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Title to Sue in Contracts for the Carriage of Goods by Sea

------Chinese and English Law Compared

by

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ABSTRACT

This research is aimed to seek the avenues open to remodeling the laws regulating rights of suit under the contract of carriage of goods by sea in China by identifying the problems incurred and analysing the solutions provided under the English and Chinese law with a comparative study of the Draft Instrument on transport law proposed by United Nations Commission on International Trade Law (UNCITRAL).

This research will elucidate the relevant provisions in the Chinese legal system; outline the problems caused by the lack of particular doctrines or inconsistencies among the present clauses in the Chinese Maritime Code; highlight the pitfalls that might arise for litigants; examine and evaluate the solutions provided in judicial practice by judges or conceived by academics; indicate where the law should be amended; and propose the draft of new provisions with reformative suggestions.

This research will examine the history and development of the English law in the area of rights of suit under the contract of carriage; outline the similarities and distinctions among English law, the Draft Instrument and Chinese law in relation to rights of suit under the contract of carriage; and expose and evaluate the latest developments of English case law in this area.

The research will explore and evaluate the provisions regarding rights of suit in the area of carriage of goods by sea embraced in the Draft Instrument, with a view to considering the feasibilities and desirability of including these provisions in such an international regime and the possibilities of applying these provisions under Chinese jurisdiction.

The result of this research is a new draft bill regulating the cargo claimant's *locus standi* for the P.R.China.

The subject matter of this thesis will be divided into five topics and each will be dealt with in a separate chapter.

Chapter 1 is a study on the shipper's title to sue;
Chapter 2 is a study on the holder's title to sue;
Chapter 3 is a study on the shipper's liability towards the carrier;
Chapter 4 is a study on the holder's liability towards the carrier;
Chapter 5 is a study on the cargo claimant's *locus standi* and straight bills of lading;
Chapter 6 concludes with proposals for amendments to the Chinese Maritime Code 1993 in respect of the cargo claimant's *locus standi* as a conclusion to the whole research.

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INTRODUCTION

1. Background

In prosecuting any claim, the claimant's lawyer must first be careful to ensure that the action is taken in the name of the party or parties who have legal standing to sue and also make sure that the proceedings are instituted against the appropriate party or parties under the applicable law. In the specific case of maritime cargo claims, the classic basis of the merchant's right of action is either his ownership of the goods or his status as a party to the contract of carriage; in the case of maritime claims against the merchant, the classic basis of the carrier/shipowner's rights of suit is either his ownership of the vessel or his status as a party to the contract of carriage.

The law in the United Kingdom on who may sue on contracts for the carriage of goods by sea was completely overhauled by the enactment of the Carriage of Goods by Sea Act 1992 (COGSA 1992). Before then, the rights of those concerned with contracts for the carriage of goods by sea to sue on the contract were primarily regulated by the Bills of Lading Act 1855. Increasing dissatisfaction with the 1855 statute, together with a report from the United Kingdom Law Commission[1], led the U.K. Parliament to enact the Carriage of Goods by Sea Act 1992. This legislation, which repealed and replaced the former Bills of Lading Act 1855, effected a complete revision and modernisation of English maritime law in respect of actions, not only under negotiable bills of lading, but under sea waybills and ship's delivery orders as

1 See The Law Commission and The Scottish Law Commission, Rights of suit in respect of carriage of goods by sea, 1991.

well. It has achieved a breakthrough, in eliminating the historic linkage between the right to sue under the contract of carriage and the passing of property of the goods. In consequence, lawful holders of bills of lading, consignees under waybills and persons entitled to possession of the cargo under ship's delivery orders may now take suit in contract against carriers in the U.K., without regard to who has concluded the contract, who owns the cargo or who suffered the loss. This legislation also sets out rules regulating the shipper's rights of suit, the intermediate holder's rights and liabilities and the carrier's rights to sue against the parties to the contract of carriage. Despite the fact that this Act has proved a great success largely by resolving related problems that previously existed under the regime of the Bills of Lading Act 1855, some of the provisions of this Act have caused or will potentially cause issues regarding rights of suit under the contract of carriage in judicial practice in the U.K. In addition, it does not eliminate the whole of the pre-existing common law on this subject and some of the relevant issues that existed at common law are still left open to question.

At international level, issues on rights of suit under the contract of carriage are regulated by national laws, which are not internationally harmonised. Views were expressed, in the twenty-ninth session of the UNCITRAL (United Nations Commission on International Trade Law)[2] in 1996, that the law in this area was in need of a set of uniform rules on the grounds that the fact that the present laws were

[2] Chinese delegation comprising representatives from the Supreme People's Court and Research Institutes participated most meetings hosted by the Working Group on Transport Law at UNCITRA for discussing the preliminary provisions of the Draft Instrument.

See CMI (Comité Maritime International) Yearbook 1999, pp 166-174; see Reports from Working Group on Trade Law in UNCITRAL at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

disparate and the fact that many states lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. In the Draft Instrument on Transport Law (hereinafter referred to as the Draft Instrument) proposed by the Working Group on Transport Law before the UNCITRAL in 2005, the provisions of Chapter 14 are particularly designed for regulating the rights of suit under the contract of carriage. However, the proposed provisions on rights of suit contained in the Draft Instrument do not appear to be sufficiently clear and uncontroversial to make their inclusion in a new international regime desirable.

At the same time, the Chinese legislative body has also started identifying the problems that have arisen from the application of its maritime law in the area, *inter alia*, of rights of suit under the contract of carriage. The Chinese laws regulating the contract of carriage of goods by sea are codified in Chapter IV of the Chinese Maritime Code 1993. Owing to the fact that this code (the Chinese Maritime Code) is the first maritime statute enforced in the P.R.China dealing with various issues surrounding the carriage of goods and passengers by sea, undoubtedly there are lacunae in several areas and inconsistencies among the clauses in the present Code. In particular, the provisions regulating the rights of suit of those concerned with the carriage of goods by sea are not fully developed in the Chinese Maritime Code and have failed to resolve the relevant disputes arising from bills of lading and other transport documents. In recent years, noticing the difficulties that have occurred in maritime judicial practice and considering the huge international concern on the harmonisation of the laws in the area of carriage of goods by sea, the Chinese legislative body has been circulating consultation questionnaires among the judges, academics and maritime industry to invite proposals for the amendment of its present

maritime law. The issues pertaining to rights of suit are on the priority list for reform. So far, there has been little academic work based on this special topic of Chinese law and some thorough comparative research is necessary and in urgent need of being conducted for the forthcoming amendment of the Chinese Maritime Code 1993.

2. Aims and Objectives

This research aims to seek the avenues open to remodeling the laws regulating rights of suit under the contract of carriage of goods by sea in China by identifying the problems incurred and analysing the solutions provided under English and Chinese law along with a comparative study of the Draft Instrument

- The most significant objective of this work is to amend some current provisions and propose some new provisions in respect of the merchant's title to sue and exposure to suit in the Chinese Maritime Code (CMC). In contrast to English law, the current Chinese law in this area is rather primitive. Many related problems that have been left unresolved are caused either by the lacunae or by the obscurity of some of the provisions under the present CMC. This is utterly incompatible with the rapid increase of maritime litigation in China. This research will elucidate the relevant provisions in the Chinese legal system; outline the problems caused by the lack of particular doctrines or inconsistencies among the present clauses in the CMC; highlight the pitfalls that might arise for litigants; examine and evaluate the solutions provided in judicial practice by judges or conceived by academics; indicate where the law should be amended; and propose the drafting of new provisions with reformative suggestions.

- This research will examine the history and development of English law in the area of rights of suit under the contract of carriage; evaluate the rules and doctrines established by statute law (the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992) and common law; analyse the rationality of the mechanism and complexity of this regime; outline the similarities and distinctions among English law, the Draft Instrument and Chinese law in relation to rights of suit under the contract of carriage; and expose and evaluate the latest developments of English case law in this area.

- The research will explore and evaluate the provisions regarding rights of suit in the area of carriage of goods by sea embraced in the Draft Instrument proposed by UNCITRAL, with a view to considering the feasibility and desirability of including these provisions in such an international regime and the possibilities of applying these provisions under Chinese jurisdiction.

- Having become more and more involved in the world economy and international trade, China needs to ensure that its legal system is in line with international commercial practice and customs. It is hoped that by deeply exploring and critically examining the treatment given to these issues under English Law and the Draft Instrument, clear resolution can be found and proposals on reform can be put forward for those problems caused by the lack of, or inconsistent provisions in Chinese Law in order to reduce the legal cost for both Chinese and foreign litigants and bring about certainty and consistency at a considerable level in the court decisions. This work seems to be the first of its kind to take the initiative in attempting to make reformative

recommendations and to develop or reform the rules governing this doctrine under Chinese Law. Thus the result of this work will have a direct and positive influence on the implementation of the CMC that is supposed to be superseded by a new Code in the very near future. The report published in 2002 in consequence of a project conducted on the implementation of the CMC will be taken into account and evaluated where appropriate in this work.

3. Structure and Methodology

The subject matter of this thesis will be divided into five topics and each will be dealt with in a separate chapter. The underlying thread connecting all the chapters of this work is the search for the solutions to the problems relating to rights of suit arising from the various transport documents employed in the course of carriage of goods by sea. (Discussion made in the first four chapters is focused on the issues that arise under negotiable bills of lading. i.e. order bills of lading and bearer bills of lading; the issues that arise under straight bills of lading will be dealt with in Chapter 5).

Chapter one is a study on the shipper's title to sue;

Chapter two is a study on the holder's title to sue;

Chapter three is a study on the shipper's liability towards the carrier;

Chapter four is a study on the holder's liability towards the carrier;

Chapter five is a study on the cargo claimant's *locus standi* and straight bills of lading.

Chapter six concludes with proposals for amendments to the Chinese Maritime Code 1993 in respect of the cargo claimant's *locus standi* as a conclusion to the whole research.

The approach to satisfactorily achieve the aims and objectives of this research is via the citation, discussion (a combination of analysis, critique and evaluation) and comparison of the relevant legislation and case law under the jurisdictions examined. Each chapter will be divided into four parts.

Part I: The problems encountered or that might arise under Chinese law will be paraphrased and briefly presented.

Part II: The solutions provided under English law (set out by relevant provisions of English statute law and established by the case law) and under the Draft Instrument will be elaborated upon, analysed, evaluated and compared in order to find the possible avenues open to the remodeling of Chinese law.

Part III: This part will identify the problems experienced in judicial practice or those that might arise under Chinese law, analyse and evaluate the present solutions provided by judges and legal experts, and compare them with those under English law and the Draft Instrument where appropriate. Suggestions will be given both on the abolition or amendment of some provisions that exist under the present CMC and on the insertion of new provisions into the present law in the particular area under discussion.

Part IV: A draft of the amended or inserted provisions will be put forward as a conclusion to the research of each subject matter.

4. Chinese Legal Sources

In order to familiarise those who are new to the Chinese legal system, at the outset, it might be convenient and necessary to give a brief summary of the judicial system in China, which is as follows:

(1) General Introduction to Courts in China

A. The system of the people's courts in China

The system of the people's courts in China consists of the Supreme People's Court, local people's courts at various levels and special people's courts. Local people's courts at various levels are: the high people's courts, intermediate people's courts and primary people's courts. The special people's courts consist of maritime courts, courts martial, and railway transportation courts.

The Supreme People's Court is the highest judicial organ of the state. It supervises the administration of justice by the local people's courts at different levels and by the special people's courts; people's courts at higher levels supervise the administration of justice by those at lower levels.[3]

The high people's courts have supervisory jurisdiction over all the cases dealt with by the lower courts. The high people's courts comprise the high people's courts in the provinces, autonomous regions and municipalities. At present there are altogether 31 high people's courts throughout the state.

The intermediate people's courts supervise the adjudication of primary people's

[3] See Article 127, Section VII in Constitution of the People's Republic of China

courts under their respective jurisdiction.

The primary people's courts try the criminal, civil and administrative cases of first instance, except for the cases as otherwise provided by law.

The maritime courts deal with the maritime cases, and the cases that fall within their jurisdiction as provided by law. At present, China has set up maritime courts in such port cities as Guangzhou, Shanghai, Qingdao, Tianjin, Dalian, Wuhan, Haikou, Xiamen, Ningbo and Beihai.[4] Cases of appeals against the judgments and decisions of the maritime courts are heard by the high people's courts in the locality.

The majority of the judgments cited and examined in this work were respectively collected from the ten maritime courts, the high people's courts in the locality and the Supreme People's Court.

B. The legal effects of the judgments from the Chinese Courts

In structure and theory, China's legal system is a "civil law" system based on written statutes. The decision delivered by Chinese courts on a case, although binding on the parties to the case, does not contain a *ratio decidendi* and thus does not establish a specific legal rule for application in future cases in the same way as does a decision of an English court. The courts in future cases are free to depart from a single previous decision. Thus the decisions do not constitute binding precedents nor do they need to be distinguished in the same way as in the English legal system.[5] The form of

[4] http://www.ccmt.org.cn/hs/intro/indexall.php

[5] As examined in other parts of this work, the lack of binding precedents in Chinese legal system result in the facts that the decisions produced by Chinese courts are not as predictable as those delivered by English courts.

judgments delivered by Chinese courts also differ from those in English cases in that only one judgment will be delivered, with no dissent, and judgments are much more succinct. Previous case decisions may well not be referred to at all or, if they are, will not be subject to any detailed analysis. The focus of the judgments, to a much greater extent, is on aims, objectives and general principles. Thus it is not necessary to examine all of the judgments relating to the present work, and evaluations on the typical cases will be sufficient to investigate the problems experienced and solutions produced in practice.

The underdeveloped nature of the legal system and the defective quality of much of the legislation leads the Supreme People's Court habitually to issue interpretations of statutes, rules, memoranda and instructions to other inferior courts. The legitimacy and legal basis of these various pronouncements is constitutionally questionable. Under Art 62(3)[6] of the Constitution of the PRC, the National People's Congress has the power to make "basic" laws; under Art 67(3) and 67(4)[7], the Standing Committee of the National People's Congress also has law-making powers and the power to interpret laws. The Standing Committee also has supervisory power over the Supreme People's Court pursuant to Art 67(6). No power of law-creation by interpretation of the constitution or statutory law is given to the courts under the constitution. Judicial

[6] It is prescribed that the National People's Congress exercises the following functions and powers: (3) to enact and amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters.

[7] It provides that the Standing Committee of the National People's Congress exercises the following functions and powers: (3) to enact, when the National People's Congress is not in session, partial supplements and amendments to statutes enacted by the National People's Congress provided that they do not contravene the basic principles of these statutes; (4) to interpret statutes; (6) to supervise the work of the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate.

power is limited to deciding individual cases in accordance with the law created by the people's Congress. Nevertheless, normative instruments issued by the Supreme Court are generally followed by lower courts, and it is most likely that the lower courts, when they are dealing with similar legal issues, take into consideration the judgments held by the Supreme People's Court, even though there is no formal system of *stare decisis*, in the common law sense, in the Chinese legal system.

C. The law report system in China

There is no law report system in China. The original judgments of the cases are conserved respectively in the archive rooms in various courts.

(2) Chinese Legal Sources

Due to the fact that it is virtually impossible and unnecessary to collect all the related cases in China, typical cases rather than all the cases in respect of merchant's title to sue and exposure to suit will be fully examined in this work. As discussed above, there is no law report system in China, albeit a volume of reports is published quarterly by Chinese Supreme People's Court in Beijing. In these reports some material cases, where maritime law applied, are available although they are very rare. These reports are collected in the library of the Supreme People's Court. The inferior courts irregularly release publications which are merely available and circulated among judges in different courts. Discussion of some cases or judgments on some controversial issues is published in those booklets. Additionally, there are four main sources of the cases relating to Chinese Maritime Law available publicly: "Comments on Some Cases on Maritime Law" that was published in 2003 by the Intellectual Property Press; "Comments on Typical Cases on Maritime Law in China" that was

published in 1999 by the Law Press; "Annual of Maritime Trial in China" that is published yearly and edited by the judges in the Guangzhou Maritime Court; The website http://www.ccmt.org.cn/, which is supervised and supported by the Supreme People's Court, providing some judgments delivered since 2000. These cases are regarded as typical and important either by the court or academic authority, otherwise it is most unlikely that they were collected and published in the first instance.

The majority of cases are unreported. In respect of cases in maritime law, the judgments are archived in ten maritime courts, ten High People's Courts in different provinces and the Supreme People's Court in Beijing. Through personal contact with the judges in some maritime courts, the cases relating to the present work have been collected. Copies of some typical judgments were collected at the archive rooms and libraries in the Ningbo Maritime Court and the Dalian Maritime Court. With the help of the judges in the Shanghai Maritime Court, the booklets where some judgments were available were collected. In the Guanzho Maritime Court, the Tianjin Maritime Court, the Wuhan Maritime Court and the Supreme People's Court, some advice on the present work was given by the judges. No original judgments have been collected in the Haikou Maritime Court, the Xiamen Maritime Court and the Beihai Maritime Court.

Some typical cases discussed in the textbooks and periodicals relating to the merchant's title to sue and exposure to suit are cited and evaluated in this work.

(3) General Introduction to the Chinese Statutes Regulating Contracts of Carriage of Goods by Sea

The Chinese Maritime Code 1993 (the CMC1993)

There was no official Maritime Code in force until July 1st 1993 in the People's Republic of China, even though the commencement of the preparation for the project on drafting the national maritime law can be traced back to 1952, three years after the PRC was established. The first draft of the Maritime Code was completed in 1963; however, it was not revised until 1981 because of interference from the left wing of political power, particularly during the Cultural Revolution between 1966 and 1978. The final draft of the maritime code, being in line with the international maritime practice and legislation closely and consciously[8], was adopted in 1992 by the Standing Committee of the National People's Congress and this Chinese Maritime Code was brought into force on July 1st 1993. It is the first Maritime Code in the People's Republic of China. Within its two hundred and seventy-eight articles, the Code covers the following topics: General Provisions; Ships; Crew; Contract of carriage of Goods by Sea; Contract of Carriage of Passengers By Sea; Charter Parties; Contract of Sea Towage; Collision of Ships; Salvage at Sea; General Average; Limitation of Liability for Maritime Claims, Contract of Marine Insurance; Limitation of time; Application of Law in Relation to Foreign-related Matters; Supplementary Provisions.[9] As to the provisions concerning contracts of carriage of

[8] For example, China has not ratified the Hague Rules, the Hague-Visby Rules or the Hamburg Rules, however, the CMC has incorporated a number of principles and provisions from them. Therefore, in respect of the carriage of goods by sea, the CMC is deemed as a combination of the Hague/Visby Rules and the Hamburg Rules, notwithstanding that certain innovative changes have been made to the principles and provisions adopted from all the related international conventions.

[9] See The Chinese Maritime Code (the CMC).

goods by sea, the majority of them are provided for in Chapter IV of this Code, entitled "Contract of Carriage of Goods by Sea". A few other provisions relating to it are provided for in the rest of the CMC.

The Chinese Contract Code 1999 (the CCC 1999) and General Principles of the Civil Law of the People's Republic of China 1987

Relevant provisions regulating contractual relationships in Chinese general contract law and the general principles of civil law in China will be examined in this work where appropriate and necessary.

CHAPTER 1: THE SHIPPER'S TITLE TO SUE

Issues on the shipper's rights of suit are to be examined in this section and are divided into two parts as follows[1]:

(1) The general rules on the shipper's rights of suit after the bill of lading is transferred to the consignee/endorsee

(2) Exceptions to the general rules

- Shipper's rights to sue where the bill of lading is reindorsed to him
- Shipper's rights to sue as charterer
- Shipper's rights to sue in another's interest (particularly in cases where the bills of lading are lost or lack requisite endorsement)
- Shipper's rights to sue in tort
- Shipper's rights to sue in bailment

This chapter examines and discusses the issues pertaining to the shipper's rights of suit against the carrier for breach of contract arising under negotiable bills of lading. The transfer or endorsement of the bill of lading from the shipper to the consignee/endorsee will confer rights of suit under the contract of carriage on the latter.[2] The consignee/endorsee as the lawful holder of the bill of lading is entitled to sue the carrier on the contract in the three jurisdictions under discussion.[3] Concern here is with the following questions: should the shipper remain entitled to sue the

[1] The issues arising under other documents rather than bills of lading will be discussed in Chapter 5 of this work.

[2] See *post*, Chapter 2 The holder's title to sue.

[3] Ibid.

carrier in contract after the bill is transferred or endorsed to others? Or does he lose such rights of suit by virtue of transferring the bill? Will the shipper be entitled to sue in circumstances where the bill is reindorsed to him? These questions are not capable of achieving a uniform answer under Chinese law.[4] The lack of the relevant provisions in the Chinese Maritime Code in this area of law leads to the production of controversial arguments and delivery of conflicting (justified or unjustified) decisions in judicial practice[5]. Given the cost of litigation increasingly raised by the unpredictability of the decisions on the issues concerned, filling out the lacuna is required urgently by means of inserting into the present statute new provisions regulating the rights of the shipper to sue the carrier. The rules established under English law and the relevant solutions provided by the Draft Instrument will be examined and evaluated with a view to finding an avenue open to the reform of the Chinese Maritime Code in this regard.

1.1. General rule on the shipper's rights to sue the carrier in contract when the bills of lading are transferred to others

The paramount and fundamental question relating to the shipper's rights of suit is whether the contractual rights of the shipper against the carrier are extinguished with the transfer or endorsement of the bill of lading evidencing the contract of carriage. There has not been a certain answer produced in the Chinese maritime courts. Several approaches have been adopted to resolve the relevant problems:

(1) Some judges have acknowledged the coexistence of two contracts (i.e. a new one with the consignee/endorsee and the original one with the shipper surviving after the

[4] See *post*, 1.1.3.

[5] See *post*, 1.1.3.

transfer of the bills of lading);[6]

(2) Other judges have found difficulties with there being two contracts at the same time, supporting the view of terminating the original contract on the transfer of the bills of lading;[7]

(3) A third group have countenanced the argument that the shipper loses such rights to sue the carrier in contract at the moment when he loses the proprietary rights or/and he does not bear the risk.[8]

Nevertheless, unfortunately, none of these approaches has proved to be a satisfactory solution.[9] Filling the lacuna in this regard in Chinese statute law is urgently required and it is thus desirable to seek guidance from other jurisdictions. How has English law dealt with the same problem? Will the shipper be deprived of the title to sue the carrier after the bills of lading are transferred or endorsed to others? The following part of this section attempts to explore, evaluate and compare the approaches adopted under English law and the Draft Instrument respectively.

1.1.1. Under English law

1.1.1.1. At common law before the enactment of the Bills of Lading Act 1855

At common law, contractual rights under a bill of lading remain with the original shipper even after the bill has been physically transferred to another party. The original shipper retains the right of suit against the carrier for breach of contract. He can sue for recovery of not only his own losses but also, on behalf of the transferee

[6] See *post*, 1.1.3.1.

[7] See *post*, 1.1.3.2.

[8] See *post*, 1.1.3.3.

[9] See *post*, 1.1.3.

(basis the so-called *Dunlop-v-Lambert*[10] rule), for any losses suffered by the transferee – typically the buyer of the goods.

1.1.1.2. Under the Bills of Lading Act 1855

This position under common law was changed by the Bills of Lading Act 1855. The preamble to the 1855 Act states, so far as is material, that "by the custom of merchants a bill of lading of goods being transferable by endorsement the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property". Section 1 of the 1855 Act provides that the consignee and endorsee to whom the property in the goods passes upon or by reason of the consignment or endorsement "shall have transferred to and vested in him all rights of suit". The courts interpreted this section to mean that all contractual rights under the bill of lading were "transferred" to the consignee or endorsee and that these rights were no longer available to the original shipper,[11] although the extinguishing of the shipper's rights is not precisely provided for in the 1855 Act.

In *Sewell v. Burdick*[12], it was held by the Earl of Selborne L.C. that:

> "[the]1855 Act provides that all rights of suit under the contract contained in the bill of lading should be transferred to the endorsee and should not any longer continue in the original shipper or owner"

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[10] *Dunlop v. Lambert*, [1839] 9 Cl. & F. 600, 626-627.

[11] *Sewell v. Burdick* (1884) 10 App. Cas. 74, 84; *Short v. Simpson* (1866) L R 1 C.P. 248.

[12] See *Sewell v. Burdick* (1884) 10 App. Cas. 74, 84.

This view was also supported in *Short v. Simpson*[13], where it was held that:

> "It was evidently, therefore, the intention of the legislature (of the 1855 Act) that all the rights of the shipper should for the future pass by the indorsement to the assignee of the bill of lading, as well as the property in the goods.
>
> ...the plaintiff indorsed the bill of lading to third persons, and so parted with all his rights in respect of the goods...
>
> By the re-indorsement, the plaintiff was remitted to his original rights under the bill of lading."

The case of *Short v. Simpson* did not really require anything to be decided as to the extinction of the shipper's rights under the 1855 Act, and nothing was in fact so decided; what was decided in that case was that the party who took a bill of lading by indorsement after a breach by wrongful delivery of the goods to a stranger, could maintain an action by virtue of the Bills of Lading Act 1855. Nevertheless all the judges were in favour of the argument that the shipper's rights under the bill of lading contract should be remitted to him. "Had the original shipper's rights under the bill of lading contract remained in him, the reindorsement and the argument in the case would have been unnecessary...It clearly implied that at one stage the shipper had been divested of all rights."[14]

The common law rule under which the shipper retained his rights of action under the contract of carriage accordingly no longer applies where those rights were transferred

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[13] See *Short v. Simpson* (1866) L R 1 C.P. 248. (Court of Common Pleas).

[14] See The Law Commission and The Scottish Law Commission, Rights of suit in respect of carriage of goods by sea, 1991, para 2.36.

by virtue of section 1 of the 1855 Act.

1.1.1.3. The position since the enactment of COGSA 1992

It is provided in section 2(1) of COGSA 1992 that the lawful holder of the bill of lading shall have "transferred to and vested in him all rights of suit under the contract of carriage". Section 2(5) stipulates that where rights are transferred by virtue of section 2 (1), that transfer "shall extinguish any entitlement to those rights which derives (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage." This section clearly sets out the rule that the shipper should not be entitled to take actions against the carrier under the bills of lading after the rights have been transferred to the third party. Surely, this unambiguous provision in COGSA 1992 on the extinction of the shipper's rights of suit would lead the judges to interpreting it with consistency.

There is a *dictum* in *The Berge Sisar*[15], where it was elaborated by Lord Hobhouse of Woodborough that:

> "Section 2 (1) makes being the lawful holder of the bill of lading the sole criteria for the right to enforce the contract which it evidences and this transfer of the right extinguishes the right of preceding holders to do so."

The shipper, being the first holder of the bill of lading, could be regarded as one of the preceding holders referred to in this statement and his rights are consequently extinguished upon the transferring of the bill to others.

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[15] *Borealis AB (formerly Borealis Petrokemi AB) v. Stargas Ltd and another (Bergesen DY A/S, third party) (The Berge Sisar)* [2001] 1 Lloyd's Rep. 663, para 30.

In *East West Corporation v. Dkbs 1912 and Akts Svendborg Utaniko Ltd. v. P& O. Nedlloyd B.V*[16], the claimant shipper claimed damages against the defendant carrier for delivery of their cargo shipped from Hongkong to Chile to a third party Gold Crown without presentation of the bill of lading. It was held by Thomas, J., answering the question as to "did the claimants (shippers) lose their right of suit", that:

> "Under Section 2(1) of the 1992 Act, the lawful holder of a bill of lading, by virtue of becoming the lawful holder of the bill of lading, has transferred to him and vested in him all rights of suit under the contract of carriage.
>
> ...Section 2(5) provides for the extinguishments of the shipper's rights."[17]

This argument on the extinction of the original shipper's rights against the carrier was not challenged in the Court of Appeal[18], albeit that the shipper was held to be entitled to sue in bailment eventually[19].

It seems like there have not been any issues so far on construction of the general rule, which is set out by section 2 (5) of COGSA 1992 depriving the shipper's rights against the carriers when the bill of lading is transferred to another person under English law.

In contrast, such a general rule as that created by section 2(5) of COGSA 1992 does not exist under Chinese law. Chinese statute law regulating the contract of carriage, i.e. the Chinese Maritime Code and the Chinese Contract Code, neither refers to the extinction nor the survival of the shipper's rights against the carrier under any

[16] [2002] 2 Lloyd's Rep. 182.

[17] [2002] 2 Lloyd's Rep. 182. para 19.

[18] [2003] 1 Lloyd's Rep. 239. para 17.

[19] See *post* 1.2.5.1.

circumstances. The lacuna in this area of law consequently gives rise to issues unsettled under Chinese law.[20]

The Draft Instrument does not follow the example of COGSA 1992 which is regarded as a successful piece of legislation with regard to the rights of suit under the contract of carriage of goods by sea. It will be seen in the following section that the Draft Instrument does not intend to deprive the shipper of rights to sue the carrier with the transfer or endorsement of the bills of lading.

1.1.2. Under the Draft Instrument on transport law

This regime does not create a particular rule regulating the rights of shippers after the rights incorporated in the bill of lading are transferred to another person upon the endorsement of the bill of lading by virtue of Article 61(1).[21] Nonetheless, it could be implied from Art 68 (b) and Art 67 that the shipper is entitled to sue the carrier in contract after the bill is transferred providing that he proves that (1) he suffers loss or damage in consequence of a breach of the contract, (2) the endorsee/consignee as holder of the bill of lading does not suffer such loss or damage. Art 68 (b) says that

> "When the claimant is not the holder, it must, in addition to its burden of proof proving that it suffered loss or damage in consequence of a breach of the

[20] See *post*, 1.1.3.

[21] See the Preliminary Draft Instrument on the carriage of goods by sea, Working Group on Transport Law, United Nations Commission on International Trade Law at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html for the latest version (A/CN.9/WG.III/WP.56 in September 2005).

Article 61(1) provides that " If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by transferring such document to another person:

(a) If an order document, duly endorsed either to such other person or in blank, or,

(b) If a bearer document or a blank endorsed document, without endorsement, or,

(c) If a document made out to the order of a named person and the transfer is between the first holder and such named person, without endorsement".

contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made."

When Article 68 (b) is construed in conjunction with Art 67, which provides that "Without prejudice to articles 68 (a) and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:

(a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(c) any third person to which the shipper or the consignee has assigned its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage", it could be concluded that the shipper, who falls within the ambit of Art 67, as the claimant is entitled to take action against the carrier, provided that conditions regarding the burden of proof are fulfilled pursuant to Art 68 (b).

In cases where the holder, being a purchaser/consignee, rejects the (damaged) goods and does not pay for them, the seller/shipper is not deprived of the right to sue in contract and is entitled to claim damages from the carrier providing that he, as the claimant, proves that he suffered loss or damage in consequence of a breach of contract and that the holder did not suffer the damage. In cases where the goods are

sold under a contract containing an "out-turn quantity and landed weight clause",[22] the buyer's duty to pay will be partly discharged when a lesser quantity of goods is discharged than sold, and the seller will be entitled to recover his loss against the carrier provided that the conditions regarding the burden of proof stipulated by Art 68 (b) are satisfied.

It should be recalled that the initiative for drafting Article 68 (b) in the Draft Instrument is that a person exercising a right of suit under the contract of carriage should not be dependent upon the cooperation of the holder of the negotiable bill of lading if that person, and not the holder, has suffered the damage.[23] It was considered by the Working Group[24] that the seller/shipper must be entitled to claim damages from the carrier in cases where the holder, being a purchaser/consignee, rejects the (damaged) goods and does not pay for them. Meanwhile, it was also expressed by the Working Group[25] that in order to protect the position of the holder against the loss of suit, it seems fair that in this type of case the claimant has to prove that the holder did not suffer the damage.[26] Nevertheless, doubts must be expressed regarding the operation of this provision in practice. In accordance with this provision, the claimant should prove that the holder does not suffer the damage, which means that in these cases the shipper would more likely request assistance from the holder in respect of providing convincing evidence that the latter does not suffer a loss. From this perspective, the shipper still has to be potentially dependent upon the cooperation of

[22] See, for example, Federation of Oils, Seeds and Fats Associations (FOSFA) 54, Lines 5 and 170-172.

[23] See Draft Instrument, Working Group on Trade Law in UNCITRAL Ninth Session 15-26 at New York, April 2002 http://www.uncitral.org/english/workinggroups/wg_3/wg3-transport-index-e.htm

[24] Working Group on Trade Law in UNCITRAL.

[25] Working Group on Trade Law in UNCITRAL.

[26] Ibid ,Thirty-sixth Session at Vienna, May 2003.

holder of the negotiable bill of lading. The Working Group decided that Art 68 (b) needs to be discussed further at a later stage.[27]

In contrast, the shipper's rights to sue the carrier in contract after the bill is transferred to others are *prima facie* extinguished under COGSA 1992. It seems that the basic rule confirmed by COGSA 1992 is to entitle a party, whoever is the lawful holder of the bill of lading, to sue under the contract of carriage. In cases where the purchaser/consignee rejects the (damaged) goods and does not pay for them, the shipper, not being the holder of the bill, is entitled to sue the carrier under the Draft Instrument whilst COGSA 1992 particularly emphasises that the shipper is entitled to sue the carrier providing he becomes the holder of the bill of lading in pursuance of a reindorsement of a bill of lading following the rejection of goods or documents under certain circumstances[28]. This solution is more practical than the one offered by the Draft Instrument which allows the shipper to sue the carrier in contract in cases where the bill of lading is transferred and not reindorsed to the shipper.

Indeed, in contrast with the position under the Draft Instrument, the seller/shipper faces serious difficulties at a basic level of establishing his contractual title to sue the carrier under English law, in cases where the goods are sold under a contract which contains an "out-turn quantity and landed weight clause" which leaves the risk of short-delivery with the sellers. However, it does not mean that the shipper is definitely exposed to loss which is unrecoverable by any other remedies. He can ask the lawful holder of the bill of lading to either sue the carrier on his behalf under section 2(4) of the Carriage of Goods by Sea Act 1992 or to assign his rights of suit

[27] See http://www.uncitral.org/english/workinggroups/wg_3/wg3-transport-index-e.htm.

[28] See *post*.1.2.1.1. Reindorsement: subsection 2(2)(b) of COGSA 1992.

against the carrier to him.[29] Alternatively, in certain trades – for example where goods are sold on outturn terms – the shipper might insert a clause in the sales contract that actually obliges the buyer to do this.[30] If the shipper does not do so to protect his position, his problems are the result of his own voluntary act. Even under the Draft Instrument, the shipper could also persuade the lawful holder of the bill to sue the carrier on his account by virtue of Art 68 (a).[31] In this respect, the necessity of providing the shipper with generous rights of suit[32] against the carrier in this new international regime is doubtful.

1.1.3. Under Chinese law

There is no general rule established by the Chinese Maritime Code stating whether the shipper's rights to sue the carrier in contract are extinguished or retained upon the transfer or endorsement of the bills of lading to others.

Article 78 in the Chinese Maritime Code is widely regarded as the main provision designed for resolving some issues relating to rights of suit arising from the bills of lading. It provides that:

> "The relationship between the carrier and the consignee and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading. Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in

[29] See, Charles Debattista, *Sales of Goods carried by Sea*, 2nd edition, Butterworths, 1998, footnote, 12, p78. (Hereinafter it is referred to as Debattista)

[30] See, Debattista, para 4-11.

[31] See *post*, 1.2.3.2.Art 68 (a) provides that "In the event that a negotiable transport document or negotiable electronic record is issued: (a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself".

[32] See *post*, 1.2.3.2.

respect of loading inccurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the consignee and the holder of the bill of lading".

We have seen that what this provision regulates is the contractual relationship between the carrier and the consignee/endorsee as a holder of the bills of lading (their rights and obligations are defined by the clauses therein)[33], without expressly referring to the survival or the termination of the contractual relationship between the shipper and the carrier.

Given this lacuna in the Chinese Maritime Code, we must ask whether the Chinese judges could find any solutions within the Chinese Contract Code 1999. Disappointingly, the Code is quiet with regard to this point.

Concern is thus with the question of whether the shipper is entitled to sue the carrier on the contract of carriage after the bills of lading have been transferred to the consignee/endorsee under Chinese law. Undoubtedly, the lack of a definite solution provided by statute law in this regard leads to conflicting and controversial answers to the question in practice. Although most of the judges held that the shipper was not entitled to sue the carrier in contract with the transfer of the bill to others, there were decisions delivered in favour of the shipper. Thus the shippers and carriers find it hard to predict the decision of the courts on this subject matter.

Various approaches have been adopted by judges and proposed by law experts in

[33] See *post*, Chapter 2 The holder's title to sue.

legal literature in order to resolve the related problems caused by this lacuna, but none of them has been backed up by a satisfactory and justified rational reasoning. There are mainly three schools of thought:

(1) Some judges have acknowledged the coexistence of two contracts (i.e. the new one made with the consignee/endorsee and the original one made with the shipper surviving after the transfer of the bills of lading);

(2) Other judges have found difficulties with there being two contracts at the same time, supporting the view of that the original contract is terminated on the transfer of the bills of lading;

(3) A third group claims that the shipper loses the right where he does not have proprietary rights or/and the risk is passed to others.

The three schools of opinion are examined and evaluated below.

1.1.3.1. School of thought A

Two contracts of carriage exist concurrently (in favor of the shipper)

One group claims that two contracts exist concurrently after the transfer of the bill of lading from the shipper to the consignee.[34] It holds that the original contract, i.e. the contract of carriage between the shipper and carrier, evidenced by the bill of lading, survives, whilst the new one, contained in the bill of lading between its holder and the

[34] See "Practice and Theory on Maritime Justice", 1st edition, 2002, Law Press, p 115.

carrier, exists at the same time.[35] On this analysis, the shipper never loses his rights to take action against the carrier for his breach of contract, in other words, once he is a shipper, he is always a shipper.

Some judges have supported this opinion and in some cases they have opined that the shippers were entitled to sue the carrier after the bill was transferred as long as they suffered a loss when the carriers were in breach of the carriage contracts.[36]

In one case[37], part of the cargo was allegedly damaged and rejected by the buyer on arrival and the seller/shipper was not fully paid accordingly. It was held in the Shanghai Maritime Court that there was no express provision in the present Chinese Maritime Code regarding the extinction of the contractual relationship between the shipper and the carrier, although it was true that the claimant shipper transferred to and vested in the holder of the bills of lading the rights and obligations contained in the bills of lading by reason of endorsement. The judges concluded that the shipper's rights against the carrier for the breach of contract were not extinguished.

In *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co*[38], the goods carried by the defendants were allegedly damaged at the port of discharge and delivered to the consignee upon surrender of the bills of lading. The consignee, i.e.

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[35] Ibid.

[36] See *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co*, Law Report from Supreme People's Court, Volume 6, 1999, p 211; *Dalian Xiaoze Gongyi Co Ltd. v. Dalian Datong International Shipping Co*, [1998] Da Haifashangchuzi No339 from the Dalian Maritime Court and [1999] Liao Jingyizhongzi No67 from the High People's Court in Liaoning Province.

[37] See Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p 98 and p 139.

[38] See *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co*, Law Report from the Supreme People's Court, Volume 6 in 1999, p 211.

the buyer under the CIF trade contract, asserted his contractual rights of recovery against the seller and eventually recovered the damages against the latter.[39] The claimant was the seller under a CIF trade contract. His agent made a contract of carriage with company B and B made a contract of carriage with Company C. It was agreed in these two contracts which contained similar terms that the cargo be shipped on board the vessel "Wansheng". The defendant was the registered shipowner of the vessel "Wansheng" and Wantong Co was running the vessel when the cargo concerned in this case was on board.

It was held in the Haiko Maritime Court that the defendant should compensate the claimant for his loss on the grounds that the defendant was in breach of the contract of carriage between them. The defendant appealed and alleged that the claimant was not entitled to take action against him for loss of or damage to the goods. The High People's Court in the Hainan Province held that there was a contract of carriage between the claimant shipper and the defendant carrier; hence the claimant was entitled to sue the defendant as the shipper under the bill of lading although the bill of lading had been transferred to the consignee.

The approach adopted in these two courts was based on "school of thought A" that two contracts of carriage, i.e. the contract between the shipper and the carrier evidenced by the bill of lading and the contract between the carrier and the consignee

[39] Generally speaking, China adopts essentially the same approach to CIF contracts as English law. However, in practice, sometimes the payment is made on delivery of the goods rather than documents and buyer could seek recourse from the seller successfully for what appears to be loss/damage in transit, although it is contrary to the principle that risk passes on shipment. (For example, the case under discussion in this section: *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co*, Law Report from Supreme People's Court, Volume 6, 1999, p 211.)

contained in the bill of lading, exist concurrently. Should this argument be accepted, both the shipper and the consignee would be entitled to sue the carrier in contract. This consequence is by no means desirable for the following reasons:

First, it is quite likely that the carriers could face a multiplicity of litigation instituted under different jurisdictions by the shipper and consignee/holder of the bill of lading: for instance, the shipper would be entitled to sue the carrier to recover the economic loss and the consignee/holder could claim recovery for damage to the cargo. It is true that the carrier will not, eventually, pay twice for the damage caused by his breach of one contract, i.e. either the shipper or the consignee will get compensation from the carrier when the final judgments are made in the suits respectively. Nonetheless, the carrier might find himself in the unnecessary position of being involved in two claims and even having his ships arrested by applications from both shipper and consignee respectively when the proceedings are instituted under different jurisdictions.

Secondly, it would result in the situation whereby the consignee holder may find that his rights against the carrier under the contract of carrier are unsecured. It is generally accepted in China by custom of merchants, judges and legal literature that possession of the bill of lading should be treated as equivalent to possession of the goods covered by it, and the consignee, as the holder of the bill of lading, believes that the contractual rights are conferred on him with the endorsement of the bill of lading. If a person who transfers a bill of lading were to retain rights, the security of the new holder would be undermined by the anticipatory action from the indorsers/transferors. Since the question of who (seller/shipper or buyer/consignee) bears the risk of a loss will depend on the sale contract, the consignee as the holder might find that the

shipper has been compensated in proceedings to which the holder was not a party, without being able to argue that the loss was his. The carrier, in subsequent proceedings instituted by the holder would surely not be required to pay again. On the one hand, the carrier would be exposed to inconsistent claims; on the other hand, the holder might be left without a remedy. Thus the coexistence of the rights against the carriers in contract from the shipper and the consignee is undesirable.

