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FOB seller under Chinese law and privity of contract in carriage of goods by sea

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ABSTRACT

The FOB (Free On Board) seller under Chinese law (FOB seller) has no contractual relation with the carrier but is **recognized** as the shipper under Chinese law. The FOB seller thus has the right to demand the issue of bill of lading from the carrier and the rights of suit against the carrier in Chinese judicial practice. These exceptions to privity of contract in carriage of goods by sea are inconsistent with the globally **recognized** doctrine of privity of contract. This inconsistency has caused troubles to international shipping and trade transactions. It is submitted that the doctrine of privity of contract should be respected and the exception of the FOB seller shall be limited in carriage of goods by sea.

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I. Introduction

A. FOB seller under Chinese law

In normal international sale of goods, parties usually incorporate the Incoterms rules which are a set of three-letter trade terms reflecting business-to-business practice in contracts for the sale of goods. The Incoterms rules describe mainly the tasks, costs and risks involved in the delivery of goods.¹ The 11 Incoterms 2010 rules are presented in two distinct classes: rules for any mode or modes of transport and rules for sea and inland waterway transport. In the latter class, FOB (Free On Board) and CIF (Cost, Insurance and Freight) are commonly used in international sale of goods contracts. Under the FOB contracts, the buyer must contract for carriage of goods and the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment. Therefore, unless otherwise agreed by the parties, the FOB seller has no contractual relation with the carrier. If requested by the buyer or if it is commercial practice and the buyer does not give instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. However, in either case, the seller may decline to make the contract of carriage.² By contrast, under the CIF contracts, the seller must contract on usual terms for the carriage of the goods to

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¹ International Chamber of Commerce, *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms* (ICC Publications, 2010) 5.

² *Ibid.*, 88–89.

the named port of destination by the usual route in a seagoing vessel, whereas the buyer has no obligation for carriage of goods.³

The parties to the contract of carriage of goods by sea are the shipper and the carrier in the Maritime Code of the People's Republic of China 1992 (Chinese Maritime Code).⁴ In the Chinese Maritime Code, the shipper means: (a) The person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier; (b) The person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.⁵ The two types of shipper are named the contractual shipper and the actual shipper in the Provisions of the Supreme People's Court on Certain Issues concerning the Trial of Cases of Disputes over Marine Freight Forwarding 2012 (Marine Freight Forwarding Interpretation).⁶ In China's export trade based on FOB contracts, the foreign FOB buyer is the contractual shipper and the FOB seller is called the actual shipper. In this circumstance, the FOB seller as a shipper is an exception to privity of contract in carriage of goods by sea in the Chinese Maritime Code. Based on this exception, the FOB shipper has a statutory relation with the carrier even though he has no contractual relation with the carrier.

The concept of actual shipper originates from the United Nations International Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules).⁷ The shipper in the Hamburg Rules means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.⁸ The only minor difference to the concept of shipper is the conjunction 'or' between the two types of shippers which exists in the Hamburg Rules but does not exist in the Chinese Maritime Code. It is understood that this concept aims to protect the interests of FOB sellers.⁹ However, this is not the truth. In the draft of the Hamburg Rules, definitions for 'actual carrier' and 'consignee' were included. Mexico then proposed that the draft convention should contain a definition of 'shipper', since the draft convention already defined the other parties who had a direct interest in the contract of carriage. Mexico suggested that the definition of the term 'shipper' could read as follows: "Shipper" means any person who in his own name or in the name of another concludes with a carrier a contract for carriage of

³ Ibid, 110–111.

⁴ Chinese Maritime Code, art 41 provides that a contract of carriage of goods by sea is a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another. The law of China in this article refers to the law of the People's Republic of China excluding the laws of Hong Kong, Macau and Taiwan.

⁵ Chinese Maritime Code, art 42 (3).

⁶ Marine Freight Forwarding Interpretation, art 8, paras 8 and 9. The judicial interpretations are interpretations promulgated by the Supreme People's Court of China. They are not official source of Chinese law but have binding effect on all Chinese courts for implementation.

⁷ The Hamburg Rules establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. It was adopted in Hamburg on 31 March 1978 and came into force on 1 November 1992.

⁸ Hamburg Rules, art. 1 (3).

⁹ See Yao Hongxiu and Lin Hui, 'On the Identity of "shipper" under the Chinese Maritime Code' (1996) 7 Annual of China Maritime Law 31, 32; see also *Zhejiang Textiles Imp & Exp Group Co Ltd v Evergreen International Storage and Transport Corporation* (2001) HHFSCZ 441 (Shanghai Maritime Court, China); (2003) HGMS(H)ZZ 39 (Shanghai High People's Court, China) (CA).

goods by sea.¹⁰ In this suggestion, only the contractual shipper is defined as the shipper without making an exception of the actual shipper. The reason that the actual shipper is considered in the draft convention is a different understanding of the term 'shipper'. For example, the International Shipowners' Association (ISA) pointed out that:¹¹

The contract of carriage of goods by sea on the bill of lading basis is not always concluded by the shipper. In cases when booking of ship's space precedes surrender of cargo to the carrier, in the sale and purchase FOB or FAS transactions, the contract of carriage of goods by sea is concluded by the consignee. This is why mentioning the shippers as the only contractors of the carrier seems not quite exact. It is desirable to use the term 'cargo disponent' instead of 'shipper', otherwise to give a definition of what the term 'shipper' means for the purpose of this convention.

'Shipper' in the ISA's understanding does not mean a contractual shipper in the legal sense but is a term used in shipping practice describing the shipper as the cargo disponent who actually delivers the goods to the carrier, namely the actual shipper in the Chinese Maritime Code. This practical 'shipper' in shipping business is therefore not a legal term and should not be defined in the same way as the legal shipper. The ISA did not suggest to define the shipper in practice as the shipper in law, but recommended the use of the term 'cargo disponent' instead of 'shipper' to reflect the shipping practice for international sale of goods based on FOB contracts. However, the Hamburg Rules ultimately incorporated both the legal shipper and practical shipper in the definition of shipper. It must be noted that, although cargo disponents are called shippers by the shipowners in shipping business, they are not the shippers in the contract and law of carriage of goods by sea. This definition of shipper in the Hamburg Rules was considered and adopted in the drafting of the Chinese Maritime Code in which the contractual shipper and the actual shipper are given the same definition.

B. Privity of contract in carriage of goods by sea

Under the Chinese Maritime Code, the contractual shipper has the right to take the bill of lading from the carrier and the rights of suit against the carrier for damage to or loss of the goods.¹² According to the doctrine of privity of contract in the Contract Law of the People's Republic of China 1999 (Chinese Contract Law),¹³ the FOB seller is not a contractual party to the contract of carriage of goods by sea.¹⁴ Therefore, the FOB seller cannot demand the issue of the bill of lading from the carrier and has no rights of suit against the carrier. Nor can he control the goods carried by sea once the goods are delivered to the carrier. However, the concept of the shipper in the Chinese Maritime Code provides an exception to the privity of contract in carriage of goods by sea. Based on the exception of actual shipper in the Chinese Maritime Code, the FOB seller, like the contractual shipper, becomes entitled to demand the bill of lading and claim against the

¹⁰ United Nations, *United Nations Commission on International Trade Law Yearbook, Volume II: 1976* (United Nations Publications, 1977), 265.

¹¹ *Ibid.*, 252.

¹² Chinese Maritime Code, arts 46 and 72.

¹³ Chinese Contract Law, art 8.

¹⁴ The bill of lading in the Chinese Maritime Code is a document which serves as evidence of the contract of carriage of goods by sea, as a receipt for the goods by the carrier, and as an undertaking by the carrier to deliver the goods against its surrender. See Chinese Maritime Code, art 71.

carrier. This understanding has been accepted in Chinese judicial practice.¹⁵ Although mainland China is not a common law jurisdiction and the **judgements** are not precedents, the **judgements** from superior level courts, in particular, the appellate courts and the Supreme People's Court of China (SPC) are always considered in judicial practice of Chinese courts. On the one hand, Chinese judges make **judgements** according to the law, not the previous **judgements**. On the other hand, Chinese courts still try to keep their **judgements** consistent with previous ones. There are two main reasons for this practice. First, it is to avoid different **judgements** for the same or similar types of dispute. Second, the lower level courts need to avoid the consequence that their **judgements** would be overruled in appeals if they are inconsistent with the **judgements** delivered by the superior level courts.¹⁶ In this circumstance, it is meaningful to study Chinese **judgements** to see how Chinese courts applied the Chinese Maritime Code and interpreted the concept of shipper as an exception to the privity of contract in carriage of goods by sea.

