorsing to the bank.

5. Conclusion

Since the Chinese legal framework concerning letters of credit relies heavily on the UCP, close attention has been paid in this chapter to the UCP600 Article 20 as well as the recent ISBP No.745 and the implications of those instruments upon the examination of bills of lading presented under a letter of credit. Most of the requirements of Article 20 focus on the function of a bill of lading as a receipt of the goods. It also incidentally but controversially reflects the role of the bill of lading as evidence of the carriage contract. The third classical function of the bill of lading as a document of title, along with the accompanying delivery issue, has only been lightly touched by the UCP600.

Regarding the function as a cargo receipt, it is noteworthy that neither the UCP nor the CMC contains compulsory requirements regarding cargo description. If the bank wants to ensure that the bill of lading presented is truly that pertaining to the specific cargo, it has to specify in the letter of credit the requirement of the description of the cargo recorded in the bill of lading. As the cargo description will become conclusive evidence in the hands of the bank as bill of lading holder, this specification will strengthen the bank's security, should the bank become embroiled in litigation against the carrier.

Admittedly, the UCP has not successfully reconciled the tension between bank's disclaimer and the consideration of bank's security. On the one hand, the bank is not supposed to examine the carriage terms and conditions contained in a bill of lading. On the other hand, the bill of lading will become the only contract of carriage between the carrier and the bank when the latter becomes the bill of lading holder. The most obvious difficulty can be found in the process of dealing with "delivery without production clauses" appearing on the bill of lading. The transshipment provisions stipulated in the UCP and the consideration of carrier's liability are further examples of issues that will require a resolution in the next UCP revision.

The delivery issue and the document of title function carried by bills of lading have been largely left by the UCP to the governing law of a documentary credit. For the purpose of bank's security, the UCP does ask for a full set of bills of lading in document presentations. The CMC with the recent development of judicial interpretations has made the presentation rule clear in terms of cargo delivery. However, the CMC only focuses on regulating bills of lading from the perspective of carriage of goods by sea, rather than approaching bills of lading as an independent subject matter and addressing the legal issues generated from bills of lading into a whole. Incomplete guidance on the document of title function in Chinese law makes the bank's security uncertain. The forthcoming law reform needs to consider how bank's pledge is going to operate within the contractual framework established by the CMC and whether straight bills of lading should be distinguished in performing the document of title function.

It is true that few modern banks would rely solely on the security provided by the transport documents. However, the reality is, where the bank has inadvertently or by mistake paid against irregular documents that go on to be declined by the buyer, the bank will be left with no recourse apart from enforcing the security provided by the presented documents. There is

therefore an urgent need for clarification as to what terms a qualified bill of lading should contain under the imperfect framework provided by the UCP and how the governing law can assist bank's security in letter of credit transactions.