1.1.3.2. School of thought B

Termination of the contract of carriage between the shipper and the carrier (against the interests of the shipper)

Some judges have supported the view that the contract of carriage made between the shipper and the carrier terminates where the bills of lading have been transferred or endorsed to the consignee-holder/endorsee-holder of the bill of lading[40]; and consequently all the rights and obligations of the shipper defined in the bill of lading have been transferred to the holder of the bill of lading, including the title to sue. One of the direct conclusions, thus, is that the shipper, as a party to the contract of carriage by sea as evidenced by the bill of lading, is deprived of the right to take action against the carrier in breach of contract as long as he transfers or endorses the bills of lading. On this analysis, transfer or endorsement of the bills of lading kills the shipper's standing to sue the carrier in contract.

[40] In the judgment at [1997] Jiaotizi No8 in the Supreme People's Court on *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co*, the judges agreed that the shipper who suffered loss is not entitled to sue the carrier who misdelivered the goods to the consignee at the port of destination on the grounds that all the rights including rights of suit had been transferred to the holder of the bill of lading and the holder was the only legal party to sue the carrier in breach of contract.

In a case[41] before the Shanghai Maritime Court in 2001 where part of the cargo was allegedly damaged and rejected by the buyer on arrival and the seller/shipper was not fully paid accordingly, it was held that neither the claimant shipper nor his insurer to whom all of his rights were subrogated was able to sue the carrier in contract, on the grounds that all rights and liabilities contained in the bill of lading were transferred by endorsement and the consignee, as the holder of the bill of lading, was the sole person entitled to take action against the carrier for damage to the cargo. The question of whether this approach of depriving the rights of the shipper is the most appropriate will be evaluated in detail later in this section (analysis on the decision delivered at the Supreme People's Court in *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co*[42]); what should be pointed out now with regard to this judgment is that there is no statutory provision in China supporting the view that "the consignee as the holder of the bill of lading is the sole person being entitled to take action against the carrier for damage to the cargo" although it is generally admitted in judicial practice that he is entitled to take action against the carrier[43]. Being "the party" entitled to sue the carrier and being "the sole party" entitled to sue are totally different. This conclusion, reached by the judges, was not founded upon any legal basis in China.

The defendants in *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co*[44] appealed to the Supreme People's Court. The decisions from the Haiko Maritime Court and the High People's Court in the Hainan Province were examined and reversed in the Supreme People's Court. It was respectfully submitted

41 See Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p 140.

42 See Law Report from the Supreme People's Court, Volume 6 in 1999, p 211.

43 See *post*, Chapter 2 The holder's title to sue.

44 See Law Report from the Supreme People's Court, Volume 6 in 1999, p 211; see *ante*, the judgment at first instance.

by a majority of the judges: a) that the carrier was discharged from all the liability of carriage when the cargo was delivered to the consignee/the holder of the bill of lading on arrival; b) that, since all the contractual rights and liabilities were transferred from the shipper/CIF seller to the consignee with the endorsement of the bill of lading, the plaintiff was not entitled to sue the carrier for the damage to the cargo; c) that, it was the freedom of the consignee to choose to assert trade contractual rights of suit against the seller or carriage contractual rights of suit against the carrier; since he chose the first remedy in effect, the claimant was not able to claim against the carrier for his economic loss, unless the consignee assigned to him all the rights under the bill of lading relating to the carriage.

The Supreme People's Court in this case was against the argument that "two contracts existed concurrently" (school of thought A) and was in favour of the notion that "all the contractual rights and liabilities were transferred from the shipper/CIF seller to the consignee with the endorsement of the bill of lading" (school of thought B). Although the decision on depriving the shipper of rights to sue the carrier is justified[45], the reasoning behind the decision was not well founded for two reasons:

First, this solution gives rise to a conflict of policies. Assuming that this concept emphasising the termination of the original contract between the shipper and the carrier was acceptable, it follows that the shipper should be divested of being liable to the carrier under the contract whilst he is deprived of suing the carrier in contract. On the one hand, there is the argument that if the bill of lading is transferred, he should not be entitled to sue the carrier. On the other hand, to divest the shipper of liabilities

[45] See *ante*, analysis of the judgments on the same case delivered by High Court in Hainan Province.

for the loss suffered by the carrier is an exercise of doubtful justice.[46]

Secondly, this argument contradicts the view expressed in some courts that the shipper as the holder of the reindorsed bill of lading should be entitled to sue the carrier.[47] It is hard to envisage that the shipper, as the holder of the bill of lading which is redelivered to him by the consignee, is able to sue the carrier on the contract whereas the contract is regarded as being terminated between them upon the endorsement of the bill.

Therefore, this point of view on the termination of the contractual relationship between the shipper and the carrier upon the endorsement of the bill of lading relating to the carriage contract is far from being regarded as the best solution in solving the problems on shipper's rights.

The judges also held that the claimant shipper was not able to claim against the carrier for his economic loss unless the consignee assigned to him all the rights under the bill of lading. It implied that if the consignee did assign all the rights under the bill of lading to the plaintiff shipper, the shipper should have gained entitlement to sue the carrier. This solution could be workable in practice under the present law. The assignment of the contractual rights will not be at odds with the Chinese Civil Procedural Code and the Chinese Contract Code: Art 13 of the Chinese Civil Procedural Code provides that "The parties to a civil lawsuit shall be entitled, within the scope stipulated by law, to dispose of their rights in civil affairs and their litigation

[46] See *post*, Chapter 3 The carrier suing the shipper.

[47] See *post*, 1.2.1.3.

rights."[48]; Pursuant to Article 81 of the Chinese Contract Code, in cases where the creditor assigns his contractual rights to the assignee, his contractual rights of suit against the debtor are transferred to the assignee upon the assignment[49]. Thus in this case, if the shipper had made an agreement with the consignee about the assignment of the carriage contractual rights when the latter claimed recovery for damage under the trade contract, the shipper might have been entitled to sue the carrier in contract.

It seemed that the Supreme People's Court was in favour of the view that the shippers were not entitled to sue the carrier in contract after the endorsement of the bill of lading. The problem that arises here is that the lacuna in Chinese statute law in this regard compels the court to look for a convincing rationality to back up the conclusion. But as analysed above, the arguments (school of thought A and B) supported by the court were defective. Other approaches (school of thought C) adopted by some courts to deprive the shipper of suing the carrier in contract will be examined below.

1.1.3.3. School of thought C

The third group claims that the shipper loses the right to sue the carrier on the contract of carriage where he loses proprietary rights or/and where the risk is passed.

1.1.3.3.1. Shipper loses his right to sue where he does not have the ownership of the cargo

In *Shanghai Baoliantai Electric Facility Co Ltd v. Japanese "K" Line Kawasaki*

[48] http://www.novexcn.com/civil_procedure_law.html.

[49] See Interpretation of Chinese Contract Code, edited by Ping Jiang, Press in Chinese University of Politics and Law,1999, p 68.

Kisen Kaisha Ltd.[50], the goods carried by a vessel owned by the defendant, *Japanese "K" Line Kawasaki Kisen Kaisha Ltd*, were found damaged on arrival and the consignee who was the CIF buyer of the cargo deducted part of the payment as recovery for the loss he suffered against the claimant who was the CIF seller. The bills of lading had been transferred to the consignee by endorsement. The claimant, seller under a CIF trade contract, not being the holder of the bill of lading, made a claim against the carrier for recovery of the economic loss he suffered, as the buyer had not paid him in full, instead deducting monies he felt he was owed due to the loss he had suffered himself, by virtue of the carrier's negligence in the undertaking of carriage of the cargo.

It was held in the Shanghai Maritime Court that the shipper was not entitled to sue the carrier since the goods had been delivered to the holder of the bill of lading at the port of discharge. It was also pointed out that the claimant shipper was not the holder of the bills of lading and therefore he was not able to recover damage against the defendant carrier for his economic loss.

The judges in the High People's Court in Shanghai Autonomous City upheld this judgment. However, they reached the same conclusion on different grounds: that the shipper was no longer the cargo-owner whilst the consignee obtained the property in the cargo from the shipper upon the endorsement of the bill of lading to him. Although no injustice was brought to the shipper by the decision that the shipper in this case should not be granted the entitlement to sue the carrier in contract[51], the

[50] See *Shanghai Baoliantai Electric Facility Co Ltd v. Japanese "K" Line Kawasaki Kisen Kaisha Ltd* Cases from the Shanghai Maritime Court, 1998. p 27.

[51] See *post*, 1.1.4.

justice of the reasoning given by this court was questionable. The court intended to link proprietary rights with rights of suit on the contract. But the problem that arises here is that there is no legal basis in China on which it could be regarded as appropriate to request the shipper to prove ownership of the cargo when the claimant shipper is suing against the carrier for breach of contract rather than in tort. If the shipper takes action against the carrier in tort, one of the requirements that should be satisfied is that he has the proprietary rights over the goods involved.[52] That did not happen in the present case. In this respect, the reasoning failed to support the decision made by the court. Linking proprietary rights to the rights of suit in contract is thus not a satisfactory solution to the present issue.

Despite the respect which is due to the two courts, the same conclusion might be given on this ground: Since the present statute (i.e. the Chinese Maritime Code) does not provide a legal basis upon which the decision could be made on the extinction of the rights of the shipper, it could be more acceptable if the judges point out that only the lawful holder of the order bill of lading can demand delivery of the cargo from the carrier pursuant to Art 71 which provides that "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 against surrendering the same. A provision in the document stating that the goods are to be delivered to a named person or to the order of a named person, or to order, or to bearer, constitutes such an undertaking." The carrier could argue that the shipper no longer has any right to delivery after he has parted with the bill of lading, the shipper therefore is deprived of the rights of suit that stem from delivery

[52] See *post*, 1.2.4.3. Suing in tort.

against the carrier. However, it must be noted that the shipper also could defend himself by stating that he is not deprived of his contractual rights against the carrier by any Chinese statutes and thus he is entitled to sue the carrier on the contract for the recovery of the loss or damage.

The judgments, delivered in the cases discussed above, would have caused less controversy if the Chinese Maritime Code provided as explicitly as in COGSA 1992 that the shipper's rights shall be extinguished with the endorsement of the bill of lading to others and the rights could only be resumed by reindorsement under specified circumstances.

1.1.3.3. 2. Shipper loses his right to sue upon the transfer of the risk

In *The Yawei*[53], the facts were virtually identical to those in the case discussed above (*Shanghai Baoliantai Electric Facility Co Ltd v. Japanese "K" Line Kawasaki Kisen Kaisha Ltd.*[54]), it was held in the Dalian Maritime Court that the claimant shipper was not entitled to sue the carrier on the grounds that he was not on risk in respect of the loss which occurred, in other words, that the risk had been passed to the consignee when the goods were shipped on board at the port of shipment and the consignee was the sole party entitled to sue the carrier for recovery of the damage.

The court did not consider "School of thought A or B", but sought to link the shipper's right of suit with risk. But was it a satisfactory solution to the present issue? Should carrying risk be regarded as a decisive factor in deciding whether the shipper is entitled to sue the carrier in contract?

[53] *The Yawei*,[2004] Da Haifashangchuzi No114, the Dalian Maritime Court in Liaoning Province.

[54] See Cases from Shanghai Maritime Court, 1998. p 27.

If this notion is accepted, it follows that the seller/shipper will not be entitled to sue the carrier as long as the goods are shipped over the rail of the vessel at the port of shipment.[55] Indeed, this principle will back up the decision, in most cases, that the shipper loses his rights of suit after the bill is transferred, since in the majority of cases he is not on risk from the moment when the cargo is shipped over the rail. However, it will also cover the situation where the bill of lading is not transferred from the shipper at all or it is reindorsed to the shipper. Put in another way, the application of this principle will lead to the result that the shipper, who does not transfer the bill or who has the bill reindorsed to him, will not be entitled to sue the carrier, on the grounds that the risk has been passed to others.[56] This is just not a desirable consequence. As discussed in another section of this chapter[57], it is not justified on the part of the shipper when he is deprived of the rights in cases where the bill of lading is not transferred or duly reindorsed to him under certain circumstances. Thus, the shipper's right of suit should not be linked to risk.

Summary of the decisions at Chinese courts on shipper's rights to sue

As already examined, the decisions made in the above cases on the question of whether the shippers' rights to sue the carrier are retained after the bills of lading are transferred to others are divided into two opposite groups:

One is that the shipper is entitled to sue in contract after the transfer or

[55] Risks pass to the buyer at the agreed point/port of shipment where Incoterms 2000 ("C" or "F") terms are incorporated into the trade contract: (shipment sales contracts): FCA,FAS,FOB,CFR,CIF,CPT,CIP.

[56] See *post*, 1.2.1.3. *Dalian Xiaoze Gongyi Co Ltd. v. Dalian Datong International Shipping Co*, [1998] Da Haifashangchuzi No339, the Dalian Maritime Court in Liaoning Province; [1999]Liao Jingyizhongzi No67, the High People's Court in Liaoning Province.

[57] See *post*, 1.2.1. Where the bill of lading is reindorsed to the shipper.

endorsement of the bill of lading on various grounds (there is no provision under Chinese Law to deprive the shipper of such rights[58] and that two contracts exist concurrently[59]);

The other, delivered by majority of the courts, is that the shipper is not entitled to sue in contract based upon various reasons (the shipper is not the cargo owner,[60] the risk is transferred to the consignee at shipment[61], all rights and liabilities are transferred and the original contract is terminated[62]).

Nevertheless, neither of them proves to be a satisfactory solution.[63] This is an acute defect of the Chinese Maritime Code which defeats the legitimate expectations of those involved, i.e. shippers and carriers. Should this lacuna in the Chinese Maritime Code be filled, the shippers and carriers would be more likely to be saved from unnecessary litigation.

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[58] See *ante*, 1.1.3.2, in a case in the Shanghai Maritime Court, See Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p 98. and p139.

[59] See *ante*, 1.1.3.1. The judgment from the Haiko Maritime Court and the High People's Court at *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co,* Law Report from the Supreme Court, Volume 6 in 1999, p 211.

[60] See *ante*, 1.1.3.3.1. Judgement from the High People's Court at Shanghai, *Shanghai Baoliantai Electric Facility Co Ltd v. Japanese "K" Line Kawasaki Kisen Kaisha Ltd.* , Cases from the Shanghai Maritime Court, 1998. p 27.

[61] See *ante*, 1.1.3.3.2 judgement from the Dalian Martime Court, *The Yawei*, [2004] Da Haifashangchuzi No114, the Dalian Maritime Court in Liaoning Province.

[62] See *ante*, 1.1.3.2. on termination of the original contract, a from Shanghai Maritime Court, Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p140; see *ante*, 1.1.3.2. judgment from the Supreme People's Court, at *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co,* Law Report from the Supreme Court, Volume 6 in 1999, p 211.

[63] See *ante*, 1.1.3.1.; 1.1.3.2.; 1.1.3.3.1. and 1.3.3.2.

1.1.4. Recommendations for the reform of the Chinese Maritime Code[64]

Under Chinese statute law and in judicial practice, no general rule or principle could be found for determining whether the cargo interests are entitled to sue the carrier. The shipper as one of the cargo interests has thus found it hard to foresee his rights against the carrier due to this lacuna. The carriers may also find themselves in a position of some difficulty because it is hard to predict whether they can be sued by the shippers in any particular circumstances.

In contrast with Chinese statute law, English statute law creates a general rule dealing with the shipper's rights of suit after the bill of lading is transferred although as we shall see exceptional provisions are also provided.[65] COGSA 1992 deprives the shippers of rights of suit against the carriers by transferring to and vesting in the holder of the bills of lading all rights of suit under "the contract of carriage"[66], which is evidenced by or contained in the bills of lading.[67] The Draft Instrument does not emphasise the survival or extinction of the shippers' rights of suit against the carrier after the bills of lading are passed to the subsequent holder, however, it provides that the shipper is entitled to institute proceedings against the carrier in contract provided that he bears the burden of proof that he suffers loss or damage in consequence of a breach of the contract of carriage and that the holder of the bill of lading does not suffer such loss or damage.[68]

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[64] The drafted provision relating to the shipper's title to sue to be inserted into the Chinese Maritime Code will be proposed at the end of this Chapter at 1.3. All of the suggested amendments to the present Chinese Maritime Code will be presented in the concluding chapter of this work.

[65] See *post*.1.2. Under English statute law, Section 2(5), 1.2.2.1.Section 2(2)(b)of COGSA 1992.

[66] See Section 5 (1) COGSA 1992.

[67] See *ante*, 1.1.1.3. on Section 2(5) of COGSA 1992.

[68] See *ante* 1.1.2.

We have seen that judicial practice has failed to produce a satisfactory solution to the problems arising from the lacuna in the Chinese Maritime Code regarding the shipper's rights as discussed and examined above[69]. Thus, legislative intervention is required. The justification for adding a provision such as section 2(5) of COGSA 1992 into the Chinese Maritime Code is as follows:

First, as a matter of policy, it is difficult to see why a carrier should be exposed to actions on two fronts, i.e. an action by the consignee/endorsee, and an action by the shipper. As evaluated in the section above (school of thought A) that "two contracts exist concurrently", should the shipper remain entitled to sue the carrier in contract after the bill of lading is transferred to the consignee, it is more likely that the carrier will face a multiplicity of suits from the shippers and the consignees, whilst the security of the consignee's contractual rights are undermined by the anticipatory suit from the shippers against the carriers.[70]

Secondly, since only the holder of the bill of lading can demand delivery of the cargo from the carriers pursuant to Art 71 of the Chinese Maritime Code, the shipper would clearly not have a right of delivery once the bill of lading is transferred to someone else. If the shipper retains the rights of suit, those rights of suit may arguably include the rights to instruct the carrier regarding delivery. If this is correct, then that can lead to a conflict with the rule laid down by Art 71 which only entitles the holder of the bill to demand delivery. The carrier will then be faced with a difficult question: Who should he obey, the shipper or the consignee/endorsee-holder of the bill of lading? On

[69] See *ante* 1.1.3.

[70] See *ante* 1.1.3.

this basis, it is not desirable to give the shipper rights which could lead to mis-delivery.

Thirdly, in most cases the shipper will not remain on risk after he ceases to hold the bill of lading and therefore he will not normally have any interest in suing. In other words, in the great majority of cases, the shipper will face no problem. The shipper, not being the holder of the bill of lading, but remaining on risk after the shipment of the cargo, has several ways to protect himself if his rights were to be extinguished by a new provision in the Chinese Maritime Code: the shipper has the right to sue the carrier in tort[71]; he can also negotiate with the buyer and have an agreement obliging the buyer to reindorse the bill of lading to him[72] or assign the contractual rights to him[73]. Providing one of these steps is taken, the seller will not be prejudiced by his lack of a contractual claim against the carrier. The approach adopted by Art 68(b) of the Draft Instrument entitling the shipper to sue after the bill is transferred is superfluous, in addition to its impracticability[74].

Fourthly, when it was asked, by the Working Group on Transport Law at UNCITRAL[75], "to what extent are rights and liabilities retained by the shipper after he has ceased to hold the bill of lading", the Chinese delegation comprising representatives from the Supreme People's Court and Research Institutes acknowledged that it was generally accepted that "...after the shipper has ceased to

[71] See *post*, 1.2.5.

[72] See *post* , 1.2.2.

[73] See *ante*, 1.1.3.1. on two arguments, judgment from Supreme People's Court, at *Wukuang International Metal Trade Co v. Hainan Tonglian Shipping Co,* Law Report from Supreme Court, Volume 6 in 1999, p 211.

[74] See *ante*, 1.1.2.

[75] See CMI (Comité Maritime International)Yearbook 1999 p.173. para 3.1.5.

be the holder the bill of lading, he shall not enjoy the rights under the bill of lading...". It indicated that the delegation was in favour of the argument that the shipper's rights should be extinguished under certain circumstances and it should be desirable to confirm this by inserting a provision with clarity into the Chinese Maritime Code.

Finally, if it were provided explicitly in statute in China that the rights of the shippers were extinguished under certain circumstances, the problems arising from the issues on the termination of the contract of carriage between the shipper and the carrier[76] would be solved.

Accordingly, it is necessary and appropriate to confirm and establish the general rule of extinguishing the original shipper's rights of suit when the negotiable bill of lading is transferred to others by adding a new provision into the relevant statute law in China (i.e. the Chinese Maritime Code).

Moreover, some of the information collected by the Law Commission and the Scottish Law Commission could be cited in this section, for supporting the argument that practising the general rule on the extinction of shippers' rights will not create controversy, as similar data is hard to collect in China at the present time. It was held in the Commissions' findings that "the statutory assignment model of the 1855 Act is familiar to international traders and we have had no complaints from cargo interests on this aspect of the law".[77] This conclusion is persuasive on the grounds that 100

[76] See *ante*, 1.1.3.1.

[77] The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991, p15, para 2.34. (iv)

replies were received from traders within the United Kingdom and elsewhere in Europe when the Law Commission carried out preliminary research in 1987 for establishing the extent of any problems which might occur in practice by sending a questionnaire to various commodity and other trade associations for circulation to their members[78]. It can be seen that the general rule on shipper's rights against the carrier in contract established under English law has been successful in resolving the relevant judicial issues and problems without controversy. Thus, there seems a necessity to create a similar rule under the Chinese jurisdiction to that used in the English system at present, ideally based on the said system.

1.2. Exceptions to the general rule

It has been established in the preceding part of this Chapter that the general rule regarding the shipper's title to sue the carrier in contract is to extinguish the shipper's rights of suit when the bills of lading are transferred. The following section will consider in detail the operation of the exceptions to this general rule:

- Shipper's rights to sue where the bill of lading is reindorsed to him
- Shipper's rights to sue as charterer
- Shipper's rights to sue in another's interest (particularly in cases where the bills of lading are lost or lack requisite endorsement)
- Shipper's rights to sue in tort
- Shipper's rights to sue in bailment

1.2.1. Where the bill of lading is reindorsed to the shipper

The problems regarding rights of the shipper to sue the carrier under examination here arise from two circumstances:

[78] Ibid, p 1, Background.

(1) The goods are delivered to the buyer without surrender of the bill (e.g., against a letter of indemnity), the bill of lading is transferred to the buyer, and he then rejects the goods and the documents, normally for breach of condition;
(2) The buyer rejects the goods after taking delivery of them against the bill of lading, and then reindorses the bill relating to the goods back to the shipper.

Is the shipper as the holder of such a bill of lading able to sue the carrier in contract in these two circumstances?

The present Chinese statute law does not deal with the question of when possession of the bill of lading ceases to give a right to possession of the goods and no provision is provided for dealing with the problems relating to the reindorsement of the bill under such circumstances.[79] The courts might deliver conflicting decisions if such issues were to arise under Chinese law.[80] It will be seen below that English statute law provides a satisfactory solution to the issues under discussion.

1.2.1.1. Under English law

Subsection 2(2)(b) of COGSA 1992

Section 2(2) of the 1992 Act is specifically designed to deal with the situation in which "when a person becomes the lawful holder of the bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates." The subsection provides that, in such a case, that person "shall not have any rights transferred to him by virtue of [section 2(1)] unless he becomes

[79] See *post*, 1.2.1.3.

[80] See *post*, 1.2.1.3.

the holder of the bill" in one of two circumstances specified in section 2(2): "(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements."

Subsection 2(2) (a) is irrelevant to the present subject matter and will be examined in detail in the chapter on the holder's rights of suit. What should be noticed here is that the "arrangements" referred to in subsection 2(2)(b) are the same as the ones referred to in subsection 2(2)(a) which are "any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill".

The primary concern here is with the meaning of "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" which is discussed below.

Possession of the bill no longer gives a right to possession of the goods

(1) Delivery is made to the person entitled to the delivery

In order to examine the effect of a delivery, it might be necessary to distinguish between a wrongful delivery and a due delivery.

Wrongful delivery

Wrongful delivery does not mean that the bill ceases to grant constructive possession

of the goods. In the case of *Short v. Simpson*[81] the main issue was whether a party, who takes a bill of lading by endorsement after a breach by wrongful delivery of the goods to a stranger, can maintain an action by virtue of the 1855 Act[82]. The goods were shipped to Bombay under a bill of lading making them deliverable "to order or assigns." The consignor/shipper indorsed the bill of lading in blank, and deposited it with a banker as security for an advance of money, and, on his re-paying the sum advanced, the bill of lading was reindorsed and delivered back to him. Erle, C.J. opined that

> "I think the strongest way of putting it for the plaintiff, is, to say that, without the aid of the Bills of Lading Act (1855), he was by that re-delivery remitted to all the rights which he had under the original contract. But, where there has been an indorsement of the bill of lading in blank, and a re-indorsement, I should be inclined to say that whoever took the bill of lading would take it as endorsee, and might sustain a claim upon it under that statute. The defendants (carriers) have not fulfilled their contract by the wrongful delivery of the goods to a third person."

Keating, J also pointed out that "by the re-endorsement, the plaintiff was remitted to his original rights under the bill of lading. A wrongful delivery of the goods is no delivery".[83]

In *Glynn Mills Currie & c. v. East & West India Dock Co.*[84], Mr. Justice Willes said that :

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[81] [1866] LR 1 C.P. 248

[82] Ibid.

[83] Ibid.

[84] *Glynn Mills Currie & c. v. East & West India Dock Co.*, (1882) 7 App. Cas. 600.

> "I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim under it."

In *London Joint Stock Bank v. British Amsterdam Maritime Agency*[85], Mr. Justice Channel observed that the question as to whether the bill of lading was discharged depended upon whether the person who took delivery was entitled to delivery. It was also held by Mr. Justice Thomas in *East West Corporation v. DKBS 1912 and Akts Svendborg Utaniko Ltd., P&O Nedlloyd B.V.* [86] that:

> "The bills of lading were not spent when the goods were delivered to them; It is clear on the basis of the long accepted dictum of Mr Justice Willes that a bill of lading remains in force even if the goods were misdelivered to a person not entitled to them."

Therefore, the shipper, who becomes the holder of the bill of lading by reindorsement after the carrier delivered goods to the wrong person, is remitted to his rights to sue against the carrier for recovery of the damage by breach of contract, on the grounds that the bill of lading remains in force, i.e. possession of the bill of lading still gives a right to possession of the goods.

Due delivery

The bill of lading ceases to be an effective document of title which transfers constructive possession of the goods once delivery of the goods have been made to

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[85] *London Joint Stock Bank v. British Amsterdam Maritime Agency*, (1910) 16 Com. Cas.102.

[86] *East West Corporation v. DKBS 1912 and Akts Svendborg Utaniko Ltd., P&O Nedlloyd B.V.* [2002]2 Lloyd's Rep. 182, pp 189-191.

the person having the right to claim them under the bill of lading.[87] Mustill LJ said, in *The Delfini*[88], that

> "When the goods have been actually delivered at destination to the person entitled to them, or placed in a position where the person is entitled to immediate possession, the bill of lading is exhausted and will not operate at all to transfer the goods to any person who has either advanced money or has purchased the bill of lading"

If a person who has acquired rights of suit against a carrier as a holder of a bill of lading could, after the cargo has been delivered to him, still transfer the bill to another person then there arises the possibility that bills of lading could be negotiated for cash on the open market, without any dealings in the goods, in other words, trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers.[89] This may be offensive to the spirit of the rule of law under which the sale of contractual rights of suit to persons with no interest in the underlying contract is illegal.[90] The general rule therefore is that a bill of lading is "spent" or "exhausted" when the goods covered by it have been delivered to the person entitled to delivery under the bill,[91] and consequently "spent" bills should not be regarded as documents of title[92]. Contractual rights can not be transferred by the transfer of a "spent" bill of

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[87] *Enichem Anic Spa and others v. Ampelos Shipping Co Ltd (The Delfini*)[1988] 2 Lloyd's Rep. 599, 609; *Short v. Simpson* (1866) L.R. 1 C.P. 248.

[88] [1990]1 Lloyd's Rep. 252, 269; citing *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317,330,335.

[89] See Treitel, Guenter, Reynolds,F.M.B., *Carver on Bills of Lading*, 2nd edition, Sweet& Maxwell, 2005. (Hereinafter it is referred to as Carver). para 5-052.

[90] See Carver, para 5-052; *The Kelo* [1985] Lloyd's Rep. 85; *Trendtex Trading Corp. v. Credit Suisse* [1982] A.C.679.

[91] *Barber v. Meyerstein* (1874) L.R. 4 H.L. 317 at 329-330; *London Joint Stock Bank v. British Amsterdam Maritime Agency* (1910) 104 L.T. 143; *Hayman & Son v. M' Lintock* 1907 S.C. 936 at 951; *Leigh& Sillavan Ltd v. Aliakmo Shipping Co. Ltd (The Aliakmon)* [1986] A.C.785.

[92] *Hayman & Son v. M' Lintock 1907* S.C. 936 at 951, *Seconsar Far East Ltd v. Bank Markazi Jomhouri Islami* [1997] 2

lading. Accordingly, the buyer who has received goods without presentation of the bill does not derive rights under the bill when he gets the bill. He could not then pass it to sub-buyers.[93] The shipper who loses his rights against the carrier on transfer of the bill will not regain his rights against the carrier if the buyer rejects the bill and goods against the shipper. In other words, in cases where the "spent" bill of lading is transferred by the consignee to anyone else by endorsement[94], or to the shipper or any previous holder by re-indorsement after the bill is spent or exhausted, the endorsee in the former cases or the re-indorsee in the latter cases could not obtain rights of suit against the carrier for breach of contract pursuant to this rule. Another point that must be noted is that possession of the bill of lading ceases to give a right to possession of the cargo, providing that the cargo is delivered to the consignee entitled to the delivery and disregarding the circumstances under which the cargo is delivered, i.e. it does not matter whether the delivery is made against a letter of indemnity or against the bills of lading.

COGSA 1992 leaves unaffected the substance of the general rule that contractual rights can not be transferred by the use of a "spent" bill of lading.[95] The consultants at the Law Commission[96] in the Reports[97] expressed, before emphasising the conditions that should be satisfied at the same time (i.e. the indorsement was effected

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Lloyd's Reps. 89 at 97: "The bills of lading were worthless as security because the [goods] were delivered without them."(The delivery was made to the consignees entitled to it).

[93] See Chapter 2 The holder's title to sue.

[94] This also will be discussed in Chapter 2 The holder's title to sue.

[95] See also Benjamin, *Sale of Goods*, 7th edition, Sweet & Maxwell, 2006.(Hereinafter it is referred to as Benjamin),para 18-90.

[96] The Law Commission and The Scottish Law Commission.

[97] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991.

in pursuance of contractual or other arrangements made before delivery[98]), that "implementing legislation should make clear that a bill of lading can be effectively indorsed so as to pass contractual rights even after delivery had been made."[99]

Subsection 2(2)(b) of COGSA 1992 provides that

> "...unless he becomes the holder of the bill... (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements."

Two circumstances are covered by this section:

(A) This provision typically applies where goods were sold by a shipper, and the goods were then delivered to the buyer without surrender of the bill (for example, against a letter of indemnity), when the bill of lading was transferred to the buyer, then he rejected the goods and the documents against the seller/shipper, normally for breach of condition. Pursuant to subsection 2(2) (b), the shipper as the endorsee/holder of this rejected bill of lading, is entitled to sue against the carrier for breach of contract even though the bill of lading ceases to transfer constructive possession of the goods at the moment when the cargo is delivered (against the letter of indemnity) to the consignee who is entitled to the delivery.

(B) Even in cases where the cargo is delivered to the buyer/consignee against the presentation of the bill of lading, and he then rejects the goods and the

[98] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.44.

[99] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.42.

document, the shipper as the holder of the bill of lading by reindorsement is entitled to sue the carrier in pursuance of subsection 2(2)(b) of COGSA 1992. For example, S and B in March made a contract for delivery in June. The goods are delivered but then rejected in June and the bill of lading goes back up the chain to S, who receives it in October. Even though the bill of lading ceases to grant constructive possession of the goods as the goods are delivered to the person entitled to the delivery in June, subsection 2(2)(b) provides S with rights as he acquired the bill "as a result of the rejection to [S] by [B] of goods...delivered to [B] in pursuance of [the March sale]".[100] Therefore, irrespective that the bill of lading ceases to be a document with proprietary rights attached to it in consequence of the delivery of the cargo to the person entitled to it (against the letter of indemnity or bill of lading), section 2 (2)(b) provides the seller/shipper with rights to sue the carrier if he is the person who received the reindorsed bill of lading "as a result of the rejection to" him" of goods or documents delivered to" the buyer/consignee in pursuance of "any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill".

(2) Other situations covered by the wording "possession of the bill no longer gives a right to possession of the goods to which the bill relates" of s. 2(2)

As will be expounded in Chapter 2, the wording of s.2(2) also covers the situation where the goods are destroyed and the goods related to the bill are lost at sea.[101]

[100]See this example given at Statute Annotated 1992 c. 50, Carriage of Goods by Sea Act 1992, p50-5, annotated by James Cooper, Lord Chancellor's Department.

[101] See *post*, Chapter 2 The holder's title to sue the carrier.

1.2.1. 2.Under the Draft Instrument

It is not stipulated by the Draft Instrument under what circumstances possession of the goods ceases to be attached to possession of the bill of lading and whether such a bill of lading reindorsed to the shipper would entitle him to sue the carrier in contract.

In cases where the bill of lading is transferred back to the shipper, the shipper will be entitled to sue the carrier under the Draft Instrument. The shipper, possessing a bill of lading where the bill is duly reindorsed to him (following rejection of the goods or documents or not) in the context of an order bill or when the bill is simply in his hands for various reasons in the context of the blank endorsed order bill or bearer bill, could fall within the definition of the holders under Art 1 (J), which defines a holder as

> "(i) a person that is for the time being in possession of a negotiable transport document and
>
> (a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or
>
> (b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
>
> (ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record."

Thus the shipper as a holder of a reindorsed bill following the rejection of the goods and documents against him might be able to sue the carrier in contract under the Draft

Instrument.[102] However, the lack of a limitation to the reindorsement of the bill of lading results in the possible problems of trafficking in the bills of lading within the market.[103] The approach adopted by section 2(2) of COGSA 1992 balances the benefits between the holder of such a bill and the carrier in a much more successful way than the Draft Instrument in this respect: on the one hand, it provides that "Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above"; on the other hand, it establishes the parameters within which such "a bill of lading can be effectively indorsed so as to pass contractual rights even after delivery had been made"[104].

1.2.1.3. Under Chinese law

In contrast with English law, no such provisions as that of section 2(2) (b) of COGSA 1992 are designed for dealing with the situations where the bill of lading is reindorsed to the shipper following a rejection of goods or documents against him.

In cases where the cargo is rejected without being delivered to the consignee buyer before the reindorsement of the bill to the shipper/seller, the shipper could be entitled to sue the carrier. The shipper could argue that, pursuant to Art 71 of the Chinese

[102] Such a shipper is entitled to sue the carrier in contract and it is not necessary for the shipper who institutes such proceedings to prove the loss or damage itself, it is deemed to act on behalf of the party that suffered such loss or damage in pursuance of Art 68 (a). (see *post*, 1.2.3.2.) This solution is different from the one provided by COGSA 1992 under which the shipper who got the reindorsed bill of lading takes a claim against the carrier in contract must prove that it suffers loss or damage by itself. Nonetheless, the shipper did not suffer loss or damage might sue in others' interest at common law under English jurisdiction. (see *post*, 1.2.3.1.)

[103] See *ante*, 1.2.1.1.

[104] See *Rights of Suit in Respect of Carriage of Goods by Sea*, The Law Commission and The Scottish Law Commission, 1991, para 2.42.

Maritime Code which provides that "..... A provision in the document (bill of lading) stating that the goods are to be delivered to the named person, or to the order of a named person, or to order, or to bearer, constitutes such an undertaking", any holder of a duly indorsed order bill of lading should be regarded as being entitled to demand delivery from the carrier and therefore the shipper as a holder of the duly endorsed bill is able to assert the rights of suit that stemmed from delivery against the carriers.

In cases where the cargo is rejected after being delivered to the consignee/endorsee against a letter of indemnity or bill of lading, the opinions as to whether the shipper, who gets the reindorsed bill is consequently entitled to sue the carrier in contract will be divided:

On the one hand, some Chinese judges might be inclined to countenance the argument that the bill of lading becomes "spent or exhausted" and should not continue to have possessory rights to the goods attached to it where the goods are delivered to the person entitled to the delivery[105] and therefore reindorsement of a "spent" bill to the shipper will not restore the shipper's contract with the carrier. Such an argument regarding the conditions under which the bill of lading is "spent" is not supported by any legal basis in China and more likely that this argument stems from legal experts who are familiar with the common law where this rule is well established.

On the other hand, the lacuna in this area of the law might lead to opposite decisions

[105] See *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co* [1996] Wuhan fshangzi No 128, from the Wuhan Maritime Court in Hubei province; [1997] E Jiangzhougzi No 294; [2000] Jiaotizi No 7, from the Supreme People's Court; See *Huayuan Hongkong co. v. Dalain Ship Agence Co,* [1995] Da Haifashangchuzi No72, from the Dalian Maritime Court.

being delivered in the courts. It has been stated in some courts[106], that "possession of the bill of lading" is the decisive factor in determining the rights of the shipper to sue the carrier in contract whilst no conditions are described to limit application of this approach and thus the reindorsement of the "spent" bills of lading to the shipper could be regarded as having legal effect. On this analysis, the shipper as holder of the reindorsed "spent" bill might be entitled to sue the carrier in contract.

1.2.1.4. Recommendations for the reform of the Chinese Maritime Code

As discussed above, the rule, regulating reindorsement of the bill of lading where possession of goods ceases to be attached to it, is very well developed under English jurisdiction.[107] The provision of s.2(2)(b) in COGSA 1992 would most obviously apply in cases where the shipper sold the goods and transferred the bill of lading to the buyer so as to vest rights under the contract of carriage in the buyer and the buyer then, after the goods had been delivered to him by the carrier (against presentation of the bill or the letter of indemnity), rejected them and transferred the bill of lading back to the shipper. Such a provision could solve similar problems, which have not been thus experienced but which might arise from analogous situations in China. Such a provision will not contravene any existing general principles on bills of lading under the present Chinese Law. It is widely accepted by judges and legal experts that possession of the bill of lading should be treated as the equivalent to possession of the goods covered by it and the bill loses such a feature if the goods are delivered to the person who is entitled to the delivery. Considering that the expression in s.2(2)(b) COGSA 1992 of "possession of the bill no longer gives a right (as against the carrier)

[106] See judgement from the High People's Court in Liaoning Province, *Dalian Xiaoze Gongyi Co Ltd. v Dalian Datong International Shipping Co*, [1999]Liao Jingyizhongzi No 67; Current Theory and Practice in Maritime Law, edited by Dongdian Yin, People Commute Press, 1st edition ,1997, p 71.

[107] See *ante*, 1.2.2.1.

to possession of the goods to which the bill relates"[108] has been a source of hardship in terms of interpretation,[109] it might be wise to define these wordings in order to eliminate confusion and unnecessary issues on interpretation, whilst the rest of this section could be transplanted into the Chinese Maritime Code. It is suggested that the reformed Chinese Maritime Code should include the provision that "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" include the following situations: the goods are duly delivered to the person entitled to claim it.[110]

1.2.2. The shipper as charterer

The shipper as the charterer will not lose his rights against the carrier for breach of contract when the bills of lading were transferred to others by endorsement under Chinese law.[111] What is the proposition of the law under English jurisdiction and the Draft Instrument?

1.2.2.1. Under English law

The answer to the question of whether the shipper/charterer's rights to sue the carrier under the contract of carriage is extinguished by the operation of COGSA 1992 depends on the answers to two questions: first, whether such a contract as between the shipper and the carrier is contained in or evidenced by the bill of lading; and secondly, whether the shipper's rights derive from the bill of lading. This argument is based upon the construction of s.2(5) and s.5(1)(a) of COGSA 1992. It is provided by s.2(5) that the transfer of rights by virtue of the operation of subsection (1) "shall

[108] See *post*, Chapter 2 The holder's title to sue.

[109] See *post*, Chapter 2 The holder's title to sue.

[110] See *ante*, 1.2.1.1.; see *post*, conclusion at Chapter 2 The holder's title to sue.

[111] See *post*, 1.2.2.3.

extinguish any entitlement to those rights" which derives from "the bill of lading" "from a person's having been an original party to the contract of carriage." S.5(1)(a) stipulates that, for the purpose of COGSA 1992, "the contract of carriage" in relation to a bill of lading means "the contract contained in or evidenced by that bill." Thus, in order to apply COGSA 1992 to extinguish the shipper's rights under the contract of carriage in any cases where a bill of lading is involved, at least two requirements should be satisfied: One is that the contract of carriage here refers to the contract contained or evidenced by the bill of lading; the other being that the rights which would be extinguished by the operation of the statute must derive from the bill of lading. Only one of these preconditions being satisfied would not be sufficient to determine that the shipper's rights to sue the carrier in contract are extinguished. The two questions in the context of the bill of lading issued under the charterparty to the shipper/charterers are examined below.

Where goods are shipped in a ship chartered by the shipper directly from the shipowner, any bill of lading issued to the charterer by or on behalf of the shipowner *prima facie* operates, as between shipowner and charterer, as "a mere receipt".[112] (This was one aspect of the decision in the leading case of *Rodocanachi Sons & Co v. Milburn Bros*).[113] Such a bill of lading is evidence of the facts stated therein, such as the receipt of the goods by the shipowner, the time of shipment and the apparent order and condition of the goods. But it is not evidence of the terms of the contract of carriage, for that contract will normally be contained in the charterparty.[114] If the bill

[112] See Carver, para 5-038 and para 5-039.

[113] *Rodocanachi Sons & Co v. Milburn Bros*, (1886) 18 Q.B.D. 67, at 75("only an acknowlegement of the receipt of the goods"), 78("to be looked upon as a mere receipt") 79 ("operates prima facie as a mere receipt").