In Chinese judicial practice, the FOB seller is considered as the shipper under the Chinese Maritime Code on the condition that he has delivered the goods to the carrier.¹⁷ Although the FOB seller is not the first type of shipper, he is considered as the second type of shipper under the Chinese Maritime Code and thus has a contractual relation with the carrier.¹⁸ Although there is no express contract between the FOB seller and the carrier, Chinese courts believe that there should be an actual contract between them.¹⁹ Therefore, once the FOB seller delivers the goods to the carrier, there will be an implied contract between him and the carrier who receives the goods.²⁰ If there is no written contract of carriage of goods by sea but only the bill of lading is issued as evidence of contract, the FOB seller can still be **recognized** as the shipper even if he is not named as the shipper in the bill of lading. Even if the FOB buyer is named as the shipper in the bill of lading, Chinese courts consider the performance of the FOB seller, namely the delivery of the goods in the port of shipment, to identify the FOB seller as the shipper,²¹ because the bill of lading is not the contract itself, but only evidence of the contract.²² In this common practice of Chinese courts, the FOB seller is always **recognized** as the shipper which establishes the carriage contract relation with the carrier. Based on this exception to privity of contract in carriage of goods by sea, the FOB seller may demand the bills of lading issued from the carrier although this should be a contractual right of the contractual shipper, namely the FOB buyer. However, it must be noted that holding

¹⁵ The Chinese judicial practice in this article means the practice reflected by the **judgements** from Chinese courts. The Chinese **judgements** cited throughout this article are from the official database of CHINA JUDGEMENTS ONLINE at <http://wenshu.court.gov.cn>. The **judgements** are only in Chinese and official translations are not provided.

¹⁶ Of course, a local court may not consider previous **judgements** from superior courts which are not appellate courts of the local court. That is one of the reasons why different courts in China make inconsistent **judgements**.

¹⁷ *Zhejiang Shaoxing Sun Textile Co Ltd v Shanghai Pingfan Freight Forwarders Ltd* (2013) HHFSCZ 1065 (Shanghai Maritime Court, China).

¹⁸ *Linyi Nanyang Trade Co Ltd v Panda Logistics Ltd and Panda Logistics Ltd Qingdao Branch* (2014) QHFSCZ 646 (Qingdao Maritime Court, China); (2015) LMSZZ 80 (Shandong High People's Court, China) (CA).

¹⁹ *Xianning Huimeida Industry and Trade Co Ltd v Transpac Containers System Limited* (2014) WHFSZ 01293 (Wuhan Maritime Court, China).

²⁰ It has been confirmed by the SPC in *Xianning Huimeida Industry and Trade Co Ltd v Transpac Containers System Limited* (2016) ZGFMS 2284 (SPC) (Retrial).

²¹ *Xianning Huimeida Industry and Trade Co Ltd v Transpac Containers System Limited* (2014) WHFSZ 01293 (Wuhan Maritime Court, China) 10–11.

²² Chinese Maritime Code, art 71.

a bill of lading covers both physical retention and holding in law. An FOB seller who physically holds the bill of lading in the buyer's name would not be a holder in law. However, by applying the concept of shipper in the Chinese Maritime Code, an FOB seller who physically obtained a bill of lading is qualified as a lawful holder of the bill of lading. 135

It can be seen that Chinese judicial practice has taken a pro-FOB seller approach by interpreting the FOB seller as a party to the contract of carriage of goods by sea. However, once the FOB seller is considered as the contractual shipper and thus becomes an exception to the privity of contract, other relevant parties in the carriage of goods by sea may be prejudiced. For example, a contractual shipper may not be able to have the bill of lading from a carrier when the carrier has to deliver the bill of lading to an FOB seller, and the carrier may be potentially liable for the damage to the FOB seller when he performs the contract with the contractual shipper. The dilemmas faced by the contractual shipper and the carrier are caused by the concept of the shipper in the Chinese Maritime Code. China started a project to amend the Chinese Maritime Code a few years ago and the Ministry of Transport of the People's Republic of China published the Consultation Bill for Amendment to the Chinese Maritime Code (Consultation Bill) in November 2018. These exceptions to privity of contract in carriage of goods by sea have been considered in the Consultation Bill. It is time to review whether these exceptions are appropriate for the contract of carriage of goods by sea and whether they should be adopted by the new Chinese maritime law. 140 145 150

II. Rights of FOB seller

A. Right to demand bill of lading 155

Because the bill of lading is a document of title upon presentation of which the goods will be delivered, the FOB seller by holding the bill of lading can control the goods in transit and secure the payment of price of goods. Therefore, FOB sellers always demand the issue of the bill of lading from the carrier. Under the Chinese Maritime Code, when the goods have been taken over by the carrier or have been loaded on board, the carrier shall, on the demand of the shipper, issue to the shipper a bill of lading.²³ Since the FOB seller is defined as a shipper in the Chinese Maritime Code, the question arises whether the FOB seller is entitled to demand the delivery of bills of lading from the carrier. The Chinese Maritime Code does not give answer for this but Chinese courts have given their views. In *Shanghai Hua Yi Textiles Imp. & Exp. Co Ltd v C.H. Robinson Freight Services (China) Ltd (Hua Yi v Robinson)*,²⁴ one of the issues is whether the FOB seller had the right to demand the issue of the bill of lading from the carrier. Chinese courts, including the SPC, held that the FOB seller was the actual shipper and was entitled to demand the issue of the bill of lading from the carrier. 160 165

In *Hua Yi v Robinson*, the FOB seller claimed against the carrier who had failed to deliver the bill of lading to him but delivered goods against his instruction. The defendant carrier argued that the claimant had no contractual relation with him, and thus the claimant had no right to demand the issue of the bill of lading. This argument 170

²³ Ibid, art 72, para 1.

²⁴ (2013) HHFSCZ 1389 (Shanghai Maritime Court, China).

was not accepted by the Shanghai Maritime Court. First, it was interpreted that the second type of shipper, namely the actual shipper in the Chinese Maritime Code, was designed for the benefit of the FOB seller in the carriage of goods by sea. Second, the FOB seller shall be considered as the actual shipper once he has delivered the goods to the carrier.²⁵ Based on this interpretation, the Shanghai Maritime Court held that the FOB seller is the shipper to the contract of carriage of goods by sea **recognized** by law, irrespective of whether he is a party to the contract. Therefore, the shipper who can demand the bill of lading from the carrier under the Chinese Maritime Code includes both the contractual shipper and the FOB seller as the actual shipper.²⁶ Furthermore, the FOB seller has the right to choose the type and contents of the bill of lading and demand the delivery of such a bill of lading. This is how the benefits of the FOB seller can be protected and the protective purpose of legislation can be achieved.²⁷ The protective purpose interpretation in *Hua Yi v Robinson* was affirmed by the SPC in the retrial of this case.²⁸ It can be seen that the FOB seller, like the contractual shipper, has the right to demand the delivery of the bill of lading from the carrier. Even though the carrier has the contractual obligation to deliver the bill of lading to the contractual shipper, Chinese courts do not accept it as a valid defence against the actual shipper's claim.²⁹

In carriage of goods by sea, the freight forwarder may also be required to deliver the bill of lading issued from the carrier to the FOB seller.³⁰ It is understood that the freight forwarder's obligation is to protect the benefits of the FOB seller.³¹ In Chinese judicial practice, the freight forwarder has such an obligation to the FOB seller according to the agency contract between them, even if the FOB seller does not demand the bill of lading.³² It can be seen that, although both the carrier and the freight forwarder have the same obligation to deliver the bill of lading to the FOB seller, the legal basis is completely different. The carrier's delivery obligation is based on the Chinese Maritime Code under which the FOB seller has the statutory right to demand the bill of lading as the actual shipper, whereas the freight forwarder's delivery obligation is based on the agency contract under which the FOB seller has the contractual right to demand the bill of lading as the principal. This difference requires the agency law or the agency contract to expressly or impliedly provide such a right against the freight forwarder. However, Chinese law does not provide such a right. In the Chinese Contract Law, the agent shall, at the request of the principal, report on the situation of the entrusted affairs handled.³³

²⁵ *Ibid*, 11–12. The citations of Chinese **judgements** in this article are neutral citation and page numbers of Chinese **judgements** are the numbers of the original **judgements**.