[114] *Rodocanachi Sons & Co v. Milburn Bros*, (1886) 18 Q.B.D. 67, at 75(the bill of lading was merely a receipt and did not alter "the contract between them contained in the charterparty").

of lading conflicts with the charterparty, the latter will prevail as the original contract of carriage. Unless there is an "express provision"[115] in the relevant documents to the contrary, the bill of lading is not regarded as a subsequent contract that varies the terms of the charterparty.[116]

This bill of lading's non-contractual status should lead to the conclusion that no contractual action can be brought, either by the charterer against the shipowner or by the latter against the former. In other words, the rights of the shipper/charterer to sue the carrier/shipowner derive from the contract (i.e. the charterparty rather than the contract contained in or evidenced by the bill of lading) to which they are parties.

Thus COGSA 1992 would not apply to cases where the bill of lading is issued to the shipper/charterer under the charterparty and the shipper/charterer does not lose his rights under the contract of carriage contained in the charterparty merely because he has transferred the bill of lading on the grounds that his rights emanate from the charterparty and the contract is contained in the charterparty rather than in the bill of lading involved. This continues to be governed by the charterparty even though the charterparty contains a cesser clause in the usual form, making provision for cesser of the charterer's liability "but none for any cesser of the owner's responsibility." [117] Hence if the goods are lost while they are still at the charterer's risk the charterer will

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[115] *Rodocanachi Sons & Co v. Milburn Bros*, (1886) 18 Q.B.D. 67, at 75,78.

[116] *Rodocanachi Sons & Co v. Milburn Bros*, (1886) 18 Q.B.D. 67, at 75; *Sewell v. Burdick* (1884) 10 App.Cas. 74 at 105; *Leduc v Ward* (1888) 20 Q.B.D. 475 at 479; *Tagart, Beatson & Co. v. James Fisher & Sons* [1903] 1 K.B. 391 as explained *in Molthes B/A v. Ellerman's Wilson Line Ltd* [1927]1 K.B. 710 at 716; *President of India* v. *Metcalfe Shipping Co. Lte (The Dunelmia)* [1970] 1 Q.B.289 at 305,308; *Aktieselskabet de Danske Sukkerfabrikker v.Bajiamar Compania Naviera S.A.(The Torenia)* [1983] 2 Lloyd's Rep. 210 at 216; cf. *The Ardennes* [1951] 1 K.B. 55 at 60; *The Al Battani*[1993]2 Lloyd's Rep.219 at 222; *Trade Star Line Corp. v. Mitsui &Co.Ltd (The Arctic Trader)* [1996] 2 Lloyd's Rep. 449 at 455.

[117] *SS.Den of Airlie Co.Ltd v. Mitsui &Co* .(1911-1912) 17 Com. Cas. 116 at 122

prima facie be entitled to damages for breach of the charterparty.[118] He may be so entitled even if the goods are, at the time of the loss, at the risk of the transferee of the bill if, at that time, the latter has not yet acquired any contractual rights against the carrier by virtue of the transfer; any damages so recovered by the charterer would have to be held for the transferee.[119]

1.2.2.2. Under the Draft Instrument

It is not provided under the Draft Instrument as to whether the rights of the shipper/charterer will be extinguished after the bills of lading are transferred to others.

1.2.2.3. Under Chinese law

Chinese statute law does not operate to extinguish the rights of the shipper/ charterer to sue against the carrier/shipowner in contract after the bill of lading issued under the charterparty is transferred to others.

First, the contractual relationship between the shipper/charterer and the carrier/shipowner is not stipulated in the Chinese Maritime Code, however, the answer to this issue could be found in the construction of Art 95 of the Chinese Maritime Code which regulates the relationship between the carrier and the consignee/holder of the bill of lading.

Art 95 provides that

"Where the holder of the bill of lading is not the charterer in the case of a bill of

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[118] *SS.Den of Airlie Co.Ltd v. Mitsui &Co* .(1911-1912) 17 Com. Cas. 116 at 122

[119] On the principle of *Albacruz (Cargo Owners) v. Albazero (Owners) (The Albazero)* [1977] A.C. 774; the charterer in that case was named, not as the shipper, but as the consignee of the bill of lading which was later endorsed to the buyer from the charterer.

lading issued under a voyage charter, the rights and obligations of the carrier and the holder of the bill of lading shall be governed by the clauses of the bill of lading. However, if the clauses of the voyage charterparty are incorporated into the bill of lading, the relevant clauses of the voyage charter party shall apply."

It could be deduced from Art 95 of the Chinese Maritime Code that where the holder is the charterer in the case of a bill of lading issued under a voyage charter, the rights and obligations of the carrier and the holder of the bill of lading shall not be governed by the clauses of the bill of lading (but by the contract of carriage between them, i.e. the charterparty). A further conclusion that could be drawn is that in cases where the bill of lading remains in the hands of the shipper as the charterer, the rights and obligations of the carrier and the shipper shall not be governed by the clauses of the bill of lading but by the clauses of the charterparty. So if no express clause is found in the charterparty to the shipper/charterter of the right to sue the carrier for recovery of damage due to breach of contract, these rights would be retained.

Secondly, in cases where the shipper is a charterer, the shipper's rights and liabilities should be regulated by the voyage charterparty or time charterparty respectively in association with Art 94 and Art 127 of the Chinese Maritime Code, which provides for freedom of contract to the parties to the charterparty.[120] The general rule in respect of the voyage charterparty set out by Art 94 is that the provisions (excluding

[120] Art 94 of the CMC provides that "The provisions in Article 47 and Article 49 of this Code shall apply to the shipowner under voyage charter party. The other provisions in this Chapter (on Voyage Charter Party) regarding the rights and obligations of the parties to the contract shall apply to the shipowner and the charter under voyage charter only in the absence of relevant provision or in the absence of provisions differing therefrom in the voyage charter."

Art 127 of the CMC stipulates that "The provisions concerning the rights and obligations of the shipowner and the charterer in this Chapter (on Time Charter Party and Bareboat Charter party) shall apply only when there are no different stipulations in this regard in the charterparty. "

Art 47[121] which provides for the carrier's liability before and at the beginning of the voyage, and Art 49[122] which concerns the carrier's liability about shipping on the direct route) in the Chinese Maritime Code regarding the rights and liabilities of the parties to the voyage charterparty shall apply to the shipowners and charterer only in the absence of relevant provision or in the absence of provisions differing therefrom in the voyage charter; the general rule regarding the time charterparty set out by Art 127 is that the provisions in the Chinese Maritime Code concerning the rights and obligations of the shipowner and the charterer under the time charterparty shall only apply when there are no express provisions to the contrary in the charterparty. Thus the contractual relationship between the shipowner and the charterer shall be principally governed by the voyage charterparty or time charterparty: if there is inconsistency between the terms of the contractual clauses and the provisions in the Chinese Maritime Code, the former will prevail over the latter; if there is an absence of a particular clause in the charterparty, the Chinese Maritime Code will apply. As to the shipper/charterer's rights to sue the carrier after the bill of lading issued under the charterparty is transferred to a third party, the statute provides no answer. Therefore such rights will not be deprived in cases where the charterparty did not contain an express clause to deprive such rights.

1.2.2. 4. Recommendations for the reform of the Chinese Maritime Code

As discussed above, an unequivocal conclusion could be reached by construction of

[121] Art 47 provides that "The carrier shall, before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. "

[122] Art 49 provides that "The carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an act deviating from the provisions of the preceding paragraph. "

the present provisions of the Chinese Maritime Code, thus it is not necessary to modify the proposition of law in this area under Chinese jurisdiction.

1.2.3. One party suing in another's interest

Under Chinese law, neither the shipper nor the consignee can recover damage or loss from the carrier in circumstances where goods are shipped under a bill of lading which is never delivered to the buyer or which is delivered to him without the requisite endorsement.[123] The carrier can not escape liability in these circumstances under English law by virtue of the well-established rule at common law in *Dunlop v. Lambert*[124]. Concern here is with the question of whether such a rule could apply to similar cases under Chinese law.

1.2.3. 1. Under English law

At common law

Under common law, contractual rights under a bill of lading stay with the shipper even after the bill of lading has been physically transferred to a third party. (This common law position stated above was first altered by the Bills of Lading Act 1855 and then affirmed by the Carriage of Goods by Sea Act 1992 which expressly provides for the extinction of the rights of the shipper against the carrier after the bill of lading is transferred.[125]) On the basis of the so-called *Dunlop v. Lambert*[126] rule, the shipper could sue the carrier for breach of contract not only in respect of his own losses but also for any losses incurred by any subsequent holder of the bill of

[123] See *post*, 1.2.3.3.

[124] *Dunlop v. Lambert*, (1839) 9 Cl. & f. 600, 626-627.

[125] See *ante*, 1.1.1.1. the general rule under English statute law.

[126] See (1839) 9 Cl. & f. 600, 626-627.

lading.[127]

This was an exception to the general common law rule that a claimant can only sue in respect of his own losses[128]. However it was justified on the grounds that since the shipper would know, when he made the carriage contract, that title to the goods would be transferred to a third party during the voyage, he was in fact making the contract for the benefit not only of himself but also for any other party who would acquire title to the goods during this period.[129]

This situation changed when, pursuant to the 1855 Bills of Lading Act, contractual rights under a bill of lading attach to whosoever has physical possession of it. The House of Lords in *The Albazero*[130] considered that since the passing of the Bills of Lading Act 1855, the rationale upon which cases such as *Dunlop v. Lambert* were based should no longer apply in cases of carriage of goods by sea where the contract contemplated that the shipowner would also enter into separate bill of lading contracts with whoever might become the owner of the goods and endorsees of the bill of lading. However the common law rule established by *Dunlop v. Lambert*, can still be applied today in cases where for some reason contractual rights have not been transferred (basis COGSA 92, Section 2(1)) to the person who has suffered loss – for example where the bills of lading are either lost in transit before the claimant has acquired physical possession of the bill of lading or they are delivered to him without

[127] See Carver, para 5-057.

[128] See Carver on Bills of Lading, para 5-057. *The Albazero*, [1977] AC 774, at 846; *Woodar Investment Development Ltd v. Wimpey construction UK Ltd* [1980] 1. W.L.R. 277.

[129] See Carver on Bills of Lading, para 5-057.*The Albazero*, supra, at 846

[130] *The Albazero*, supra, at 846.

the necessary bill of lading endorsement.[131] The shipper could, in these cases, recover damages in respect of the buyer's loss.[132]

In *The Sanix Ace*[133], the goods were shipped in bulk under an FOB contract. The claimants were the charterers of the ship who were also the FOB buyers and who became the owners of the goods upon shipment. The bill of lading was issued to the order of the buyers' bank and only received by the buyers at a later date. During the voyage, the goods were re-sold to 11 end-users, each of whom received only a copy of the single bill of lading covering the whole shipment. The goods were damaged during transit as a result of the carrier's breach of the charter party carriage contract.

It was held that even though the claimant charterers had not suffered any loss they could nevertheless recover substantial damages on behalf of the end users since without this solution the end users would have no access to compensation. It was also held that the fact that the claimants had already been paid by the end users and had suffered no loss was not relevant provided the damages they received from the carrier were held for the account of the end users. One of the reasons given for the decision in *The Sanix Ace* was that, if the charterers were not entitled to claim substantial damages against the carriers, there would be *"no-one who could recover substantial damages from the carriers"*.[134] This rationale could equally be applied to any situation where a genuine loss has occurred as a result of the carrier's breach of the

[131] See Carver on Bills of Lading, para 5-057.

[132] Carver on Bills of Lading, para 5-057. "Such a case would not fall within s.2(4) of the 1992 Act since this subsection only enables a transferee of rights under the contract of carrriage to recover damages in respect of a third party's loss: it does not enable the original shipper to do this". Also see *post*, 1.2.4.1. discussion on s.2(4) of the 1992 Act.

[133] *The Sanix Ace* [1987] 1 Lloyd's Rep. 465 at 470.

[134] Ibid.

carriage contract and where the party who has suffered the loss has no entitlement to claim. For example where the bill of lading that was sent to him was lost in transit or not properly endorsed.[135]

In contrast, the Draft Instrument does not entitle the shipper to sue in another's interest in such cases where the shipper is not the holder of the bill of lading;[136] and Chinese law does not allow anyone who does not suffer loss to sue in another's interest under any circumstances.[137]

Under section 2(4) of the Carriage of Goods by Sea Act 1992

The 1992 Act deals with the situation in which rights under the contract of carriage are transferred to A by virtue of section 2(1), but the loss resulting from a breach of that contract is suffered by B. It does so in section 2(4), which provides that:

> "Where, in the case of any document to which this Act applies-(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but (b)subsection (1)above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of this person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised."

The purpose of this sub-section is to provide flexibility when necessary to the general

[135] See Carver on Bills of Lading, para 5-057.

[136] See *post* 1.2.3.2.

[137] See *post* 1.2.3.3.

principle in English law that claims for damages in contract can only be recovered in respect of a claimant's own losses. The present concern is with the operation of section 2(4) in circumstances where the shipper claims against the carrier to recover the loss or damage for the benefit of the consignee/endorsee who for some reason does not have contractual rights vested by virtue of section 2 (1) of the 1992 Act. In other words, has section 2(4) substituted the rule established in *Dunlop v. Lambert*[138] which entitles the shipper to sue on the account of the consignee/endorsee who suffers loss in circumstances where goods were shipped under a bill of lading which was never delivered to the buyer or which was delivered to him without a requisite endorsement?

The view was expressed that s.2(4) was inserted to make it clear that a person with rights of suit can recover in full, if necessary for the benefit of another.[139] This argument does not mean the shipper is excluded. However, it was expressed that it might be incorrect to state that section 2(4) would apply where "the other person" referred to in this provision is the original shipper under the bill of lading, because in such a case his rights under the contract of carriage would have been acquired as an original party and not (as required by section 2(4)(b)) by virtue of section 2(1).[140] Moreover, it should be noticed that *Dunlop v. Lambert*[141] is applicable to the cases where contractual rights have not been transferred by virtue of section 2 (1) of the 1992 Act to the person who has suffered the loss; whereas section 2(4)(b) provides that "subsection (1) above (i.e. section 2(1)) operates in relation to that document so that rights of suit in respect of that breach are vested in another person". This might

[138] See (1839) 9 Cl. & f. 600, 626-627.

[139] See James Cooper, *Statute Annotated 1992*, Carriage of Goods by Sea Act 1992, 50-6.

[140] See Carver on Bills of Lading, para 5-068. (This opinion is left open to argument.)

[141] See (1839) 9 Cl. & f. 600, 626-627.

preclude the court from applying section 2(4)(b) to the two situations discussed here. No matter how the court construes section 2(4)(b), the shipper in the cases under discussion here could seek remedy by applying the principle established in *Dunlop v. Lambert*[142].

1.2.3.2. Under the Draft Instrument

There are lacunae in this regime as to dealing with the shipper's rights to sue in other's interest in situations where the bill of lading is delivered to him without a requisite endorsement covered by *Dunlop v. Lambert*[143] rule under English jurisdiction.

Art 68 (a) of the Draft Instrument does establish a rule regarding suing in another's interest, but it requires that the person who does so is the holder of the bill of lading. Pursuant to Art 68 (a) of the Draft Instrument, the holder of a negotiable transport document, e.g. order bill of lading, "without having to prove that it itself has suffered loss or damage", is entitled to assert rights under the contract of carriage against the carrier or a performing party and "if such holder did not suffer the loss or damage itself, it is be deemed to act on behalf of the party that suffered such loss or damage"[144]. The holder referred to in Art 68 (a) could be the shipper and thus the shipper (as a holder of the bill) who does not suffer loss or damage himself could act on behalf of the party that suffers such loss or damage. The shipper could be regarded as a lawful holder under Art 1 (j)[145] of the Draft Instrument when the bill is not

[142] See (1839) 9 Cl. & f. 600, 626-627.

[143] See (1839) 9 Cl. & f. 600, 626-627.

[144] See A/CN.9/WG.III/WP.21 at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

[145] Art 1. (j) provides that " 'holder' means

(i) a person that is for the time being in possession of a negotiable transport document and

transferred or the bill is reindorsed to them in the context of an order bill or when the bill is simply in their hands for various reasons in the context of the blank endorsed order document or bearer document. This rule set out by Art 68 (a) in the Draft Instrument is different from the one established in *Dunlop v. Lambert*[146] at common law. This rule at common law could be applicable to the cases where the shipper is not the holder of the bill of lading (It could apply to cases where for some reason contractual rights have not been transferred by virtue of section 2(1) of the 1992 Act to the person who has suffered the loss: e.g. where goods are shipped under a bill of lading which is never delivered to the buyer[147] or which is delivered to him without the requisite indorsements.) The precondition that the shipper could sue on behalf of a third party under the Draft Instrument is that they are the holder of the bill of lading under Art 68(a), if they are not the holders, they are only entitled to sue for their own loss pursuant to Art 68(b).

It appears that the Draft Instrument provides generous solutions to the shippers taking actions against the carrier in contract: the shipper could sue as the holder of the bill of lading no matter whether they are the party who suffers a loss in pursuance of Art 68 (a); the shipper, not being the holder of the bill of lading but suffering a loss, could also be entitled to sue the carrier in contract by the operation of Art 68 (b). Art 68 (b) states that:

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or

(ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record."

[146] [1839] 9 Cl. & F. 600, 626-627.

[147] As in *Sanix Ace*, where there was only one bill of lading but there were 11 buyers, each of whom received only a copy (as opposed to one of a number of original parts of a bill issued in a set).

> "When the claimant is not the holder, it must, in addition to its burden of proof proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made."

Pursuant to this provision in Art 68 (b), the shipper, not being the holder of the bill of lading, is entitled to sue the carrier in contract after proving that the holder did not suffer such loss or damage in addition to its burden of proof that he suffered loss or damage in consequence of a breach of the contract.

The only situation where the shipper can not sue the carrier in contract under the Draft Instrument is where he does not suffer the loss and he does not hold the bill of lading at the same time. It includes the circumstances under discussion here: where the bill of lading is never delivered to the buyer or is delivered to him without the requisite indorsement. This lacuna gives rise to the problem that the carrier could consequently escape from being liable to the merchants for breach of contract. In contrast, the rule established in *Dunlop v. Lambert* at common law[148] is capable of resolving such a problem.[149]

1.2.3. 3. Under Chinese law

There is an analogous principle under Chinese law to the general rule set out at common law that a claimant can recover damages only for his own loss. Nonetheless, there is no exception to this general rule in Chinese law like that established in

[148] Such a case would not fall within s.2(4) of the 1992 Act(see post on s.2(4)) since this subsection only enables a transferee of rights under the contract of carriage to recover damages in respect of third party's loss: it does not enable the original shipper to do this. See *ante*, 1.2.3.1.on 2(4) of COGSA 1992.

[149] See *ante*, 1.2.3.1.

Dunlop v. Lambert at common law. The Civil Procedural Law of the People's Republic of China stipulates, in Art 108 at Chapter V entitled "Bringing a Lawsuit and Entertaining a Case", that the following conditions must be met when a lawsuit is brought: "(1) the plaintiff must be a citizen, legal person or any other organisation that has a direct interest in the case; (2) there must be a definite defendant; (3) there must be specific claim or claims, facts, and cause or causes for the suit; and (4) the suit must be within the scope of acceptance for civil actions by the people's court and under the jurisdiction of the people's court where the suit is entertained." These four subsections provide for the basic requirements to be satisfied for instituting a civil suit. One of that needs to be emphasised here is that the claimant must have a direct interest in the case in accordance with Art 108 (2). It is true that the expression "direct interest" is not defined in this statute, however, it is well learned and generally accepted in China that this means the claimant should sue for his own interest and not entitled to sue on other's account. Thus in the cases, where the rule of *Dunlop v. Lambert* could apply (e.g. the bill of lading is never delivered to the carrier or the bill of lading lacks the requisite endorsement), the shipper can not, under the present law, sue in another's interest under Chinese jurisdiction (i.e. they must prove that he is the party who suffers the loss or damage).

It is quite likely that neither the shipper/seller nor the consignee/buyer in these cases could sue the carrier in contract. On the one hand, the shipper who does not suffer loss could not sue for the account of the consignee. On the other hand, the consignee who suffers a loss can not sue in contract under circumstance where the bill of lading is lost or lacking the requisite indorsement since the bill of lading is the only evidence of the contract of carriage of goods by sea between the consignee and the carrier. It is

thus necessary to decide whether the carrier should be allowed to escape liability in these circumstances under the remodeled Chinese Maritime Code.

1.2.3.4. Recommendations for the reform of the Chinese Maritime Code

Empowering any party to the contract to take action under the contract on another's behalf will violate the fundamental principle that the claimant must have a direct interest in the case, this is well established under Chinese jurisdiction. It is undesirable for the reformed Chinese Maritime Code to break this general rule. However, the lack of such a rule means that inevitably the carrier will completely escape from compensating the cargo interests for its breach of the contract under these circumstances (i.e. where the bill of lading is transferred but lost in transmission and not delivered to the consignee; or the bill of lading lacks the requisite endorsement). Could the victim of the irrecoverable loss cover himself against such exposure by insurance cover? It is virtually impossible to envisage that any insurance companies would show interest in covering this risk when it is predictable that the loss will be unrecoverable. This problem thus is not simply one that can be shifted to matters of insurance. Concern here is mainly with the question of whether it is feasible to create a new rule entitling the shipper to sue the carrier on the account of another in the circumstances under discussion. The legislative history of the Chinese Maritime Code and the provisions within the present Chinese Maritime Code show that, although it is undesirable, it is not impossible to create a new rule that might break the general principles established under Chinese jurisdiction, providing it is demonstrated that this violation is necessary and no other remedies could be provided by other means[150]. The issues examined here accord with this precondition, thus it is

[150] Professor Si Yuzhuo, *Study on Maritime Law*, edited 1st edition, Dalian Maritime University Press, 2002, p16.

suggested that a new rule similar to the one established in *Dunlop v. Lambert*[151] at common law be inserted into the reformed Chinese Maritime Code.

1.2.4. Suing in Tort

Chinese statute law does not restrict the rights of the shipper to sue in tort for recovery of damage to the cargo concerned, if he also has contractual title to sue the carrier. The carrier is not deprived of his contractual defences where the action is taken in tort as opposed to in contract.[152] The proposition under English law is to the contrary.

1.2.4. 1. Under English law

At common law

If claims are to be made against a sea carrier under English law, it is more desirable that they are based on contract rather than in tort. The shipper could sue the carrier in tort but such rights of suit are restricted.

First, if the claim is made in tort, the claimant has the onus of proving negligence and also that he had either the legal ownership of, or a possessory title to, the goods in question at the time when the loss or damage occurred.[153] In *The Aliakmon*[154], Lord Brandon stated that:

> "...there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a

[151] See (1839) 9 Cl. & f. 600, 626-627.

[152] See *post*, 1.2.4.3.

[153] See (1839) 9 Cl. & f. 600, 626-627.

[154] *Leigh & Sillivan Ltd. v. Aliakmon Ltd. (The Akiakmon)*[1986] A.C. 785at p 809.

possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it."

In the case of purchaser of part of a bulk, it is unlikely that he will have such rights because any loss or damage to the cargo will usually occur while the goods are still unascertained. Even in other cases, it may be difficult to pinpoint the exact time either of the negligence or when ownership passed to the claimant.[155]

Furthermore, it is unsatisfactory that a buyer can sue in tort and evade the provisions of the contract of carriage which incorporates an internationally accepted set of rules.[156] The question arises as to whether the seller/shipper can recover damages in tort from the carrier even where there is a contractual relationship between them: in such cases, there may well be concurrent liability in contract and in tort. It is likely, for example, that there would be such concurrent liability where the duty arising under the contract (and alleged to have been broken) is no different from the corresponding tort duty. [157] But there will be no liability in tort where the imposition of the tort duty would be "so inconsistent with the applicable contract that, in accordance with ordinary principles, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded"[158] For example, it is submitted that, where the contract between the buyer was governed by the Hague Rules, the buyer

[155] *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606, 612-613.

[156] *See Compania Portorafti Commerciale S.A. v. Ultramar Panama Inc. (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310, 318.

[157] *Henderson v. Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 193.

[158] Ibid, at 194.

should not be able to deprive the carrier of the exceptions and limitations of those Rules simply by framing his claim in tort; and that this is so even though the Hague Rules lack the express provision to this effect which is now contained in the Hague-Visby Rules.[159] It was expressed that a claim in tort could fail on the ground that the relations between carrier and transferee were governed exclusively by the contract of carriage.[160] This would apply where the seller/shipper was in the same situation as the buyer. Thus the shipper/seller who has a carriage contractual relationship with the carrier might find it hard to recover the loss or damage to the cargo as a cargo owner from the carrier in tort.

Under the Carriage of Goods by Sea Act 1992

The Report[161] explained the Law Commission's decision not to recommend any exclusion of the right of an owner to sue in tort. Thus the proposition of law on taking action against the carrier in tort is not modified by COGSA 1992. The shipper is not deprived from taking action against the carrier in tort, but a claim in tort might fail on the grounds that the relationship between the two parties concerned are governed exclusively by the contract of carriage.

1.2.4.2. Under the Draft Instrument

This regime does not contain provisions regarding the conditions under which the parties to the contract of carriage are entitled to sue in tort. The underlying reason might be that, if cargo interests (including the shipper) could sue in contract whether he has suffered a loss (pursuant to Art 68(b)) or not (in accordance with Art 68 (a)),[162]

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[159] See supra, at 193.

[160] See *Greater Nottingham Co-operative Society Ltd v. Cementation Piling and Foundation Ltd* [1989] Q.B. 71; See Guenter Treitel, Bills of Lading: Liabilities of Transferee, [2001] LMCLQ, Par3 August 2001, 321-448, p 348.

[161] The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991. para 2.45 and para 5.24.

[162] See *ante*, 1.2.3.2 sue in other's interest under the Draft Instrument.

it will not be necessary to provide for other remedies such as tort for the loss under the same regime.

1.2.4.3. Under Chinese law

In cases where there may well be concurrent liability in contract and in tort, the shipper will not find it so difficult to recover from the carrier by taking action against him in tort under Chinese law as under English law.

In "*The Ruyi 2*"[163], the carrier delivered the cargo to the consignee without presentation of the order bill of lading, the shipper as holder of the bill of lading sued the carrier in tort. It was held that the shipper (claimant) was entitled to sue the carrier (defendant) in tort even though there was a contractual relationship between these two parties. The shipper claimant was required to assume the burden of proving negligence and showing that he was the owner or the party entitled to possession of the goods and the causation between the loss or damage and the negligence. (Four requirements should be satisfied to constitute an act of tort where the claimant institutes a claim in tort in China: The ownership of or the possessory title to the property, the act of negligence, the loss of or damage to the property, and the causation between the act and the loss or damage.[164])

The cargo owners can find that it is not so hard to bring an action against the carrier in tort in cases where there is contractual relationship between them under Chinese law as under English law. By operation of Art 58 of the Chinese Maritime Code, the problem of depriving the carrier of the exceptions and limitations of liability under

[163] *The Ruyi 2*, (2004) GuanghaifashenziNo74, from Guangzhou Maritime Court.

[164] Institute of study on law at Chinese Social Science Association, Law dictionary, Law Press, 2002, p1104; Tort Law, Shi Shangkuan, Law Press, 1st edition, 2001.

the Chinese Maritime Code simply by suit in tort as opposed to in contract would be resolved. Art 58, which is substantially identical with Art 7 of Hamburg Rules[165], provides that

> "The defense and limitations of liability[166] provided for in this Chapter (Chapter IV on contract of carriage of goods by sea) shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the action is founded in contract or in tort. The provisions of the preceding paragraph shall apply if the action referred to in the preceding paragraph is brought against the carrier's servant or agent, and the carrier's servant or agent proves that his act was within the scope of his employment or agency."

Since the carrier (or his servant or his agent) accordingly would not be subject to more liability in a claim brought by the cargo owners in tort than in contract, the shipper could choose to sue and get recovery in either way as long as all the rest of the requirements are satisfied. Additionally, another factor makes taking action in tort under Chinese law easier than under English law: the shipper is not required to prove

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[165] Article 7 (Application to non-contractual claims) of the Hamburg Rules (United Nations Convention on the Carriage of Goods By Sea 1978) provides that " 1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise. 2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention."

[166] The provisions regarding the exemption and limitation of the liabilities of the carriers under the Chinese Maritime Code are principally drafted by reference to the Hague Rules and are substantially identical with those under Hague Rules.

that he has proprietary rights or possessory rights when the tort of negligence occurred, providing he proves that he has such rights and that there is damage to the cargo caused by the negligence of the carrier; on the contrary, as discussed above, the shipper must prove that at the time when the loss or damage occurred, he had either the legal ownership of or a possessory title to the property concerned, otherwise he will not be entitled to sue the carrier in tort at Common law.

1.2.4. 4. Recommendations for the reform of the Chinese Maritime Code

It is not necessary to modify the present law in China even if the general rule extinguishing the shipper's rights will be formulated in the reformed Chinese Maritime Code.

1.2.5. Suing in Bailment

"Bailment" is a concept originated and established at Common law. The concern here is with the question of whether it has solved related problems effectively under English jurisdiction and whether it is necessary and feasible to transplant it into Chinese statute law.

1.2.5.1. Under English law

The shipper might get the right to sue as the bailor against the carrier bailee in bailment even if his rights to sue the carrier in contract are deprived by Section 2(5) of COGSA 1992.[167]

The question of whether the 1992 Act has changed the position in bailment arose at

[167] See *ante*, 1.1.1.3.on s.2(5) of COGSA 1992.

the *East West Corporation v. Dkbs 1912 and Akts Svendborg Utaniko Ltd. v. P& O. Nedlloyd B.V*[168]. The claimant shippers bailed their goods to two carriers and endorsed the bills of lading, and consigned the goods, to banks in Chile. The goods were released by customs agents to agents of the intended purchasers without presentation of the bills of lading and without payment of the purchase price. The banks delivered, but did not endorse, the bills of lading to the claimant shippers. The claimant shippers sued the carriers.

Under the ordinary principles of the law of carriage by sea, the claimant's action should have failed[169]: the naming of the banks as consignees with delivery of the bills of lading rendered the banks "lawful holders of the bill of lading" and this status operated to assign the contractual rights of the shippers, evidenced by the bills of lading, to the banks pursuant to COGSA 1992.

At first instance, the judge held that the rights between the shippers and the carriers in bailment and their rights under the contract were the same, there were no separate rights.[170] The Court of Appeal held, however, that the relationship of bailment continued between the plaintiff shippers and the carriers despite the delivery of the bills of lading to the consignee banks. It doubted whether possession ever left the shippers[171] or whether the banks acquired a sufficient possessory title at common law in respect of the goods to sue in tort for loss of, or damage to the goods.[172] It was

[168] *East West Corporation v. Dkbs 1912 and Akts Svendborg Utaniko Ltd. v. P& O. Nedlloyd B.V* ,[2003] 2 Lloyd's Rep. 239.

[169] Ibid, at 253, para42.

[170] [2002] 2 Lloyd's Rep. 182, para 52.

[171] Ibid.

[172] Ibid, at 254, para 45.

decided that COGSA1992 did not transfer rights in "bailment" to the consignee in possession of the bills of lading.[173] The defendant carrier was in breach of an obligation in "bailment" or, alternatively, on a basis "analogous to bailment" by their failure to deliver the goods to a person presenting the original bills of lading or to arrange the same of the customs agents when they delivered the goods to the latter.[174]

By analysing the report of the Law Commission, it was pointed out by the Court of Appeal that "it does not follow that the transferor loses all right to immediate possession or, therefore, all right of suit in bailment."[175] and that "where there is no intention to pass any possessory right, possessory rights sounding in bailment remain unaffected."[176]

With respect, it was stated, by Lord Hobhouse of Woodborough in *The Berge Sisar*[177], that it must be observed that all these statements in the report (i.e. the report from the Law Commissions on Rights of Suit in 1991), like the terminology used in the Act (COGSA 1992), are expressed in terms which refer explicitly to "the contract of carriage" and not to the rights of the holder of the endorsed bill of lading to the possession of the goods as the bailor as against the bailee. He also submitted that the important point which is demonstrated by this part of the report (s3.15, s.3.18 and s.3.22.), and carried through into the Act (COGSA 1992) is that it is the contractual rights, not the proprietary rights (be they general or special), that are to be relevant.[178]

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[173] Ibid, at 257, para 58,at 258, para 61, at 259, para 68, and at 264 para 86.

[174] Ibid, at 259, para 69 and at 264, para86.

[175] Ibid, at 254, para 45.

[176] Ibid, at 254, para 45.

[177] [2001] 1 Lloyd's Rep. 663.

[178] Ibid, at para 31.

If it were right to conclude that the sole effect of the 1992 Act is on contractual rights, it could follow that claims by shippers as bailors against the carriers as bailees would remain possible in the cases like *East &West* where there is no intention from the shipper to pass any possessory right and thus possessory rights sounding in bailment remain unaffected. "It does not mean that the shipping lines were exposed to conflicting claims, since they were entitled and bound to deliver against an original bill of lading", as it was respectfully submitted by Lord Justice Mance.[179]

1.2.5. 2. Under the Draft Instrument

Bailment is not considered as a device to solve the problems regarding rights of suit in the Draft Instrument.

1.2.5. 3. Under Chinese law

There is no such legal concept under Chinese law as "bailment" at common law. The contract of carriage is governed by general doctrines regarding contract set out by the General Principles of the Civil Code in the People's Republic of China and also governed by particular rules on contract of carriage created by the Chinese Civil Code and the Chinese Maritime Code. Art 288 of the Chinese Civil Code provides a definition on all types of carriage contracts, which is that "A carriage contract is a contract whereby the carrier carries the passenger or cargo from the place of departure to the prescribed destination, and the passenger, consignor or consignee pays the fare or freightage." The contract of carriage of goods by sea is defined particularly by Art 41 of the Chinese Maritime Code as "a contract under which the

[179] Ibid, at para 47.

carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another". The shipper could take action against the carrier either in contract as a party to the contract of carriage or in tort as the person who has the ownership of the goods. If the facts of the *East West Corporation v. Dkbs 1912 and Akts Svendborg Utaniko Ltd. v. P& O. Nedlloyd B.V.* were presented to the Chinese Maritime Courts, it might be held that the shippers would not be entitled to sue the carrier or a reverse decision would be given[180], or the shipper might succeed in this case if he takes action against the carrier in tort providing that requirements for suing in tort are satisfied (proving its proprietary rights, the loss or damage, the negligence of the carrier, and the causation between the negligence and the damage[181]).

1.2.5.4. Recommendations for the reform of the Chinese Maritime Code

It is far from desirable and necessary to transplant the concept of "bailment" from common law into the Chinese Maritime Code without very strong grounds.

1.3.Conclusion[182]-Legislative suggestion

1.3.1. General rule

The shipper will lose rights of suit against the carrier in contract for loss or damage when someone else acquires them.

"Where rights are transferred by virtue of the operation of subsection (1)[183]

[180] See *ante*, 1.1.3.

[181] See *ante*,1.2.4.3.

[182] The locations in the reformed Chinese Maritime Code of these new and those present provisions will be presented at the last chapter of this work as part of the conclusion.

above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives- (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage."

1.3.2. Exceptions to the general rule

In the case where a person becomes the holder of a bill of lading in pursuance of a reindorsement of a bill of lading following rejection of the goods or document, the shipper is remitted to the rights of suit against the carrier by reason of the reindorsement.

"Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, in consequence of a due delivery of the goods, that person shall not have any right transferred to him by virtue of subsection ( ) above[184] unless he becomes the holder of the bill as a result of the rejection to a person by another person of goods or document delivered to the other person in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill"

The position of the present law on the shipper's rights to sue under charterparty and sue in tort should not be modified.

In cases where goods are shipped under a bill of lading which is never delivered to the buyer or which is delivered to him without a requisite endorsement resulting in

[183] See *post,* Chapter 2 The holder's title to sue.

[184] See *post*, Chapter 2 The holder's title to sue.

contractual rights not being transferred to the consignee/endorsee, the shipper should be entitled to recover damages in respect of the buyer's loss.[185]

> "Where, in the case of any document to which this Act applies- a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage, but contractual rights have not been vested in that person by virtue of section ( ) of this code[186], the other person, without having to prove that it itself has suffered loss or damage, shall be entitled to exercise those rights for the benefit of this person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised".

The approach of entitling the shipper to sue in bailment should not be adopted under the Chinese legal system.

[185] See *ante*. 1.2.3.4.

[186] See *post*, Chapter 2 The holder's title to sue.

CHAPTER 2: THE HOLDER'S TITLE TO SUE

Issues pertaining to the holder's rights of suit against the carrier to be examined in this section are as follows:

(1) The definition of a lawful holder of a bill of lading

(2) The rights to sue the carrier in contract are conferred on the lawful holder of a bill of lading

(3) The lawful holder's rights to sue the carrier on behalf of a third party

The issues regarding the rights of suit to be considered in this chapter arise in the common case where goods are shipped by a shipper (often a seller of goods) on the terms that they are to be delivered by the carrier at the agreed destination, not to the shipper himself, but to (or to the order of) a third person who is the consignee or the endorsee under the order bill of lading or under the bearer bill of lading.[1] An elucidation of the following questions will form the subject-matter of this chapter:

Is the third person as a holder of the bill entitled to sue the carrier in contract?[2]

If the holder has such rights, the question that must be asked is who will fall within the ambit of "the lawful holder".[3]

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[1] The holder of the bill of lading may also have other rights of suit other than under the bill of lading, e.g. in tort or bailment under English law. Considering that no issues have arisen under Chinese law regarding the holder's title to sue in tort and there is no legal concept under Chinese law as "bailment" at common law, it is not necessary to examine the proposition under English law in this regard. However, the shipper's title to sue in tort or bailment under English law is respectively examined in Chapter 1 at 1.2.4 and 1.2.5.

[2] See *post*, 2.3.2.

[3] See *post*, 2.3.1.

Can the holder sue the carrier in cases where possession of the bill of lading no longer gives a right to possession of the cargo to which the bill relates?[4]

Is the holder who has no loss entitled to sue on behalf of the party who suffers loss, which is caused by the carrier's breach of the contract?[5]

This chapter consists of four parts.

In the first part, the basic principles established under English law in this area will be set out; then the practical problems which have arisen and the solutions adopted in English courts will be examined; we will anticipate the possible answers which could be delivered under the present Chinese law in Chinese courts to these related questions.

In the second part, the relevant provisions under the Draft Instrument will be presented and articulated.

The third part will start with articulation of the related principles under the present Chinese Maritime Code; then the practical problems which arose and the solutions adopted in the Chinese courts will be listed; we will then anticipate the possible answers which the English law and the Draft Instrument might have given to these questions.

[4] See *post*, 2.1.3.

[5] See *post*, 2.3.3.

In the fourth and last part of this chapter, the amendments to the present Chinese law will be proposed, in the light of the previous comparative study of the related problems and solutions in England and China.

2.1. Under English law

The acquisition of rights under the contract of carriage by, and the imposition of liabilities under that contract on, the consignee named in, or the transferee of, a bill of lading has been dealt with by special legislation (the Bills of Lading Act) since 1855 and is now dealt with by the Carriage of Goods by Sea Act 1992 in England.

The main rule with regard to the transfer of contractual rights by the use of bills of lading is contained in section 2(1) of the 1992 Act by which "a person who becomes (a) the lawful holder of a bill of lading...shall (by virtue of becoming the holder of the bill...) 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." It is no longer necessary for the holder to show that the property in the underlying goods has passed to him upon or by reason of his having become the lawful holder as was required under the 1855 Act. "Title to sue now derives from enquiring whether the bill of lading is lawfully held, rather than by examining how or when the property (or indeed, risk) passed."[6] In addition to this provision, the "lawful holder" is defined in s.5(2) of COGSA 1992 to cover three situations.[7] The holder is even allowed to sue in another's interest who is the real party who suffers the loss by the carrier's breach of contract by virtue of s.2(4).[8]

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[6] See James Cooper, *Statute Annotated 1992*, Carriage of Goods by Sea Act 1992, p 50-4.

[7] See the paragraph below.

[8] See *post*, 2.3.

To acquire rights under section 2(1) or section 2(2), a person must have become the "lawful holder" of the bill. The meaning of the "holder" is set out in section 5(2), which provides:

> "References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say-
>
> (a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
>
> (b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
>
> (c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;
>
> And a person shall be regarded for the purpose of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith."

Essentially, three situations are covered by the definition of "holder" in section 5(2). In these situations the holder is "a person with possession of the bill" and he must in addition satisfy one of three further requirements. He must either (under section 5(2)(a)) be "the consignee of the goods to which the bill relates, by virtue of being the person identified in the bill"; or (under section 5(2)(b)) be in possession of the bill "as

a result of the completion, by delivery of the bill, of any indorsement of the bill, or in the case of a bearer bill, of any transfer of the bill"; or (under section 5(2)(c)) be the holder of a bill which is not a document with proprietary rights attached to it under certain circumstances.

This section of the Carriage of Goods by Sea Act has given rise to the forthcoming difficulties of interpretation since it came into force in 1992 as follows:

1.Will the person identified in a straight bill of lading as consignee fall within the definition of holder referred to in section 5(2)(a)?

2. What action constitutes "the completion, by delivery of the bill, of any indorsement of the bill" under section 5(2)(b)?

3.What are the situations covered by the words "possession of the bill no longer gives a right to possession of the goods" and how to interpret the wording "transaction" and "any contractual or other arrangements" under section 5(2)(c)?

4. What is the meaning of the words "good faith"?

2.1.1. Consignee with possession of the bill defined in section 5(2)(a)

Will the person identified in a straight bill of lading as consignee fall within the definition of holder referred to in section 5(2)(a)?

Section 5(2)(a) stipulates that "a person identified in the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates" is the holder of the bill of lading. In view of the generally accepted argument that the straight bill of lading is regarded as the sea waybill for the purpose of COGSA 1992,[9] it is hard to conclude that the named consignee referred to in this subsection could be the consignee identified in the straight bill of lading. Thus the named consignee with possession of the bill here must refer to the person named as "to order" in the order bill of lading and he does not endorse such a bill to anyone else.[10]

2.1.2. Transferee with possession of the bill defined in section 5(2)(b)

What action constitutes "the completion, by delivery of the bill, of any indorsement of the bill" under section 5(2)(b)?

Intention to accept the delivery

Section 5(2)(b) deals with two situations: first, with that of a person (other than the consignee) to whom the bill is indorsed and delivered so as to complete the endorsement; and secondly with that of a person who acquires possession of a bearer bill as a result of any "transfer of the bill."

In a case of the former kind, it has been held[11] that the "delivery" requires more than merely sending the bill from the transferor to the transferee; such an act must be

[9] See Chapter 5 where the status of the straight bills of lading will be examined in detail; see *Rights of Suit in Respect of Carriage of Goods by Sea (Law Com No.196)*, paras 2.50 and 4.10-4.12. The definitions of bill of lading and sea waybill are set out for the purpose of the 1992 Act in ss 1(2) and 1(3) respectively. A straight bill of lading clearly falls in the latter definition.

[10] The position of such a holder under Chinese law is discussed below at 2.1.2.

[11] *Aegean Sea Traders Corporation v. Repsol Petroleso S.A. and Anothehr (The Aegean Sea)*, [1998] 2 Lloyd's Rep. 39.

accompanied by an intention of the part of the transferor to deliver the bill to the recipient and by an intention on the part of the recipient to accept this delivery.

In *Aegean Sea Traders Corporation v. Repsol Petroleso S.A. and Another (The Aegean Sea),* the question arose of whether a cargo receiver was a holder of a bill of lading under the 1992 Act and could incur liabilities under it[12]. An oil tanker went aground in Spain, after a voyage from the UK, and the carrier (the shipowner) sought to claim an indemnity for the enormous pollution claims, essentially on the basis that the receiver had nominated an unsafe port. The primary issue in this case was whether the alleged transferee had incurred liabilities under the bill by virtue of s.3 of the 1992 Act and, since liabilities can only be incurred under this section by a lawful holder of a bill of lading, the underlying question was whether the transferee was the holder of the bill or, in other words, someone who acquired rights under s.2(1).

The facts in this case are complex, but the following will suffice for the present discussion. On 20 November 1992, the charterer sold the oil cargo covered by the bill to its parent company Repsol (an oil refiner). The ship grounded on 3 December 1992. The bill had been drawn to the order of the charterer's supplier, who in turn by mistake indorsed it to Repsol on 17 December. The bill and invoice were sent to the charterer, who in turn forwarded the bill to Repsol. The indorsement was made in error, as it was clear that it should have named the charterer, so the bill was returned to the supplier who later re-indorsed the originals of the bill to the charterer i.e. the correct indorsee. The owners claimed against Repsol on the basis that Repsol became

[12] [1998] 2 Lloyd's Rep. 39. The issue in this case was whether the alleged transferee had incurred liabilities under the bill by virtue of s.3 of the 1992 act; but under s.3 (1) liabilities are incurred only by a person who has acquired rights under s.2(1).

subject to the liabilities, principally by reason of the provisions of the 1992 Act, under one of the two bills of lading under which the cargo was carried. The owners accepted that a person could not have "possession" of a bill of lading under s. 5(2)(b) unless that person knew that he had it, but argued that it was sufficient in this case that the terms of s. 5(2)(b) were satisfied once the supplier put the indorsed bill in the post to Repsol, and the latter received it; it did not matter that Repsol did not want to accept it on its own behalf, or as indorsed to it, or that it had been indorsed to it in error. It involves the questions of whether Repsol became the lawful holder of the bill of lading and whether Repsol obtained rights under s.2(1).

It was held that Repsol had not become holder of the bill of lading under s. 5(2)(b) merely because he had obtained the bill in consequence of someone indorsing it and sending it to the company. One reason backing up this conclusion was that "the person receiving [the bill] has to receive it into his possession and accept delivery before he becomes the holder"[13]; and there had been no such acceptance by Repsol in this case. Another reason given by the judges was that the bill was delivered to Repsol, not by the supplier, i.e. the indorser, but by the charterer, so that "there was never any delivery of the bill of lading by the indorser to complete the endorsement."[14] This reasoning assumes that the delivery of the indorsed bill of lading must be made by the indorser, although the wording of section 5(2)(b) does not expressly require this. Indeed one can presume that delivery by an agent of the indorser would suffice.[15]

[13] *The Aegean Sea*, supra, pp 59-60.

[14] Ibid., at p60.

[15] See Carver para 5-015.

It is also unclear how this reasoning in *The Aegean Sea* could be applied in respect of bearer bills of lading. Presumably, the transfer and proper delivery of the bills of lading would have to involve not just the physical receipt of the bill but also the indorsee's formal acceptance of it. What should also be pointed out is that Thomas J noted that the indorsement required did not have to be an indorsement that was intended to pass property, as that would be to re-introduce the very link between the passing of property and rights under the bill which the 1992 Act sought to remove.[16]

Thus a person might not be regarded as a holder of the bill of lading under s. 5(2)(b) merely because he obtains the bill in consequence of someone indorsing it and sending it to him. "The person receiving [the bill] has to receive it into his possession and accept delivery before he becomes the holder"[17]; and the bill should be delivered to the holder by the indorsor rather than other person *"to complete the endorsement."*[18]

The moment when the delivery is completed

Section 5(2) (b) also gave rise to the question of the exact moment when the delivery is regarded as being completed. Is the delivery completed at the moment when the bill is sent from the previous holder or when the final holder receives the bill? In *Gulf Interstate Oil Corporation L.L.C. and the Coral Oil Co. Ltd v. Ant Trade and Transport Ltd of Malta (The Giovanna)*,[19] a question arose as to the exact moment when the claimant buyer became the holder of bills. The seller's bank had been a

[16] *The Aegean Sea*, supra, at p 62.

[17] *The Aegean Sea*, supra, pp 59-60.

[18] Ibid., at 60.

[19] *Gulf Interstate Oil Corporation L.L.C. and the Coral Oil Co. Ltd v. Ant Trade and Transport Ltd of Malta (The Giovanna)*, [1999] 1 Lloyd's Rep. 867.

lawful holder of the bill and a delay in its indorsement to the claimant buyer was caused by a dispute over payment for the cargo represented by the bills. After agreement had been reached on the payment, the bank confirmed that it had indorsed the bills to the claimant and had dispatched them by the courier to the claimant. The claimant relied on s.5(2)(b) and argued that he had possession of the bills through the bank, at least from the moment when the bank had indorsed the bills and handed them to the courier. The carrier submitted that "possession" required the bills to be in the claimant's hands in order to come within s.5(2)(b).[20] The court suspected but assumed that the claimant's position was correct, i.e. it had possession of the bills from the moment when the bank had indorsed the bills and handed them to the courier, although at the same time, Rix J acknowledged that he had not come to a concluded view on this important point under the 1992 Act.[21] The assumption made by him on this point is questionable. Section 5(2)(b) identifies such a person as a lawful holder of bill of lading: a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill. The expression about "the possession of the bill" could mean the physical possession of the bill in most cases whilst it could also mean the rights to possessing the bill between the time when it is sent from the previous holder and the time when it is received physically, as assumed by the judge in *The Giovanna*[22]. However, even if it could also mean the rights to possessing the bill before it is received physically, on the facts of *The Giovanna*, it might be thought that the bank would have had the authority to cancel the delivery of the bill of lading before it arrives at the hands of the claimant buyer physically since the courier should

[20] Ibid, p 877.

[21] Ibid.

[22] *The Giovanna*, [1999] 1 Lloyd's Rep. 867.

follow the instruction from the bank. In such circumstances it is difficult to see that the claimant buyer ever had possession of the bills at the moment when the bill was sent from the bank within the meaning of the Act. Thus the assumption held in *The Giovanna* might not be correct, and the claimant buyer therein probably could not become the holder of the bills from the moment when the bank sent the bills to the courier as the bank was still entitled to demand the bills back before they arrived at the claimant's hands.

Will the holder defined in s. 5(2)(a) and s. 5(2)(b) of COGSA 1992 be regarded as holder under Chinese law?

It has been orthodox that the provision of Art 78 in the Chinese Maritime Code is the legal basis upon which the consignee or the endorsee as the holder of the bill of lading is entitled to sue the carrier for breach of contract. Nevertheless, it must be pointed out that Art 78 does not precisely refer to transfer of rights to the holder of the bill of lading in the same way as s.2(1) of COGSA 1992 does. What Art 78 says is, *inter alia,* that "the relationship between the carrier and the holder of the bill of lading with respect of their rights and obligations shall be defined by the clauses of the bill of lading".[23]

Concern lies with the meaning of the wording "the holder" referred to in Art 78 of the Chinese Maritime Code. The lack of the definition of such an important wording gave rise to the question of who could be regarded as holders (lawful holders)[24] under the

[23] Further discussion on this matter will be found at 2.3.

[24] Regardless of the lack of the word "lawful" in front of the wording "holder", "the holder of bills of lading" in the CMC is regarded as referring to "lawful holder of the bills of lading" in judicial practice. See Professor Si Yuzhuo, *Study*

present law. A category of "the holder" might be implied from Art 71 of the Chinese Maritime Code. The first part of Art 71 describes the status of a bill of lading by providing that "A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same". If it is correct to construe that the carrier is obliged to deliver the goods against the presentation of the bill of lading pursuant to this provision, the following question must be asked: who will present the bill of lading to the carrier? An answer might be found in the second part of Art 71 of the Chinese Maritime Code, which says that "A provision in the document stating that the goods are to be delivered to a named person or to the order of a named person, or to order, or to bearer constitutes such an undertaking." So in the cases where the order bill of lading is presented, the person named therein or the endorsee could be regarded as the lawful holder; in cases where the blank endorsed order bill of lading or a bearer bill of lading is produced, the presenter of such a document could be regarded as the lawful holder of the bill of lading; in cases where the straight bill of lading is presented, the person named therein could be regarded as the lawful holder.[25] On this analysis, it could be implied that the lawful holder must be a person who possesses the bill physically and intends to accept the bill with a view to surrendering it, otherwise the carrier cannot "undertake to deliver the goods against surrendering the same"[26].

Through the previous discussion of English law, it is clear that the lawful holders referred to under section 5(2)(a) and 5(2)(b) of COGSA 1992 will be either the

on Maritime Law, edited 1st edition, Dalian Maritime University Press, 2002,139; See Professor Si Yuzhuo, *Textbook of Maritime Law, 1999*, 2nd edition, Dalian Maritime University Press, p 160.

[25] The holder of the straight bill of lading's rights and liabilities will be discussed in Chapter 5.

[26] First part of Art 71 of the CMC.

consignee who is identified in and possesses the order bill or the endorsee with possession of the order bill by way of delivery, or holders of bearer bills.

It might be hard, as discussed above, to conclude that the "holder" referred to in the Chinese Maritime Code would exclude these three types of persons defined in COGSA 1992. The difference is that the holder of a "straight bill of lading" does not fall within the definition of a lawful "holder of the bill of lading" in section 5(2)(a) of COGSA 1992 in England whereas he could be regarded as a "holder of the bill of lading" in China by a construction of Art 71 of the Chinese Maritime Code.[27] As to the question arose on the interpretation of the wording "as a result of the completion, by delivery of the bill, of any indorsement of the bill" in section 5(2) (b) of COGSA 1992, the answer that might be implied under the Chinese Maritime Code is that the lawful holder should be the person who has the intention to accept the delivery of the bill and should physically possess the bill by a construction of Art 71.

2.1.3. Section 5(2) (c)

Under COGSA 1992, the mere fact that a bill of lading is indorsed after delivery has taken place does not necessarily deprive the new holder of the bill of lading of a right to sue the carrier. Section 2(2)(a) and section 5(2)(c) of COGSA 1992 are specifically designed to allow the holder of a bill of lading which ceases to be a document with proprietary rights attached to it to sue the carrier providing certain conditions are satisfied. They are examined below.

Section 5(2) (c) provides that

[27] The holder of the straight bill of lading's rights and liabilities will be discussed in Chapter 5.

"Reference in this Act to the holder of a bill of lading is a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates."

Section 2(2) of COGSA 1992 states that

"Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements."

By reason of the combined operation of the provisions in s.5(2)(c) and s.2(2)(a), the lawful holder of a bill of lading, where possession of the bill no longer gives him a right to possession of the goods, is entitled to take actions against the carrier providing that he became the holder of the bill in pursuance of any contractual or other arrangements made before the time when such a right to possession ceases to attach to possession of the bill. It is indicated in the Reports[28] that s.5(2)(c) should be

[28] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991,p 53. In explaining clause 5(2), it is stated that "though see, of course, subsection 2(2). " Section 2 of COGSA 1992 provides that

interpreted in conjunction with s.2(2)(a). These two sections are interconnected closely. The former section defines the holder of a bill of lading in cases where possession of the bill no longer gives a right to possession of the goods. The latter section stipulates that such a holder is able to have rights of suit transferred to him under certain circumstances. In addition, in view of the fact that several significant forms of words used in section 5(2)(c) are identical to those in section 2(2)(a), it will be convenient to examine these two sections at the same time. There are at least three phrases used in these two sections that are a source of controversy:

(1) "possession of the bill no longer gives a right to possession of the goods";

(2) "transaction";

(3) "any contractual or other arrangements".

(1) "Possession of the bill no longer gives a right to possession of the goods"

(A). Delivery is made to the person entitled to claim the cargoes[29]

The general rule established at common law is that a bill of lading ceases to be an effective document of title transferring constructive possession of the goods once delivery of the goods has been made to the person entitled to receive them under the bill of lading[30]. Such a bill is regarded as "spent" or "exhausted" [31] and consequently

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"(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill."

[29] See *ante*, 1.2.1.1. pp 49-55.

[30] *The Delfini* [1988] 2 Lloyd's Rep. 599, 609; *Short v. Simpson* (1866) L.R. 1 C.P. 248.

[31] *Barber v. Meyersein* (1874) L.R. 4 H.L. 317 at 329-330; *London Joint Stock Bankd v. British Amsterdam Maritime Agency* (1910)104 L.T. 143; *Hayman & Son v. M'Lintock* 1907 S.C. 936 at 951.

should not be regarded as a document conferring title or other contractual rights[32]. Accordingly, the buyer who has received goods without presentation of the bill does not derive any rights under the bill when, in due course, he gains possession of it.

The general rule at common law, as stated above, is modified by COGSA 1992. In their reports, the Law Commission consultants commented that "implementing legislation should make clear that a bill of lading can be effectively indorsed so as to pass contractual rights even after delivery had been made."[33] This particular purpose is achieved by the combined operation of section 5(2) (c) and section 2(2) (a).

The Law Commissions did not intend to permit an open market in bills of lading that was unrelated to dealings in the goods themselves[34]. The assumption behind these sections is that the holder of a "spent" bill of lading will not acquire rights of suit against the carrier unless it fits within s.2(2)(a) or (b). By the operation of subsection 2(2)(a), the holder who becomes a holder in pursuance of any contractual or other arrangements before the bill of lading becomes "spent" is entitled to sue the carrier.

"In those cases where the bill of lading had been held up in the banking system until after the holder took delivery of the cargoes,[35] a person who later becomes the holder

[32] *Hayman & Son v. M' Lintock* 1907 S.C. 936 at 951, *Seconsar Far East Ltd v. Bank Markazi Jomhouri Islami* [1997] 2 Lloyd's Reps. 89 at 97: "The bills of lading were worthless as security because the [goods] were delivered without them."(The delivery was made to the consignees entitled to it); Benjamin, para 18-061.

[33] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.42.

[34] See *ante*, 1.2.1.1.

[35] *Cf. The Delfini* [1990] 1 Lloyd's Rep.252, and *The Filiatra Legacy* [1991] 2 Lloyd's Rep. 337.

might now be able to sue the carrier where the carrier has already delivered the goods against production of a letter of indemnity (LOI) (rather than the bill)."[36]

(B). Other situations covered by the words "*possession of the bill no longer gives a right to possession of the goods to which the bill relates*" in s. 2(2) and s.5 (2)(c)

a. *Where the goods are destroyed*

The Explanatory Notes to the Bill (COGSA 1992) state clearly that these words of "possession of the bill no longer gives a right to possession of the goods to which the bill relates" in s.5(2)(c) cover, *inter alia*, the case where the goods are destroyed.[37]

b. *Where the goods are lost at sea*

Concern here lies with the rights of the holder who possesses the bill of lading after the goods related to the bill are lost at sea. No authoritative answer to this question has been produced so far. In *Primetrade A.G. v. Ythan Ltd (The Ythan)*[38] where the cargo was totally lost when the vessel sank, one of the issues is about the ambit of the words in s.5(2)(c) "at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods". It was held by Mr Justice Aikens that "there cannot be a contractual right (as against the carrier) to possession of the goods that no longer exist (for practical purpose) because they are at the bottom of the sea."[39] On this basis, he concluded that this phrase "in section 5(2) (c) does apply to a situation where the goods have been lost forever."[40]

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[36] Gaskell, *Bills of Lading: Law and Contracts*, 1st edition, LLP, 2000, para 1 4. 69.

[37] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, p 49.

[38] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457.

[39] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457. para 70.

[40] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457. para 71. Mr Justice Aikens also conceded that "If the reason for the loss is a breach of contract by the carrier, there may at that stage spring

As pointed out by Mr Justice Aikens,[41] the drafters of COGSA 1992 might have had well in mind that section 2(2) covers this situation. This could be demonstrated by the statement in respect of section 5(4) and the association between s.2 (2) and s.5 (4) made in the Explanatory Notes to the Bill (COGSA 1992) in the Report[42]. The Explanatory Notes state that section 5(4)[43] "makes it clear that rights of suit in relation to any document can exist in respect of goods...carried on a vessel which sinks", the drafters might have had well in mind that section 2(2) covers the same situation as section 5(4) does since that section 5(4) refers to section 2(2) by providing that "without prejudice to sections 2(2) and 4 above..."

Accordingly, the wording of "possession of the bill no longer gives a right to possession of the goods to which the bill relates" in s. 2(2) and s.5(2)(c) covers the situation where the goods are due delivered, are destroyed and the goods related to the bill are lost at sea.

(2) "Transaction"

The lack of a definition of "transaction" might give rise to a question of what performance could fall within the meaning of "transaction" in these subsections. It is

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up a contractual right to damages, but whether there is and who can exercise that right are different question which I need not discuss here".

[41] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457. para 69.

[42] See *Rights of Suit in Respect of Carriage of Goods by Sea*, The Law Commission and The Scottish Law Commission, 1991, p 55.

[43] Section 5(4) of COGSA 1992 says that "Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates ---(a) cease to exist after the issue of the document; or (b) cannot be identified (whether because they are mixed with other goods or for any other reason); and reference in this Act to which a document relates shall be construed accordingly."

clear that in the context of order bills of lading, the transaction will refer to the endorsement of the bills of lading.[44] Whereas, no clue is provided in the Reports in respect of its meaning in the context of blank indorsed bills and bearer bills. Presuming that the transaction here might refer to a performance similar to indorsement of the order bill of lading, it follows that it should refer to the transfer of the bearer bill of lading or blank indorsed bill of lading to the person who consequently becomes the holder.

Among the issues that arose in *Primetrade A.G. v. Ythan Ltd (The Ythan)*[45] was the meaning of the word "transaction". The vessel Ythan, with a cargo of metallic HBI fines on board, exploded and sank off Colombia in February 2004, resulting in the death of the master and five crew members, as well as the loss of the vessel and its cargo. The shipowner sued the buyer Primetrade under two bearer bills of lading, alleging shipment of dangerous cargo.

One of the facts that must be noted here is that Primetrade instructed the bank UBS to transfer the bills to its agent, the insurance broker Marsh who then passed on the bills to the underwriters so that they could make an *ex gratia* payment in respect of the loss of the cargo.

By reason of the operation of the Carriage of Goods by Sea Act 1992, Primetrade could incur contractual liabilities towards the shipowner, providing that three preconditions were fulfilled: (1) Primetrade was regarded as the lawful holder of the

[44] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991,para 2.44; On s.5(2) at p53.

[45] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457.

bills, (2) the rights of suit were conferred on Primetrade, (3) Primetrade did exercise its contractual rights against the shipowner.

The commercial court gave its judgment in *Primetrade A.G. v. Ythan Ltd (The Ythan)*[46] on 1 November 2005 in which it focused on the first two of these issues, namely whether the defendant buyer fell within the wording of the "holder of the bill of lading" under s.5(2) (c) of COGSA 1992, and secondly whether the rights of suit were vested in him by virtue of s.2(2)(a) of COGSA 1992.

Considering the first issue of whether Primetrade fell within the wording of the "holder of the bill of lading" under s.5(2) (c). Section 5(2) (c) provides that "a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates."

Aikens, J. gave one primary reason why Primetrade was not regarded as a holder under s. 5(2)(c), which was that "the 'transaction' of the bills from UBS (the bank) to Marsh (the agent of Primetrade) has nothing to do with the normal course of trading a bearer bill of lading"[47] and "The transaction was made solely to enable Primetrade to collect from the underwriters once the casualty had taken place and the insurance settlement had been made."[48]

[46] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457.

[47] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457. para 80.

[48] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457.para 80.

With respect, this conclusion is not well founded for two reasons:

First, as Aikens, J. himself articulated, at para 66 of the judgment, "the word 'transaction' refers to the physical process by which the bill is transferred from one person to another." This was also the view of Carver on Bills of Lading[49] and also Benjamin's Sale of Goods[50]. It appeared to be Lord Hobhouse's understanding too, given the way he referred to a transfer of a bill of lading in his judgement in *The Berge Sisar*[51], which emphasised the physical transfer of the bills rather than the cause or the goal of the transaction. No authority has been found to support the view that what causes the transaction is relevant to the definition of the holder of the bills of lading.

Secondly and more importantly, given that s.5 (2)(c) is closely connected with s.5 (2)(b), it should be read in conjunction with the latter provision. If this is right, it follows that the meaning of the word "transaction" would be similar to the one defined by s.5(2)(b), i.e. "the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill." Returning to the facts of the present case, Primetrade's agent possessed the bills of lading on behalf of Primetrade "as a result of the completion, by delivery of the bearer bill, of any transfer of the bill" from the bank. On this basis, Primetrade fell within the definition of the holder under s.5(2)(c).

[49] At para 5-54.

[50] At para 18-090.

[51] *Borealis AB v. Stargas Ltd (The Berge Sisar)*,[2001] 2 All E.R. 193, at para 30.

(3) "Any contractual or other arrangements"

The second issue that the Commercial Court focused upon in *The Ythan*[52] was whether rights of suit were properly conferred in Primetrade and in particular on the construction of the words "any contractual or other arrangements". The lawful holder referred to in s.5(2)(c) shall have rights transferred to him providing two requirements set out in s.5(2)(c) and s.2(2)(a) are satisfied. One is that the transaction is effected in pursuance of any contractual or other arrangements; the other is that this relevant arrangement is made before the time when such a right to possession ceased to attach to possession of the bill. The contractual or other arrangements should refer to the fundamental reason or cause for the transference, i.e. the original sale contract or similar arrangements made between the seller and the holder.

There were two transactions involved and examined in *Primetrade A.G. v. Ythan Ltd*[53]. One of the transactions was the transfer of the blank indorsed order bills to the bank upon payment to the seller of the cargo. It was regarded as one that fell within the ambit of s. 5(2)(c) on the grounds that the bank "would have become holders of the bills under s.5(2)(b) if the transaction had taken place before the ship and cargo was lost."[54] and "the transaction that took place did so pursuant to the sale contract, all of which had been in place before the loss of the vessel."[55]. But another transaction, in the same case, involving the transfer of the bills from the bank to the underwriter (being regarded as the agent of the buyer), was not regarded as one falling within s.5(2)(c) on the grounds that the "transaction" involved had nothing to do with the normal course of trading a bill of lading and was made solely enabling the buyer to

[52] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457.

[53] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457.

[54] Ibid, para 74.

[55] Ibid, para 74.

collect from the underwriters once the casualty had taken place and the insurance settlement was made[56]. The judge further held that even if he was wrong about this point[57], the conclusion will be the same because the "contractual or other arrangement" in this instance was the agreement between the buyer/holder and his underwriters that they would make a compromise payment on the insurance, this agreement was made after, rather than before, the time when a right to possession of the cargo ceased to attach to possession of the bills.[58] The fact about the agreement was that "the buyer was prepared to agree with the underwriters that they should make an *ex gratia* payment in respect of the loss of the cargo"; and it was believed that the reason for the buyer to instruct the bank to transfer the bill to the underwriters was that the buyer contemplated underwriters would pay under a compromise agreement with the buyer.[59] Based upon the analysis of the facts and wordings of relevant provisions, it was concluded that no rights of suit could be transferred to the buyer under s 2(2)(a) of COGSA 1992.[60]

Although respect is due to the court, it is hard to say that it was a correct construction of the wording "contractual or other arrangements" for the purpose of s.2(2) of COGSA 1992.

It was submitted by Mr Justice Aikens that the relevant contractual or other arrangements should be the immediate reason or proximate cause for the transfer and

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[56] Ibid,para 80.

[57] See *ante*, on the construction of the word "transaction".

[58] *Primetrade A.G. v. Ythan Ltd (The Ythan)*, [2006]All ER (Comm) 367. [2006] 1 Lloyd's Rep. 457. para 83.

[59] Ibid, para 84.

[60] Ibid, para 86, 90.

on the facts of this case. It was the agreement between Primetrade and its underwriters that they would make an *ex gratia* payment on the insurance.[61]

Assuming that it is not wrong to say that the relevant contractual or other arrangements should be the immediate reason or proximate cause for the transfer, then the question that must be asked is why the bills of lading are transferred to the buyer. The paramount reason must be that the buyer (or the buyer's agent) paid the bank in exchange for the bills of lading. As to the reason why the buyer's agent paid the bank on behalf of the buyer, it was irrelevant to the question under consideration. Therefore, the reason or cause for the transfer of the bills in the present case was not the agreement between Primetrade and his agent, but was the act, by Primetrade or his agent, of paying the bank in exchange for the bills of lading.

But does this performance of payment fall with the ambit of "contractual or other arrangements" under s.2(2)? Indeed, the wording of "contractual or other arrangements" is not defined in the Act. However, the example, provided in the Law Commission Report on rights of suit in respect of carriage of goods by sea from The Law Commission and The Scottish Law Commission before the Act came into force, indicated that the legislature did not intend to confine "contractual or other arrangements" to the performance of any person to pay the bank in exchange for the bills of lading. Indeed, the Report gives the following example, in para 2.44, of what is covered by the wording of section 2(2). The instance provided in the report is as follows:[62] The goods which are to be delivered in June are sold by A to B in March,

[61] Ibid, para 85.

[62] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.44.

by B to C in April and by C to D in May. Upon delivery of the goods to the person entitled to them in June, the bill of lading ceases to be a transferable document of title: it can no longer perform its function of granting constructive possession of the goods to which the bill relates. The bill of lading makes its way down the chain and is indorsed to D in September. Although by that time the bill ceased to be a transferable document of title, D has rights of suit against the carrier. This is because he became the holder of the bill in pursuance of arrangements (viz. the sale of contract concluded in May) made before the bill of lading ceased to be a transferable document of title (in June). This instance shows that the arrangement, in pursuance of which D (the end-user) became the lawful holder of the bill by endorsement in September, refers to the sale contract, concluded in May which was made before the bill of lading ceased to be a transferable document of title in June. If the wording of "contractual or other arrangements" means "immediate reason or proximate cause for the transfer", as the judge submitted in *The Ythan*, the drafters would have stated in this example that the arrangements referred to the performance of paying the bank for the endorsement of the bill, as that would be the immediate reason or proximate cause for the transfer[63]. If the drafters had so stated, the holder would NOT have contractual rights conferred on him, as the payment was made in September, after the bill ceased to function as a document of title. This would have resulted in a failure to achieve the purpose of s.2 (2) of COGSA1992, which was not the intention of the drafters. Therefore, the wording must refer to the fundamental reason or cause for the transfer of the bill, i.e. the sale contract or any similar arrangements between the holder and the seller. On the facts of this case, it is the sale contract between Primetrade and the seller/ shipper. Thus the transfer of the bills from the bank to Primetrade's agent should be regarded

[63] See the preceding paragraph.

as one within the ambit of s. 5(2)(c), on the grounds that Primetrade would have become holders of the bills under s.5(2)(b) if the transaction had taken place before the ship and cargo were lost and the transaction that took place did so pursuant to the sale contract which had been in place before the loss of the vessel. Contractual rights should have been vested in Primetrade by virtue of s.2(2)(a) of COGSA 1992 as he became the holder of the bill by virtue of a transaction effected (on 22 March 2004[64]) in pursuance of the contractual arrangements made (on 24 November 2003[65]) before the time when such a rights to possession ceased to attach to possession of the bill (i.e. when the ship sunk on 28 February 2004).

If the decision delivered in *The Ythan* on the construction of these two provisions of s.5(2)(c) and s.2(2)(a) of COGSA 1992 is accepted, it will follow that in any case where the cargo is lost due to a casualty after the bill of lading has been issued, the holder of the bill will first not be regarded as a lawful holder and then not be entitled to take action against the carrier for recovery of this loss caused by breach of contract. This is not in conformity with the purpose of s.2(2) of the 1992 Act, which is specifically designed to allow such a holder to sue the carrier. The purpose of s.2(2) of COGSA 1992, as its legislative background demonstrates, is to establish the exceptional rule that "allows the lawful holder of a bill of lading which is no longer a transferable document of title to sue the carrier providing that he became the holder of the bill of lading in pursuance of any contractual or other arrangements made before the bill ceased to be a transferable document of title."[66]

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[64] Ibid, para76.

[65] Ibid, para19.

[66] See *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, Explanatory note, p49.

In *The David Agmashenebeli*[67], a decision was made on the effect of s.2(2)(a) of COGSA 1992. The master had claused the bill of lading which had lead to its rejection under the letter of credit. The seller then took over the cargo by presenting to the shipowner an original bill of lading marked "accomplished". The sale contract was then varied between the seller and the buyer so as to reduce the price and to provide for delivery of the goods from the seller rather than from the vessel. Payment of the varied price was made under the letter of credit. The transfer of the bill first to the bank and then to the buyer did not entail that either party ever became a "lawful holder". It was held that the proviso contained in s.2(2)(a) did not operate in respect of these transfers of the bill, as they were made pursuant to the varied sale contract at a time after the delivery had been made by the ship to the seller. By that time the bills of lading had ceased to give their holder possessory rights in the cargo. Mr Justice Colmanon stated that "the July agreement (varied sale contract) replaced the earlier agreement (the original sale contract) and its terms". It could be implied from this statement that Mr Justice Colmanon was inclined to agree that the "contractual or other arrangements" should be construed as the original sale contract between the seller and the holder.

Owing to the reasons put forward above, Primetrade should be regarded as a holder of the bills of lading under s.5(2)(c) of COGSA 1992 and contractual rights should have been vested in it by virtue of s.2(2)(a) of COGSA1992.

[67] *The David Agmashenebeli*,[2003] 1 Lloyd's Rep.92.

Other arrangements

Another situation covered by s.2(2)(a) of COGSA 1992 is that where "a person becomes the holder of the bill by virtue of a transaction effected in pursuance of any other arrangements made before the time when such a right to possession ceased to attach to possession of the bill". The arrangement might refer to gift or pledges.[68] An example of a gift could be the case where food is given to a famine relief agency in Africa, but is damaged in transit. This famine agency would in principle be able to sue under COGASA 1992.[69]

The position under Chinese law

There are difficulties in presuming that the holder of "spent" bills could be regarded as a lawful holder under the present Chinese Maritime Code[70] whereas the COGSA 1992 does so by the operation of s.5(2)(c) which enables title to sue to be given to certain holders of "spent" bills who fall within the ambit of s.2(2).[71]

The existing Chinese statutory law does not provide that the possessory rights are attached to bills of lading. In judicial practice, there are possibilities that the judges be inclined to support the argument that the bills of lading will be "spent" or "exhausted" upon the delivery of the cargo by the carrier to the person who is entitled to such a delivery and that the bill should not continue to be "a document of title" to the

[68] James Cooper, *Statute Annotated 1992*, Carriage of Goods by Sea Act 1992, p 50-5.

[69] Ibid

[70] See *ante*, on spent bill of lading in China. 1.1.2.2.2. at Chapter 1 Shipper's Rights; See *post*, 4.2.2.

[71] See above. on Lawful holder under COGSA 1992.

goods.[72] However, it must be noted here that although the legal conception of "a document of title" at Common Law is widely used in China, the statutory law there does not give any definition of it at all. This terminology is actually accepted by custom of merchants, judges and law academics only to the extent, and no more than that "possession of the bill of lading should be treated as equivalent to possession of the goods covered by it".[73] Thus, what is accepted in judicial practice is that the holder of such a bill of lading is not entitled to sue the carrier in contract on the grounds that the right (as against the carrier) to possession of the goods will cease to be attached to possession of the bill in consequence of a due delivery of the goods.

In cases where the cargo is destroyed or lost before the transaction of the bill of lading, the holder of the bill of lading will not be prevented from suing the carrier in contract under the present Chinese Maritime Code. The first part of Art 71 of the Chinese Maritime Code states the "A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same" and the second part of Art 71 says that "A provision in the document stating that the goods are to be delivered to a named person or to the order of a named person, or to order, or to bearer constitutes such an undertaking." If it is correct to construe that the carrier is obliged to deliver the goods against the presentation of the bill of lading by the holder of the bill of lading identified in the second part of this provision, it will follow that the lawful holder will

[72] See *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co* [1996] Wuhan fshangzi No 128, from the Wuhan Maritime Court in Hubei province; [1997] E Jiangzhougzi No 294; [2000] Jiaotizi No 7, from the Supreme People's Court; See *Huayuan Hongkong co. v. Dalain Ship Agency Co,* [1995] Da Haifashangchuzi No72, from Dalian Maritime Court

[73] See Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p 69.

be entitled to sue the carrier in contract if he presented the bill to the latter and the carrier alleged that the cargo was destroyed or totally lost.

This proposition under Chinese law is different from that under English law. The wording " possession of the bill no longer gives a right to possession of the goods to which the bill relates" used in s. 2(2) and s.5(2)(c) of COGSA 1992 covers the situations where the cargo is destroyed or lost.[74] The holder of the bills of lading in these two circumstances will not be regarded as the lawful holder and consequently not entitled to sue the carrier unless the requirements set out by the relevant provisions in COGSA 1992 are fulfilled – namely, that he acquired possession of the bill by virtue of a "transaction" that took place before loss occurred.[75]

2.1.4. Good faith

Once it is established that a person is the "holder", the next requirement for the acquisition of rights under section 2(1) is that he must be the "lawful" holder; and section 5(2) provides that "a person shall be regarded for the purpose of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith." The concept of good faith, however, is not defined in COGSA 1992, and in this respect, the 1992 Act may contrast with the Bills of Exchange Act 1882 and the Sale of Goods Act 1979, both of which provide that "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not."[76]

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[74] See the discussion under English law in this section above.

[75] Also see the discussion above.

[76] Bills of Exchange Act 1882, s.90; Sale of Goods Act 1979, s.61(3). *Cf.* also U.C.C. s. 1-201 (19)

Honest conduct

The underlying concept of "honest conduct" has been said, in *The Aegean Sea*[77], also to apply for the purpose of the 1992 Act. In *The Aegean Sea*, the underlying concept of "honest conduct" has been said to also apply to the 1992 Act. In it, Thomas J adopted a restricted construction of the wording "good faith" in Section 5(2). He held, obiter, that the expression "connotes honest conduct and not a broader concept of good faith such as the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned". [78] In other words, the minimum requirement for performance in "good faith" is one of honesty.[79]

Dishonest conduct

It is true that no precise definition could be found for "honest conduct", but it is possible to identify factors or situations which do amount to dishonesty and bad faith and which would, where found to exist, negate honesty, and hence negate good faith, so as to prevent the holder of a bill of lading from qualifying as a lawful holder. Common sense dictates that if a person obtains a bill of lading either unlawfully or from a person that he knows had previously acquired the bill of lading unlawfully then he cannot be considered as a holder of the bill of lading in good faith and he should not acquire any contractual rights of suit under it.[80]

Forged bill

What, however, of the person holding in good faith an entirely fraudulent bill? The definition of lawful holder would not allow the holder in good faith of such a

[77] *Aegean Sea Traders Corp. v. Repsol Petroleo S.A. (The Aegean Sea)* [1998] 2 Lloyd's Rep.39 at 60

[78] *Aegean Sea Traders Corp. v. Repsol Petroleo S.A. (The Aegean Sea)* [1998] 2 Lloyd's Rep.39 at 60

[79] See Gaskell, para 4.25.

[80] See Benjamin, para 18-082A.

fraudulent bill to sue the carrier, not because the person was acting in bad faith but simply because a bill of lading which is not issued by or on behalf of a vessel should not be regarded as a bill of lading within the accepted meaning of that term, a view supported by s.4 of COGSA 1992, which refers to bills of lading that have been signed by the master or with the authority of the carrier[81].

Under Chinese Law

Honest conduct

Although it is not specified in the present Chinese Maritime Code that the holder of the bill of lading must be the holder in good faith, this notion is widely recognised in judicial practice in China as a necessary requirement for being a lawful holder and a conduct of "honesty" is generally accepted as one of "good faith".

In *"The Jujian No 6"*[82], the buyer as the applicant of a letter of credit did not pay the money for obtaining the bills of lading from the bank and the claimant bank as the pledgee was holding the whole set of the bills of lading while the carrier made delivery of the cargo to the buyer without demanding the presentation of the bills of lading. It was held that the bank was the lawful holder of the bill of lading who acquired the documents *in good faith* and thus was entitled to sue the carrier for breach of contract. It was stated that the conduct was one of honesty and no factors were presented to the court showing that the bank acted in "bad faith".

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[81] S.4 of COGSA 1992 provides that "A bill of lading which---

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment."

[82] *The Jujian No 6*, ,Yu Guo, Study on the bills of lading, Beijing University Press, 1st edition, 1997, p 125.

In "*The MengTe*"[83] and "*The MILOS*"[84], the judges before the High People's Court in Guangdong province were also in favour of the view that the holders who acquired the bills of lading *in good faith* were entitled to sue the carrier in contract.

Concern here lies with the question of whether it is feasible to use the wording "good faith" in the proposed provision defining the lawful holder in the reformed Chinese Maritime Code. The phrase of "good faith" is used in Art 77 of the Chinese Maritime Code which allows a third party acting in good faith to rely on receipt statements in the bill, so that its use in the context of bills of lading is not unusual although no definition of this phrase is provided in Art 77 either. Art 77 states that

> "Except for the note made in accordance with the provision of Art 75 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." (Emphasis added)

Taking these elements together, it is proposed that the wording "good faith" could be used when defining the lawful holder of the bills of lading in the reformed Chinese Maritime Code.[85]

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[83] *The MengTe*, [2003]Yugaofaminsizhongzi No 56, from the High People's Court at Guangdong Province.

[84] *The MILOS*, [2003]Yugaofaminsizhongzi No 27, from the High People's Court at Guangdong Province.

[85] See *post*, 2.4.

Dishonest conduct

Despite the fact that the phrase "good faith" is not defined in the Chinese Maritime Code, Article 58 of the General Principles of the Civil Law of the People's Republic of China contains a list of situations and factors that might negate good faith.

Art 58 states that

> "Civil acts in the following categories shall be null and void: (1) those performed by a person without capacity for civil conduct; (2) those that according to law may not be independently performed by a person with limited capacity for civil conduct; (3) those performed by a person against his true intentions as a result of cheating, coercion or exploitation of his unfavourable position by the other party; (4) those that performed through malicious collusion are detrimental to the interest of the state, a collective or a third party; (5) those that violate the law or the public interest; (6) economic contracts that violate the state's mandatory plans; and(7) those that performed under the guise of legitimate acts conceal illegitimate purposes.
>
> Civil acts that are null and void shall not be legally binding from the very beginning."

The acts performed by a person against his true intention as a result of cheating by the other party are not regarded as acts in good faith by the operation of subsection 3 of Art 58. This is applicable to circumstances where bills of lading are involved. Essentially, similar to the principle under English law, the requirement is that the conduct must be one of honesty, at least. It will clearly exclude the person acquiring a

bill of lading by theft or from some person who had, to his knowledge, acquired it by theft from being a lawful holder.

Forged bill

In cases where somebody seeks to claim against a carrier under a bill of lading he has purchased in good faith, he will not be able to do so if the reality is that, unknown to him, the bill of lading he purchased was forged. The carrier should not bear any liabilities under a forged bill of lading. Pursuant to Art 71 of the Chinese Maritime Code, "a bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea". Article 72 of the CMC stipulates that "When the goods have been taken over by the carrier or have been loaded on board, the carrier shall, on demand of the shipper, issue to the shipper a bill of lading. The bill of lading may be signed by a person authorized by the carrier. A bill of lading signed by the Master of the ship carrying the goods is deemed to have been signed on behalf of the carrier." The carrier could thus argue that a contract of carriage does not exist between the carrier and a holder of a bill of lading if it has not been issued by the Master or an authorised agent of the Master of the ship carrying the goods.

2.2. Under the Draft Instrument

Art 67 sets out a general rule as to which party will have a right of suit under the Draft Instrument, which provides that:

> "1. Without prejudice to articles 68 (a) and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:
>
> (a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(c)..."

Pursuant to this provision a consignee can assert the rights under the contract of carriage which belong to it and if it has sufficient interest to claim.

Art 68 is specifically designed to deal with the rights of suit in the event that a negotiable document is issued. It is provided in 68(a) that

"In the event that a negotiable transport document or negotiable electronic record is issued:

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself."