²⁶ *Ibid*, 12–13.

²⁷ *Ibid*, 13. However, the claimant did not demand the issue of the bill of lading and thus failed to be protected by this approach in this case. The carrier was held liable based on its promissory estoppel.

²⁸ *Hua Yi v Robinson* (2015) MSZ 2816 (SPC) (Retrial).

²⁹ *China Auto CAIEC Ltd v Qingdao Sinosun International Logistics Co Ltd* (2015) MSZ 1660 (SPC) (Retrial).

³⁰ *Ningbo Yinzhou Jinning Electron & Commodity Manufactory v AIT International Logistics (Shanghai) Co Ltd Ningbo Branch* (2009) ZHZZ 127 (Zhejiang High People's Court, China) (CA). This freight forwarder's obligation has been confirmed in the Marine Freight Forwarding Interpretation, art 8, para 1.

³¹ Yanjun Wang and Xiaoqiang Fu, 'Interpretation and Implementation of the Provisions of the Supreme People's Court on Certain Issues concerning the Trial of Cases of Disputes over Marine Freight Forwarding' (2012), 12. The People's Judicature (Application) 38. The two authors are former Justices of the SPC who were in charge of the draft of the judicial interpretation.

³² *Zhejiang Shengfa Textile Printing and Dyeing Co Ltd v Ningbo Yuanheng Logistics Co Ltd* (2015) MSZ 2851 (SPC) (Retrial).

³³ Chinese Contract Law, art 401, para 1.

The agent shall hand over to the principal any property acquired in handling the entrusted affairs.³⁴ In *Zhejiang Shengfa Textile Printing and Dyeing Co Ltd v Ningbo Yuanheng Logistics Co Ltd*,³⁵ the SPC referred to the agent's two obligations in the Chinese Contract Law and accordingly concluded that the freight forwarder had the obligation to deliver the bill of lading to the FOB seller. However, it can hardly be implied from the agent's two statutory obligations that the freight forwarder as an agent had the obligation to deliver the bill of lading to the FOB seller. First, the delivery of the bill of lading is not an activity of report. Second, the bill of lading is a shipping document issued from the carrier. It is a receipt of goods, evidence of contract and a document of title,³⁶ but not the property of the FOB seller. The SPC did not even discuss how the bill of lading could be considered as the property of the FOB seller. Having said this, it may be more appropriate to ascertain the FOB seller's contractual right to demand the bill of lading from an agency contract. 210

The freight forwarder has the obligation to deliver the bill of lading to the FOB seller even if the contractual shipper also demands the issue of the bill of lading. In *Wuxi Dahua Habit Co Ltd v Damco China Limited (Dahua v Damco)*,³⁷ the Shanghai Maritime Court was asked to determine whether the freight forwarder was at fault when he failed to deliver the bill of lading to the FOB seller. It was pointed out that, when both the actual shipper and the contractual shipper demand the issue of the bill of lading from the carrier, the actual shipper has priority over the contractual shipper to demand the bill of lading from the freight forwarder.³⁸ However, the Shanghai Maritime Court did not explain why the actual shipper had such priority. It must be noted that entitlement to the bill of lading does not mean priority of entitlement. Article 8 of the Marine Freight Forwarding Interpretation provides that the actual shipper is entitled to obtain the bills of lading obtained by the freight forwarder from the carrier, but it does not provide priority of the entitlement. In fact, there is no Chinese law providing that the FOB seller's legal rights have priority over the FOB buyer's contractual rights. This priority of entitlement to the bill of lading, like the right to demand the bill of lading, is in place to protect the benefits of the FOB sellers, although the Shanghai Maritime Court in *Dahua v Damco* did not say so. 215 220 225 230 235

In *Dahua v Damco*, the priority issue does not involve the matter of the carrier. However, the Shanghai Maritime Court continued to point out that, when both the actual shipper and the contractual shipper demand the issue of the bill of lading from the carrier, the actual shipper's right to demand the bill of lading takes priority over the right of the contractual shipper.³⁹ Yet this view is not based on either the facts of this case or any Chinese law. Even if it is accepted that the actual shipper has priority to demand the bill of lading from the freight forwarder, it does not mean that the actual shipper automatically has the same priority against the carrier. The FOB seller may have the right to demand delivery of the bill of lading from the freight forwarder provided that there is an agency contract between them which provides such a right. However, 240 245

³⁴ *Ibid*, art 404.

³⁵ (2015) MSZ 2851(SPC) (Retrial) 4.

³⁶ Chinese Maritime Code, art 71.

³⁷ (2012) HHFSCZ 492 (Shanghai Maritime Court, China); (2012) HGMS(H)ZZ 159 (Shanghai High People's Court, China) (CA).

³⁸ (2012) HGMS(H)ZZ 159 (Shanghai High People's Court, China) (CA) 9.

³⁹ *Ibid*, 8.

the carrier has no contractual relation with the FOB seller and its legal position is different from the freight forwarder. The only reason that can be inferred from *Dahua v Damco* is the protection of the benefits of the FOB seller. The priority approach in *Dahua v Damco* has been followed by the Shanghai Maritime Court and its appellate court, i.e. the Shanghai High People's Court.⁴⁰ 250

The Consultation Bill proposes that the carrier shall deliver the transport document including the bill of lading to the actual shipper if both the contractual shipper and the actual shipper demand the bill of lading from the carrier.⁴¹ In essence, this proposal recognizes the priority of the FOB seller in obtaining the bill of lading from the carrier. However, if the FOB seller is given the priority, the Consultation Bill shall provide the contractual shipper with corresponding protection of interest if the contractual shipper could not obtain the bill of lading according to the contract with the carrier. Unfortunately, the Consultation Bill does not propose any corresponding protection for the contractual shipper. Therefore, this proposal does not reasonably balance the interests between the FOB seller and the contractual shipper. Furthermore, the carrier under this proposal will face dilemma because he shall deliver the bill of lading to the contractual shipper according the contract but may also be asked to deliver the bill of lading to the FOB seller. Therefore, this is not a reasonable proposal. The only advantage of this proposal is to provide the Chinese court with a lawful basis to recognize the FOB seller's priority in demanding the delivery of the bill of lading. 255
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In the Chinese Maritime Code, the actual carrier means the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract.⁴² The provisions with respect to the obligations and liabilities of the carrier contained in the Chinese Maritime Code apply to the actual carrier.⁴³ Therefore, the FOB seller may have the same right to demand the issue of the bill of lading from the actual carrier who, failing to satisfy the demand, may be liable for loss thus caused. If this inference is correct, the FOB seller as the shipper will enjoy an unlimited exception to privity of contract in carriage of goods by sea in China. In this circumstance, the dilemmas arise by virtue of the conflict of entitlement to the bill of lading. When the FOB seller demands the issue of a bill of lading from the carrier, the carrier may have to issue the bill of lading to the contractual shipper according to the carriage of goods by sea contract. Similarly, the actual carrier may have to issue a bill of lading to the contractual party (e.g. the carrier) when the FOB seller demands the issue of the same bill of lading. No matter to whom the bill of lading is issued, both the contractual carrier and the actual carrier will be liable for breach of either the obligation by contract of carriage of goods by sea or the obligation by law, namely the Chinese Maritime Code. The exception to privity of contract in carriage of goods by sea under the Chinese Maritime Code will break the contractual relationship chains between all parties involved in the international sale and carriage transaction. Specifically, the carrier and the freight forwarder will be affected when the FOB seller demands the issue of bills 270
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⁴⁰ *Zhejiang Newfine Industry Co Ltd v Shanghai Jicheng International Freight Forwarding Co Ltd and Others* (2014) HHFSCZ 30(Shanghai Maritime Court, China); (2014) HGMS(H)ZZ 109 (Shanghai High People's Court, China) (CA).