Pursuant to Art 68 (a) the holder of a negotiable bill of lading is entitled to assert rights under the contract of carriage against the carrier or a performing party. The person in possession of the bill of lading will fall within the category of "holders" provided by Art 1 (j) of the Draft Instrument if he is identified as the consignee in an order bill, or if the bill is endorsed to him in the case of an order bill, or if he is holding a blank endorsed order bill or a bearer bill. Art 1 (j) provides that

"(i) a person that is for the time being in possession of a negotiable transport document and

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record."

It is clear that the holder of a straight bill of lading will not fall within the definition of the "holder" in the provision above. The person named in the straight bill of lading as the consignee is not entitled to take action against the carrier in contract by the operation of Art 68 (a) which particularly governs the issues arising under the negotiable bills of lading. He could, however, assert rights against the carrier under the contract of carriage as the consignee by virtue of Act 67.[86] This proposition under the Draft Instrument is similar to, but not the same as that under COGSA 1992 which excludes the person named in the straight bill of lading from the category of the "holder" defined in section 5(2) but deals with him as a person named in a sea waybill.[87]

The Draft Instrument also does not use the term "lawful" or "good faith" in the provisions regulating the holder's rights against the carrier. The dilemma faced by the consultants who drafted these provisions might be as follows: on the one hand, using these two terms without specifying what is meant by "lawful" possession in "good faith" could invite reference to national law, thus undermining uniformity; on the

[86] See further discussion at Chapter 5.

[87] See further discussion at Chapter 5.

other hand, specifying what these terms meant would greatly expand the scope of the Draft Instrument.

Another difference between the Draft Instrument and COGSA 1992 in respect of the holder's rights against the carrier in contract is that it does not intend to regulate any issues that arise under a "spent" bill of lading whereas COGSA 1992 does so by the operation of section 5(2)(c) and section 2(2).

2.3. Under Chinese Law

Article 78 in Chapter IV Contract of Carriage of Goods by Sea in the Chinese Maritime Code (CMC) is deemed as the main stipulation designed for resolving some issues on rights of suit arising under the bills of lading under Chinese jurisdiction. It has been generally accepted that the provision of Art 78 is the legal basis upon which the consignee or the endorsee as the holder of the bill of lading is entitled to sue the carrier for breach of contract.

Nevertheless, it should be pointed out that Art 78 does not precisely refer to transfer of rights to the holder of the bill of lading in the same way as s.2(1) of COGSA 1992 does. What Art 78 says is, *inter alia,* that "the relationship between the carrier and the holder of the bill of lading with respect of their rights and obligations shall be defined by the clauses of the bill of lading". (Emphasis added).

The lack of a provision in the existing Chinese Maritime Code explicitly conferring contractual rights on the holder of the bill of lading has resulted in the delivery of conflicting judicial decisions and arguably unjustified judgments on the question

whether the holder of the bills of lading is entitled to take action against the carrier in contract in China. Legislative reform is urgently required in order to address problems. Among the questions which arise are the following:

(1) Who could be regarded as the "holder" referred to in Art 78?

(2) Is the holder entitled to take action against the carrier in contract?

(3) Is the holder entitled to sue on behalf of a third party?

2.3.1. Who could be regarded as the "holder" referred to in Art 78?

Concern lies with the meaning of the wording "the holder" referred to in Art 78 of the Chinese Maritime Code. The lack of the definition of such an important wording gave rise to the question of who could be regarded as lawful holder under the present law. A category of "the holder" might be implied from Art 71 of the Chinese Maritime Code[88]: in cases where the order bill of lading is presented, the person named therein or the endorsee could be regarded as the lawful holder; in cases where the blank endoersed order bill of lading or a bearer bill of lading is produced, the presenter of such a document could be regarded as the lawful holder of the bill of lading; in cases where the straight bill of lading is presented, the person named therein could be regarded as the lawful holder.[89]

2.3.2. Is the holder entitled to take action against the carrier in contract?

[88] See *ante*, 2.1. Art 71 provides that "A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to a named person, or to the order, or to bearer constitutes such an undertaking."

[89] The holder of the straight bill of lading's rights and liabilities will be discussed in Chapter 5.

Despite the fact that the prevailing view regarding the rights of the consignee/indorsee under the carriage contract is that they, as holders of the bill of lading, are entitled to sue the carrier on the contract of carriage under present law, the lack of provisions in this regard in the CMC still leads to differing interpretations and outcomes in judicial practice. To illustrate this, some typical judgments are examined and analysed below:

The holders are not held to be entitled to sue the carrier in contract

In *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co*[90], the claimant *Jiangsu Suhao* made a CFR contract of purchase with an American Company *Winmar International Ltd* and then had an agreement with *Shangcheng Co* for selling the goods to the latter. The goods on board "*Lodestar Queen*" owned by the defendant carrier *Fanye* were delivered to *Shangcheng Co* without presentation of the original order bills of lading at the port of discharge.

The claimant *Suhao*, as holder of the original order bill of lading which was endorsed by the shipper in blank, claimed against the carrier for loss of 10,851,864.75 RMB caused by the carrier's breach of contract (by misdelievery of the cargo to *Shangcheng Co*).

The contention of the defendant carrier was that he should not compensate the claimant in this case due to the fact that he delivered the cargo to *Shangcheng Co*

[90] See [1996] Wuhan Fashangzi No128, from Wuhan Maritime Court in Hubei Province; [1997] E Jingzhongzi No294, from the High People's Court in Wuhan Province; [2000] Jiaotizi No7, from the Supreme People's Court.

under a letter of indemnity from the shipper in conjunction with a copy of the bill of lading.

It was held by the judges at the Wuhan Maritime Court and the High People's Court at the Hubei Province that the carrier was guilty of breach of contract, since he had delivered the goods to others without the production of bills of lading at the discharging port. The defendant carrier *Fanye Co* appealed to the Supreme People's Court.

A material fact was adduced in the Supreme People's Court: the claimant *Suhao* had already claimed 3,700,000RMB back from *Shangcheng* as part of the payment for the goods delivered to the latter by the defendant at the discharging port. The judges in the Supreme People's Court held that the claimant's undertaking of getting part of the payment for the cargo from *Shangcheng* indicated that he accepted the fact that the property in the goods had been legally passed to *Shangcheng*, and thereby the order bills of lading held by him were no longer effective as a document of title and he was no longer the lawful holder of the bills. It was further held that, the letter of indemnity given to the carrier by the shipper, which showed that the carrier was entitled to deliver the cargo to *Shangcheng* without the production of the original bills of lading, also proved that the order bill of lading was not effective as a document of title any longer. Based upon these reasons, the claimant was held not to be entitled to assert contractual rights against the carrier in this case and the carrier was exempted from compensating him.

Although respect is due to the court, the justification of such a conclusion is questionable.

First, the carrier is obliged to deliver the cargo to the holder of the blank endorsed bill of lading in accordance with Art 71 of the Chinese Maritime Code which provides that

> "A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based upon which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document (bill of lading) stating that the goods are to be delivered to the named person, or to the order of a named person, or to order, or to bearer, constitutes such an undertaking."

The claimant as the holder of the blank endorsed order bill of lading was entitled to sue the carrier to recover the loss he suffered by the carrier's breach of contract.

Secondly, the statement made by the judges in respect of the function of the bill of lading as a document of title was not well founded. There is no express provision in Chinese law that specifies how or when a bill of lading can become effective or ineffective as a document of title. The features of the bill of lading described by Art 71 can be summarised as follows: evidence of the contract; evidence of the taking over or loading of the goods; document against which the goods are to be delivered. Although it is widely accepted in practice that the rights to possession of the cargo are attached to possession of the bills of lading,[91] the existing Chinese law does not limit

[91] See Si Yuzhuo, *Textbook of Maritime Law, 1999*, 2nd edition, Dalian Maritime University Press, p 69.

the definition of bills of lading to bills which are "document of title"[92], so it might be hard in any circumstances to find grounds for saying that a bill of lading will become ineffective as a document of title, including the circumstances in the case under discussion.

Further, should the bill of lading be regarded as a "document of title" [93] as the judges alleged, it does not necessarily follow that the carrier should be allowed to deliver the cargo to others without presentation of such a document. Although the term "document of title" is not defined in Chinese statute law, the legal conception of "document of title" at common law is generally accepted and widely used in China by custom of merchants, judges and law academics to the extent that possession of the bill of lading should be treated as equivalent to possession of the goods covered by it. At common law possession of the bill may be regarded as equivalent to possession of the goods covered by it at least in the following ways: "(a) The holder of the bill is entitled to delivery of the goods at the port of discharge; (b) The holder can transfer the ownership of the goods during transit merely by endorsing the bill; (c) The bill can be used as a security for a debt."[94] Thus, presuming that the bill of lading has the features of a document of title in the sense that it is a document representing the goods under Chinese jurisdiction, the holder is entitled to delivery of the goods and thus entitled to sue the carrier for his misdelivery of the goods to others. After all, misdelivery of the cargo could by no means be deemed as a conduct which can result

[92] See Si Yuzhuo, *Textbook of Maritime Law, 1999*, 2nd edition, Dalian Maritime University Press, p 161.

[93] It is not the purpose of this project to examine and define the term "document of title".

[94] See John F Wilson, Carriage of Goods by Sea, 5th edition, 2004, p133.

in that possession of the bills of lading no longer gives rights to possession of the cargo to which the bills relate[95].

Moreover, the claimant/respondent holder of the bill of lading did suffer loss even if it claimed part of the payment for the cargo back from *Shangcheng* who took delivery of the cargo. This loss was caused by the carrier's misdelivery of the cargo to *Shangcheng* which constituted breach of contract. Therefore, it might be incorrect to hold that the holder of the bill of lading in this case was not entitled to recover loss from the carrier for the latter's breach of contract.

Owing to the reasons put forward above, the claimant, as holder of the blank endorsed bills of lading, should be entitled to sue the carrier in contract.

In *Huayuan Hongkong Co. v. Dalian Ship Agency Co*[96], where the facts were proved analogous to those in the case above, the judges at the Dalian Maritime Court produced similar judgment by stating that the order bill of lading held by the claimant consignee was no longer effective as a document of title after he got part of the compensation from the company to whom the defendant carrier delivered the cargo to which the bill of lading related, hence the claimant was not able to sue the carrier.

[95] See *ante*, 2.2.1.

[96] See *Huayuan Hongkong Co. v. Dalian Ship Agency Co,* [1995] Da Haifashangchuzi No72, from the Dalian Maritime Court, Liaoning Province.

The holders are held to be entitled to sue the carrier in contract

In contrast, in *Weihai Textile Trade Co.Ltd. v. Korean Hwasan Shipping Co. Ltd.*[97] and in" *The Suda*"[98], where the facts were analogous to those in the two cases above in the respect that the consignee made contact with or reached a new agreement about payment with the person to whom the carrier misdelivered the cargo, it was decided that the consignees as the lawful holder of the bills of lading were entitled to sue the carriers and the carriers were not discharged of the obligation of delivery of the cargo to the consignee by virtue of Art 71 and Art 78 in the Chinese Maritime Code.

In the CMI (Comité Maritime International)conference in 1999[99], the answer given to the question of "under your national law what are the rights of the holder as regards the goods after delivery to the person entitled to the goods under the contract of sale?", by the Chinese delegation comprising representatives from Supreme People' Court and Research Institutes, was that "only the lawful holder is entitled to take delivery, also in this case the lawful holder has the right to claim against the carrier for the loss of the contract value he suffered thereby (the carrier delivers the goods without surrender of the bill of lading). The rights of a holder in good faith prevail over the rights of a person who has taken possession of the goods in accordance with the terms of the contract of sale."

It could be concluded from the instances above that the judges in Chinese courts are more inclined to support the view that the rights of suit in contract should be conferred on the holders. Art 78 of the present Chinese Maritime Code failed to

[97] See *Weihai Textile Trade Co.Ltd. v. Korean Hwasan Shipping Co. Ltd* , [2000] Qing Haifaweihaishangchuzi No1, from the Qingdao Maritime Court, Shandong Province.

[98] See *The Suda,* [1994] Su Jingchuzi No 8, the High People's Court in Jiangsu Province.

[99] CMI Yearbook 1999, p 169.

provide a solution to the issues regarding rights of the consignee/indorsee as lawful holder of the bill of lading to sue the carrier for breach of contract; such rights should be recognised and confirmed by a new provision in the Chinese Maritime Code. The approach to solve the similar problems adopted under English law and the Draft Instrument will be examined below with a view to furnishing the Chinese law with a feasible and justified solution to this matter.

If English law, instead of Chinese law was applied to the case of *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co*[100], it may have been decided that the claimant holder of the bill of lading is entitled to use the carrier on the contract of carriage which is contained in the blank endorsed bill of lading. The main rule with regard to the transfer of contractual rights by the use of bills of lading is contained in section 2(1) of the 1992 Act by which "a person who becomes (a) the lawful holder of a bill of lading...shall (by virtue of becoming the holder of the bill...) 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." By the operation of this provision, the consignee/endorsee's title to sue now derives from enquiring whether the bill of lading is lawfully held. In *East West Corporation v. Dkbs 1912 and Akts Svendborg Utaniko Ltd. v. P& O. Nedlloyd B.V*[101], it was held by Thomas, J., answering the question as to "did the claimants (shippers) lose their right of suit", that:

[100] See [1996] Wuhan Fashangzi No128, from the Wuhan Maritime Court in Hubei Province; [1997] E Jingzhongzi No294, from the High People's Court in Wuhan Province; [2000] Jiaotizi No7, from the Supreme People's Court.

[101] [2002] 2 Lloyd's Rep. 182.

"Under Section 2(1) of the 1992 Act, the lawful holder of a bill of lading, by virtue of becoming the lawful holder of the bill of lading, has transferred to him and vested in him all rights of suit under the contract of carriage."[102]

It was stated in *The Berge Sisar*[103] by Lord Hobhouse of Woodborough that "section 2(1) makes being the lawful holder of the bill of lading the sole criterion for the right to enforce the contract which it evidences and this transfer of the right extinguishes the right of preceding holders to do so." On the facts of *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co*[104], the claimant bank falls within the category of "lawful holder of the bill of lading" defined by section 5(2)(b) of COGSA 1992 and has rights to sue the carrier in contract by virtue of section 2(1). As to the question whether the bill of lading ceases to be a document of title, the answer under English law will be that wrongful delivery does not result in the bill ceasing to grant constructive possession of the goods[105]. In *Glynn Mills Currie & c. v. East & West India Dock Co.*, [106] Mr. Justice Willes said that:

"I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim under it."

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[102] [2002] 2 Lloyd's Rep. 182. para 19.

[103] *Borealis A B v. Straga Ltd (The Berge Sisar)* [2001] 2 All E.R.193, [2001]1 Lloyd's Rep. 663. para 30.

[104] See *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co,* [1996] Wuhan Fashangzi No128, from the Wuhan Maritime Court in Hubei Province; [1997] E Jingzhongzi No294, from the High People's Court in Wuhan Province; [2000] Jiaotizi No7, from the Supreme People's Court.

[105] See *ante*, 1.2.2.1.

[106] *Glynn Mills Currie & c. v. East & West India Dock Co.*, (1882) 7 App. Cas. 600

In *London Joint Stock bank v. British Amsterdam Maritime Agency*[107], Mr. Justice Channel observed that the question as to whether the bill of lading was discharged depended upon whether the person who took delivery was entitled to delivery. It was also held by Mr. Justice Thomas in *East West Corporation v. DKBS 1912 and Akts Svendborg Utaniko Ltd., P&O Nedlloyd B.V.* [108] that:

> "The bills of lading were not spent when the goods were delivered to them; it is clear on the basis of the long accepted dictum of Mr Justice Willes that a bill of lading remains in force even if the goods were misdelivered to a person not entitled to them."

In *The Future Express*[109] the goods were delivered against letters of indemnity. At first instance, Judge Diamond Q.C. stated that he would be "reluctant to hold that a bill of lading becomes exhausted as a document of title once the carrier has delivered the goods against an indemnity to a person authorised to receive delivery."[110] He further explained that such a conclusion would "greatly detract from the value of bills of lading as documents of title to goods, would diminish their value to bankers and other persons who have to rely on them for security and would facilitate fraud.[111]"

A further question, which might arise here, is whether section 2(2) and 5(2) of COGSA 1992 deal with the situation presently under discussion. Under COGSA 1992, the mere fact that a bill of lading is indorsed after delivery has taken place does not necessarily deprive the new holder of the bill of lading of a right to sue the carrier.

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[107] *London Joint Stock bank v. British Amsterdam Maritime Agency*, (1910) 16 Com. Cas.102.

[108] [2002]2 Lloyd's Rep. 182, pp 189-191

[109] *The Future Express*, [1992] 2 Lloyd's Rep. 79, [1993] 2 Lloyd's Rep. 542. See Benjamin, para 18-061.

[110] [1992] 2 Lloyd's Rep. 79 at 99.

[111] [1992] 2 Lloyd's Rep. 79 at 99.

Section 2(2) and 5(2) of COGSA 1992 are specifically designed to allow the holder of a bill of lading which ceases to be a document with proprietary rights attached to it to sue the carrier providing certain conditions are satisfied. By reason of the combined operation of the provisions in s.5(2)(c) and s.2(2)(a), the lawful holder of a bill of lading, where possession of the bill no longer gives him a right to possession of the goods, is entitled to take actions against the carrier providing that he became the holder of the bill in pursuance of any contractual or other arrangements made before the time when such a right to possession ceases to attach to possession of the bill. However, it must be noted that the situation covered by the wording "possession of the bill no longer gives a right to possession of the goods to which the bill relates" in s.2(2) and s.5(2)(c) are those where the goods are due delivered, are destroyed and the goods related to the bill are lost at sea.[112] A wrongful delivery does not fall within this ambit.

The fact in the case of *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co*[113] was that the cargo was delivered to a party who was not entitled to it. Thus in this circumstance the bill of lading would not be regarded as being ineffective as a document of title under English law.

If the Draft Instrument were the governing law in the bills of lading involved in the case of *Jiangsu Suhao Trade Group Co Ltd v. Japanese Fanye Shipping Co*[114], the claimant as the holder of the bills of lading would fall within the category of

[112] See *ante*, 2.1.

[113] See [1996] Wuhan Fashangzi No128, from the Wuhan Maritime Court in Hubei Province; [1997] E Jingzhongzi No294, from the High People's Court in Wuhan Province; [2000] Jiaotizi No7, from the Supreme People's Court.

[114] See [1996] Wuhan Fashangzi No128, from the Wuhan Maritime Court in Hubei Province; [1997] E Jingzhongzi No294, from the High People's Court in Wuhan Province; [2000] Jiaotizi No7, from the Supreme People's Court.

"holders" provided by Art 1 (j) of the Draft Instrument and then be entitled to assert rights under the contract of carriage against the carrier or a performing party by virtue of Art 68(b) of the Draft Instrument which confers contractual rights on the holder of the order or bearer bills of lading.[115]

2.3.3. Suit by holder on behalf of another

As to the principle of suing on another's account, it is well established and generally accepted that the existing Chinese law only allows claimants to institute legal proceedings in respect of their own losses. In other words, nobody is entitled to sue in another's interest under Chinese law. There may be cases where the holder does not have the ownership in the goods and in fact has suffered no loss. The real cargo owner who is not holding the bill could institute an action for the tort of negligence against the person under the present Chinese law. However, there are possibilities that the carrier will escape from liability to either the holder of the bills who has not suffered the loss or the real cargo owner who is unable to provide the bills of lading evidencing that he has the proprietary rights or the possessory title.[116] The solutions to this practical problem provided by COGSA 1992 and the Draft Instrument will be examined below.

2.3.3. 1. Under English law

Suit by holder on behalf of another under s. 2(4) of COGSA 1992

One result of allowing any lawful holder to sue the carrier is that there may be cases where the holder does not have the property in the goods and in fact has suffered no loss. Examples of such holders might be agents of the merchants in the port of

[115] See *ante*, 2.2.

[116] See *post*, 2.3.3.3.

discharge, or banks, who are named as consignees. Such a holder would not have been entitled to sue under s.1 of the Bills of Lading Act 1855 as property in the goods would not normally have passed to them by reason of any consignment or indorsement. One major change introduced by the 1992 Act is now found in s.2(4) which provides that

> "Where, in the case of any document to which this Act applies---
>
> (a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but
>
> (b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised."

This subsection allows a lawful holder to take action against the carrier/shipowner on behalf of the person who does have rights or interests in the cargo, but is not a lawful holder. It follows that s.2(4) will entitle agents as holders to institute proceedings on behalf of cargo owners.

Agent of the real cargo owner is the holder of the bill of lading

This is an exception to the general rule that an agent acting for a disclosed principal can neither sue in his own name nor be sued by a third party. Where a bill of lading is transferred, e.g. by a seller who has shipped goods in pursuance of a contract for the sale of those goods, the actual possession of the bill may be acquired, not by the

buyer himself, but by a person who acts as his agent for the purpose of taking delivery of the goods from the carrier. Under the 1855 Act, contractual rights were not normally transferred to the agent since property would not normally have passed to him[117]. The reasoning is obsolete now as the "property gap" in the 1855 Act has been closed by the 1992 Act. The agent is regarded as a lawful holder and entitled to sue the carrier in contract on behalf of his principal (the cargo owner) under the 1992 Act.

Bank is the holder of the bill of lading

Banks who are pledgees would also be entitled to sue the carrier pursuant to s. 2(4). In those cases the rights of suit will be exercised for the benefit of those who sustained the loss.

Under out-turn quantity and landed weight terms

This subsection could also be applicable in cases[118] where the goods are sold on the basis of out-turn quantity and landed weight terms which make the amount payable dependant on the quantity of goods that actually arrive.[119] If some of the goods are actually lost as a result of the carrier's breach of contract, that loss would fall on the shipper rather than the consignee. However, pursuant to section 2(5) of COGSA 1992, the shipper should not be entitled to sue the carrier for his breach of contract after the contractual rights have been vested in the consignee who is the lawful holder of the

[117] *Kaukomarkkinat O/Y v. Elbe Transport-Union Gm.b.H. (The Kelo)* [1985] 2 Lloyd's Rep. 85, 87.

[118] See Benjamin, para 18-095.

[119] e.g. *R&W Paul Ltd v. National SS Co. Ltd* (1937)59 Ll.L. R. 28.

bill of lading[120]. Section 2(4) provides the holder of the bill with rights of suits in the shipper's interest although such a holder is not obliged to exercise these rights.

2.3.3. 2. Under the Draft Instrument

Similarly, Art 68 (a) of the Draft Instrument does establish a rule regarding suing in another's interest, and it requires that the person who does so should be the holder of the bill of lading. Pursuant to this provision, the holder of a negotiable transport document, e.g. order bill of lading, "irrespective of whether it suffered loss or damage itself", is entitled to assert rights under the contract of carriage against the carrier or a performing party and if such holder did not suffer the loss or damage himself, it is be deemed to act on behalf of the party that suffered such loss or damage[121].

2.3.3.3. Under Chinese law

The holder of the bill of lading who does not suffer any loss is not able to sue the carrier for the breach of contract under the present Chinese law on the grounds that it is well established and generally accepted that Art 108 of Civil Procedural Law of the People's Republic of China stipulates that the claimant should have the interest concerned directly by itself (i.e. nobody is entitled to sue in another's interest). Meanwhile, the cargo owner, not being a lawful holder, will not be able to claim against the carrier in contract. Then the carrier might escape from being liable to any of them for the loss of or damage to the cargo involved.

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[120] See *ante*, 1.1.1.3.

[121] See A/CN.9/WG.III/WP.21 at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html

Is it necessary and desirable to have a similar provision as s.2(4) of COGSA 1992 added into the reformed Chinese Maritime Code? If not, are there any remedies available under present Chinese law?

The fact that cargo owners do not have the title to sue the carrier in contract might lead them to resort to another legal technique: to sue in tort. Under the present Chinese law, such a cargo owner could institute an action for the tort of negligence against the person, usually the shipowner, whose faults had caused cargo loss and damage. Unlike the problem arising from similar cases regarding suit in tort under English law, this course of conduct does not have the added advantage that it might allow the cargo owner to avoid contractual exceptions and limitations in the bill of lading to which, by definition, it was not a party.[122] Art 58 of Chinese Maritime Code provides that

> "The defence and limitations of liability[1] provided for in this Chapter (chapter 4 on contract of carriage of goods by sea) shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the action is founded in contract or in tort. The provisions of the proceeding paragraph shall apply if the action referred to in the proceeding paragraph is brought against the carrier's servant or agent, and the carrier's servant or agent proves that his act was within the scope of his employment on agency."

[122] See *ante*, on sue in tort, Chapter 1 The Shipper's Title to Sue.

By the operation of Art 58 of the Chinese Maritime Code, the problem of depriving the carriers of the exceptions and limitations of liabilities under the Chinese Maritime Code simply by the suit in tort as opposed to in contract can be resolved. The carrier (or his servant or his agent) accordingly would not be subject to greater liabilities in a claim brought by the cargo owners in tort than in contract.[123] Another problem about suing in tort in England also does not exist in China. The House of Lords in England confirmed in *The Aliakmon*[124] that the claimant had to prove title to the goods at the time when they were damaged or lost. Chinese law in tort does not emphasise that the cargo owner who sues in tort should prove the title to the goods at the time when they were damaged or lost providing that four conditions to sue in tort are satisfied, i.e. The ownership of or the possessory title to the property, the negligence, the loss of or damage to the property, the causation between the act and the loss or damage.[125] Nevertheless, the carrier might be faced with problems when he is required to adduce evidence of the ownership or the possessory title to the property without possessing the bills of lading, which contain the contract of carriage. There are possibilities that the carrier will escape from being liable to either the holder of the bills who does not suffer the loss or the real cargo owner who is unable to provide the bills of lading evidencing that he has the proprietary rights or the possessory title. Thus it is desirable and necessary to empower the holder to take action on behalf of the person who does have rights or interest in the cargo but is not the holder. As examined in another part of this work[126], empowering any party to the contract to take action under the contract on another's behalf will violate the fundamental principle that the

[123] See *ante*, sue in tort, at Chapter 1 The Shipper's Title to Sue.

[124] *The Aliakmon*, [1986] A.C. 785, approving *Margarine Union G. m. b. H. v. Cambay Prince Steamship Co. Ltd (The Wear Breeze) [1969] 1 Q.B. 219.*

[125] Institute of study on law at Chinese Social Science Association, Law dictionary, Law Press, 2002, p1104.

[126] See *ante*, 1.2.3.4.

claimant must have a direct interest in the case; this is well established under Chinese jurisdiction. It is undesirable for the reformed Chinese Maritime Code to break this general rule. However, the lack of such a rule means that inevitably the carrier will escape from compensating the cargo interests for its breach of the contract under these circumstances. Concern here lies mainly with the question of whether it is feasible to create a new rule entitling the holder to sue the carrier on the account of another in the circumstances under discussion. The legislative history of the Chinese Maritime Code and the provisions within the present Chinese Maritime Code shows that, although it is undesirable, it is not impossible to create a new rule that might break the general principles established under Chinese jurisdiction, providing it is demonstrated that this violation is necessary and no other remedies could be provided by other means[127]. The issues examined here accord with this precondition, thus it is suggested that a new rule similar to the one established in COGSA 1992 and the Draft Instrument be inserted into the reformed CMC.

2.3.4. Recommendations for the reform of the Chinese Maritime Code

Transfer of the rights to the lawful holder of the bill of lading

The Chinese Maritime Code does not create a clear rule as COGSA 1992 does as to the acquisition of contractual rights by the holder of the bill of lading upon the transfer of the bills despite the fact that some courts recognise the holder's rights of suit by adopting a broad construction of Art 78 of the Chinese Maritime Code.[128] Unsurprisingly, the lacuna in the Chinese Maritime Code in this respect has resulted in the delivery of controversial and unjustified judgments in judicial practice.[129] The

[127] Professor Si Yuzhuo, *Study on Maritime Law*, edited 1st edition, Dalian Maritime University Press, 2002, p16.

[128] See *ante*, 2. 3.2.

[129] See *ante*, 2. 3.2.

solution for the problems caused by Art 78 might be to replace it by several new provisions entitling the lawful holder of the bills of lading to sue the carrier in contract for loss or damage to the goods to which the bill of lading relates. A similar definition of the "holder" as the one in COGSA 1992 and the Draft Instrument could be adopted in supplementing the present Chinese Maritime Code.

It will be in conformity with the solutions adopted by judges in the majority of the relevant cases.[130] In the CMI conference in 1999[131], when the Chinese delegation comprising representatives from Supreme People' Court and Research Institutes were asked, "what rights and liabilities are rights and liabilities exclusively of the holder", it was stated that "he has the rights of taking delivery of the goods, asking the cargo inspection agency to inspect the goods and claiming the loss of or damage to the goods." A conclusion that might be drawn from these statements is that it is widely acknowledged that the lawful holder of the bill of lading is entitled to take action against the carrier in contract. This judicial practice should be confirmed by a new provision without ambiguity in the reformed Chinese Maritime Code.

Definition of lawful holders

Although inference could be drawn from Art 71 of the Chinese Maritime Code about who can be a lawful holder of the bills of lading[132], a clear definition of "the holder of the bill of lading" is not superfluous and is necessary for achieving an unambiguous understanding of his rights and liabilities established by the existing provisions[133] in the Chinese Maritime Code and the new provisions that are proposed to be added into

[130] See *ante*, 2.3.2.

[131] CMI Yearbook 1999, p 169.

[132] See *ante*, 2.3.1.

[133] The second part of Art 78 refers to " holder of the bill of lading"; Art 95 refers to "holder of the bill of lading".

the reformed Chinese Maritime Code. In view of the fact that the notion has been widely accepted that lawful holder must have acquired the bills in good faith and that the phrase will not be new in the context of bills of lading under Chinese Law, it might be convenient and desirable to have it confirmed by means of adding a new provision into the reformed Chinese Maritime Code.

Rights of the holder of the bill of lading after the goods are duly delivered

General rule

Under English law, once delivery of the goods has been made to the person having a right under the bill of lading to claim them, the bill of lading ceases to be an effective document which transfers constructive possession of the goods[134] and rights of suit against the carrier. Although the present Chinese statute law does not provide for the possessory rights attached to bills of lading, it seems that it is accepted in judicial practice that the right (as against the carrier) to possession of the goods will cease to be attached to possession of the bill in consequence of a due delivery of the goods[135]. Disagreement might not arise if this is to be recognised by means of a new provision in the reformed Chinese Maritime Code.

Exception to this general rule

Nevertheless, an exception to this general rule seems fair and necessary in order to protect the rights of suit against the carrier of a person who had lawfully acquired rights of possession of the bill of lading in pursuance of an earlier contractual transaction completed before the goods were delivered but who in fact only received

[134] *The Delfini* [1988] 2 Lloyd's Rep. 599, 609; *Short v. Simpson* (1866) LR.1 C.P. 248.

[135] See *ante*, 2.1.

the actual bill after the goods had been delivered to him – perhaps because of some delay in transmission beyond his control.

Rights of the holder of the bill of lading where goods are destroyed or cease to exist

Construction of Art 71 of the present Chinese Maritime Code can lead to the result that the lawful holder of a bill of lading is entitled to sue the carrier in contract for recovery of loss or damage where the goods are destroyed or cease to exist.[136] It is not necessary to change the position.

Suit by holder on behalf of another

Both s. 2(4) of COGSA 1992 and the second part of Art 13.2. of the Draft Instrument set out a rule of deeming the holder to act on behalf of the party that suffered loss or damage. Chinese law does not recognise the rights to sue on another's account. But for commercial convenience, a similar provision is suggested to be added into the reformed maritime code.[137]

Meanwhile, in view of the fact that the holder of the bill who enforces the contractual rights by instituting a formal claim against the carrier will trigger the liabilities under the contract of carriage contained in the bill of lading, the holder of the bill should not be obliged to sue against the holder on behalf of another person who suffers the loss or damage.

The person who alleges that he is the cargo owner without being in possession of the bills of lading could still sue in tort under Chinese law by proving, *inter alia*, that he

[136] See *ante*, 2.1. and *ante*, 1.2.4.3.

[137] See *ante*, 2.3.3.

has either the ownership of, or a possessory title to the cargo in question, although there might be difficulties with such an action. Or the real cargo owner could persuade the holder of the bill of lading to sue on its account and agree to indemnify the latter for any loss incurred in consequence of the enforcement of rights under the bill of lading. The seller who wishes to compel the buyer to do this should therefore make express provision to this effect in the contract of sale.

2.4. Conclusion-Legislative suggestion

"A person who becomes the lawful holder of a bill of lading shall, by virtue of becoming the holder of the bill, 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. If such a holder does not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffers such loss or damage."

"Where, when a person becomes the lawful holder of the bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, in consequence of a due delivery of the goods, that person shall not have any rights transferred to him by virtue of the section above unless he becomes the holder of the bill- (a) as a result of any transaction effected in pursuance of any contractual or other arrangements made before the time when the right (as against the carrier) to possession of the goods ceased to attach to possession of the bill in consequence of a due delivery of the goods; or (b)……[138]"

[138] See *ante*, Chapter 1 on Shipper's Rights of Suit.

"The lawful holder is

(a) a person with possession of the order bill who, by virtue of being the person identified in the bill, is the shipper[139] or the consignee of the goods to which the bill relates;

(b) a person with possession of the order bill as a result of the completion, by delivery of the bill, of any indoresement of the bill;

(c) a person with possession of the blank endorsed order bill or the bearer bill as a result of any other transfer of the bill;

(d) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph(a) or (b) or (c) above had not the transaction been effected at a time when the right (as against the carrier) to possession of the goods ceased to attach to possession of the bill in consequence of a due delivery of the goods.

A person shall be regarded for the purposes of this Code as having become the lawful holder of a bill of lading wherever he has acquired the bill in good faith.

[139] See *ante*, Chapter 1 on Shipper's Rights of Suit.

CHAPTER 3: THE CARRIER SUING THE SHIPPER

The scope of this section will be confined to the discussion of the shipper's exposure to suit from the carrier in contract under two circumstances:

(1) The bill of lading is transferred but the endorsee/consignee did not enforce the contractual rights, for instance, nobody takes delivery of the cargo.

Could the shipper be absolved of his liabilities under the contract simply by endorsing the bill of lading to others? Although it is more likely that the court will deliver a decision in favour of the carrier under Chinese law, there are possibilities that the carrier fails in suing the shipper under the present law.

(2) The bill of lading is transferred and the endorsee/consignee, by asserting his contractual rights, assumed part of the contractual liabilities which are clearly imposed on him.

Will the shipper remain liable to the carrier for all the loss or fees relating to the shipment?[1] Could the shipper be exempted from being sued by the carrier for the contractual liabilities, which are imposed on the consignee?[2] These question are not

[1] See *post*, 3.3.1.

[2] See *post*, 3.3.2.

capable of achieving a uniform answer under Chinese law.[3]

We will examine in Chapter four under what circumstances the contractual liabilities are rested on the consignee/endorsee as holder of the bill of lading and how far the consignee/endorsee is liable to the carrier under the contract of carriage. A question of equal importance, which is discussed in this chapter, is what residual liability remains with the shipper where the consignee/endorsee holder assumes contractual liability. Another concern is with the liability of the shipper where the consignee/endorsee holder is not liable to the carrier if the requirements for imposition of the liability on the latter are not satisfied.

3.1. Under English law

At common law before the enactment of the Bills of Lading Act 1855

The original shipper was not exempted from the liabilities to the carrier under the bill of lading even in cases where another person, such as the holder of a bill of lading, became liable under an implied contract[4].

Under the Bills of Lading Act 1855

This position at common law was preserved under the Bills of Lading Act 1855[5]. One of the main issues discussed in *The Giannis NK* [6] was as to whether the shippers had

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[3] See *post*, 3.3.1. and 3.3.2.

[4] See also, Carver, para 5-097; *Williams v. East India Company*, (1802) 3 East 192; *Brass v. Maitland*, (1856) 6 E.& B.470.

5 *Fox v. Nott* (1861) 6 H.& N. 630; *The Athanasia Comninos and George Chr. Lemos* [1990] 1 Lloyd's Rep. 277 at 281; *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605. [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[6] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605.[1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

been divested of liability (including liability for shipping dangerous goods in this particular case) by the operation of s.1 of the Bills of Lading Act, 1855. It was respectfully held that:

> "Whereas the rights under the contract of carriage were to be transferred, the liabilities were not. The shippers were to remain liable, but the holder of the bill of lading was to come under the same liability as the shippers. His (the holder's) liability was to be by way of addition, not substitution."

The wording of s.2 of the 1855 Act casts some doubt on the width of this proposition. It states, *inter alia*, that "Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner..." Considering that only the liability of the shipper for freight was expressly preserved by this provision, it could be implied that his other liabilities are transferred. The question that arises here is why should Parliament expressly preserve the carrier's right to claim freight against the original shipper, if the shipper was to remain subject to all his original liability in any event? Such a question was put forward by the shippers in *The Giannis N.K* [7]. It was respectfully held that indeed it might seem an odd result that the shippers should remain liable for the freight but not for the consequences of shipping dangerous cargo.[8] In this connection, it is also difficult to see why the shipper should remain liable for freight but not also for demurrage, dead freight, or other charges (For instance, the cargo may have been heavier than described or of some size or shape that made its handling more expensive than had been warranted). On this basis, the liability under the Bills of

[7] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605. [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[8] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

Lading Act 1855 s.1 should be regarded as concurrent, with both the shipper and the consignee or endorsee sharing the same obligation, including the payment of freight and other liabilities in relation to them under the contract of carriage.

Under the Carriage of Goods by Sea Act 1992

The Law Commission was of the view that under the Bills of Lading Act 1855 the original shipper remained liable under the bill of lading contract, despite rights acquired later by an endorsee.[9] Nevertheless, in order to remove further doubts as to the meaning of s.2 of the 1855 Act as that put forward in *The Giannis N.K*, the Law Commission recommended that COGSA 1992 expressly provide that the original liabilities of the shipper should continue. Thus, section 3(3) of the 1992 Act confirms the common law position by providing that "this section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract" (i.e. the contract contained in or evidenced by the bill of lading[10]). Section 3 preserves the liability of the original shipper under the contract of carriage, particularly emphasising that in cases where liability is imposed on the holder who enforces contractual rights by virtue of s.3 (1).

3.1.1. Can the carrier sue the shipper where he cannot sue the receiver?

Section 3(3) of the 1992 Act emphasises that the imposition of liability on the consignee/endorsee under the contract will not affect the liability of the original shippers. It implies that in cases where the liability was not assumed by the

[9] *Rights of Suit in Respect of Carriage of Goods by Sea*, The Law Commission and The Scottish Law Commission, 1991, pp. 26-27.

[10] "The contract " in s.3(3) clearly refers back to "the contract of carriage" in s.3(1) and (2).

consignee/endorsee, the contractual liabilities of the original shipper to the carrier will be unaffected. Thus the shipper would be the appropriate party to be sued by the carrier for liability which arises from the bill of lading evidencing the contract of carriage to which he is the original party in cases where the requirement of imposition of liability on the consignee/endorsee set out by s. 3(1) COGSA 1992 is not satisfied,[11] i.e. a person does not take or demand delivery from the carrier or make a claim under the contract against the carrier. In another word, the endorsement or transfer of the bill of lading will not relieve the shipper from being liable to the carrier in contract.

When the Draft Instrument applies to such cases, the carrier might find out that he is entitled to sue the shipper for recovery of the relevant loss or damage which occurred under the contract of carriage.[12]

The Chinese Maritime Code does not set out a rule to preserve the shipper's liability after the bill of lading is endorsed. The position under the Chinese Maritime Code is left open: a view was expressed[13] that the original contract and the new contract (between the carrier and the consignee/endorsee) existed concurrently after the transfer of the bill, thus the carrier was entitled to sue the shipper on the contract of carriage; a converse view was expressed[14] that the original contract was terminated between the shipper and the carrier, thus the shipper was relieved from being liable to the carrier after the bill is transferred. The problem does not end here; narrow or broad construction of Art 88 brings more controversy into this issue. It could be

[11] See *post*, Chapter 3 The carrier suing the holder.

[12] See *post*, 3.2.1.

[13] See *ante*, 1.1.3.1. School of thought A.

[14] See *ante*, 1.1.3.1. School of thought B.

construed as that in cases where the goods are not taken delivery of at the port of discharge, the carrier could sue the shipper only after he sells the goods at auction having had a lien on the cargo for the unpaid freight and fees incurred at the discharging port; but Art 88 is also interpreted in a broad way in some courts as a provision preserving the shipper's liability.[15]

3.1.2. Can the carrier sue the shipper where he can sue the receiver?

Although it was unsettled in England as to the extent to which the consignee who enforces the contractual rights should assume the liabilities by virtue of s.3(1) of COSGSA 1992,[16] s.3(3) of this Act creates a clear rule with that the shipper will not be divested of any liability under the contract even in cases where the contractual liability (partly or wholly) are assumed by another person.

The Giannis N.K [17] is a case involving the carrier's title to sue the shipper under the 1855 Act. After reaching the conclusion that the original shipper's liability remained indeed unaffected by endorsement and transfer of the bill of lading by the operation of s.1 of the Bills of Lading Act 1855, the House of Lords stated, *obiter*, that the result would have been the same under s.3(3) of COGSA 1992.[18] One of the facts in *The Giannis N.K* [19] which should be mentioned here is that the holder of the bill (receivers of the cargo) started proceedings against both the shipowner/carrier and the shipper, and the vessel carrying the cargo involved had been arrested by the

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[15] See *post*, 3.3.1.

[16] See *post*, Chapter 4 The carrier suing the holder, at 4.2.2.2. In England

[17] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[18] ibid, p 347.

[19] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

receivers[20]. "Issuing a writ or arresting a vessel" was regarded as a formal claim made by the holder of the bill of lading in *The Berge Sisar*[21] by Lord Hobhouse, who gave a strict construction of the phrase "makes a claim" in section 3(1) of COGSA 1992. If the facts in this case were before the court after the enactment of 1992 Act, liability under the contract of carriage would be imposed upon the holder of the bill.[22] Then the carrier would have had two options to claim recovery for the loss or damage: on the one hand, he would be entitled to sue the holder of the bill on the grounds that the holder had the liabilities imposed upon him by his conduct of making a claim against the carrier under the contract of carriage, albeit that the question of to which extent the holder should be liable is unsettled[23]; on the other hand, the carrier could sue the shipper who remains liable under the contract of carriage to the carrier.

In contrast, neither the Chinese Maritime Code nor the Draft Instrument establishes a rule without ambiguity regarding the continuance of the shipper's being liable to the carrier under the contract of carriage in cases where the consignee/endorsee incurs contractual liability. The Chinese Maritime Code does not provide a clear answer to the question of whether the shipper will be divested of being liable to the carrier in cases where the contractual rights are transferred and invoked; the shipper might or might not escape from being liable to the carrier for the liability which is clearly imposed on the consignee by express terms in the bill of lading.[24] The Draft

[20] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[21] *Borealis AB v. Stragas Ltd (The Berge Sisar)*,[2001] 2 All E.R. 193, para 33.

[22] See *post*, Chapter 4 The carrier suing the holder. 4.2.2.2.

[23] Ibid.

[24] See *post*,3.3.2.

Instrument does not precisely provide, but it might be implied, that the liability of the shipper should remain.[25]

3.2. Under the Draft Instrument

3.2.1. Can the carrier sue the shipper where he cannot sue the receiver?

Pursuant to Art 62 (1), the holder shall not assume any liability imposed on him under the contract of carriage, if the holder does not exercise any right under the contract of carriage.[26] Since there is no provision exempting the shipper from any of the liability under the contract of carriage in circumstances where the bill is transferred but the holder does not assume any liability under the contract, the shipper might find it hard to escape from being liable to the carrier in this circumstance under the Draft Instrument.

Under English law, the transfer or endorsement of the bill of lading will not relieve the shipper from being liable to the carrier under the contract of carriage evidenced by the bill.[27]

3.2.2. Can the carrier sue the shipper where he can sue the receiver?

It is not specified in the Draft Instrument that the shipper will remain liable to the carrier after the holder "exercises any rights under the contract of carriage".

Pursuant to Art 62 (2), "any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract

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[25] See *post*, 3.2.2.

[26] See *post*, Chapter 4 The carrier suing the holder.

[27] See *ante*, 3.1.1.

of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record". The holder thus will, and only will, assume the contractual liabilities imposed upon him which are incorporated in, or ascertainable from, the negotiable bill of lading.[28] In view of the fact that there is no provision indicating that the shipper will be exempted from any of the liabilities under the contract of carriage where the bill is transferred, it is arguable that the carrier should not be deprived of suing the shipper under such circumstances.

In contrast, s.3(3) of COGSA1992 unequivocally provides that the shipper will remain liable for all the liability even in cases where the liability is imposed upon the consignee/endorsee by virtue of s.3(1).[29]

3.3. Under Chinese law

3.3.1. Can the carrier sue the shipper where he cannot sue the receiver?

Although the courts are more inclined to countenance the view that the shipper will not be absolved of liability simply by indorsing the bill of lading to another[30], a contrary view is often expressed and supported on the grounds that

(1) Two preconditions set out by Art 88 of the present Chinese Maritime Code are not satisfied before the carrier institutes proceedings against the shipper;

(2) The shipper will be relieved from being liable to the carrier due to the application

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[28] See *post*, Chapter 4 The carrier suing the holder.

[29] See *ante*, 3.1.2.

[30] See *COSCO and Zhejiang Yuanyang Shipping Co. v. Zhejiang Wanxin Group Co*, judgment from Ningbo Maritime Court, [1997] Yong Haishangchuzi No157; "*COSCO v. Fujian Trade Group Co*", " Analysis of Cases in Maritime Court", Qingdao Sea University Press, 1997. p 66.

of the concept that the original contract is terminated with the transfer of the bill of lading.

The Chinese Maritime Code does not lay down a clear rule that the shipper remains liable to the carrier after the bill of lading is transferred to others. As examined in Chapter one, two conflicting views (school of thought A and school of thought B)[31] were expressed regarding the contractual relationships between the carrier and the shipper:[32]

(A) (school of thought A) claimed that two contracts exist concurrently, then the shipper would remain liable to the carrier after the bill of lading is transferred. Under this principle, in cases where the consignee/holder did not take delivery of the cargo at the port of discharge, it would be held that the shipper should be liable to the carrier;

(B) (school of thought B) claimed that the original contract between the shipper and the carrier was terminated by the transfer of the bill of lading to others, then the shipper would be relieved from being liable to the carrier. In cases where the consignee/holder did not take delivery of the cargo at the port of discharge, it would be held that the shipper should not be liable to the carrier.

(C) Together with these two schools of opinions, Art 88 of the Chinese Maritime Code has also caused problems with regard to statutory interpretation. Art 88 provides that the shipper would be the party from whom "the carrier is entitled to claim the difference (between the proceeds from the auction at port of discharge

[31] See *ante*, 1.1.3.1. School of thought A; *ante*, 1.1.3.2. School of thought B.

[32] See *ante*, Chapter 1 The shipper's title to sue. 1.1.3.1. and 1.1.3.2.

and the related fees and charges)" and to whom "any amount in surplus shall be refunded" [33]. A broad construction of this provision is that it is inferred that the shipper is not relieved of liability towards the carrier under the bill of lading where the cargo is not taken delivery of at the discharge port on the grounds that the carrier may be entitled to claim the difference (between the proceeds from the auction at port of discharge and the related fees and charges) from the shipper. However, Art 88 does not preserve the shipper's liability in the same way as s.3(3) of COGSA 1992, as Art 88 provides a precondition for the asserting of the rights of the carrier to sue the shipper, which is that the goods must be sold by auction after the lien on the cargo is undertaken by the carrier by operation of Art 87[34]. In other words, it is doubtful that the carrier is entitled to sue the shipper for recovery of all the fees and charges without taking two prerequisite steps: the first is to have a lien on the cargo and the second is to have the cargo sold by auction if the goods under lien were not taken delivery of "within 60 days from the next day of the ship's arrival at the port of discharge". As will be seen below, the shipper can escape from being liable to the carrier in some cases by arguing that the requirements set out by Art 88 are not satisfied.

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[33] Art 88 provides that "If the goods under lien in accordance with the provisions of Art 87 of this Code have not been taken delivery of within 60 days from the next day of the ship's arrival at the port of discharge, the carrier may apply to the court for an order on selling the goods by auction; where the goods are perishable or the expenses for keeping such goods would exceed their value, the carrier may apply for an earlier sale by auction.

The proceeds from the auction shall be used to pay off the expenses for the storage and auction sale of the goods, the freight and other related charges to be paid to the carrier. If the proceeds fall short of such expenses, the carrier is entitled to claim the difference from the shipper, whereas any amount in surplus shall be refunded to the shipper. If there is no way of making the refund and such surplus amount has not been claimed at the end of one complete year after the auction sale, it shall go to the State Treasury."

[34] Art 87 provides that "If the freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien to a reasonable extent on the goods."

The shipper is held liable to the carrier in contract

Such a decision could be arrived at on the basis of a broad construction of Art 88 and/or the concept of the coexistence of the two contracts of carriage.

In *COSCO and Zhejiang Yuanyang Shipping Co. v. Zhejiang Wanxin Group Co*[35], the defendant shipper made a contract of carriage evidenced by order bills of lading with the claimant carrier, the consignee did not take delivery of the goods at the port of discharge and announced in writing that he had given up the ownership of the cargo. The order bills of lading were returned to the shipper through the bank. The carriers made a claim against the shipper for recovery of all the economic loss caused by dealing with the cargo at the port of discharge.

The defendant shipper argued that (1) by the operation of Art 88, the carrier must claim a lien on the cargo and sell the cargo by auction before he undertakes proceedings against the shipper and that the shipper will only be liable for the difference of the amount between the payment from the auction and the fees incidental to the course of carriage.[36] (2) The consignee who did not take delivery of the cargo is the appropriate party to be sued by the carrier in accordance with Art 86.[37] The first point regarding the construction of Art 88 is correct whilst the second contention made by the shipper is questionable: Whether or not the consignee/endorse is liable to the carrier under the contract (in pursuance of Art 86) is irrelevant to the shipper's liabilities to the carrier.

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[35] See *post*, Chapter 4 The carrier suing the holder; *COSCO and Zhejiang Yuanyang Shipping Co. v. Zhejiang Wanxin Group Co*, judgment from the Ningbo Maritime Court, [1997] Yong Haishangchuzi No157.

[36] See *ante*, discussion on Art 88 of the Chinese Maritime Code.

[37] See *post*, Chapter 4 The carrier suing the holder.

Both of these contentions were challenged by the court. Based on a broad construction of Art 88 and the concept of the coexistence of the two contracts of carriage, the decision made in the Ningbo Maritime Court was that, the defendant shipper, as the holder of the bills of lading and the owner of the goods carried by the claimant, was the appropriate party to be sued by the carrier in contract.

The court in this case was faced with a dilemma here: on the one hand, it is hard to say that it is justified to divest the shippers of contractual liability; on the other hand, it is difficult to ignore the existence of Art 88 which does precisely require two preconditions to be fulfilled prior to the carrier taking action against the shipper. The lack of a provision preserving the shipper's liability towards the carrier under the Chinese Maritime Code compelled the court to seek other approaches (1) a broad construction of Art 88; (2) the concept of coexistence of the two contracts of carriage. However, neither of the two solutions adopted by the court is satisfactory. As discussed in chapter one with regard to the shipper's rights, the concept of coexistence of the two contracts is not well founded.[38] As to the wide construction of Art 88, it is very difficult to accept that this is a correct way to interpret this statutory provision, which clearly sets out two preconditions that should be fulfilled where the shipper should be liable to the carrier.

In *COSCO v. Fujian Trade Group Co*[39] the straight bills of lading were not accepted and were returned to the defendant by the banks as they had been informed that the

[38] See *ante*, Chapter 1 The shipper's title to sue, at 1.1. 3.1.

[39] See *post*, Chapter 4 The carrier suing the holder; *COSCO v. Fujian Trade Group Co* , " Analysis of Cases in Maritime Court", Qingdao Sea University Press, 1997. p 66.

named consignee had gone bankrupt,[40] it was held that the shipper should be responsible for the loss suffered by the carrier at the port of discharge on the grounds that there was a contract of carriage between the defendant shipper and the plaintiff carrier, which was not terminated by the transfer of the bill but existed concurrently with the contract between the carrier and the consignee/indorsee,

Compared to the case *COSCO and Zhejiang Yuanyang Shipping Co. v. Zhejiang Wanxin Group Co* discussed above[41], it appears that the court in this case did not make the conclusion (deliberately or not) based on the construction of Art 88. It shows that the judges probably did not support a wide construction but were in favour of a restricted construction of this provision: Pursuant to Art 88, the carrier is not entitled to sue the shipper for recovery of the fees and charges incurred at the discharge port without taking two prerequisite steps: the first is to have a lien on the cargo and second is to have the cargo sold at auction.[42] On the one hand, this court probably supported the restricted construction of Art 88; on the other hand, this court recognised that the restricted construction would lead to the injustice and commercial inconvenience on the part of the carrier and had to choose to ignore the existence of such a provision.

The shipper is not held liable to the carrier in contract

This decision could be delivered on the basis of a restricted construction of Art 88 and/or the concept of the termination of the original contract.

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[40] The facts of this case are fully discussed in Chapter 4 The carrier suing the holder.

[41] See *ante*, p 97; *COSCO and Zhejiang Yuanyang Shipping Co. v. Zhejiang Wanxin Group Co*, judgment from the Ningbo Maritime Court, [1997] Yong Haishangchuzi No157.

[42] See *ante*, discussion on Article 88 of the Chinese Maritime Code.

In the case "*on shipping garlic*"[43], 52 containers of garlic were not taken delivery of at the port of discharge, the judges decided that it was not the shipper, but the consignee who should be liable to the carrier for the relevant fees and charges. This decision was based on three reasons:

First, the court stated that the contract between the shipper and the carrier was terminated upon the transfer of the bill of lading.

Secondly, the court held that the shipper was not liable to the carrier in cases where the preconditions described in Art 88 were not satisfied.

Thirdly, it was held that the consignee was the appropriate party to be sued by the carrier in pursuance of Art 86.

The first and third points made in the court were questionable. As to the first point, the problem was there was no legal basis supporting the view that the original contract between the shipper and the carrier was terminated. The third point was also not well founded. Indeed, three circumstances where the consignee/endorsee holder assumes the liabilities are covered in Art 86[44]: where the goods were not taken delivery of; where the consignee delayed taking delivery of the cargo; where the consignee refused to take delivery of the cargo. The facts in this case fell under the first circumstance, that the consignee did not take delivery of the cargo. (The injustice brought by this provision will be discussed in chapter three which focuses on the imposition of liabilities upon the consignee/endorsee-holder of the bill of lading.[45]). Nonetheless, even if it is true that liability is imposed upon the consignee by virtue of

[43] See "*on shipping garlic*",Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p166.

[44] See *post,* Chapter 4 The carrier suing the holder.

[45] See *post*, 4.2.1.2. of Chapter 4 The carrier suing the holder

Art 86, it does not necessarily indicate or lead to the conclusion that the shipper is relieved from contractual liability. Therefore, the shipper should not escape being sued by the carrier based on these two grounds.

The primary conundrum here is that it is hard to rebut the construction of Art 88 which is the second ground backing up the court's conclusion that the shipper is not liable to the carrier. On the contrary, the court delivered an accurate interpretation of Art 88, which provides literally and precisely that two steps should be taken before the carrier can sue the shipper for his loss arising from the contract of carriage.

The lacuna in the Chinese Maritime Code regarding the shipper's liability after the endorsement of the bill of lading has lead to the adoption of various solutions in the courts. It seems that the courts are more inclined to decide that the shipper will remain liable to the carrier after the bill is transferred or endorsed. However, a broad construction of Art 88 has not been unequivocally accepted in the courts, albeit it has occasionally been interpreted as a provision preserving the shipper's liability. The concept of the coexistence of the two contracts could similarly not provide a satisfactory solution. The shipper could escape from being liable to the carrier by relying on a restricted construction of Art 88 or employing the concept of the termination of the original contract (although this concept is not well founded).

Compared to the Chinese Maritime Code, COGSA 1992 provides a rule by which the carrier is entitled to sue the shipper without requiring that any similar preconditions be satisfied as under the Chinese Maritime Code.[46] The Draft Instrument would

[46] See *ante*, 3.1.1.

operate to have the same result as COGSA 1992 does, although there is no such provision as s.3(3) of COGSA 1992 setting out a clear rule.[47]

3.3.2. Can the carrier sue the shipper where he can sue the receiver?

Concern also lies with the question of whether the carrier is entitled to sue the shipper for recovery of any damage or loss caused by the shipment of the cargo in cases where the cargo was taken delivery of by the consignee/holder. No answer to the question can be found under the present Chinese Maritime Code. The present Chinese Maritime Code does not contain a similar provision as that of s.3(1) of COGSA 1992 providing the requirements which should be satisfied for the holder to be liable to the carrier. Taking into account that a new provision like s. 3(1) of COGSA 1992 is proposed (which will be expounded in Chapter 3) to be inserted into Chinese Maritime Code,[48] it is necessary to discuss here in respect of the shipper's liability where part of the contractual liability is imposed upon the consignee/endorsee who asserted contractual rights under the bill of lading. S.3(3) of COGSA 1992 covers this situation under English law. It specifically provides that the original shipper remains liable to the carrier when the contractual liability is imposed on the holder of the bill of lading by virtue of s.3(1) of COGSA 1992.[49] Is it necessary to insert a similar provision into the Chinese Maritime Code? What is the position of the law in this respect if such a provision is not introduced into the Chinese Maritime Code?

Presuming that the proposed provision regarding the consignee's liability is inserted into the Chinese Maritime Code, the shipper might or might not be held liable to the

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[47] See *ante*, 3.2.1

[48] See *post*, Chapter 4 The carrier suing the holder.

[49] See *ante*, 3.1.2.

carrier in cases where the consignee/endorsee assumed liability by virtue of this new provision. The judges would probably have to employ one of the two schools of opinions (i.e. coexistence of two contracts and termination of the original contract) to deliver a decision since nothing else under the present statute could be relied upon for drawing a conclusion.

Hence, the lacunae of the Chinese Maritime Code regarding the shipper's liability appear to be two fold:

one, whether the shipper remains liable to the carrier after the bill is transferred or endorsed;

the other, whether the shipper remains liable to the carrier after the bill is transferred and the consignee/endorsee assumed contractual liability by virtue of the new provision in the Chinese Maritime Code.

The shipper's liability should be unaffected in either case. The reasons are presented below.[50]

3.3. 3. Recommendations for the reform of the Chinese Maritime Code

3.3.3.1. The carrier can sue the shipper where he cannot sue the receiver.

In cases where the consignee/indorsee did not take or refused to take delivery of the cargo, it is justified that the shipper should be liable to the carrier under the contract of carriage evidenced by the bill of lading on the grounds that he is the original party to the contract and contractual liability is not incurred by anyone else. To prevent the carrier from suing the shipper in the wake of his performance of transferring or

[50] See *post*, 3.3.3.2.

endorsing the bill to others is an exercise of doubtful justice, as the result might be that the carrier would be denied redress against anyone in such circumstances.

The courts have been inclined to support the view that the shipper will not be absolved of his liabilities simply by indorsing the bill of lading to another[51], a new provision confirming this argument should be inserted into the reformed Chinese Maritime Code.

Art 88 of the present Chinese Maritime Code, which requires two preconditions to be satisfied before the carrier institutes proceedings against the shipper, is an obstacle to achieving a justifiable result. The injustice on the part of the carrier under this provision is noticed in judicial practice: a broad construction of this provision was given but not generally accepted; some courts had to choose to ignore its existence. Neither of these two approaches is satisfactory or logical. Therefore, it is suggested that this controversial provision in Article 88 be abolished.

3.3.3.2. The carrier can sue the shipper where he can sue the receiver.

It is also suggested a particular rule be created for preserving the liability of the shipper in cases where contractual liability is imposed on the consignee-holder or endorsee-holder who enforces contractual rights (by taking or making a formal demand of delivery from the carrier of any of the goods to which the document relates, by instituting a formal court procedure against the carrier in respect of any of

[51] See *COSCO and Zhejiang Yuanyang Shipping Co. v. Zhejiang Wanxin Group Co*, judgment from the Ningbo Maritime Court, [1997] Yong Haishangchuzi No157; "*COSCO v. Fujian Trade Group Co*", " Analysis of Cases in Maritime Court", Qingdao Sea University Press, 1997. p 66.

those goods) by virtue of the new provision in the Chinese Maritime Code [52].

Should the shipper be relieved from being liable to the carrier under these circumstances, it would involve taking away a carrier's right of action against a shipper who in many cases may be known, and substituting for it a right of action against an unknown endorsee who may be insolvent or unreachable by effective legal process. If an exporter shipped a cargo of highly poisonous gas which escaped and caused extensive property damage and loss of life, a shipowner/carrier would be disturbed to find that the shipper had been absolved of liability simply by indorsing the bill of lading to another; the new holder who seeks to enforce the contract might happen to be insolvent, and the shipowner/carrier would be denied compensation from anyone. To use the words of Hirst LJ, in favour of this proposition, at the Court of Appeal in England in *The Giannis N.K*[53], "It would require very clear words indeed to divest the owner of this rights against the shipper (with whom he is in contractual relationship) and leave him with his sole remedy against a complete stranger who happens to be the consignee of the goods or the endorsee of the bill of lading, of whose whereabouts and financial stability he knows nothing, and who may be a man (or enterprise) of straw."[54]

Therefore it is recommended that the imposition of liabilities upon the holder of a bill of lading be without prejudice to any liabilities of the original shipper. This provision would not preclude the shipper from making a special provision regarding freight and demurrage in his contract of carriage. Neither would it prevent the shipper from

[52] See *post*, Chapter 4 The carrier suing the holder. 4.3.

[53] *The Giannis N.K* , [1996] 1 Lloyd's Rep. 577.

[54] Ibid, p586.

making similar provisions in their sale contract as to requiring the buyer to indemnify him in respect of any such payment. It might not be necessary to add a provision for providing a solution to the issue of whether the shipper and the consignee would be liable to the carrier jointly and severally where the consignee assumed the contractual liabilities by enforcing the contractual rights, presuming that the shipper and the consignee would make agreements on such issues in their trade contract and they could get indemnification from each other by taking recourse action.

3.4. Conclusion-Legislative suggestion

The suggested new provision would be:

> "The transfer and endorsement of the transport document to others or the imposition of liabilities under any contract on any person[55] shall be without prejudice to the liabilities under the contract of any person as an original party to the contract."

The provision in Art 88 as a source of controversy should be abolished: "If the proceeds fall short of such expenses, the carrier is entitled to claim the difference *(between the proceeds from the auction at port of discharge and the related fees and charges)* from the shipper.

[55] See *post*, Chapter 4 The carrier suing the holder 4. 3.

CHAPTER 4: THE CARRIER SUING THE HOLDER

The subject matter of this chapter is as follows:

(1) The requirements for the imposition of contractual liabilities on the consignee/endorsee as a holder of the bill of lading and;

(2) The extent to which he is liable to the carrier/shipowner.

Could the carrier sue the consignee/endorsee for the recovery of the loss or damage occurred during the course of carriage and at the ports of loading and discharging? This question can be broken down into two subsidiary questions:

(1) Under what circumstances should the consignee/endorsee assume the liabilities? In other words, should he assume the liabilities at the moment when the bill of lading is transferred to him or at the moment when he avails himself of contractual rights under the bill?[1]

(2) Should the consignee/endorsee assume all the liabilities or only particular part of the liabilities under the bill of lading? (For example, demurrage, dead freight, liability for shipment of dangerous cargo.)[2]

It has been established in the preceding chapter that the shipper should be liable to the carrier/shipowner after the transfer or endorsement of the bill of lading to others. This chapter concerns in detail whether the carrier/shipowner could claim recovery from the consignee/endorsee-holder of the bill of lading for the loss or damage occurred during the course of carriage, loading and discharging of the cargoes under which the

[1] See *post*, 4.1.3.

[2] See *post*, 4.2.3.

bill of lading is issued. In cases where the consignee/endorsee are sued by the carrier/shipowner, the court will be faced with two crucial issues: one is under what circumstances the consignee/endorsee-holder gets the liabilities imposed on him and thus is the appropriate person to be sued; the other one is how far the holder will be liable for the shipper's liabilities.

4.1. Requirements for imposition of liabilities on the holder

The Chinese Maritime Code does not explicitly provide the requirements for the imposition of liabilities on the consignee/endorsee. The carrier is entitled to take action under the bill of lading against the consignee/endorsee who delays at taking delivery of the cargo. Nonetheless, it also creates the rule that the consignee/endorsee be liable to the carrier from whom he did not or refused to take delivery of the cargo. The injustice imposed on the part of the consignee/endorsee by the operation of this rule is acknowledged in judicial practice. The judges, counsels and legal academics intended to resolve this problem by adopting several approaches[3]:

(1) by simply ignoring the existence of the present rule;

(2) by application of other provisions in the Chinese Maritime Code;

(3) by applying particular principles established by the Chinese Contract Code 1999.

Unfortunately, none of these solutions proved satisfactory and thus legislative intervention is desirable.[4] The approaches taken under English law and the Draft Instrument will be examined below and it is hoped that considerable guidance might be explored therein and thus be useful for furnishing a solution to the problems incurred under Chinese law.

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[3] See *post*, 4.1.3.

[4] See *post*, 4.1.3.

4.1.1. Under English law

There is no privity of contract between the carrier and consignee or endorsee at common law, so that in principle the consignee is not liable on the contract of carriage. However, he may incur liability (for example, he may be liable for freight and demurrage in accordance with the terms of the bill of lading) under a separate implied contract arising (typically) on delivery of the goods to him by the carrier on presentation of, and in exchange for, the bill of lading.[5] But in recent years this implied contract device became a somewhat fragile one in view of the increasing stringency with which the courts came to apply the requirement of contractual intention as a necessary condition for its operation.[6]

The consignee or endorsee may incur certain duties and liabilities under the contract of carriage by the operation of statutes. Both the Bills of Lading 1855 and the Carriage of Goods by Sea Act 1992 provided for the imposition of liabilities on the transferee of a bill. Some of the potentially undesirable consequences of the position under the 1855 Act were avoided by a process of strict construction of the Act[7], and a new approach to the problem was adopted by the 1992 Act.

Section 1 of the Bill of Lading Act 1855 provides that "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in

[5] *Cock v. Taylor* (1811) 3 East 399; *Allen v. Coltart* (1883) 11 Q.B.D. 782; *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 K B 575.

[6] *The Aramis* [1989] 1 Lloyd's Rep 213; *The Gudermes* [1993] 1 Lloyd's Rep. 311.

[7] *Sewell v. Burdick,* (1884) 10 App. Cas.74.

the bill of lading had been made with himself." The effect of this section is that a consignee or endorsee of a bill of lading had liabilities under the bill imposed on him at the same time as he acquired rights thereunder. It is not necessary here to make extensive discussion of this section, which has now been repealed by section 3(1) of COGSA 1992. The problems caused by this linkage between rights and liabilities were examined by the Law Commissions who considered, for example, how this might affect parties such as banks who take up shipping documents in the normal course of financing international sales and who could, in the process, become liable for freight, demurrage and other charges.[8] As is well known, the House of Lords in *Sewell v. Burdick*[9] skillfully avoided such a conclusion by a process of strict or narrow construction of s.1 of the 1855 Act.[10]

The Carriage of Goods by Sea Act 1992 in part adopted and in part rejected the structure of the 1855 Act, which it repealed and replaced.[11] Section 3(1) of COGSA 1992 breaks the link between the acquisition of rights and imposition of liabilities by providing that:

> "Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection- (a) takes or demands delivery from the carrier of any of the goods to which the document relates; (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or (c) is a person who, at a time before those rights were vested in him, took or

[8] See The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991, para. 3.2.

[9] (1884) 10 App. Cas.74.

[10] Treitel, Bills of lading: Liabilities of transferee, [2001] LMCLQ August 2001, p345.

[11] Treitel, Bills of lading: Liabilities of transferee, [2001] LMCLQ August 2001, p345.

demanded delivery from the carrier of any of those goods, that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract."

Under s.3(1) of the 1992 Act, the acquisition of rights under the bill of lading contract by the transferee remains a necessary , but no longer a sufficient, condition of the imposition of liabilities under that contract on him. The liabilities will be incurred by the consignee/endorsee under section 3 (1) only if two requirements are satisfied: first, the holder must have acquired rights by virtue of section 2(1); secondly, one of the circumstances described in para (a)(b)(c) of s.3(1) must have occurred, i.e. where the consignee/endorsee demands or takes delivery from the carrier of any of the goods (s.3(1)(a)) or makes claims against the carrier under the carriage contract against the carrier in respect of any of the goods (s.3(1)(b)), or where the transferee "took or demanded the delivery" of any of the goods from the carrier and then acquired rights under the contract of carriage (s.3(1)(c)).

Contractual rights must have been vested by virtue of section 2 (1) under 1992 Act

Pursuant to Section 3(1), a person can only incur liabilities under the Act if he has first acquired contractual rights under section 2(1). This means in the case of a bill of lading for example that the person must be lawful holder of the bill.

When a person has not acquired contractual rights under section 2(1) - for example[12] because his bill of lading lacks the necessary indorsement or it has been lost in transit[13] or it exists, in his hands, only as a receipt for shipment[14] – then he will not incur any liabilities under the Act.

However, he may incur liabilities in other ways outside the scope of the Act. Even if his bill of lading lacks a necessary indorsement or it has been lost, he could still take or demand delivery from the carrier and this could give rise to an implied contract – for example where delivery is made against a letter of indemnity.[15] The potential liabilities he then incurs arise under the terms and scope of that implied contract and not under section 3(1) of the Act.[16] To put it another way, the liabilities that he might incur under section 3(1) in respect of normal bill of lading terms relating, for example, to freight charges or the shipments of dangerous cargoes would only be incurred (or exceeded) if the terms of the implied contract required this. Thus, liability in respect of shipment of dangerous cargo by the original shipper could be incurred under s.3(1) although the courts appeared to be reluctant to reach such a conclusion in *The Berge Sisar*[17], but not be incurred under the implied contract[18].

[12] See Benjamin, para 18-101.

[13] *The Aegean Sea* [1998] 2 Lloyd's Rep. 39.

[14] *The Athanasia Comninos and George Chr. Lemos* (1979) [1990] 1 Lloyd's Rep. 277 at 281.

[15] See Benjamin, para 18-101.

[16] See Benjamin, para 18-101.

[17] *Borealis A B v. Straga Ltd (The Berge Sisar)* [2001] 2 All E.R. 193.

[18] It was held that the liabilities should not be imposed on the transferee in respect of the shipper's act in shipping dangerous goods in *The Athanasia Comminos* [1990] 1 Lloyd's Rep. 277, at 281.

The consignee/endorsee avails himself of the contractual rights

Section 3 (1) (a) of COGSA 1992

Taking delivery

Actual or physical possession of the goods The reference in section 3 (1) (a) to a person who "takes...delivery" is clearly to one who takes *actual or physical* possession of the goods and not to the *constructive* possession obtained by the transferee of a bill of lading as a result of the transfer. Interpreting the phrase in the sense of "constructive possession" would defeat the legislative intention behind section 3,[19] which was to break the linkage between the transfer of rights and imposition of liabilities under bill of lading. Moreover, it could be inconsistent with the wording of section 3(1), which refers to the taking delivery "from the carrier." The constructive possession which a transferee of a bill of lading obtains by virtue of the transfer is obtained from the transferor, not from the carrier.

Voluntary transfer of possession Delivery involves the "voluntary transfer of possession"[20] from the carrier to the holder of the bill. In *The Berge Sisar*[21], buyers of propane directed the carrying ship to their import jetty, took routine samples which showed the cargo to have been contaminated and therefore refused to allow the cargo to be discharged into their terminal. It was held that the conduct of the holder which could constitute "taking delivery" must be such as to "amount to an election (by the

[19] See The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991, para 3-15

[20] *Borealis AB v. Stragas Ltd (The Berge Sisar)*,[2001] 2 All E.R. 193, para 32.

[21] *Borealis AB v. Stragas Ltd (The Berge Sisar)*,[2001] 2 All E.R. 193.

holder) to avail himself of ...[his] contractual rights against the carrier"[22]. The requirement to constitute "delivery" for the purpose of section 3 must amount to "more than just co-operating in the discharge of the cargo from the vessel"[23], so that the requirement is not satisfied by the holder's merely providing berthing facilities[24] or by his receiving "routine samples"[25] that enable him to determine whether he is bound to accept the bulk from which they are taken.

Demanding delivery

It was held in *The Berge Sisar*[26] that "demand" for delivery must likewise be such as to provide evidence of the holder's *"election to avail himself of his rights against the carrier"*[27] which he has acquired by virtue of section 2(1). It was further stated that to satisfy the requirement, there must be "a formal demand made to the carrier or his agent asserting the contractual right as endorsee of the bill to have the carrier deliver the goods to him."[28] In accordance with the judicial policy of construing section 3 strictly against the carrier, it has further been held that the demand involves "more than an informal request or invitation". The contrast in section 3(1)(a) between taking and demanding delivery indicates that liabilities may be incurred by the holder even though the carrier does not comply with the demand. Where the carrier has a legal justification for not comply with the demand, the outcome might be that the holder has incurred liability by reason of having made the demand, even though the right which he has acquired by virtue of section 2(1) is no more than an empty one. The

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[22] Ibid, para 32.

[23] Ibid, para 36.

[24] Ibid.

[25] Ibid, para 5 and para 38.

[26] *Borealis AB v. Stragas Ltd (The Berge Sisar)*,[2001] 2 All E.R. 193.

[27] Ibid, para 33.

[28] Ibid.

justice of such a conclusion appears to be somewhat questionable. It is also uncertain whether liability is incurred where the demand is rejected and then not pursued by the holder who had originally made it.[29]

Section 3(1)(b) of COGSA 1992

Making a claim under the contract of carriage

Under section 3(1)(b), liabilities also are imposed on a holder who has acquired contractual rights if he "makes a claim under the contract of carriage against the carrier in respect of any of [the] goods" to which the bill of lading relates: such as where goods are damaged, or not delivered.

There is no commentary at all in either the Law Commission's report or the Explanatory Notes to the draft bill on the possible scope of the phrase "make a claim under the contract of carriage" in clause 3(1)(b) of the Bill. Lord Hobhouse stated in *The Berge Sisar*[30], *obiter*, that the phrase would be read by him as referring to "a formal claim" against the carrier asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading.[31] The phrase "makes a claim" was strictly construed, like the phrase "demands delivery", against the carrier on the basis of an examination of the purpose underlying section 3(1). The solution adopted by the 1992 Act is that a person is not liable under the contract contained in or evidenced by the bill of lading merely because rights under it have been transferred to him on his becoming the lawful holder of the bill. Rather, he becomes liable only if in addition he takes or claims the benefit of that contract. It is this "principle of

[29] Ibid, para 34.

[30] *Borealis AB v. Stragas Ltd (The Berge Sisar)*, [2001] 2 All E.R. 193.

[31] Ibid, para 33.

mutuality"[32] which underlies, and governs the interpretation of, the provision of the Act under which liabilities can be incurred by the transferee of the bill of lading. If the person with a right of suit chooses to perform either actions referred to in para (a) and (b) of section 3(1), that person is choosing to exercise his contractual rights under the contract of carriage and to enforce them against the carrier. Lord Hobhouse described these actions as involving "a choice by the endorsee to make a positive step in relation to the contract of the carriage and the rights against the carrier transferred to him by section 2(1)."[33] He further pointed out in the same paragraph that this positive step by an endorsee "has the character of an election, to avail himself of those contractual rights against the carrier."[34]

"Issuing a writ or arresting a vessel"

"Issuing a writ or arresting a vessel" was regarded as making a formal claim within the ambit of s.3(1) by Lord Hobhouse in *The Berge Sisar*[35]. This statement was followed in *Primetrade A.G. v. Ythan Ltd (The Ythan)*[36] by Mr Justice Aikens. He gave a further illustration of this view by stating that

> "When a vessel is arrested, the claimant and arresting party invokes a formal procedure of the court to interfere with the use of a vessel by her owner. If the arrest is made recklessly, the arrestor lays himself open to a claim for damages for wrongful arrest. The arrest will be in support of an identified claim by one or more identified claimants. An arrest is made in support of either an existing

[32] Ibid, para 31.

[33] Ibid, para 33.

[34] Ibid, at para 31 and para33. The "principle of mutuality" or of "reciprocity or fairness" is the principle "that he who wishes to enforce the contract against the carrier must also accept the corresponding liabilities to the carrier under the contract."

[35] Ibid, para 33.

[36] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457.

claim process or one that is imminent in either the jurisdiction of the arrest or another. So, in my view, an arrest plainly constitutes a choice by the holder of the bill of lading to enforce its contractual rights against the carrier and has the character of an election."[37]

One of the facts in *The Giannis N.K*[38] (the main issue being whether the shipper is liable to the carrier which is discussed in the section regarding carrier suing the shipper[39]) deserves mention here: the holder of the bill/receivers of the cargo started proceedings against both the shipowner/carrier and the shipper and the vessel carrying the cargo involved had been arrested by the receivers[40]. On the facts of *The Giannis N.K*[41], it is probable that the carrier now, under COGSA 1992, would be entitled to take action against, not only the shipper but also, the consignee/holder of the bill on the basis that the holder had the liabilities imposed upon him by his conduct of making a claim (including arresting the vessel) against the carrier under the contract of carriage, albeit that the question of to which extent the holder should be liable to him is unsettled and probably the holder could be exempted from being liable to the shipowner for his loss caused by the shipper's breach of warranty in respect of the shipment of dangerous cargo.[42]

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[37] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457, para 98.

[38] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[39] See Chapter 3 The carrier suing the shipper 3.1.

[40] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[41] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] A.C. 605 [1996]1. Lloyd's Rep. 577,586; [1998] 1 Lloyd's Rep.337.

[42] See *post*, 3.2.1.

"Requesting a LOU (Letter of Undertaking)" and "arresting a vessel"

One of the issues before the court in *Primetrade A.G. v. Ythan Ltd (The Ythan)*[43] was the question of whether "successfully requesting a LOU" by the holder of the bill of lading (or his agent) constitutes "making a claim" against the shipowner within section 3(1)(b). It was decided that, based on the facts of this case, the successful request by the agent of the holder of the bill of lading for security in the form of the LOU does not amount to "making a claim" for the purpose of section 3(1)(b).[44] Mr Justice Aikens accepted that "the request for security implied threat of arrest", but he further pointed out "at all stages up to and after the provision of the LOU, no one is committed to making a claim against the owners at all".[45] He made a statement distinguishing "requesting a LOU" from "arresting a vessel":

> "This request for security for a claim, even though successful, is different in character from the arrest of a vessel in support of a claim. The latter is *a formal use of court procedures* by identified claimants in the context of an existing suit or one that is started at the time of arrest. An arrest is *a positive, formal, and final action* by a claimant. An LOU, by contrast, is a contractual arrangement. "[46]

Following the analysis in *The Berge Sisar*[47] of the scope and effect of section 3(1)(b), it was held that the provision of the LOU (in this case) was not regarded as a statement, made to the (ship)owners through the (P&I) Club, of "a formal choice by

[43] *Primetrade A.G v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457.QBD(Comm)

[44] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457.QBD(Comm).para 103.

[45] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457.QBD(Comm).para 103.

[46] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457.QBD(Comm).para 103.

[47] *Borealis AB v. Stragas Ltd (The Berge Sisar),*[2001] 2 All E.R. 193.

the holder to avail itself of its contractual rights against the Owners".[48]

The question of whether a conduct constitutes "making a claim" under section 3(1)(b) is unsettled and the decision will depend on the facts at particular cases, nevertheless the strict construction of this phrase given by the House of Lords in *The Berge Sisar*[49] will probably be highly persuasive in cases where the same question arises. The phrase would be strictly read as referring to "a formal claim against the carrier asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading"[50]. That person is choosing to "make a positive step" [51] exercising his contractual rights under the contract of carriage (availing himself of those contractual rights against the carrier[52]) and enforcing them against the carrier. "Issuing a writ or arresting a vessel" could be regarded as making a formal claim within the ambit of s.3(1).[53]

The question then arises whether it is possible for a bill of lading holder to make a claim against a carrier without exposing himself to liabilities under the bill of lading.

Section 3(1)(b) refers only to claims "under the carriage contract". If a bill of lading holder pursues his claim in tort then he might be able, on this basis, to proceed without the risk of incurring liabilities under the bill of lading.

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[48] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006] 1 All E.R.367.[2006]1Lloyd'sRep.457.QBD(Comm).para 103.

[49] *Borealis AB v. Stragas Ltd (The Berge Sisar),*[2001] 2 All E.R. 193.

[50] Ibid, at para 33.

[51] Ibid, at para 33.

[52] Ibid, at para 33.

[53] Ibid, at para 33.

However, this seems an unlikely opportunity in practice. This is because there is a general principle in law that when a relationship between two parties is set out in a contract then any claim between these two parties should be determined in accordance with the terms of that contract – at least to the extent that the claim arises from facts that amount to a breach of it. [54]

Claims made under section 2(4)

Where section (2)4 applies it enables the holder of a bill of lading to make a claim against the contract of carriage on behalf of another party who has actually suffered loss. As soon as he exercises his right to make such a claim he will be exposed to potential liabilities under that contract by virtue of section 3(1)(b). The only way he can avoid these liabilities is to ensure that the person on whose behalf he has agreed to claim will indemnify him in respect of any liabilities he incurs as a consequence of making this claim

Section 3(1)(c) of COGSA 1992

This provision reads as

> "Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subjection-(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods, that person shall...become subject to the same liabilities under that contract as if

[54] See Benjamin, para 18-105; Guenter Treitel, Bills of lading: Liabilities of transferee, [2001] LMCLQ August 2001, p348. *Greater Nottingham Co-operative Society Ltd v. Cementation Piling & Foundations Ltd* [1989] Q.B. 71; *Red Sea Tankers Ltd v. Papachristides (The Hellespont Ardent)* [1997] 2 Lloyd's Rep. 547

he had been a party to that contract."

The usual cases covered in this sub section are ones where a ship arrives at the contractual port of discharge before the arrival of the original bill and the cargo is discharged and delivered (often against a letter of indemnity) to the person who will, in the course of time, be the final holder of the bill of lading[55]. Before interpreting this subsection, one question that has to be answered is how could the person take or demand delivery from the carrier "at a time before rights were vested in him by virtue of subsection 2 (1)". In answering this question, subsection 2(2) must be construed in conjunction with subsection 2(1). The general rule established by subsection 2(2) is that when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection 2(1). The fact that goods are delivered to the person entitled to take delivery of the cargo results in the bill being "spent" or "exhausted",[56] namely, possession of the bill no longer gives a right to possession of the goods.[57] Mustill LJ said, in *The Delfini*[58], that

> "When the goods have been actually delivered at destination to the person entitled to them, or placed in a position where the person is entitled to immediate possession, the bill of lading is exhausted 'and will not operate at all to transfer the goods to any person who has either advanced money or has purchased the bill of lading'."

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[55] As, for example, the facts in *Enichem Anic SpA v. Ampelos Shipping Co. Ltd (The Delfini)* [1990] 1 Lloyd's Rep. 252.

[56] *The Delfini* [1988] 2 Lloyd's Rep. 599, 609; *Short v. Simpson* (1866) L.R. 1 C.P. 248.

[57] See *ante*, Chapter 1 Shipper's title to sue; and *post*, Chapter 4 Holder's title to sue.

[58] [1990]1 Lloyd's Rep. 252, 269; citing *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317,330,335.