⁴¹ Consultation Bill, cl 4.33, para 3.

⁴² Chinese Maritime Code, art 42 (2).

⁴³ *Ibid*, art 61.

of lading from them, and the FOB buyer as contractual shipper will be affected when the FOB seller takes priority in demanding the issue of bills of lading. This should not be the consequence of a reasonable exception to privity of contract in carriage of goods by sea. 290

The carrier and the freight forwarder may refuse to deliver the bill of lading to the FOB seller if they are obliged to deliver the bill of lading to their contracting parties. In this circumstance, the FOB seller may apply for a maritime injunction to force the carrier and the freight forwarder to deliver the bill of lading to him. A maritime injunction in the Special Maritime Procedure Law of the People's Republic of China 1999 (Chinese Special Maritime Procedure Law) means the compulsory measures ordered by the maritime court on the application of a maritime claimant to compel the person against whom a claim is made to do or not to do certain things, so as to prevent the lawful rights and interests of the claimant from being infringed upon.⁴⁴ A maritime injunction will be granted if: (1) the claimant has a specific maritime claim; (2) a breach of legal provisions or contractual provisions by the person against whom a claim is made needs to be redressed; and (3) in a situation of emergency where losses will be caused or will become worse if a maritime injunction is not granted forthwith.⁴⁵ Under Chinese Special Maritime Procedure Law, if the carrier or freight forwarder refuses to deliver the bill of lading, the FOB seller can claim for the bill of lading as a specific maritime claim. In Chinese judicial practice, it is commonly understood that the refusal of the carrier or the freight forwarder should be redressed as otherwise the FOB seller's entitlement to the bill of lading will be deprived. Therefore, a maritime injunction, upon the application of a FOB seller, is always granted against the carrier or freight forwarder to force them to deliver the bill of lading to the FOB seller.⁴⁶ In a word, the benefits of the FOB seller are protected by both the substantive law and the procedural law of China. However, neither the substantive law nor the procedural law of China considers the protection of benefits of the contractual parties equally. Therefore, the Chinese judicial practice which considers the FOB seller as the actual shipper is not a reasonable exception to privity of contract in carriage of goods by sea. 315

B. Rights of suit against carrier

The FOB seller is protected by obtaining a bill of lading under Chinese law. However, he may still suffer loss of goods when the carrier delivers the goods to another person without the surrender of the bill of lading. With regard to such loss, Chinese courts have provided the FOB seller with the rights of suit against the carrier. Chinese courts adopt a simple contract approach to solve the problem of the FOB seller's rights of suit against the carrier. The logic is straightforward: the FOB seller is a shipper under the Chinese Maritime Code, and therefore he has a contractual relation with the carrier, and thus he has the rights of suit against the carrier based on the contract.⁴⁷ The problem with this logic is that the FOB seller is an actual shipper but has no contractual relation with the 320 325

⁴⁴ Chinese Special Maritime Procedure Law, art 51.

⁴⁵ *Ibid*, art 56.

⁴⁶ E.g. *Yekalon Industry Inc v High Goal Logistics Ltd* (2008) GHFQZ 18–23 (Guangzhou Maritime Court, China); *Yekalon Industry Inc v Ningbo Guangbo Sailing International Logistics Co Ltd* (2013) YHFQZ 9 (Ningbo Maritime Court, China).

⁴⁷ *Ningbo New Dragon Fashion IMP.&EXP. Co Ltd v Mitsui O.S.K. Lines Ltd* (2004) YHFSCZ 406 (Ningbo Maritime Court, China); *Ningbo Leedor Leisure Articles Co Ltd v OOCL (China) Ltd and Orient Overseas Container Line Limited* (2007) YHFSCZ 273 (Ningbo Maritime Court, China).

carrier. The FOB seller becomes the actual shipper not because he concludes the contract with the carrier but because he delivers the goods to the carrier. That is why and how the actual shipper is distinguished from the contractual shipper. Even though the FOB seller is entitled to demand the bill of lading as the actual shipper, it does not mean he automatically becomes a contractual party to the contract with the carrier. 330 Furthermore, the FOB seller holds the bill of lading to prove that he has a contractual relation with the carrier. However, the bill of lading is evidence of the contract of the carriage of goods by sea between the contractual shipper and the carrier because they in fact concluded the contract. Holding the bill of lading does not turn the FOB seller 335 into a contractual party to the contract. Although the Chinese Maritime Code provides the concept of shipper which has **recognized** the FOB seller as the shipper, it does not provide that the FOB seller shall have the same rights of suit as the contractual shipper.

The SPC promulgated 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 Original Bills of Lading 2009 (Delivery of Goods without Bills of Lading Interpretation). In this, 340 the SPC did not adopt the simple contract approach to deal with the FOB seller's rights of suit but created a new general rule. Under this interpretation, where a carrier delivers goods without the original bill of lading, thus prejudicing the bill of lading holder's rights under the bill of lading, the holder may request the carrier to bear the civil liability for the loss so caused.⁴⁸ The general rule in the Delivery of Goods without Bills of Lading Interpretation 345 abandons the simple contract approach and provides the condition for such rights of suit, namely the FOB seller's rights under the bill of lading are prejudiced. Based on this approach, the rights under the bill of lading shall be the right to claim the delivery of the goods from the carrier when the FOB seller holds the bill of lading. Specifically, the FOB seller may have the rights of suit against the carrier for the delivery of goods without the bill 350 of lading. However, the Delivery of Goods without Bills of Lading Interpretation does not examine whether the FOB seller is entitled to claim the delivery of goods. If the FOB seller has no right to claim delivery, the carrier's delivery of goods without bills of lading will not prejudice the FOB seller's right.

Of course, the carrier shall be liable for loss of the goods because he fails to deliver the 355 goods against the surrender of the bill of lading. However, the carrier's liability does not mean that the FOB seller has the rights of suit against the carrier for the delivery of goods without the bill of lading. The key question is to whom the carrier shall be liable for the delivery of goods without the bill of lading. The delivery of goods is subject to the type of bill of lading. 360 Under the Chinese Maritime Code, there are three types of bill of lading according to its negotiability: straight bill of lading, order bill of lading and bearer bill of lading. The straight bill of lading is not negotiable; the order bill of lading may be negotiated with endorsement to order or endorsement in blank; and the bearer bill of lading is negotiable without endorsement.⁴⁹ A straight bill of lading is a bill which is consigned to a named person and is non-negotiable.⁵⁰ An order bill of lading is a bill which is consigned to order, that is to say, 365 the goods are to be delivered according to the order of a person, e.g. the shipper.⁵¹ A bearer bill of lading is a bill which is made out to the bearer, that is to say, whoever presents it to the

⁴⁸ Delivery of Goods without Bills of Lading Interpretation, art 2.

⁴⁹ Chinese Maritime Code, art 79.

⁵⁰ Peter R Brodie, *Dictionary of Shipping Terms* (6th edn, Informa Law, 2013) 238.

⁵¹ *Ibid*, 183.

carrier at the discharge port is able to take the delivery of the goods.⁵² The order and bearer bills of lading are negotiable. A provision in the bill of lading stating that the goods are to be delivered to the consignee of the straight bill of lading, or to the order of a person of the order bill of lading, or to the bearer of the bearer bill of lading, respectively, constitutes the carrier's undertaking for such delivery.⁵³ Therefore, the carrier shall be liable for the delivery of goods without a bill of lading to the named consignee, the person who is authorized to give the order, or the holder of the bearer bill of lading. This means that the consignee, the order person or the bearer bill of lading holder has the rights of suit against the carrier who dishonours its delivery obligation, even though the consignee, the order person or the bearer bill of lading holder may not be the party to the contract evidenced by the bill of lading. Therefore, such rights of suit based on the bill of lading are independent from the contract evidenced by the bill of lading.