Hence, in consequence of the cargo being taken delivery of (against the LOI) by the consignee/endorsee who is entitled to this delivery, the bill of lading ceases to operate to transfer the goods to any person and no contractual rights under the bill are transferable to the holder by virtue of s.2 (1). However, subsection 2(2)(a) also creates an exception to this general rule: if a holder became a holder "in pursuance of any contractual or other arrangements" made before the time when the bill of lading became spent, an endorsement of a bill of lading after delivery of the goods will be deemed as being effective to transfer contractual rights by virtue of s. 2(1).[59] Returning to the situation under discussion, the consignee/endorsee had the bill of lading transferred or endorsed to him eventually after taking delivery of the goods against the LOI in pursuance of some arrangement (sale contract) made prior to the delivery of the goods, he acquires contractual rights by virtue of s.2(1) in pursuance of s.2(2)(a). Whilst the acquisition of rights of such a holder of bill of lading are recognised by s.2(2)(a), subsection 3(1)(c) deals with the imposition of the liabilities upon him. Such a person, "who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods", "shall...become subject to the same liabilities under that contract as if he had been a party to that contract".[60] In addition, the cooperation of these two sections (i.e. s.2(2)(a) and s.3(1)(c)) in regulating contractual relationships between such a holder and the carrier, demonstrates, from another perspective, that the intention of the draftsmen of

[59] See *ante*, Chapter 1 Shipper's title to sue. See *post*, 4.1.3. p174. Section 2(2) of COGSA 1992 provides that "Where, when a person becomes the lawful holder of the bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, the person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill-(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements."

[60] S.3(1)(c) of COGSA 1992.

COGSA 1992 was to ensure "the mutuality of the contractual relationship between the carrier and the shipper and then the endorsee of the bills of lading"[61] and gives support to the view[62] that it is the "principle of mutuality" which underlies, and governs the interpretation of the provisions of the Act under which liabilities can be only incurred by the transferee of the bill of lading who takes a positive step in exercising the contractual rights under the bill.

This provision of 3(1)(c) also covers another situation: where a person who later acquires rights by virtue of section 2(1), on becoming the lawful holder of the bill, "demanded delivery." The words "demand delivery" can not have the same meaning in section 3(1)(c) as in section 3(1)(a).[63] A person cannot acquire contractual rights under a bill of lading before and until he is in possession of it (section 2(1)).[64] In the *Berge Sisar*, Lord Hobhouse of Woodborough illustrates this as follows:

> "A demand made without a legal basis for making it or insisting upon compliance is not in reality a demand at all. It is not a request made "as of right", which is the primary dictionary meaning of "demand". It is not accompanied by any threat of legal sanction. It is a request which can voluntarily be acceded to or refused as the person to whom it is made may choose."

In other words, "demand delivery" in section 3(1)(c) must refer to a demand based on something other than possession of a bill of lading – perhaps an assertion of ownership of the goods.

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[61] *Borealis AB v. Stragas Ltd (The Berge Sisar)*, [2001] 2 All E.R. 193, at para32.

[62] *Borealis AB v. Stragas Ltd (The Berge Sisar)*, [2001] 2 All E.R. 193, at para32.

[63] See Benjamin, para 18-107.

[64] Ibid.

Unlike sections 3(1)(a) and 3(1)(b), liability is only incurred under section 3(1)(c) when somebody who has previously taken or demanded delivery of the cargo without surrendering a bill of lading actually acquires that bill of lading. Just as that person had no contractual right to take or demand delivery of the cargo before he acquired the bill of lading, equally the carrier had no contractual rights against him. The parties' rights and liabilities towards each other before the arrival of the bill of lading may have been identified in some other contract or agreement – perhaps evidenced by a voluntary decision by the carrier to discharge on terms that include a letter of indemnity.

The Draft Instrument provides that the holder will not assume any liabilities under the contract of carriage if it does not exercise any rights under the contract of carriage although the meaning of "exercise any rights" is not explained therein.[65] The lack of the definition of this term might cause some controversy if it enters into force.

In contrast with the COGSA 1992, Chinese statute law does not set out any similar rule regarding the requirements for impositions of liabilities on the consignee/endorsee. Art 86 of CMC provides that he would be liable for the relevant fees and charges if he delayed taking delivery of the cargo at the port of discharge.[66] Meanwhile, it is also provided that he would be liable for the relevant fees and charges occurred at the port of discharge when he did not or refused to take delivery of the cargo.[67]

[65] See *post*, 4.1.2.

[66] See *post*, 4.1.3.

[67] See *post*, 4.1.3.

4.1.2. Under the Draft Instrument

Art 62 (1) of Draft Instrument is designed to deal with the requirements for imposition of liabilities upon the consignee/endorsee as holder of the bill of lading. It provides that

> "Without prejudice to the provision article 59, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder".

Pursuant to this provision, the holder, apart from the shipper (the shipper could fall with the definition of holder in pursuance of Art 1 (j)[68]), shall not assume any liabilities imposed on him under the contract of carriage, if the holder does not exercise any right under the contract of carriage. It follows that the holder of the bill of lading will not, solely by reason of becoming a holder, be subject to the liabilities under the contract of carriage. However, the wording "exercise any rights" is not defined or explained by the drafters. This must be a potential source of hardship. The draft article might be misread as suggesting that any time a holder became active or exercised a right, the holder would automatically assume responsibilities or liabilities under the contract of carriage. Taking delivery, making a formal or even informal claim, demanding delivery of the cargo, arresting the ship and even contacting the shipowner for a LOU (Letter of Undertaking) might be regarded as the performance of "exercising any rights" under the contract of carriage.

[68] Art 1 (j) provides that "holder means (i) a person that is for the time being in possession of a negotiable transport document and (a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or (b) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or....."

In contrast, COGSA 1992 deals with this question by listing those requirements that should be satisfied rather than simply using the expression "exercising any rights" as the Draft Instrument does. Pursuant to section 3(1), the holder who has acquired rights by virtue of section 2(1) shall be subject to the same liabilities under the contract of carriage providing that one of the three conditions listed therein were fulfilled.[69] The approach adopted by the COGSA 1992 is far more feasible than that under the Draft Instrument.

4.1.3. Under Chinese law

Although it is precisely provided in Art 86 of Chinese Maritime Code that the consignee/endorsee would be liable for the relevant fees and charges if he delayed to take delivery of the cargo at the port of discharge, Chinese statute law does not set out the requirements for impositions of liabilities on the consignee/endorsee, namely, neither does it state that the holder assumes the liabilities under the contract at the moment when he acquires contractual rights nor does it provide that he assumes the liabilities at the moment when he exercises the contractual rights. The main issue requiring urgent resolution arises in cases where the consignee/endorsee does not or refuse to take delivery of the cargo.

Under the Chinese Maritime Code

Art 86 is a provision imposing the contractual liabilities upon the consignee/endorsee holder. It provides that

> "If the goods were not taken delivery of at the port of discharge or if the consignee has delayed or refused the taking delivery of the goods, the Master

[69] See *ante* 4.1.1.

may discharge the goods into warehouses or other appropriate places, and any expenses or risks arising therefrom shall be borne by the consignee".

Three circumstances are included in Art 86:

(1) where the consignee delayed taking delivery of the cargo;

(2) where the goods were not taken delivery of;

(3) where the consignee refused to take delivery of the cargo.

In cases where the consignee delayed taking delivery, this provision provides a clear solution for the carrier. In addition to Art 86 of the Chinese Maritime Code, Art 309 of the Chinese Contract Code (CCC) on taking deliver of cargo by consignee says that "Where the consignee delays in taking delivery, it shall pay expenses such as safekeeping fee, etc. to the carrier." These two provisions in Art 86 of the Chinese Maritime Code and Art 309 of the Chinese Contact Code provide a legal basis for the proposition that the consignee/endorsee would be subject to the liabilities providing that he took delivery of the cargo at the port of discharge.

Nevertheless, the justification of imposing liabilities upon the consignee/endorsee who did not or refuse to take delivery of the cargo by virtue of Art 86 is questioned in judicial practice. Some of the typical judgments regarding the consignee/endorsee's liabilities where he did not or refuse to take delivery of the goods will be examined below.

The decisions delivered by the courts on the issue under discussion are divided into two groups:

(1) the consignee is held liable to the carrier in accordance with Art 86;

(2) the consignee is held not be liable to the carrier on other grounds.

The consignee is held liable to the carrier

In the case *The Weiyuan*[70], the cargo was not taken delivery of at the port of discharge. The judges opined that the consignee was the appropriate party to be sued and liable to the carrier for the fees incurred at the port of discharge. This decision was based upon the construction of Art 86, which provides that

> "If the goods were not taken delivery of at the port of discharge, the Master may discharge the goods into warehouses or other appropriate places, and any expenses or risks arising therefrom shall be borne by the consignee".

The primary issue discussed in *COSCO v. Fujian Trade Group Co*[71] was on the shipper's liabilities to the carrier (this case is also discussed in Chapter 2 The carrier suing the shipper). The reason why this case is mentioned here is that one of the grounds based upon which the shipper was held liable was that the court regarded the shipper as a consignee. It was held that the consignee should be liable to the carrier pursuant to Art 86. The facts of this case were as follows: The defendant, named shipper in the bill of lading issued under a carriage contract with the plaintiff carrier, made a CIF sale contract with a French company, *Sefpo Co.*, who was named as the consignee in the bills of lading. The buyer did not come to collect the goods under the bill of lading at the port of discharge as he became insolvent after the trade contract was made with the defendant. The bills of lading were not accepted and were sent

[70] See *The Weiyuan*, Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p160.

[71] See " Analysis of Cases in Maritime Court", Qingdao Sea University Press, 1997. p 66.

back to the defendant by the banks who were informed that the named consignee gone bankrupt. The defendant shipper alleged that the bills of lading were mailed to the consignee afterwards in order that the consignee could take delivery of the cargo at the port of discharge. The plaintiff carrier claimed against the shipper for all of his economic loss for dealing with the cargo at the discharging port and customs.

The judges decided that the shipper should be responsible for the loss suffered by the carrier at the port of discharge on two grounds:

(1) there was a contract of carriage between the defendant shipper and the plaintiff carrier and thus the shipper should be responsible for the loss suffered by the carrier at the port of discharge[72];

(2) the defendant was the holder of the bills of lading and the owner of the property thus he fell within the definition of "consignee" in Art 42 of the Chinese Maritime Code which provides that "consignee" means the person who is entitled to take delivery of the goods.

The judges further held that the defendant, as the consignee, should bear the responsibility of paying for the expenses occurred in the port of discharge pursuant to Art 86 of the Chinese Maritime Code.

From first sight, this appears to be a case involving the shipper's, in lieu of the consignee's, liability towards the carrier under the contract of carriage. However, it should not be ignored that one of the reasons that the shipper was held liable to the carrier in this case was that the defendant shipper was regarded as falling within the definition of "consignee" in Art 42 of the Chinese Maritime Code and then was held

[72] See *ante*, Chapter 3 The carrier suing the shipper.

to be liable to the charges occurred at the port of discharge as a consignee by virtue of Art 86. With respect, it is hard to regard this as a correct interpretation of the provision of Art 42. It is generally accepted that the "consignee" is the person who is entitled to take delivery of the cargo at the port of discharge[73] and he is not a party to the original contract of carriage.[74] Thus, consignee refers to the person who is entitled to take delivery of the cargo merely at the port of discharge rather than any person who is entitled to take delivery of the cargo at any place. It is hard to agree on the argument of regarding the shipper as falling within the category of the consignees in any case. Irrespective of the fallacious construction of Art 42, concern here is mainly with the decision made regarding the imposition of the liabilities upon the consignee. The application of Art 86 of CMC to the present case implies that the court supported the view that the consignee should be liable for the fees and liabilities occurred under the contract of carriage in cases where he does not take delivery of the cargo.

The consignee is held not be liable to the carrier

Some courts expressed doubts about the justification, brought about by the operation of Art 86 of the Chinese Maritime Code, for imposing liabilities upon the consignee/endorsee who did not take delivery of the cargo and then delivered decisions inconsistent with the provision in Art 86.

In one case *"on carriage of two containers of carrots from Qingdao, China to*

[73] Art 42 of Chinese Maritime Code defines the "consignee" as "the person who is entitled to take delivery of the goods."

[74] See Textbook of Maritime Law, 1999, Dalian Maritime University Press, p 170.

Japan[75]", the defendant Company Q made a contract of carriage, being evidenced by the freight-prepaid bill of lading, with the claimant carrier Company C. Company J was the consignee named under the bill of lading. Two containers of carrots were unloaded into the warehouse at discharge port in Japan and allegedly damaged. Subsequently, Company J concluded a carriage contract with the carrier and Company Q was named as the consignee in the freight to collect straight bills of lading. Thereafter, the vessel owned by the plaintiff carrier proceeded back to Qingdao, China, where the two containers of carrots were shipped on board under the first set of bills of lading. Unsurprisingly, the defendant neither agreed to take delivery of the carrots nor paid for the freight or other related fees incurred at Qingdao, China.

The claimant carrier submitted that the defendant consignee was liable to take delivery of the cargo at the port of discharge pursuant to Art 86 of the Chinese Maritime Code. In addition, it was submitted that the defendant, as consignee, fell within the definition of "merchants" in the bill of lading, which stipulates that the merchants shall be liable for the fees and charges occurred at the port of discharge. These related clauses in the bill of lading should be regarded as "the clauses of the bills of lading" referred to in Art 78 of the Chinese Maritime Code, by which the relationship between the carrier and the holder of the bill of lading in respect of their rights and obligations is defined.

The defendant contended that he did not reach an agreement with the carrier on carrying the cargo back to Qingdao; and Company J, as the shipper in the straight bill

[75] See *"on carriage of two containers of carrots from Qingdao, China to Japan"*, "Study on Maritime Law",2002, Dalian Maritime University Press. pp 164-166.

of lading, should be sued for indemnity for the freight and other fees caused at the port of discharge. It is also opined that Art 88 of the Chinese Maritime Code provided that the shipper is not exempted from the liabilities, including being liable for the fees and charges occurred at the discharging port. The defendant was not obliged to take the delivery of the cargo at the port of discharge.

The judges from the court of first instance and the court of appeal upheld the argument from the defendant and decided, without mentioning the application of Art 86, that the defendant as a consignee who did not take delivery of the cargo at the discharging port is not the appropriate party to be sued by the carrier. Apart from simply ignoring the existence of Art 86 of the Chinese Maritime Code, the court also did not give either positive or negative comments on the submission made by the claimant carrier on the application of Art 78. The court delivered the decision in favor of the consignee on the grounds that

(1) broad construction of Art 88 assists in concluding that the shipper is regarded as the party whom should be sued by the carrier where the cargo is not taken delivery of at the port of discharge;

(2) the principle of "vicarious performance" set out by Art 65 of the Chinese Contract Code is applicable in the context of carriage contract.

It seems that the court noticed the injustice brought by Art 86 of the Chinese Maritime Code to the consignee who did not take delivery of the cargo and intended to avoid applying it to the present case. Indeed, the operation of Art 86 does not give justification on the part of the consignee/endorsee[76] and the decision in favor of the

[76] See *post*, 4.1.4.

consignee/endorsee delivered by the court is plausible, but it does not mean the reasoning behind this decision was well founded. Although respect is due to the court, the two approaches adopted by the court are unsatisfactory for the following reasons:

First, Art 88 of the Chinese Maritime Code does not precisely provide that the shipper is the party who should be sued in contract for the loss or fees incurred by the carrier at the port of discharge[77]. Even if the construction of Art 88 is correct, so that the shipper is liable to the carrier pursuant to Art 88, it does not necessary lead to the conclusion that the consignee/endorsee is exempted from the liabilities to the consignee.

Secondly, the principle of "vicarious performance" is not applicable in the context of carriage contract. The reasons are elucidated below:

Vicarious performance under the Chinese Contract Code 1999 (CCC)

The concept of vicarious performance under Chinese law is identical to that under English law. Under English Law, where vicarious performance is permitted no liability is transferred; the original debtor remains liable for the due performance of his obligations under the contract; and the sub-contractor does not become liable in contract to the creditor.[78] No contract exists between the sub-contractor and the creditor[79].

Under the Chinese Contract Code, if the contracting parties agreed that a third

[77] See *ante* Chapter 3 The carrier suing the shipper.

[78] See Treitel, The Law of Contract, 11th edition, p 673.

[79] Ibid, p 674.

party should perform the debtor's obligation to the creditor and the third party fails to do so, the debtor remains liable to the creditor for breach of contract. This doctrine of "vicarious performance" is prescribed by Art 65 which reads that

> "Where the parties agree that a third party performs the obligations to the obligee, and the third party (sub-contractor) failed to perform the obligations or the performance does not meet the terms of the contract, the obligor shall be liable to the obligee for the breach of contract." [80]

Pursuant to this provision, the debtor will remain liable for the due performance of his obligations under the contract. It is expressed that if this principle applied to the context of the carriage contract, the carrier (creditor) is deprived from suing the consignee who as sub-contractor failed to take delivery of the cargo on the grounds that the shipper (debtor) is the only party he is entitled to sue on the contract under the doctrine of "vicarious performance".[81] It seems like a reasonable explanation of the decision that the consignee should not assume any liabilities under the contract of carriage where he did not take delivery of the cargo at the port of discharge. Nevertheless, this statement must be taken with considerable caution and is in need of elaboration. It should be noted that the doctrine of "vicarious performance" applies to cases where there is no contractual relationships between the creditor and the sub-contractor. Then it

[80] http://www.chinaiprlaw.com/english/laws/laws2-4.htm, In China so far there is no official English language translation of national legislation as such, although the Legislative Affairs Committee of the NPCSC publishes an annual volume of English translations of national laws adopted in the previous year. Despite great effort, sometimes certain inaccuracies still show the need for improvement. See Zhang Xianchu, Hongkong, Review a book on contract law in china, Law Journal, Volume 32, Part 2, 2002.

[81] Study on Contract Law in China, Jiangping, Chinese University of Politics and Law Press, 1999. p167.

follows that, when such a principle applies to the situation under discussion, the consignee/endorsee merely performs the shipper's obligation as a sub-contractor and has no contractual relationships with the creditor (carrier). In this connection, the consignee/endorsee as the sub-contractor will be exempted from being liable to the carrier (creditor) under any circumstances, even including where he takes delivery of the cargo. This conclusion will contradict with the established rule under Chinese law that the consignee/endorsee takes delivery of the cargo will be liable to the carrier.[82] Thus, the doctrine of "vicarious performance" is not applicable to the context of carriage of goods by sea, although, indeed, the operation of this doctrine could justify the decision on exempting the consignee/endorsee from being liable to the carrier where no delivery was taken. Accordingly, the application of this "vicarious performance" principle failed to solve the present problem.

The decision delivered by courts on this typical case gave rise to further debates on the requirements for imposing liabilities upon the consignee/endorsee. The prevailing view is that there is no justice on the part of the consignee/endorsee and he should not incur liabilities under the contract of carriage where he does not avail himself of the contractual rights.[83] It is suggested that eradication of the relevant provision in Art 86 is a necessary step to be taken. Attention then is focused on seeking legal basis upon which the consignee/endorsee could be relieved from being liable to the carrier in the situation under discussion. Some law academics proposed to apply the general principles set out by the Chinese Contract Code to the situation under discussion: one is the doctrine of "vicarious performance" and the other is the principle on "transfer

[82] See *ante*, Art 86 of the Chinese Maritime Code and Art 309 of the Chinese Contract Code.

[83] See "Study on Maritime Law", 2002, Dalian Maritime University Press. pp 164-166.

of the contractual liability". Assuming that either of these two basic principles established by the Chinese Contract Code could provide solutions to the problems concerned, the drafters of the reformed Chinese Maritime Code will be relieved of creating a new provision regarding the imposition of the liabilities upon the consignee/endorsee where he does not take delivery of the cargo. Unfortunately, it is hard to prove that either of these two principles could give the effect expected. The principle on "vicarious performance" was just examined above; the other principle will be discussed below.

Transfer of the contractual liability under the Chinese Contract Code 1999 (CCC)

Could the principle of "transfer of the contractual liability" be applied to solve the present problem? Under Art 84 of the Chinese Contract Code, the debtor, with the consent of the creditor, is allowed to transfer its contractual liabilities fully or partly to a third party. It is provided that "if the obligor assigns its obligations, wholly or in part, to a third party, it shall obtain consent from the obligee first".[84] What should be clarified is that the wording "assign" in Art 84 is not translated from Chinese into English in a correct way in the current versions available. Assignment at common law is the transfer of a right without the consent of the debtor.[85] The common law does not recognise the converse process of the transfer of a contractual liability without the consent of the creditor: "the burden of a contract can never be assigned without the

[84] http://www.chinaiprlaw.com/english/laws/laws2-5.htm; In China so far there is no official English language translation of national legislation as such, although the Legislative Affairs Committee of the NPCSC publishes an annual volume of English translations of national laws adopted in the previous year. Despite great effort, sometimes certain inaccuracies still show the need for improvement. See Zhang Xianchu, Hongkong, Review a book on contract law in china, Law Journal, Volume 32, Part 2, 2002.

[85] See Treitel, The Law of Contract, 11th edition, p 590.

consent of the other party to the contract..."[86] It is pointed out that the phrase "assignment of liability" is highly misleading and should be avoided.[87] Consequently, it might not matter whether the process of transfer is with or without the consent of the other party to the contract. In contrast, the Chinese Contract Code creates a rule regarding the transfer[88]of contractual liabilities, by allowing the process of transfer of contractual liabilities fully or partly to a third party with the consent of the creditor. It is opined that[89]: under the contract of carriage the carrier could be regarded as the creditor, the shipper as the debtor, the consignee/endorsee as the third party; and the shipper transferred part of its liability (the liability to take delivery of the cargo and to pay the relevant fees and charges) to the consignee/endorsee. Furthermore, it is pointed out that the carrier usually accepts the booking sheet from the shipper who often fills out the column "consignee" therein and this conduct could be regarded as the consent of the carrier to such a transfer; and the conclusion made based upon this analysis is that the taking delivery of the cargo by the consignee eventually satisfies the condition when the carriage contract is transferred and thus the liabilities are arrested on the consignee.[90] At first sight, it seems that this argument provides a rational analysis as to why the consignee's taking delivery of cargo should be the requirement for imposing contractual liabilities on it in under Chinese jurisdiction. However, this argument will be proved to not be well founded by a close examination of the principle of "transfer of liability fully or partly" under Art 84 of the Chinese Contract Code. The contention is as follows:

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[86] *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85,103; *cf.Baytur S.A. v. Finagrain Holdings S. A.* [1991] 4 All E.R. 129, 134; *Societe Commerciale de Reassurance v. ERAS International Ltd.* [1992] 1 Lloyd's Rep. 570, 595-596.

[87] See Treitel, The Law of Contract, 11th edition, p 617.

[88] In order to avoid causing confusion, possibly using the wording "transfer" is better than choosing the word "assign".

[89] See Study on Maritime Law, edited by Professor Si Yuzhuo, Dalian Maritime University Press, 2002, p 163.

[90] Ibid.

First, if such a principle applies, the debtor (shipper) will cease to be liable to the creditor (carrier), and the third party (consignee) will replace him and become liable to the creditor (carrier) since particular parts of the contractual liability are transferred to the third party (consignee); this conclusion contravenes the rule set out by Art 88 of the Chinese Maritime Code that the shipper will not cease to be liable for the particular liability, e.g. to pay the relevant fees and charges.

Secondly, under this principle, the third party will be a party to such a contract and the creditor is able to require him to perform his contractual liabilities and sue him when he fails to do so. If this is applicable to the situation under discussion, the consignee is regarded as the third party, and will accordingly be sued by the carrier (creditor) even if he *does not take delivery of the cargo* on the grounds that the third party (consignee) who fails to perform his contractual liabilities including taking delivery of the cargo should be liable to the creditor (carrier) under the doctrine of "transfer of contractual liabilities". Thus the principle on transfer of contractual liabilities fails to back up the argument that the consignee should not be liable to the carrier where he does not take delivery of the cargo at the port of discharge.

Accordingly, it is desirable and necessary to insert into the remodeled Chinese Maritime Code a new provision especially designed to deal with the issues which arise in cases where the consignee/endorsee does not take delivery of the cargo.

4.1.4. Recommendations for the reform of the Chinese Maritime Code

The present Chinese Maritime Code, in lieu of specifying the requirements for the

imposition of the contractual liabilities upon the holder of the bill of lading, provides a list of the situations where they should be liable to the carrier and what liabilities they would assume. It seems that no problem arises from the circumstance where the consignee took delivery of the cargo by virtue of Art 86 of the Chinese Maritime Code.[91] Issues arise from the cases where the goods were not taken delivery of at the port of discharge or the consignee refused taking delivery of the goods. It has been recognised by some judges and noted by legal academics that it is unjust for a consignee/endorsee who has given up the right to take delivery of the cargo contractually, to then be faced with liability under the contract of carriage. However, unfortunately, the solutions adopted in judicial practice proved to be insufficient and unsatisfactory[92]. Hence, legislative intervention has become a necessary step towards resolving this conundrum. In order to exempt the consignee/endorsee from being liable to the carrier in cases where he did not or refused to take delivery of the cargo, it is suggested that the relevant provisions in Art 86 are eradicated and Art 86 is replaced with a reformed clause with a new rule establishing the requirements which should be satisfied for the imposition of liabilities. The provision of "rights and liabilities shall be defined by the clauses in the bill of lading" in Art 78 giving rise to problems in the circumstances discussed here should be eradicated and replaced by several new provisions.

Two questions require answers:

(1) Why is it justified to create the new rule requiring the holder to exercise his contractual rights against the carrier so as to make him subject to contractual liabilities?

[91] See *ante*, 4.1.3.

[92] See *ante*, 4.1.3.

(2) What performance conducted by the holder will constitute enforcing contractual rights under this new rule?

The justification for eradication of the present rule and creation of the new rule

Contractual liabilities should not be automatically imposed on every holder of a bill of lading:

> Firstly, it is entirely unfair to mandate the consignee/endorsee who gives up all of the contractual rights to assume the contractual liabilities under the bill of lading.
>
> Secondly, it is not desirable that liabilities could be enforced against any person who merely holds the bill of lading, including those holding the bill only for security interest (e.g. a bank who has possession of the bill of lading as financial security for a debt).

How to define enforcing contractual rights

Where the holder of the bill of lading enforces any rights conferred on him under the contract of carriage, he should do so on condition that he assumes any liabilities imposed on him under that contract. Clearly, it is important to know when the holder of the bill is enforcing rights so as to make him subject to contractual liabilities. It should be recalled here that the draftsman of the Draft Instrument also tried to set out a rule on the requirements for the imposition of liabilities by providing that the holder will not assume any liabilities under the contract of carriage if he does not exercise any rights under the contract of carriage. However the meaning of "exercise any

rights" is not explained therein and must be a potential source of controversy.[93] By contrast, under English jurisdiction, COGSA 1992 provides a clear solution as to the issues on the requirement of the imposition of liabilities upon the consignees by listing several performances which constitute asserting contractual rights against the carrier[94]. A solution based on the relevant provisions of COGSA 1992, with modifications, should be opted for.

It is fair to make the person, who either makes a formal claim of delivery or who takes delivery of the goods, or who makes a claim against the carrier, subject to the terms of the contract of carriage, since in these cases the person is enforcing or at least attempting to enforce rights under the contract of carriage. Although it may seem odd to impose liabilities on the person who claims delivery but who actually receives nothing, this will not invariably be so. In the report of the Law Commission and The Scottish Law Commission, an example was given to articulate this provision: "Let us say that a buyer agrees to take delivery, but will only do so from a particular dock so that the ship has to delay unloading until there is enough water. Demurrage is meanwhile incurred. If the goods are subsequently destroyed, it does not necessarily seem unreasonable that the buyer should pay the demurrage even though he never receives the goods."[95] In this respect, COGSA 1992 sets a good example and might be followed by the reformed Chinese Maritime Code.

However, the wordings of "demanding a delivery"[96] and "making a claim"[97] in s.3(1)

[93] See *ante*, 4.1.2.

[94] See *ante*, 4.1.1.

[95] See The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991, p26, para 3.18.

[96] See *ante*, 4.1.1.

COGSA 1992 gave rise to difficulties of interpretation in judicial practice in England and the courts have been inclined to construe them narrowly. Given that "the liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods, the liabilities may not be covered by insurance, the endorsee may not be fully aware of what the liabilities are,"[98] it is justified to confine "asserting contractual rights" to conduct "amount[ing] to an election (by the holder "making a positive step" [99]) to avail himself of ...[his] contractual rights against the carrier"[100]. Thus it is suggested that these wordings in s.3(1) of COGSA 1992 be replaced with expressions restricting the scope of this rule which will be inserted into Chinese Maritime Code:

> "Making a formal demand of delivery" might be less ambiguous than the wording of "demanding a delivery";
>
> "Making a claim" might be replaced by the performance of "instituting a formal court procedure" which could imply that the holder anticipates the effect of the claim and selects to take a positive step exercising his contractual rights.
>
> Both of "issuing a writ" and "arresting the vessel" will fall within the ambit of "instituting a formal court procedure"; and "requesting a LOU successfully" will not be regarded as "instituting a formal court procedure".

Emphasising that the court procedure is made under the contract of carriage does not

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[97] See *ante*, 4.1.1.

[98] *Borealis AB v. Stargas Ltd (The Berge Sisar)*,[2001] 2 All E.R. 193, at para 33.

[99] Ibid, at para 33.

[100] Ibid, at para 32.

seem necessary in this proposed new provision. Under Chinese law, it is the freedom of the claimant to choose suing in contract or in tort, if the claim made by the holder is confined to the one taken in contract, the holder will be able to avoid liabilities merely by framing his claim against the carrier in tort where the facts constituting the tort also amounted to a breach of contract of carriage.

The person, who makes a formal demand or takes delivery of the goods from the carrier (usually against a letter of indemnity) when there is some delay in the transmission of the bill and later becomes the ultimate holder of the bill, should also be liable to the carrier since by doing so he has enforced the contractual rights (conferred on him by virtue of a new provision under the Chinese Maritime Code [101]) under the contract of carriage contained in the bill of lading.

4.2. Extent of liability

Another crucial question requiring judicial answers has been where the carrier has sued the consignee/endorsee, to what extent should the consignee/endorsee be liable to the carrier if he enforces his rights under the bill of lading? Should he assume all the contractual liabilities or only those liabilities imposed clearly and noticeably on him in the bill of lading? This is not specifically prescribed for in the Chinese Maritime Code. In particular, Art 78 of the Chinese Maritime Code is regarded as a source of hardship.[102]

[101] See *ante*, Chapter 2 The holder's title to sue.

[102] See *post*, 4.2.3.

4.2.1. Under English law

At common law

Notwithstanding the Bill of Lading Act of 1855 and the Carriage of Goods by Sea Act 1992, a Common law rule still survives which provides that a new contract can come into existence when a carrier accepts and performs an instruction to deliver cargo against the surrender of an original bill of lading.[103]

The scope of such an implied contract is likely to be limited to matters relating to the performance of the contractual intention.[104] There is authority for the view that the person presenting the bill of lading under such an implied contract should not, for example, incur liabilities that would normally rest with a shipper by reason of his having shipped a dangerous cargo.[105] The liabilities should extend only to *"those rights and obligations which concern the carriage and delivery of the goods and payment therefore."*[106]

Under the Bill of Lading Act 1855

Although it is clear that under the 1855 Act, the consignee or endorsee who had rights of suit was subject to liabilities, there was some dispute as to the extent of the liabilities incurred by the transferee who acquired rights: in particular, it was not clear whether those liabilities extended to all liabilities of the original shipper, or were restricted to those incurred after shipment, or even after the endorsement of the bill.[107]

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[103] See Benjamin, para 18-114.

[104] See Benjamin, para 18-118.

[105] *The Athanasia Comnions and George Chr. Lemos* (1972) [1990] 1 Lloyd's Rep. 277 at 281.

[106] Ibid.

[107] See *Ministry of Food v. Lamport & Holt Line* [1952] 2 Lloyd's Rep. 371, 382; The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991, para 3.2.

The preamble to the 1855 Act, while stating that it is expedient that the shipper's rights should pass with the property, makes no mention of liabilities.[108] Whilst not referring to the transfer of liabilities, section 1 provides that the consignee/endorsee will be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself.[109] In *The Giannis N.K*[110], the Court of Appeal held that under Section 1 of the Bills of Lading Act, the obligations of the shipper, consignee and endorsee to the carrier were identical. The House of Lords reconfirmed this decision, emphasising that the consignee and endorsee's liabilities were in addition to rather than transferred from the shipper.[111]

This seems reasonable in respect of general contractual obligations such as the obligation to pay freight and other charges relating to the loading, carriage and discharge of the cargo. However it remains uncertain whether liabilities which the Hague Rules expressly attach to shippers, such as the obligation not to load dangerous cargo, are obligations that should also attach to a consignee or endorsee.[112]

Under the Carriage of Goods by Sea Act 1992

Whatever the true position was under the 1855 Act, the COGSA 1992 also does not, under the wording of s.3(1), provide an unequivocal answer to the question as to the extent of the liabilities incurred by the transferee who acquired rights by virtue of s

[108] Ibid, para 3.2.

[109] The Bills of Lading Act 1855, s.1.

[110] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis N.K.)* [1996] 1 Lloyd's Rep. 577. p586.

[111] *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis N.K.)* [1998] 1 Lloyd's Rep. 337, pp344-345.

[112] See Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contract*, 1st edition, LLP, 2000. (Hereinafter it is referred to as Gaskell), para 4.36.

2(1). Section 3(1) provides that,

"Where the condition specified in the subsection are satisfied, the person who has acquired rights by virtue of section 2(1) "shall ...become subject to the same liabilities under...[the contract of carriage] as if he had been a party to that contract."

It seems likely that the words "the same liabilities" should be construed as covering all the liabilities of the shipper, including those liabilities that are incurred by him at the port of loading – for example in relation to the shipment of dangerous cargo in breach of warranties in the contract of carriage. It must be noted that, before the Act came into force, the Law Commissions considered the matter and eventually decided not to distinguish between pre- and post-shipment liabilities, not to make special provision exempting the consignee or the endorsee from liability for the shipper's breach of warranty in respect of dangerous cargo.[113] It is more likely that the court will support the argument that this statement made during the drafting of the Act in the report shows that the intention of the drafters is to include into the range of the liabilities imposed on the consignee/endorsee, the so-called pre-shipment liabilities or pre-endorsement liabilities (for instance, demurrage incurred at loading port) and the liabilities for the shipper's breach of warranty in respect of the shipment of dangerous cargos. Nonetheless, there still could be some arguable cases against the carrier.

Liability for the shipper's breach of warranty in respect of dangerous cargo

Although the original shipper's liability for breach of warranty in respect of shipment of dangerous cargo could rest upon the consignee/endorsee under a broad construction of s.3(1), the House of Lords appeared to be reluctant to reach such a

[113] See The Law Commission and The Scottish Law Commission, Rights of Suit in respect of carriage of goods by sea, 1991, paras. 3.20 to 3.22.

conclusion in *The Berge Sisar,* stating, *obiter*, that "the liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are."[114] It is hard to envisage that the drafters of s.3(1) would have countenanced the prospect that it makes commercial sense for the consignee/endorsee to invest time on finding out what the potential liabilities (besides the ascertainable liabilities) under the bill of lading they are going to assume, each time he demands or takes delivery of the cargo from the carrier. Moreover, it could be argued that the warranty that the cargo is not dangerous is a personal liability of the shipper, not forming part of the contract of carriage. Thus, it might be justified to construe s.3(1) so that the consignee/endorsee who enforced the contractual rights under the bill of lading should be exempted from the liabilities relating to the shipper's breach of warranty in respect of dangerous cargos. Assuming that the claimant carrier in *Primetrade A.G. v. Ythan Ltd ("Ythan")*[115] appealed and the Court of Appeal was in favour of the argument that the consignee/endorsee in this case is "the lawful holder of the bill of lading"[116] who enforced his contractual rights by successfully requesting the LOU[117], the consignee/endorsee may still argue that he is not liable in respect of loss or damage caused by the shipper's breach of warranty in respect of the shipment of dangerous cargo.

Expressly-designated convention liabilities of the shipper

It could be argued that even as a party to the bill, the holder ought not to incur

[114] *Borealis A B v. Straga Ltd (The Berge Sisar)* [2001] 2 All E.R, para33.

[115] *Primetrade A.G. v. Ythan Ltd (The Ythan),* [2006]1 All E.R.367;[2006]1 Lloyd's Rep. 457.

[116] See *post*, Chapter 4 The holder's title to sue.

[117] See *ante*, 4.1.1.

liabilities that the bill expressly assigns to the "shipper"[118] or which are placed on the shipper by virtue of Article III r.5 and Article IV r.6 of the Hague and Hague Visby Rules.It was held, respectfully, in *The Aegean Sea*[119], that the "shipper" in Art. IV r3 and Art III r.5 of the Hague-Visby Rules means only the shipper and not the person on whom liabilities are imposed by the 1992 Act.[120] Nevertheless, a holder might be caught by a bill which imposed obligations, not on a "shipper", but on a "merchant" and which contained a wide general definitions clauses, for example, defining "merchant" to include holders, consignees etc.[121]

Thus, the question of the extent to which the consignee-holder or the endorsee-holder should be liable to the carrier under English law is left open. It is rather likely that the consignee/endorsee be held liable to the carrier for all the liabilities under the bill of lading, including those relating to the shipment of dangerous goods and those incurred before the shipment of the cargo or the endorsement of the bill, if the intention of the drafters of the COGSA 1992 is construed in a restricted way. In order to get compensation from the shipper in cases where the consignee/endorsee was held liable to the carrier for all the contractual liabilities under the bill of lading, the consignee/endorsee, as the buyer of the goods, could adopt some precautions by negotiating with the seller/shipper when drafting the sale contracts, which may include a provision requiring the seller/shipper to indemnify the buyer/consignee for any extra fee or payment relating to the carriage of the goods (which is not ascertained by the terms of the sale contract) that he is required to make.

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[118] *Adler v. Dickson (The Himalaya)* [1995] Q.B. 158.

[119] *The Aegean Sea* [1998] 2 Lloyd's Rep.

[120] *The Aegean Sea* [1998] 2 Lloyd's Rep. 39, 69.

[121] See, clause 1 of the P&O Nedlloyd Bill.

In contrast, the extent to which the holder could assume liabilities imposed upon it under the contract of carriage are strictly limited under the Draft Instrument as such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.[122]

It is provided clearly, under Chinese statute law, that the consignee/endorsee will not be liable to the freight and demurrage at the port of loading if there is not an expressed indication to that effect in the bill of lading.[123] The shipper is the party who will be liable to the carrier for the loss or damage caused by the dangerous cargo shipped under the contract of carriage under certain circumstances.[124] The wording "obligations shall be defined by the clauses of the bill of lading" in Art 78 is a source of hardship.[125]

4.2.2. Under the Draft Instrument

The extent of liabilities assumed by the holder who exercises any right under the contract of carriage is limited by Art 62 (2), which provides that

> "Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record."

Thus those liabilities being assumed by the holder must, firstly, be "imposed on it

[122] See *post* 4.1.2.

[123] See *post* 4.1.3.

[124] See *post* 4.1.3.

[125] Ibid.

under the contract of carriage", in lieu of all liabilities under the contract of carriage. "It" here refers to the "holder" of the bill of lading and other transport documents defined in the Draft Instrument. There may be certain liabilities that are merely the shipper's liabilities, such as liabilities under Art 28 [126] and Art 30 [127]of the Draft Instrument; Moreover, the carrier and the shipper may have some expressed or implied agreement regarding certain liabilities, which should be shipper's liability only, such as demurrage incurred in the loading port or the liabilities for breach of warranty in respect of dangerous cargoes. Secondly, such liabilities must be "incorporated in or ascertainable from the negotiable transport document..." This might be of particular importance when the carrier and shipper agreed that certain liabilities, which otherwise would have been the shipper's liabilities, shall be assumed by the holder. There is a possibility that the latter holder assumes liabilities which also remain liabilities of the shipper by virtue of Art 62 (2)[128]. Whether these liabilities are joint and several in such a case is not provided for in this article, but is left to the terms of the contract of carriage, as evidenced by the negotiable transport document.

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[126] See Art 28 of Draft Instrument provides that the basic obligation of the shipper is to deliver the goods to the carrier in accordance with the contract of carriage: Subject to the provisions of the contract of carriage, the shipper shall deliver the goods ready for carriage and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.

[127] See Art 30 of Draft Instrument: The shipper shall provide to the carrier the information, instructions, and documents that are reasonably necessary for: (a) the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; (b) compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licenses relating to the goods; (c) the compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 8.2.1.(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.

[128] See *ante*, Chapter 3 The carrier suing the shipper.

It is not settled as to the extent of the liabilities incurred by the transferee who acquired rights under the wording of COGSA 1992. It was not clear whether those liabilities extend to all liabilities of the original shipper including liabilities which arise when shipping dangerous cargoes or whether they are restricted to those incurred after shipment, or even after the endorsement of the bill.[129]

4.2.3. Under Chinese law

Expenses relating to the discharge of the cargo

The consignee/endorsee will be liable to the carrier for any expenses or risks incurred at the port of discharge by the operation of Art 86 of the Chinese Maritime Code, which provides that

> "If the goods were not taken delivery of at the port of discharge or if the consignee has delayed or refused the taking delivery of the goods, the Master may discharge the goods into warehouses or other appropriate places, and any expenses or risks arising therefrom shall be borne by the consignee".

Expenses incurred at port of loading

Demurrage accrued in the port of loading, dead freight and all other expenses in respect of loading, do not appear to be of relevance in judicial practice[130]. It is clearly provided in the second part of Art 78 that "Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in respect of loading inccurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the

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[129] See *ante*, 4.2.1.

[130] *"The Tianyuan Star"*, see Comments on Typical Maritime, Edited by Zhengjiajin, Guangzhou Maritime Court, Law press 1998.

consignee and the holder of the bill of lading." Pursuant to this provision, the third party consignee of a bill of lading would only be liable for dead freight, demurrage or other expenses incurred at the loading port where there is an express indication to that effect in the bill of lading

Freight

A consignee is more likely to be protected against a claim by the carrier for the payment of the freight where the CMC applies. The third party consignee of a bill of lading would only be liable for freight where there was an express indication to that effect in the bill of lading pursuant to the provisions in Art 69, which provides that "the shipper shall pay the freight to the carrier as agreed. The shipper and the carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document".