Accordingly, whether the FOB seller's right is prejudiced depends on the type of bill of lading held by the FOB seller. There is no doubt that the general rule in the Delivery of Goods without Bills of Lading Interpretation shall apply to the bearer bill of lading because the FOB seller has the right to claim the delivery of the goods when he holds the bearer bill of lading, and thus has the rights of suit against the carrier if the carrier delivers the goods to another person without the bill of lading. However, the application of the general rule shall be limited to order and straight bills of lading. First, the Delivery of Goods without Bills of Lading Interpretation provides that, if the actual shipper is not named as the shipper in the order bill of lading but holds the order bill, he has the rights of suit against the carrier for the loss of goods due to their delivery without a bill of lading.⁵⁴ As discussed above, if the goods are to be delivered according to the order of the FOB seller, but the carrier delivers the goods to another person without the order bill of lading, the FOB seller has the rights of suit against the carrier. On the other hand, if the delivery of goods is not subject to the order of the FOB seller and the carrier delivers the goods according to the instruction from the order person, no rights of the FOB seller have been prejudiced by the carrier and thus he has no rights of suit against the carrier. The FOB seller's interests may be prejudiced due to the carrier's delivery, but such prejudiced interests are from the sale of goods contract, not from the carriage of goods contract, since the carrier follows the order according to the bill of lading.

Second, when a straight bill of lading is issued, the foreign FOB buyer may be named as the consignee; the FOB seller would never be the consignee on the straight bill of lading. This means that the FOB seller has no right to claim delivery of the goods even if he holds the straight bill of lading. Therefore, the FOB seller shall not have the rights of suit because he has no rights under the bill of lading to be prejudiced when the carrier delivers the goods to the consignee. However, Chinese courts interpreted that the Delivery of Goods without Bills of Lading Interpretation does not exclude the FOB seller's rights of suit against the carrier when he holds a straight bill of lading.⁵⁵ This judicial interpretation was confirmed by the SPC.⁵⁶ It can be seen that the FOB seller's

⁵² Ibid, 40.

⁵³ Chinese Maritime Code, art 71.

⁵⁴ Delivery of Goods without Bills of Lading Interpretation, art 12.

⁵⁵ *April International Freight Forwarding (Shanghai) Co Ltd v Cangzhou Qiancheng Steel Pipe Co Ltd and Others* (2015) JGMSZZ 82 (Tianjin High People's Court, China) (CA).

⁵⁶ *Xianning Huimeida Industry and Trade Co Ltd v Transpac Containers System Limited* (2016) ZGFMS 2284 (SPC) (Retrial).

rights of suit by virtue of becoming the holder of the order or straight bill of lading do not exactly comply with the general rule in the Delivery of Goods without Bills of Lading Interpretation. In fact, the provisions in the Delivery of Goods without Bills of Lading Interpretation are to protect the benefits of the FOB seller if he holds a bill of lading.⁵⁷ However, neither the Chinese Maritime Code nor the Delivery of Goods without Bills of Lading Interpretation has provided an appropriate basis for the FOB seller's rights of suit against the carrier. Without a reasonable basis, the FOB seller's rights of suit against the carrier is not a reasonable exception to privity of contract in carriage of goods by sea.

III. Liabilities of FOB seller

The exceptions to privity of contract in carriage of goods by sea in Chinese law and judicial practice aim to provide protection to the FOB seller. At the same time, these exceptions shall impose corresponding obligations on the FOB seller so as to balance the interests of parties involved in the carriage of goods by sea. However, the Chinese Maritime Code does not clarify this point. In the Chinese Maritime Code, the shipper has the obligations to: properly package the goods and guarantee the accuracy of the statement of the goods packaged;⁵⁸ fulfil the formalities at the port, customs, quarantine, inspection or other competent authorities and furnish to the carrier all relevant documents;⁵⁹ properly package dangerous goods and inform the carrier of them,⁶⁰ and pay the freight to the carrier as agreed.⁶¹ The shipper shall not be liable for the loss sustained by the carrier or the actual carrier, or for the damage sustained by the ship, unless such loss or damage was caused by the fault of the shipper, his servant or agent,⁶² such as through the improper package of goods,⁶³ failure of compliance with formalities,⁶⁴ improper shipment of dangerous goods,⁶⁵ or non-payment of freight.⁶⁶ However, it is unknown whether the term 'shipper', for the purpose of the obligations, includes the actual shipper, and in what circumstances the actual shipper shall have those obligations and bear the liabilities when those obligations are breached.

In Chinese judicial practice, the FOB seller has been held liable as the shipper for the payment of freight under the Chinese Maritime Code. In *COSCO Shipping Line Co Ltd v Wuhu Zhongfei Plastic Co Ltd (COSCO v Zhongfei)*,⁶⁷ the claimant carrier claimed against the FOB seller for the payment of freight, but the FOB seller contended that it was an FOB contract and the payment of freight was an obligation of the foreign buyer, not the FOB seller. The Shanghai Maritime Court held that the defendant FOB seller was the shipper and should be liable for the freight. Furthermore, the agreement on payment of freight based on the FOB

⁵⁷ Shoujie Liu, 'Interpretation and Implementation of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading' in Exiang. Wan (ed), *Guide on Foreign-related Commercial and Maritime Trial* (People's Court Press 2009) 14. The author is a former Justice of the SPC who was in charge of the draft of this judicial interpretation.

⁵⁸ Chinese Maritime Code, art 66, para 1.

⁵⁹ *Ibid*, art 67.

⁶⁰ *Ibid*, art 68, para 1.

⁶¹ *Ibid*, art 69, para 1.

⁶² *Ibid*, art 70, para 1.

⁶³ *Ibid*, art 66, para 2.

⁶⁴ *Ibid*, art 67.

⁶⁵ *Ibid*, art 68.

⁶⁶ *Ibid*, art 69.

⁶⁷ (2013) HHFSCZ 1308 (Shanghai Maritime Court, China).

contract between the seller and the buyer should not bind the carrier. Therefore, when the buyer failed to pay the freight, the defendant seller was not exempted from the liability for payment of freight.⁶⁸ In *Kapok Logistics Co Ltd v Hong Kong Maidawei Industrial Co Ltd*,⁶⁹ the Guangzhou Maritime Court held that the FOB seller as the shipper should be liable for payment of the freight no matter whether it was a freight paid in advance in the port of shipment or a freight to be paid in the port of destination. Similarly, the FOB seller has the obligation to pay the freight to the freight forwarder who has paid the freight to the carrier in advance. The agreement on freight forwarding business between the sales parties shall not affect the freight forwarder's entitlement to the freight against the FOB seller.⁷⁰ Based on the same legal reasoning, where no one takes the goods in the port of destination, the carrier can even claim against the FOB seller for the container demurrage and relevant costs occurred in the port of destination.⁷¹

However, other Chinese courts took different approach to the FOB seller's liabilities. In *A.P. Moller-Maersk A/S v Jiangsu Albon Aluminium Co Ltd and Others (A.P. Moller-Maersk v Albon Aluminium)*,⁷² in which the carrier claimed against the FOB seller as the actual shipper for the container demurrage and relevant costs, the Shanghai Maritime Court did not follow the previous practice in *COSCO v Zhongfei* in which the FOB seller was held liable for the payment of freight. In *A.P. Moller-Maersk v Albon Aluminium*, although the FOB seller delivered the goods to the carrier, the Shanghai Maritime Court did not apply the concept of the shipper in the Chinese Maritime Code to recognize the FOB seller as the shipper. It was pointed out that in the FOB contract, it was the foreign buyer who contracted for the carriage of goods by sea with the carrier. Therefore, there was no legal basis for the carrier to claim the demurrage and costs against the FOB seller.⁷³ The Tianjin Maritime Court and its appellate court, the Tianjin High People's Court, took the same view in *Rider Glass Co Ltd v Tiger International Shipping Co Ltd (Rider v Tiger)*,⁷⁴ in which the FOB seller claimed against the carrier for loss of goods and the carrier counterclaimed for payment of the freight. The Tianjin Maritime Court rejected the carrier's counterclaim and held that the actual shipper should not be liable for the freight under the FOB contract. It was further pointed out that the contractual shipper should be liable for the freight and the actual shipper was not so liable in the circumstance that he did not claim the delivery of the goods in the port of destination.⁷⁵

From the judicial practice of Chinese courts in respect of the actual shipper's liabilities, it can be seen that the FOB seller is not all exempted from the contractual shipper's liabilities under the Chinese Maritime Code. The FOB seller may be protected when he is not considered to be the same as the contractual shipper for contractual liabilities although he is still the actual shipper under the Chinese Maritime Code. The inconsistent judicial practice shows the different understandings of the actual shipper's liability under the Chinese Maritime Code. The actual shipper exception to privity of contract in carriage of goods by sea under the

⁶⁸ *Ibid.*, 10.

⁶⁹ (2014) GHFCZ 489 (Guangzhou Maritime Court, China).

⁷⁰ *Ningbo Sina Ocean Logistics Co Ltd v Ningbo Chang'er Electron Co Ltd* (2016) Z 72 MC 1319 (Ningbo Maritime Court, China).

⁷¹ *Xiamen Chonglian Imp & Exp Co Ltd v A.P. Moller-Maersk A/S* (2013) MMZZ 361 (Fujian High People's Court, China) (CA).

⁷² (2015) HHFSCZ 2657 (Shanghai Maritime Court, China).

⁷³ *Ibid.*, 14.

⁷⁴ (2015) JHFSCZ 696 (Tianjin Maritime Court, China); (2017) JMZ 390 (Tianjin High People's Court, China) (CA).

⁷⁵ (2017) JMZ 390 (Tianjin High People's Court, China) (CA) 12.

Chinese Maritime Code applies differently to the FOB seller in the entitlement of rights and the exemption from liabilities. Logically, the FOB seller should have the obligations under the carriage contract if he is entitled to the rights under the contract as the contractual shipper. This is a reasonable balance of the interests of the parties involved in the sale and carriage transaction. However, it may not be reasonable to hold the FOB seller liable for the loss arising out of a breach of contract, e.g. the payment of freight when he does not claim any entitlement to the delivery of the bill of lading or the delivery of the goods. It seems that the Tianjin Maritime Court in *Rider v Tiger* realized this problem and thus held that the actual shipper should not be liable for the payment of the freight since he did not request the delivery of the goods.

This judicial practice has been considered in the Consultation Bill. Clause 4.2 of the Consultation Bill differentiates between the concept of shipper and actual shipper. Shipper in this clause refers to the contractual shipper only, while the actual shipper refers to the person who delivers the goods to the carrier or the actual carrier and is also named shipper in the bill of lading. Clause 4.38, paragraph 1 provides that the bill of lading holder rather than the shipper shall not be responsible for the contractual obligations under the carriage contract if he has not exercised the contractual rights under the contract. He shall be responsible for the contractual obligations if he has exercised the contractual rights. In this context, the FOB seller is not the shipper, nor the actual shipper if he is not named shipper in the bill of lading. The FOB seller, therefore, shall not be liable for payment of freight if he has not exercised the contractual rights under the Consultation Bill. If the Consultation Bill were accepted, the decision in *Rider v Tiger* might be changed. First, although the FOB seller did not claim the delivery of the goods, he did claim for the loss of goods due to the delivery of goods to others by the carrier. Claiming such a loss is a right based on the carriage contract. This means that the FOB seller exercised the contractual right when he counterclaimed against the carrier for the loss arising out of the contract. Thus, the FOB seller should be liable for the payment of the freight. Second, if the FOB seller did not counterclaim against the carrier for the loss, he should not be liable for the payment of the freight because he had not exercised any right including the rights of suit against the carrier under the contract. The approach in Clause 4.38, paragraph 1 of the Consultation Bill is appropriate for balancing the interests of parties. However, it is not clear whether the FOB seller shall be liable for breach of the contractual obligations if he has claimed the delivery of the bill of lading from the carrier. In Chinese judicial practice, the FOB seller has the statutory right to demand the bill of lading under the Chinese Maritime Code and so should not have the contractual obligations because the right to demand the bill of lading is not a contractual right, unless the carriage contract provides the right as well.

IV. Comparison with English law

A. FOB seller under common law

As a general common law rule, the doctrine of privity of contract provides that only parties to a contract will have rights or obligations under that contract. As an exception, if the contract involved gives rise to non-contractual rights and obligations then it is possible for these to be enforced against, or in favour of, those who are not parties to the contract.⁷⁶ In

⁷⁶ *Tweddle v Atkinson* [1861] EWHC J57 (QB); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL).

the United Kingdom (UK), the Contracts (Rights of Third Parties) Act 1999 (UK) has reformed the privity of contract rule but does not apply to the contract for the carriage of goods by sea contained in or evidenced by a bill of lading.⁷⁷ Even the exception to privity of contract in the Contracts (Rights of Third Parties) Act 1999 (UK) applies to the contract of carriage of goods by sea, the exception is different from the Chinese judicial practice in which the FOB seller is considered as the party to the contract, not the third party to be benefited or burdened in law by the making of the contract. In Carriage of Goods by Sea Act 1971 (UK), the parties to the contract of carriage of goods by sea are the shipper and carrier, and the shipper means the contractual shipper only. In the Hague Rules as amended (Hague-Visby Rules),⁷⁸ although the shipper is not defined, the carrier means the owner or the charterer who enters into a contract of carriage with a shipper.⁷⁹ The shipper in the meaning of the carrier shall be the contractual shipper only. The Hague-Visby Rules further provides that:⁸⁰

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

It also proves that the shipper in the Hague-Visby Rules refers to only the contractual shipper.⁸¹

In *Pyrene Co Ltd v Scindia Navigation Co Ltd*,⁸² Devlin J summarized three types of FOB contracts according to the arrangements of booking of shipping space. The first type is the FOB contract in which no advance arrangements are made with the carrier. Under this type of FOB contract, the buyer's duty is to nominate the ship and the seller's duty is to put the goods on board for account of the buyer and procure a bill of lading in terms usual in the trade.⁸³ In such a case, the seller is directly a party to the contract of carriage at least until he takes out the bill of lading in the buyer's name. However, it is possible for the seller in this situation to take the bill of lading in his own name as shipper because it will give him a greater degree of control over the goods. Therefore, either the buyer or the seller can be named as the shipper depending on who arranges the carriage with the carrier and is thus named as the shipper in the bill of lading. This, of course, is subject to the agreement in the FOB contract. The second type of FOB contract is similar to the CIF contract in which the shipping space is reserved in advance by the seller. Under the second type of FOB contract, the seller is asked to make the necessary arrangements and the contract may then provide for his taking of the bill of lading in his own name and obtaining payment against the transfer.⁸⁴ The seller in this kind of

⁷⁷ Contracts (Rights of Third Parties) Act 1999 (UK), s 6 (5) (a). The bill of lading in the Contracts (Rights of Third Parties) Act 1999 has the same meaning as in the Carriage of Goods by Sea Act 1992 (UK).

⁷⁸ The Hague Rules as amended, i.e. the Hague-Visby Rules means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979. The Hague-Visby have the force of law in the Carriage of Goods by Sea Act 1971 (UK).

⁷⁹ Hague-Visby Rules, art I (a).

⁸⁰ Ibid, art VII.

⁸¹ See also Carriage of Goods by Sea Act (Cap. 33) (Singapore) and Carriage of Goods by Sea Act Ordinance (Cap. 462) (Hong Kong).

⁸² [1954] 1 Lloyd's Rep 321 (QB).

⁸³ Ibid, 332. See also *Wimble, Sons & Co v Rosenberg & Sons* [1913] 3 KB 743 (CA).

⁸⁴ Ibid.

circumstance is *prima facie* an original party to the contract of carriage contained in or 555
 evidenced by the bill of lading.⁸⁵ In the third type of FOB contract, the buyer engages
 his own forwarding agent at the port of loading to book space on the carrying ship and
 to procure the bill of lading. In such a case, the seller discharges his duty by putting the
 goods on board, getting the mate's receipt and handing it to the forwarding agent to
 enable him to obtain the bill of lading.⁸⁶ In such a case, there is no doubt that it is the 560
 buyer who is the shipper of the goods and hence an original party to the contract of
 carriage originally made before the issue of the bill of lading and later contained in or
 evidenced by that bill.⁸⁷

In the FOB contract in which the FOB seller is **recognized** as the shipper, the FOB seller in 565
 China does not need protection by law because he is a contractual shipper even if he is not
 considered as the actual shipper under the Chinese Maritime Code. In the FOB contract in
 which the FOB seller is not **recognized** as the shipper, solutions from common law are
 required for Chinese law. The first potential solution from Devlin J in *Pyrene Co Ltd v Scindia*
Navigation Co Ltd is the implied contract between the FOB seller and the carrier. In *Pyrene Co*
Ltd v Scindia Navigation Co Ltd, an implied contract was found between the FOB seller and 570
 the carrier. Delivering the goods alongside the seller impliedly invited the shipowner to load
 them, and the shipowner by lifting the goods impliedly accepted that invitation. The
 implied contract was so created.⁸⁸ In such a case, 'the seller is directly a party to the contract
 of carriage at least until he takes out the bill of lading in the buyer's name'.⁸⁹ For the terms of
 the implied contract, Devlin J interpreted that the implied contract must incorporate the 575
 shipowner's usual terms and the shipowner would not contract for the loading of the goods
 on terms different from those which he offered for the voyage as a whole.⁹⁰ Devlin J seemed
 to infer that the terms of the implied contract between the FOB seller and the carrier shall be
 the same as those of the contract evidenced by the bill of lading between the FOB buyer
 and the carrier. 580

When the court interprets that there is an implied contract between the actual
 shipper and the carrier, it would not be a breach of privity of contract. However, the
 key issue is that the FOB seller is not to be the party to the implied contract, but to be
 the shipper contained in or evidenced by the bill of lading. The implied contract is not 585
 a solution for the purpose of this key issue. First, the FOB seller may be considered as the
 party to the implied contract, but it does not mean that he is the shipper in the express
 contract evidenced by the bill of lading. The FOB seller cannot demand the issue of the
 bill of lading as a shipper based on the implied contract with the carrier. The carrier
 issues the bill of lading and names a person as a shipper based on the express contract
 with the FOB buyer, not the implied contract with the FOB seller. Second, even if the 590
 FOB seller in the implied contract can be considered as the shipper so as to demand the
 bill of lading, he may not have the rights of suit against the carrier. As explained in
Carver on Bills of Lading, the words '*at least until*' seem to indicate that, on the issue of
 the bill of lading, the seller ceases to be a party to the '*contract of carriage*' which had

⁸⁵ Guenter Treitel and Francis MB Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, 2017), [4-015].

⁸⁶ [1954] 1 Lloyd's Rep 321, 332 (QB).

⁸⁷ Treitel and Reynolds (n 85) [4-018].

⁸⁸ [1954] 1 Lloyd's Rep 321 (QB) 333. In Chinese judicial practice, the similar solutions is the actual contract between the FOB seller and the carrier (n 19).

⁸⁹ *Ibid*, 332.

⁹⁰ *Ibid*, 333.

been made between him and the carrier before the issue of the bill of lading.⁹¹ If the FOB seller ceases to be a party to the implied contract, he may not be entitled to sue the carrier even if he holds the bill of lading, unless he is named as the shipper in the bill of lading. 595

These situations of FOB contract are by no means exhaustive and the fourth type of FOB contract, as discussed in *Carver on Bills of Lading*,⁹² is a contract in which the buyer books space on the carrying ship and the seller, after having the goods put on board, takes a bill of lading in his own name as the shipper.⁹³ In this circumstance, the seller is an original party to the contract contained in or evidenced by the bill of lading.⁹⁴ In this type of FOB contract, the FOB seller is named as the shipper in the bill of lading even though he does not contract with the carrier. By doing so, as described in *Carver on Bills of Lading*, the seller may gain two advantages: firstly, the taking of a bill of lading in his own name is a more certain way than the retention by him of a mate's receipt of reserving his right of disposal and so of retaining property until payment; and secondly, he will *prima facie* have the right to redirect the goods, which he may wish to exercise in the event of the buyer's repudiatory breach of the contract of sale.⁹⁵ This is the circumstance in *The Athanasia Comminos and The Georges Chr. Lemos*,⁹⁶ in which in the bills of lading the sellers were named as the shippers and the buyers as the consignees to whom or to whose order the goods were to be delivered. It was held that the buyers were not the original parties to the contracts contained in or evidenced by the bills of lading, since it was the sellers who were named as shippers in the bills. It must be noted that a bill of lading is evidence of contract and being named as the shipper in a bill of lading is just *prima facie* evidence of a contractual relation with the carrier. If the conclusive evidence proves that the FOB buyer is 'the real shipper',⁹⁷ presumably because he had made the shipping arrangements in performance of his duty under the FOB contract to do so,⁹⁸ the FOB buyer rather than the FOB seller is the original party to the contract of carriage, presumably through the agency of the seller.⁹⁹ In this circumstance, the FOB seller should *prima facie* be regarded as being a party to the contract as evidenced by the bill of lading, whereas the FOB buyer is the party to the contract itself.¹⁰⁰ 600 605 610 615 620

Being named as the shipper in the bill of lading will give the FOB seller a greater degree of control over the goods than naming the FOB buyer as the shipper. However, being named as the shipper does not provide a legal basis for the FOB seller to demand the issue of the bill of lading from the carrier. The question whether the FOB seller is entitled to demand the bill of lading has no relation with the entitlement to be named as the shipper in the bill of lading. They are totally different matters although all the matters are decided by the parties to the FOB contract. Furthermore, being named as 625

⁹¹ Treitel and Reynolds (n 85) [4-012].

⁹² *Ibid*, [4-025].

⁹³ As in *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWHC 944; [2007] 2 All ER 149.

⁹⁴ See *Union Industrielle et Maritime v Petrosul International (The Roseline)* [1987] 1 Lloyd's Rep 18 (Canada).

⁹⁵ Treitel and Reynolds (n 85) [4-025].

⁹⁶ [1990] 1 Lloyd's Rep 277 (QB).

⁹⁷ The phrase "the real shipper" was used in *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWHC 944; [2007] 2 All ER 149 [7].

⁹⁸ See Michael Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet and Maxwell, 2014), §20-046.

⁹⁹ Treitel and Reynolds (n 85) [4-030].

¹⁰⁰ In other words, where an FOB buyer has made a contractual booking of shipping space or has chartered the carrying ship, he will also be an original party to some contract with the carrier but this will not be the contract contained in or evidenced by the bill of lading. See Treitel and Reynolds (n 85) [4-025].

the shipper does not mean that the FOB seller can control the delivery of the goods. The distinction, as stated in *Carver on Bills of Lading*, is between the legal effect of making a bill of lading out in a person's name (as shipper) and making it out to a person's order.¹⁰¹ In the fourth type of FOB contract, the FOB buyer is entitled to redirect the carriage of goods according to the carriage contract with the carrier. The FOB seller, even when named as the shipper in the bill of lading, unless otherwise agreed in the bill of lading, may not have such a right of redirection because he is not the real shipper to the contract with the carrier. In this circumstance, being an order person may be more important for the control over the goods. At least when the delivery of the goods is subject to the order of the FOB seller but they are in fact delivered not according to the FOB seller's instruction, the FOB seller may have the rights of suit against the carrier who breached the undertaking to deliver the goods according to the order of the FOB seller. 630 635 640

In the context of Chinese law, it is recommended to impose a statutory duty on the carrier to name the FOB seller as the shipper in the bill of lading if it is so demanded by the FOB seller.¹⁰² This would provide a legal basis for the FOB seller to establish a contractual relation with the carrier, rather than a relation based on the performance, namely the delivery of goods from the FOB seller to the carrier. However, this may also be inconsistent with the intention of the parties involved in the transactions. In fact, the purpose of being named as the shipper in the bill of lading is not to be the contractual party but to secure the payment and control the goods after shipment. Thus, it is more important to make the delivery according to the FOB seller's order than being named as the shipper in the bill of lading. At common law, if it is agreed in a sale of goods contract that the bill of lading is to be issued to the seller and the goods are to be delivered according to the order of the seller, the seller is likely to retain possession of the bill of lading until payment,¹⁰³ and retain the right of disposal of the goods until the price has been paid,¹⁰⁴ irrespective of whether or not the seller is named as shipper in the bill of lading.¹⁰⁵ In Chinese judicial practice, when the FOB seller is named as the shipper in the bill of lading, he is **recognized** as the shipper not because of being named as the shipper but because he is the actual shipper as defined by the Chinese Maritime Code.¹⁰⁶ In contrast, a person will not be **recognized** as the shipper even if he is named as the shipper in the bill of lading.¹⁰⁷ Therefore, this recommendation is not supported. Instead, it is suggested that the contractual solution found in common law be adopted for the FOB sellers' concern. 645 650 655 660

B. Rights of suit of FOB seller

The issue of the rights of suit has been well resolved in the Carriage of Goods by Sea Act 1992 (UK) (COGSA 1992). Before the COGSA 1992, the Bills of Lading Act 1855 (UK) had been in place to remedy a defect arising from the doctrine of privity of contract. The problem was that

¹⁰¹ Treitel and Reynolds (n 85) [4-025].

¹⁰² Si Yuzhuo, *Maritime Law Monography* (4th edn, Chinese People's University Press, 2018) 171–172.

¹⁰³ *Scottish & Newcastle Breweries International v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 2 All ER 768.

¹⁰⁴ *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA (The Ciudad de Pasto and the Ciudad de Neiva)* [1988] 2 Lloyd's Rep 208 (CA).

¹⁰⁵ Treitel and Reynolds (n 85) [4-013].

¹⁰⁶ *Xiamen Southern Prosperity Confectionery Factory Co Ltd v Falcon Logistics (Xiamen) Co Ltd* (2016) ZGFMZ 59 (SPC) (Retrial).

¹⁰⁷ *Hanjin Shipping Company Ltd v Shandong COFCO Intertrans Co Ltd and Others* (2001) QHFHSCZ 140 (Qingdao Maritime Court, China). In this case, a person named as the shipper in the bill of lading was not **recognized** as the shipper because of the lack of intention of the person.

a buyer of goods was unable to sue or be sued over a contract which had been made between the shipper and the carrier and to which he was not privy. Section 1 of the Bills of Lading Act 1855 stipulates that the shipper's contractual rights and liabilities will pass to the consignee/endorsee only if property passes 'upon or by reason of the consignment or indorsement'. If the consignee/endorsee has not obtained the property, he cannot sue the carrier under the Bills of Lading Act 1855. The common law solution to this problem is the implied contract between the consignee/endorsee and the carrier.¹⁰⁸ The COGSA 1992 removes the property requirement for transfer of the rights and obligations to the consignee/endorsee. Under the COGSA 1992, the lawful holder of a bill of lading or the person to whom delivery is to be made shall have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.¹⁰⁹ Where the person in whom rights are vested takes or demands delivery of goods from the carrier; makes a claim under the contract of carriage against the carrier in respect of any of those goods; or is a person who, at a time before those rights were vested in him, took or demanded delivery of goods from the carrier, then that person shall become subject to the same liabilities under that contract as if he had been a party to that contract.¹¹⁰

From the perspective of privity of contract, the FOB seller's position is similar to that of the CIF buyer. Neither of them is privy but both of them are involved in the whole transaction of the sale and carriage of goods. Although the original purpose of the Bills of Lading Act 1855 and the COGSA 1992 is to solve the problem for the consignee/endorsee, the solutions are also applicable to the FOB seller. If the approach of the COGSA 1992 is adopted by Chinese law, the FOB seller as the lawful holder of a bill of lading is able to sue or be sued over a contract which had been made between the FOB buyer and the carrier as if he had been a party to that contract. In this circumstance, the FOB seller shall become the lawful holder of a bill of lading if he obtains the bill of lading in good faith, namely by endorsement of an order bill of lading or transfer without endorsement of a bearer bill of lading,¹¹¹ rather than the holder by virtue of the maritime court order based on the actual shipper concept in the Chinese Maritime Code. This also solves the problem in Chinese judicial practice about whether the FOB seller shall be liable for the obligations under the contract of carriage of goods by sea. Based on the approach of the COGSA 1992, the FOB seller becomes subject to the same liabilities under that contract as if he had been a party to that contract only when he takes or demands delivery of goods from the carrier or makes a claim under the contract of carriage against the carrier. This is not only a solution to the problem of privity of contract for the FOB seller, but also a means of maintaining a reasonable balance of interests between the carrier and him.

In terms of the contractual rights of suit under carriage of goods by sea, the COGSA 1992 itself is a legislative device to break through privity of contract. However, the solution from the COGSA 1992 does not provide solutions to the FOB seller's demand for issue of bills of lading in Chinese judicial practice. One suggestion is that a compulsory right for the FOB seller be provided so that he can demand the issue of bills of lading from the carrier. However, the reasoning behind such a suggestion is not given.¹¹² This proposed compulsory right may be

¹⁰⁸ *Brandt v Liverpool, Brazil & River Plate Navigation Co Ltd* [1924] 1 KB 575 (CA).

¹⁰⁹ Carriage of Goods by Sea Act 1992, s 2 (1).

¹¹⁰ *Ibid.*, s 3 (1).

¹¹¹ Chinese Maritime Code, art 79 (2) and (3).

¹¹² *Si* (n 102) 171.

inconsistent with the intention of the parties involved in the transaction. If the FOB buyer contracts with the carrier but does not intend to transfer the bill of lading to the FOB seller, the compulsory delivery of the bill of lading to the FOB seller will cause a conflict of interests between the seller and the buyer, and even put the carrier in a dilemma in respect of the delivery of the bill of lading. Therefore, this suggestion does not solve the current problem in Chinese judicial practice. Since the delivery of the bill of lading represents a conflict of interests between the seller and the buyer, it would be better to solve the problem in the sale contract instead of the enforcement by a maritime court order in the dispute of carriage of goods contract. For example, if the FOB seller has concerns about security of payment and control over goods, he may negotiate with the FOB buyer and request the delivery of the bill of lading as a contractual right in the sale of goods contract. If it is so agreed, the FOB buyer will allow the carrier to issue the bill of lading to the FOB seller and relevant conflicts and dilemmas can be avoided.

V. Conclusion

In Chinese judicial practice, the FOB seller is **recognized** as the actual shipper under the Chinese Maritime Code once he has delivered the goods to the carrier. By such delivery performance, the FOB seller is **recognized** as the party to the contract with the carrier. As the party to the contract, the FOB seller is thus entitled to take the bill of lading from the carrier. He, by holding the bill of lading, thus has the rights of suit against the carrier. Consequently, the FOB seller has vested in him the contractual rights and may become subject to the contractual liabilities. These exceptions to privity of contract are for the benefit of the FOB seller but do not convincingly balance the interests of parties involved in international sale and carriage transactions. This is a policy-oriented practice for the protection of the Chinese seller's benefits in FOB export trade. The FOB seller may be protected by using the CIF term, or by reserving his rights in the sale of goods contract, rather than the exceptions to privity of contract in carriage of goods by sea. The difference between Chinese law and English law lies in the adoption of different rules, i.e. Chinese Maritime Code brings in the concept of actual shipper in the Hamburg Rules and English law incorporates the Hague-Visby Rules. Regarding who is entitled to demand a bill of lading from the carrier, it is suggested that China should abandon the concept of actual shipper in the Chinese Maritime Code so as to keep the doctrine of privity of contract in carriage of goods by sea. China also needs a legislative device like the COGSA 1992 to provide the FOB seller with the rights of suit in certain circumstance as a legal exception to the privity of contract of carriage of goods by sea.

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