In *The Hengyun*[131], after the vessel *"Hengyun"* owned by the claimant arrived at the port of destination, it was alleged that the actual volume of the unloaded cargo exceeded the volume recorded on the freight-prepaid bill of lading. Thus, the claimant claimed against the defendant consignee, holder of the bill of lading, for the freight of the unrecorded cargo carried by him.

It was held that where it was agreed in the carriage contract to calculate the figure of the freight according to the volume of cargo, the freight-prepaid bill of lading merely evidenced that the shipper has paid the carrier the freight according to the volume of cargo recorded on the bill of lading and the holder of the bill of lading should make

[131] See *The Hengyun*, Typical Maritime Cases in China, Law Press, 1998, pp 164-171.

payment for the outstanding freight if the actual volume of unloaded cargo exceeded the recorded volume.

The Court of Appeal upheld this judgment.

The justice of such a conclusion appears to be questionable. The key issue here is whether the liability of the shipper to pay the freight under the contract of carriage should be born by the consignee/endorsee since the bill of lading is transferred from the shipper to the latter. It is prescribed clearly in Art 69 of the Chinese Maritime Code that, "The shipper shall pay the freight to the carrier as agreed. The shipper and the carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document." Pursuant to these provisions, the consignee as the holder of the bills of lading ought to be exempted from the liability of paying for the relevant freight on the grounds that such liability is not noted by terms of the bill of lading.

Liabilities for breach of warranty in respect of dangerous cargo

As to the question of whom should be sued by the carrier for the loss or damaged caused by the shipment of dangerous cargoes, the answer might be that the shipper is the proper and the only party to be sued on the grounds that Art 68 provides, *inter alia*, that "The shipper shall be liable to the carrier for any loss, damage or expense resulting from such shipment" in cases where the shipper failed to notify or notified the carrier inaccurately of the relevant information about the dangerous goods.[132]

[132] Art 68 of the CMC, it is provided that "At the time of shipment of dangerous goods, the shipper shall, in compliance with the regulations governing the carriage of such goods, have them properly packed, distinctly marked and labelled and notify the carrier in writing of their proper description, nature and the precautions to the taken. In case the shipper fails to

Statutory liabilities of the shipper under the Chinese Maritime Code

In relation to the shipper's obligations imposed by Art 66 and Art 67 of the Chinese Maritime Code, it could be argued that those are the shipper's personal liabilities to the carrier and should not be imposed upon the consignee/endorsee.

Problems caused by the first part of Art78

There are lurking possible difficulties caused by Art 78 of the Chinese Maritime Code. It is stipulated in the first part of Art 78 that "the relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading". The wording "obligations shall be defined by the clauses of the bill of lading" might be construed as that the liabilities imposed upon the consignee/indorsee would be only those that the terms of the bill directly imposed on it, as opposed to other parties to the bill, e.g. the shipper. Thus, the holder would not assume the shipper's liabilities under the contract of carriage contained in or evidenced by the bill of lading. However, as a matter of interpretation of the Act, can it be said that the holder can only have liabilities that the bill clearly imposed on him, as opposed to other persons? Some liabilities arising from the bill may not be directed at a particular person and may be phrased sufficiently generally to include any relevant cargo interest involved in a claim. Most bills of lading (for example the Mitsui OSK Lines and K-Line combined transport bills of lading) contain clauses imposing obligations to pay freight and other handling charges upon anybody falling within the definition of 'Merchant'. Although it is not decided whether the "clauses of the bill of lading" referred to in Article 78 of the Chinese

notify the carrier or notified him inaccurately, the carrier may have such goods landed, destroyed, without compensation. The shipper shall be liable to the carrier for any loss, damage or expense resulting from such shipment (of dangerous goods)".

Maritime Code covers this type of clause, it could be argued that a consignee/endorsee will not be liable to the carrier for the payment of freight and other fees only because bills of lading contain standard clauses holding him as falling within the definition of "merchant". First, it would be considered unjustified to impose liabilities upon the third party consignee without his agreement by clauses in the bill of lading including such a definition of "merchant". Secondly, the wording "obligations shall be defined by the clauses of the bill of lading" in the first part of Art 78 must be read in conjunction with, and without prejudice to the second part of Art 78 and Art 69. Art 78 provides that "Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in respect of loading inccurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the consignee and the holder of the bill of lading"; Art 69 provides that "the shipper shall pay the freight to the carrier as agreed. The shipper and the carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document". It is emphasised in these two provisions that any liabilities imposed on the consignee relating to demurrage, dead freight, and other expenses in respect of loading (Art 78), freight (Art69) must be clearly stated or noted in the transport document. The clause holding the consignee falling within the definition of "merchant" in the bill of lading should not be deemed as a clause or agreement specially, clearly, noticeably designed for imposing on the consignee the liabilities for demurrage, dead freight, other expenses in respect of loading and freight.

4.2.4. Recommendations for the reform of the Chinese Maritime Code

Is it necessary to revise the present provisions in the CMC or replace them with a

clause similar to s.3(1) of COGSA 1992? A justification for imposing extensive liabilities on the transferee is that "under the 1992 Act the holder is no longer liable merely because he has acquired rights under the contract: he is liable only if he takes active steps to claim the benefit of the contract, and in view of these requirements (which have been strictly interpreted against the carrier) it seems reasonable to impose more extensive liabilities on the holder than may have been imposed under the 1855 Act".[133] However, with respect, I do not agree with this argument. It might be unfair for the holder of the bill of lading to be liable for someone else's breaches over which he has no control and for which he was not responsible, as when demurrage is incurred at the port of loading, when loss is suffered arising from the freight pre-paid bill of lading or when damage is suffered as a result of dangerous cargo having been shipped. The consignee or endorsee often stands in no relation to the goods at the moment of shipment, and to make him liable in respect of pre-shipment liabilities is to make him subject to a retrospective liability for acts with which he had nothing to do.[134] Why should a person (consignee/endorsee), who may be contractually obliged to take up a bill of lading, have, in effect, to buy some liabilities which have accrued against an earlier holder of the bill and were even not indicated or ascertainable in the bill of lading? Moreover, it must be commercially undesirable for the consignee/endorsee to investigate the potential liabilities, which are not indicated or ascertainable in the bill of lading but could be imposed upon him, each time before he takes or demands delivery of the cargo from the carrier. After all, "the underlying motif that marks out the legal treatment of a commercial transaction is a recognition of the need to protect the free flow of trade and to avoid as far as possible the application of rules that will operate to the disadvantage of the bona fide

[133] See Carver, supra, para 5-095.

[134] *The Athanasia Comninos* [1990] 1 Lloyd's Report. 277, 281, per Mustill J.

purchaser in the ordinary course of business".[135] In this connection, it is suggested that the holder should only become subject to the liabilities imposed on him under the contract of carriage to the extent that those liabilities are incorporated in or ascertainable from the bill of lading. The holder will not assume certain liabilities, which should only be the shipper's liabilities under the contract of carriage although the holder might assume such liabilities if they were ascertainable from the negotiable document. Thus, the rules set out by Article 69 and the second part of Article 78 in the present Chinese Maritime Code, regarding the liability to pay the freight, dead freight, demurrage and all other expenses in respect of loading incurred at the loading port, should be conserved. Meanwhile, it might be appropriate and reasonable to get rid of the source of hardship which is the provision in Article 78 that "obligations shall be defined by the clauses of the bill of lading". Furthermore, in order to clarify the extent of the liabilities imposed on the consignee/endorsee, it is suggested that a new provision is inserted, analogous with Art 62 (2) of the Draft Instrument.

4.3. Conclusion- Legislative suggestion

It is suggested that the relevant provisions in Art 86 are abolished and Art 86 is replaced with a reformed clause with a new rule establishing the requirements which should be satisfied for the imposition of liabilities, which are set out below.

The consignee/endorsee is liable to the carrier where he enforces his contractual rights and the liabilities imposed on him are limited.

"The person in whom rights are vested by virtue of subsection ( )[136] - (a) takes or makes a formal demand of delivery from the carrier of any of the goods to

[135] See Roy Goode, Commercial Law, 3rd Edition, 2004, p 9.

[136] See *ante*, Chapter 2 The holder's title to sue.

which the document relates; (b) institutes a formal court procedure against the carrier in respect of any of those goods; or (c) is a person who, at a time before those rights were vested in him, took or made a formal demand of delivery from the carrier of any of those goods, that person shall become subject to the liabilities imposed on it under that contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the bill of lading."

Art 69 will be conserved:

"The shipper shall pay the freight to the carrier as agreed. The shipper and the carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document."

The second part of Art 78 will not be modified:

"Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in respect of loading incurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the holder of the bill of lading."

The first part of Art 78 should be deleted:

"The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading

CHAPTER 5: THE CARGO CLAIMANT'S *LOCUS STANDI* AND STRAIGHT BILLS OF LADING

A straight, or non-negotiable bill of lading is one made out to a named consignee which omits the words "negotiable", or "to order", or "order or assigns" on its face.[1] Alternatively, in place of the non-inclusion of these words, there may appear words that denote negative transferability, such as "non-transferable" or "not negotiable". In practice, many standard form bills of lading are hybrids permitting their issue in either form. The effect of these words is to make it impossible to transfer such bills of lading by endorsement.

Such bills of lading are usually used in those trades where a negotiable bill of lading is not required, particularly where it is contemplated that the bill of lading will not need to pass down a chain of buyers.

This chapter will focus on the following issues arising in relation to rights of suit of the cargo claimants under such a shipping document under English law, the Draft Instrument and Chinese Law:

(1) Is the consignee entitled to sue the carrier with or without holding the straight bill of lading?[2]

[1] See *The Chitral* [2000] 1 Lloyd's Rep. 529, and Gaskell, para 14.23.

[2] See *post*, 5.3.1.

(2) Is the shipper entitled to sue the carrier where the bill of lading is transferred to the consignee named on the bill?[3]

The status of the straight bills of lading will be articulated where appropriate and necessary in this section.

5.1. Under English law

5.1.1. Consignee's rights

It could be implied from COGSA 1992 that the person named as a consignee on the face of a straight bill of lading, without being in possession of the bill, is entitled to sue the carrier in contract. This appears to be somewhat inconsistent with the *obiter dicta* produced by the House of Lords in *The Rafaela S*[4] that suggested that the carrier should not deliver the cargo to the consignee named in the straight bill without production of the bill. This statement gives rise to the question of whether the status of a straight bill of lading and in particular the rights of a named consignee in a straight bill of lading under COGSA 1992 require clarification. Put in another way, concern here lies with the implication of this significant decision upon the construction of the provisions governing straight bills of lading under COGSA 1992.

Section 2(1)(b) and section 1(3) of COGSA 1992

As we have seen, COGSA 1992 was passed to remedy many defects identified over

[3] See *post*, 5.3.1.

[4] *J I MacWillian Co Inc v. Mediterranean Shipping Co SA (The Rafaela S)* [2005]2 W.L.R. 554. [2005] 1 Lloyd's Rep 347.

many years with the Bills of Lading Act 1855. Arising out of work carried out by the Law Commission of England and Wales, in conjunction with the Scottish Law Commission, COGSA 1992 applies to the following three documents: (1) any bill of lading; (2) any sea waybill; (3) any ship's delivery order and vests "all rights of suit under the contract of carriage as if he had been a party to that contract" in the following parties: (1) holders of bills of lading; (2) parties named as consignees in sea waybills; and (3) parties to whom the carrier has attorned in delivery orders by virtue of section 2(1).

Section 2 (1) says that

> "Subject to the following provisions of this section, a person who becomes-
>
> (a) the lawful holder of the bill of lading;
>
> (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract...
>
> shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) 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."

This provision must be read in conjunction with section 1(3) of the 1992 Act with a view to investigating the position of the consignee named in a straight bill in respect of rights of suit in contract. COGSA 1992 does not consider non-negotiable bills of lading to be bills of lading at all. It was clearly expressed in the Report of the Law

Commission[5], that a bill of lading must be transferable if it is to fall within the 1992 Act. Documents "incapable of transfer...by indorsement" are excluded from the phrase "bill of lading" by section 1(2)(a) which stipulates that "references in this Act to a bill of lading do not include a document which is incapable of transfer". The conventional view is that "straight bills, which are bills of lading made out simply to the consignee, are not capable of transfer by endorsement."[6] A consignee named on a straight bill of lading does not fall within the definition of "the lawful holder of a bill of lading" under section 2(1)(a) of COGSA 1992.[7] Further, it was opined that where a bill of lading is not transferable, it would undoubtedly fall within the definition of sea waybills to be found in clause 1(3) of the 1992 Act.[8] Indeed, the definition of the sea waybill prescribed in section 1(3) of COGSA 1992, namely:

> "References in this Act to a sea waybill are reference to any document which is not a bill of lading but------
>
> (a) is such a receipt for goods as contains or evidences a contract of the carriage of goods by sea; and
>
> (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract."

shows that for the purpose of the 1992 Act a straight bill of lading is regarded as a sea waybill.

Considering that a consignee named on a sea waybill acquires rights of suits against

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[5] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.50 at p20.

[6] See Debattista, para 2-30.

[7] See Debattista, para 2-30.

[8] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.50 at p20.

the carrier by the operation of section 2(1)(b) COGSA 1992 and interpreting this section in conjunction with section 1(3) by which a straight bill of lading is regarded as a sea waybill, a consignee named on a straight bill of lading also acquires rights of suit against the carrier by the operation of section 2(1)(b) COGSA 1992. In *Welex AG v. Rosa Maritime Limited. (The Epsilon Rosa)*[9], it was stated that under s. 2(1)(b) of the Carriage of Goods by Sea Act 1992 a named consignee becomes a party to the contract in the bill of lading when it is issued.[10] The 1992 Act does not require him to be the lawful holder of the straight bill of lading where he is exercising his rights of suit against the carrier. Instead, he acquires the rights just by being named as a consignee when the bill is issued. In other words, what COGSA 1992 stipulates is that the person identified as a consignee in a straight bill of lading is entitled to sue the carrier without being in possession of the bill, providing that he presents to the court documents showing his identification as "the person to whom delivery is to be made."

The facts and decisions in *The Rafaela S*[11]

As long ago as 1989, four containers of printing machinery were shipped on the terms of the carrier's standard form bill of lading. The form employed could serve as either a transferable document by the insertion of the words "or order" in the consignee box[12] on the face of the bill (an "order bill"); or, in the absence of those two words, it could be simply directed to one named consignee (a "straight bill"). The bill evidenced a contract for the carriage of goods by sea initially between the shipper and

[9] *Welex AG v. Rosa Maritime Limited. (The Epsilon Rosa)*, [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509.
[10] [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509, para 25.
[11] *J I MacWillian Co Inc v. Mediterranean Shipping Co SA (The Rafaela S)* [2005]2 W.L.R. 554. [2005] 1 Lloyd's Rep 347.
[12] The consignee box was headed: "Consignee (B/L not negotiable unless "ORDER OF")". It was, in the language of Rix LJ, a "hybrid" from which invited "error and litigation": [2004] QB 707, para 146.

the defendant carrier from Durban to Felixstowe, where the goods were transshipped for on-carriage to Boston. The underlying CIF sale transaction was for the supply of specialist printing machinery by the shipper, as seller, to an American buyer, who was the named consignee and eventual claimant. The cargo was damaged during the second leg of the carriage by sea. If Hague-Visby Rules were the applicable carriage regime, the consignee as claimant would have had a relatively generous cargo claim of some US $150,000. If it was not and the US Carriage of Goods by Sea Act 1936 applied, the package limitation would have reduced the claim to US $2,000. Here the carrier, who was the author of the document, was contending that the document despite the title was more akin to a sea waybill and therefore that the Hague-Visby Rules did not apply.

Ultimately, the House of Lords rejected the argument of the carrier and held that the bill was a "bill of lading" within the meaning of the 1971 Carriage of Goods by Sea Act (COGSA1971) and therefore the Hague-Visby package limitation applied. The bill of lading in question was regarded as a "non-negotiable bill of lading or straight bill of lading" because of the omission of words "order of " or their equivalent in box (2) of the bill of lading with the printed words "consignee:----- (B/L not negotiable unless "order of")".

However, it must be noted that the document in question was not an ordinary straight bill of lading as it also contained express wording in the so-called attestation clause requiring the bill to be presented in exchange for the goods.

One question that arises from this decision is whether the same conclusion would

have been made in court if the document in this case was a common straight bill of lading without having such a sentence regarding the requirement of presenting the bill of lading inserted. If this sentence was the essential factor that persuaded the House of Lords that the document fell within the range of "a bill of lading or a similar document of title" under the Hague-Visby Rules, then it is hard to foresee that the same conclusion would be made in the case of a connon straight bill of lading.

However, given that it was emphasised by Lord Bingham of Cornhill [13] that "I have no difficulty in regarding it as a document of title, given that on its express terms it must be presented to obtain delivery of the goods and by Lord Rodger of Earlsferry that[14] "the document in this case, if not a bill of lading, would be a similar document of title", it seems that the final decision was made primarily upon the grounds that

(a) straight bills of lading were not ignored in the Hague-Visby Rules and there was no persuasive reason why they should be excluded from the scope of the Rules (by Lord Bingham of Cornhill)[15]

(b) no policy reason had been advanced by the carrier why the draftsmen of the Hague-Visby Rules would have wanted to distinguish between a named consignee who receives an order bill of lading and a named consignee who receives a straight bill of lading (by Lord Steyn)[16]

(c) there is no justification in the language or policy of the Hague-Visby Rules to narrow the class of bills of lading in Article I(b) and the Rules extend that range by including contracts covered by any document of title that is similar to a bill of lading

[13] Ibid, para 20.

[14] Ibid, para 77.

[15] Ibid, para 16.

[16] Ibid, para 47.

(by Lord Rodger of Earlsferry)[17].

These statements showed that the reasoning was principally based upon examination of the intention of the drafters of the Hague-Visby Rules on defining "a bill of lading or similar document of title" rather than upon the fact that there was a special sentence inserted into the carrier's bill of lading making it a non-ordinary straight or non-negotiable bill of lading. It seems that even if the *Rafaela S* bill of lading had been an ordinary straight bill of lading, it is more likely that the judges would have reached the same conclusion that it was subject to the Hague-Visby Rules because it was a "bill of lading".

Another important point relating to the straight bills of lading discussed and examined by the House of Lords in *The Rafaela S* is whether a carrier has a duty to deliver the cargo carried under a straight bill of lading only against presentation of the bill. No binding decisions were made on the question of presentation[18], this is examined below. On the question of presentation, it is difficult to locate any binding reasoning in the decision of the House of Lords which was as follows:

Under a straight bill of lading with express terms regarding presentation

Lord Bingham of Cornhill[19] and Lord Steyn[20] appeared to believe that presentation was necessary in this case where the document contained express terms requiring the

[17] Ibid, para 64.

[18] Charles Debattista and Ingolf Kaiser, *Lords ruling sets out stance on straight bill presentation*, Lloyd's List, Wednesday March 02 2005, p6.

[19] Supra, para 20.

[20] Ibid, para 45.

production of the non-negotiable bill of lading in exchange for the cargo. It is difficult to argue with this approach, which clearly respects the express wording on the bill of lading. Indeed, the indications are that the courts would equally respect express wording to the opposite effect i.e. that presentation of a straight bill would not be required where the bill clearly said so.[21]

Under a straight bill of lading with express terms emphasising that the presentation is not required

Their Lordship's speeches did not suggest that "express wording to the contrary would not achieve the desired effect, i.e. that the bill of lading need not be presented if it is non-negotiable".[22] Lord Justice Rix in the Court of Appeal made it clear that if the parties had wanted to avoid presentation, then the wording of the bill of lading could achieve this.[23]

Under straight bill of lading (a common one) where there is no express provision regarding presentation

Lord Bingham of Cornhill was prepared to go further in such a case, saying that he would "if it were necessary" hold that presentation was required even where there is no express provision to that effect[24]. On the facts of "*The Rafaela S*", however, it was not necessary to decide this.

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[21] See Charles Debattisa, *Lloyd's list*, March 02 2005, p 6.

[22] See Charles Debattisa, *Lloyd's list*, March 02 2005, p 6.

[23] *J I MacWillian Co Inc v. Mediterranean Shipping Co SA (The Rafaela S)* [2003]2 Lloyd's Report, para 113.

[24] Ibid, para 20.

Thus, it is clear that in cases where the straight bill of lading contains express terms requiring presentation of the bill, the carrier is obliged to deliver the cargo against production of the bill of lading, and if he does not do so, the carrier breaches the contract of carriage; in cases where the straight bill of lading contains the reverse provision, the carrier does not have to require the presentation of the bill from the consignee in exchange for delivery of the cargo.

The issue here primarily arises in the context of common straight bills of lading with no express wording inserted therein regarding the presentation of the bill. It has been unclear whether a carrier is obliged to deliver to the consignee named in a document which is expressly described as a "straight bill", without production of that bill[25]. The drafters of the 1992 Act seemed to assume that a straight bill, unlike a seaway bill, does have to be presented, when they stated that "it will resemble a sea waybill, apart from the fact that a sea waybill will not normally be presented to the ship to obtain delivery"[26].

Returning to the subject matter under consideration in this work, even if one accepts the view that a consignee named in a straight bill can claim delivery only on production of the bill as arguably stated, *obiter*, in *The Rafaela S*, he can nevertheless acquire (other) contractual rights under it without producing it or ever having acquired possession of it under COGSA 1992. Then one of the consequences of the decision in *The Rafaela S* case is that there is now a lack of cohesion between the Carriage of Goods by Sea Act 1971---under which straight bills of lading are now

[25] "The US legal position is that a straight bill does not have to be presented, but that general practice elsewhere is to require a "straight bill" to be surrendered, rather like an order bill". See Gaskell, para 14.24.

[26] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.50 at p20.

"bills of lading"---and the Carriage of Goods by Sea Act 1992. The latter Act does not expressly recognise straight bills of lading but regards them as sea waybills, reflecting the prevailing views of that time. This is a recipe for confusion: on the one hand, under the 1992 Act the consignee seeking to sue under a straight bill of lading would have to do so as the consignee named in a sea waybill, rather than as the holder of a bill of lading; on the other hand, under the 1971 Act his cause of action would follow from the straight bill of lading being regarded as a "bill of lading".

Another problematic consequence is that if the consignee cannot produce the document and the goods have been destroyed or lost as a result of the carrier's breach of the contract of carriage (e.g. because the ship is unseaworthy or the goods have been stowed on deck and washed overboard), the consignee can still rely on s.2(1)(b) of COGSA 1992 and is thus entitled to damages for breach of that contract; but if the goods are in the carrier's possession and he refuses to deliver them on the ground that the straight bill is not produced, then the refusal might be justified where the *obiter* in *The Rafaela S* is supported and would not give rise to a claim for breach of the contract of carriage. In other words, if this *obiter* in *The Rafaela S* is followed, the consignee, without producing the straight bills of lading, probably will be entitled to sue the carrier by the operation of s.2(1)(b) of COGSA 1992, but he will not have an arguable case against the carrier for his breach of contract by refusing to deliver the cargo to the consignee. On this analysis, the general aligning of straight and negotiable bills of lading cannot follow through into the Carriage of Goods by Sea Act 1992.

It seems that one of the potential solutions to the problems caused by the conflict

between the decisions in *The Rafaela S* case and COGSA 1992 is to give a critical thought to the related provisions of COGSA 1992 and to present rational reasons for any future amendments. In the interests of seeking the most justified solution, it must be clarified whether the assumption in COGSA 1992 that a straight bill of lading could be treated exactly as a sea waybill is correct. In particular, does the straight bill of lading have any of the characteristics of a negotiable to order bill of lading that make it a transferable document of title or is it, like a seaway bill, simply a document that acts as a receipt and evidence of a carriage contract? This in turn will have a bearing on how English law eventually settles the residual rights of suit that belong to the named shipper on a straight bill once possession of the bill has passed to the named consignee.[27]

Straight bill of lading and sea waybill

The question then that arises is whether a straight bill of lading is, as implied in the 1992 Act, really the same in status and a day to day usage as a sea waybill. The drafters of the 1992 Act assumed that "straight bills of lading and sea waybills are much the same type of document save that the sea waybill is not required to obtain delivery".[28] Several authorities have, in the past, suggested that they are one and the same thing.[29] However, these authorities might now have to be read in the light of two recent cases, which have concluded differently.

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[27] See *post*, 5.1.2.

[28] *Rights of Suit in Respect of Carriage of Goods by Sea*, The Law Commission and The Scottish Law Commission, 1991, para 2.50 at p20.

[29] See Debattista, p 86, para 2-32; Gaskell, para 1.49; Carver, para 6-007.

The first is *Voss Peer v. APL Co Pte Ltd*[30], a decision at first instance of the Singapore High Court, subsequently affirmed by the Singapore Court of Appeal.[31] At first instance Judith Prakash J. clearly differentiated between the two transport documents:

> "A shipper who...asks for the issue of a straight bill of lading even though the alternative of a sea waybill is available to him wants to retain some degree of control over the delivery of the goods. The shipowner is aware of this. If he is not prepared to accept the restriction on delivery rights that a bill of lading impose he can insist on issuing a waybill instead."[32]

The Court of Appeal subsequently took a firmer view:

> "The entire argument of the appellant is that a straight bill of lading is the same as a sea waybill. While it is true that a straight bill of lading, devoid of the characteristic of negotiability, is substantially similar in effect to that of a sea waybill, that is not to say that they are the same. If the parties had intended to create a sea waybill they would have done so."[33]

The English courts then took up this issue and, in particular, Rix L.J. confirmed in *The Rafaela S* that "carriers should not use bill of lading forms if what they invite shippers to do is to enter into sea waybill type contracts".

In the House of Lords, Lord Steyn warned that when the carrier tried to equate the function of a straight bill of lading to a sea waybill, this was "plainly unrealistic":

> "In the hands of the named consignee the straight bill of lading is his document

[30] *Voss Peer v. APL Co Pte Ltd* , [2002]3 S.L.R.176.

[31] *Voss Peer v. APL Co Pte Ltd* , [2002] 2 Lloyd's Report. 707; [2002] 4 S.L.R.481.

[32] [2002] 3 S.L.R.176. at 33.

[33] [2002] 2 Lloyd's Report. 707; [2002] 4 S.L.R.481.at 48.

> of title. On the other hand, a sea waybill is never a document of title. No trader, insurer or banker would assimilate the two. The differences between the documents include the fact that a straight bill of lading contains the standard terms of the carrier on the reverse side of the documents but a sea waybill is blank and straight bills of lading are invariably issued in sets of three and waybills not. Except for the fact that a straight bill of lading is only transferable to a named consignee and not generally transferable, a straight bill of lading shares all the principal characteristics of a bill of lading as already described. "

A sea waybill is the maritime version of a document that has long been in use in the context of land and air carriage. It operates as a receipt for goods received for shipment and evidences the contract of carriage. The significant difference between it and a bill of lading is that it is never a transferable or negotiable document of title. Title remains with the shipper and the cargo is generally disposed of and delivered in accordance with the shipper's instructions. Sea waybills are usually used on short sea routes where neither the shipper nor the cargo receiver needs to pledge shipping documents in order to raise finance.

Based upon the proposition that the sea waybill is a receipt and evidence of a contract of carriage but never a transferable or negotiable document of title, it was concluded by the consultants in the Report that "where a bill of lading is not transferable (i.e. a straight bill of lading), it will undoubtedly fall within the definition of sea waybill to be found in clause 1(3) of the 1992 Act".[34]

[34] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, para 2.50 at p20.

However, as indicated by the House of Lords of England and the judges in the courts of Singapore, the differences are far more than the similarities between these two documents:

(1) The sea waybill is not issued in sets and is not transferable to the consignee whereas the straight bill is issued in sets and allowed to be transferred once from the shipper to the named consignee;

(2) The receiver named on a sea waybill is able to take delivery of the goods merely by establishing his identity without producing the original sea waybill, but in the cases where straight bills are used, the judges in *The Rafaela S* and the drafters of the 1992 Act are strongly inclined to support the view that the straight bill should be presented to the carrier in exchange for the delivery of the cargo;

(3) A straight bill of lading contains the standard terms of the carrier on the reverse side of the documents but the reverse side of a sea waybill is blank;

(4) Further, since a sea waybill is not a bill of lading, the Hague-Visby Rules do not apply (unless expressly incorporated on a case by case basis) to it whereas the Rules apply to the straight bill of lading following the *ratio* established by the House of Lords in *The Rafaela S* case.

Therefore, COGSA 1992 may now be considered to have been drafted on the basis of false or at least incomplete assumptions about the actual status of a straight bill of lading. It now seems clear that the straight bill of lading is not a negotiable bill in the sense that it can only be transferred once from named shippers to named consignees, but neither is it a sea waybill although it shares some of the characteristics of both.

Pending the reform or insertion of greater clarity into the 1992 Act, the transfer of

rights under a straight bill will still be linked to status under the contract of carriage rather than as holder of the bill, and the original shipper under a straight bill will not lose rights of suit unlike its counterpart under a negotiable bill.[35]

At this stage there might not be other options but to leave the situation as it is now, although it must remain somewhat odd and unsatisfactory, as articulated above, that a straight bill is treated as a sea waybill for the purpose of the 1992 Act but as "a bill of lading" for the purpose of the 1971 Act.

5.1.2. Shipper's rights under COGSA 1992

By the operation of section 1(3), COGSA 1992 treats straight bills of lading as sea waybills.

Under section 2(5) of COGSA 1992, the shipper under a straight bill of lading, like a shipper under a sea waybill, will not lose his rights of suit against the carrier.[36]

A sea waybill has the advantage that the shipper can vary his delivery instructions to the carrier at any time during transit. The shipper retains the waybill and delivery is made to the consignee named in the waybill upon acceptable proof of his identity. The sea waybill is therefore of much use in the short sea trades and where a bill of lading is not necessary as security for payment, such as in the case of shipments between associated companies. In the case of negotiable bills of lading, the shipper

[35] See *post*, on shipper's rights under straight bills in this chapter.

[36] See *post*, on shipper's rights in this chapter. See section 2(5) of COGS A1992, which extinguishes the shipper's rights of suit where he transfers a "bill of lading" as defined in the Act, but not where the goods are described in a sea waybill, or, presumably, a non-order bill of lading, treated by the Law Commissions as if it were a sea waybill.

loses his rights of suit once someone else becomes the lawful holder.[37] By way of contrast to the status under a bill of lading, the rights of a sea waybill consignee are without prejudice to the rights of the sea waybill shipper by virtue of s.2 (5).

Section 2(5) states that

> "Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives------
>
> (a) where that document is a bill of lading, from a person's having been an original party to that contact of carriage; or
>
> (b) in the case of any documents to which this Act applies, from the previous operation of that subsection in relation to that document;
>
> but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order. "

The consignee named in a sea waybill (defined in s.1 (3)), or any other person to whom delivery is to be made in accordance with the contract, can sue on the contract of carriage by virtue of s.2 (1).The original contracting party can also take action against the carrier pursuant to section 2(5).

[37] See *post*, on shipper's rights in this chapter. See section 2(5) of COGS A1992, which extinguish the shipper's rights of suit where he transfers a "bill of lading" as defined in the Act, but not where the goods are described in a sea waybill, or, presumably, a non-order bill of lading, treated by the Law Commissions as if it were a sea waybill.

This is not the same as the position in regard to bills of lading: the difference is justified in the Law Commissions' Report[38] on the basis that a waybill is not a document of title.[39] It was stated in the Reports[40] that

> "We also recommend that, in the case of a sea waybill, the consignee's rights should be without prejudice to any right which the shipper might have[41]. We do not wish to deprive the shipper of any rights of disposal which he may possess under the waybill contract and which may allow him to alter his delivery instructions. Of course, where the waybill shipper agrees in the contract of carriage that he should at any stage forfeit his contractual rights (whether of disposal or generally) in favour of the consignee, only the consignee will have rights of suit under our proposals."

The legislation makes it clear that the consignee's rights are without prejudice to the shipper's. Where the shipper has agreed with the shipowner to divest himself of rights, only the consignee will have rights. It is true that, in the case of bills of lading, the shipper loses his rights of suit once someone else becomes the lawful holder. It could, therefore, be said to be anomalous that waybill shippers are treated differently. Nevertheless, the Law Commissions felt it to be justified to treat bills of lading and sea waybills differently on this point. It was emphasised that although the two documents have similarities, they have their differences, the most important of which is that a bill of lading is a transferable document of title at common law, whereas the

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[38] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, p34-35.

[39] See F.M.B.Reynolds, The Carriage of Goods by Sea Act 1992, [1993] LMCLQ, Par3 August1993, p 442.

[40] *Rights of Suit in Respect of Carriage of Goods by Sea,* The Law Commission and The Scottish Law Commission, 1991, p34-35.

[41] S 2(5) of COGSA 1992.

waybill is not.[42] The drafters of the 1992 Act did not specifically mention the position of the shipper under a straight bill of lading, but it could be implied that his rights will survive after the bill is transferred to the named consignee in that the straight bill is regarded as a sea waybill for the purpose of this Act.

If a straight bill of lading is no longer regarded as a sea waybill for the purpose of the 1992 Act, the rights of the shippers will be lost at the moment when the bill is transferred to the consignee named on the straight bill of lading, which will be the same as his position under a negotiable bill of lading.

As we will see below, the Draft Instrument attempts to treat the straight bill of lading as a document that is non-negotiable. The positions of the consignee and shipper with respect to rights of suit where a straight bill is used will therefore be analogous to those under English law: It entitles the consignee named in a straight bill, who is not yet the holder of it, to assert rights under the contract of carriage against the carrier. At the same time the shipper is not deprived of suing the carrier in contract under that regime.

However, the status of the straight bills of lading under existing Chinese law is different from that under English law.[43] It has been settled in China that a straight bill of lading is a bill of lading and that it is a non-negotiable "bill of lading" as opposed to a non-negotiable "sea waybill".

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[42] *Rights of Suit in Respect of Carriage of Goods by Sea*, The Law Commission and The Scottish Law Commission, 1991, p 36.

[43] See *post*, 5.3.1.

5.2. Under the Draft Instrument

As it currently stands,[44] the Draft Instrument is intended to treat a non-negotiable/ straight bill of lading and a negotiable bill of lading differently.

The Draft Instrument attempts to apply to any carriage contract "in which a carrier, against the payment of freight, undertakes to carry goods by sea from one place to another".[45] The Draft Instrument will only apply to those transport documents that are "issued pursuant to a contract of carriage by the carrier or a performing party that (i) evidences the carrier's or a performing party's receipt of the goods under a contract of carriage, or (ii) evidences or contains a contract of carriage".[46] There are further definitions of "negotiable transport document" and "non-negotiable transport document" in Art1 (o) and Art 1(p), which provide respectively that

> " 'Negotiable transport document' means a transport document that indicates, by wording such as 'to order' or 'negotiable' or other appropriate wording recognised as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being 'non-negotiable' or 'not negotiable'."
>
> " 'Non-negotiable transport document' means a transport document that does not qualify as a negotiable transport document."

[44] It must be emphasised that the Draft Instrument is undergoing revision. See http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html for the last version (A/CN. 9/WG.III/WP.56 in September 2005)

[45] Art. 1(a). The contract must provide for sea carriage and may provide for carriage by other modes of transport in addition to the sea carriage.

[46] Art. 1 (n).

Straight bills of lading will thus fall within the definition of "non-negotiable transport document" under the Draft Instrument. Art 67 and Art 68 of the Draft Instrument are respectively designed to deal with the rights of suit against the carrier under the contract of carriage of a named consignee in a non-negotiable transport document and a holder of a negotiable transport document.

Article 67 provides that

> "1. Without prejudice to articles 68 (a) and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:
>
> (a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;
>
> (b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;
>
> (c)..."

Article 68 provides that

> "In the event that a negotiable transport document or negotiable electronic record is issued:
>
> (a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and
>
> (b) When the claimant is not the holder, it must, in addition to its burden of proof proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made."

The definition of the "consignee" in a non-negotiable bill and the "holder" of a negotiable bill are provided for in Art 1(k) and Art 1(j) as follows:

Article 1 (k) stipulates that

> " 'Consignee' means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic transport record."

Article 1 (j) defines "Holder" as

> (i) a person that is for the time being in possession of a negotiable transport document and
>
> (a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or
>
> (b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
>
> (ii) the person to which a negotiable electronic transport record has been issued or transferred and that has exclusive control of that negotiable electronic transport record."

It is clear from these provisions that it is intended under the Draft Instrument that the consignee named in a straight bill, is entitled, even before he has become the holder of such a bill, to assert rights under the contract of carriage against the carrier to the extent that he has suffered loss or damage in consequence of a breach of the contract of carriage. There is no conflict between the position of the consignee as to rights of suit and in respect of rights to delivery under the Draft Instrument. The named

consignee is not obliged to present the original straight bills to the carrier, provided that he produces proper identification, in accordance with Article 48 (b) of the Draft Instrument, which provides that

> "When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply
>
> (a)...
>
> (b) the carrier must deliver the goods at the time and location mentioned in Article 11(4) to the consignee. As a prerequisite for delivery, the consignee must produce proper identification."

Thus the problems arising under English law in the aftermath of the delivery of the *obiter* in *The Rafaela S* case will not occur under the Draft Instrument.

In the meantime, similar to the position under English law, it is clear that the shipper, in the context of the straight bill of lading, is not deprived of his ability to sue the carrier provided that he could prove that he is the party suffering loss or damage in consequence of a breach of the contract pursuant to Art 67 (1)(a) under this regime.

5.3. Under Chinese law

5.3.1. Rights of suit of the consignee and the shipper under a straight bill of lading

A question that must be asked here is whether a straight bill of lading is treated as a document that is completely different from a negotiable bill under the present Chinese Law. If the law on this point is settled like that, it might be necessary to propose some

new provisions to regulate this special document in the reformed Chinese Maritime Code, otherwise the legal positions of the parties under a straight bill should remain the same as those under a negotiable bill of lading where Chinese law applies.

No specified provision under Chinese law could be found with respect to the consignee's rights of suit where straight bills of lading are issued. It is highly likely that the court would support the view that a straight bill should be regarded as a bill of lading under Chinese law for the following reasons:

(1) Pursuant to Article 79 in the Chinese Maritime Code, a straight bill of lading is a bill of lading although it is not negotiable. It is provided that

> "The negotiability of a bill of lading shall be governed by the following provisions:
>
> (1) A straight bill of lading is not negotiable;
>
> (2) An order bill of lading may be negotiated with endorsement to order or endorsement in blank;
>
> (3) A bearer bill of lading is negotiable without endorsement."

Irrespective of the fact that there is lack of the definition of the word "negotiable" under Chinese law, it is generally accepted that successive transferability is the crucial factor of a negotiable document, i.e. it can be transferred successively from one holder to another. This provision in Article 79 clarifies that a straight bill of lading does not have the same function of negotiability as an order bill or bear bill, but it still falls within the range of bills of lading under the Chinese Maritime Code.

(2) Article 71 of the Chinese Maritime Code, where the presentation rule is stipulated, does not distinguish a straight bill from a negotiable bill. The Chinese Maritime Code provides at Art 71, *inter alia*, that

> "A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same."

This provision does not limit the presentation function only to bills of lading that are to order or bearer.

In *The MV Eagle Comet*,[47] it was held that judgment should be given against the carrier who had delivered the cargo without presentation of the straight bill of lading, which has been issued. On appeal to the High People's Court at the Guangdong Province, the court confirmed that the lower court had been right in determining the issue according to Chinese law and also upheld its interpretation of Art 71. In *Shangdong Oriental International Trade Co Ltd v. CMA*, the Shandong Maritime Court likewise held. [48]

In *Feida Electronic Co Ltd v. Great Wall Co Ltd*,[49] the Supreme People's Court held, interpreting bills of lading subject to US law, that straight bills of lading did not have

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[47] *The MV Eagle Comet*, Judgment from the Guangzhou Maritime Court, No 66 of 1994. The judge in this case applied Chinese law notwithstanding a clause paramount providing for the application of US law.

[48] *Shangdong Oriental International Trade Co Ltd v. CMA*, Felix W.H.Chan, "A Plea for Certainty: Legal and Practical Problems in the Presentation of Non-negotiable Bills of Lading" (1999) 29 Hongkong Law Journal 44, p 107.

[49] *Feida Electronic Co Ltd v. Great Wall Co Ltd*,Supreme Court Report of the PRC, 2002, issue 5, 175-178. See too George Y.B.Wang, www. forwarderlaw.com/cases/.

to be presented to obtain delivery of the cargo. However, it does not mean that the court has drawn a concluded statement on this point. We must note that this decision would be reversed if the applicable law in this case were Chinese Law. More recently, the Supreme People's Court held, interpreting the law of the P.R.C., that a carrier was liable in the case of cargo released without production of an original straight bill of lading.[50] At the Thirteenth National Seminar on Maritime Adjudication held at Qingdao in September 2004, the judges of the Supreme People's Court and also the maritime courts concluded that, in future, where P.R.C. Maritime Law was applicable, delivery of cargo under straight bills of lading should be made against surrender of the original bills of lading.

(3) Further, it could be implied from the provisions regarding other shipping documents in Art 80 of the Chinese Maritime Code that a straight bill is regarded as a bill of lading. Article 80 provides that

> "Where a carrier has issued a document other than a bill of lading as an evidence of the receipt of the goods to be carried, such a document is prima facie evidence of the conclusion of the contract of carriage of goods by sea and the taking over by the carrier of the goods as described therein.
>
> Such documents issued by the carrier shall not be negotiable."

The documents referred to in Art 80 include sea waybills that are not negotiable, but exclude bills of lading, no matter it is negotiable bill or non-negotiable bill under Art 79 of the Chinese Maritime Code as examined above.

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[50] See Simon Chan & Richard Chan, "Straight bill of lading in P.R. C.", the judgment was delivered on 25th June, 2002, reported at http://tpwebapp.tdctrade.com.

Taking all these elements together, it could be concluded that present Chinese law treats a straight bill of lading as a bill of lading and the only difference between a straight bill and an order bill or bearer bill is that it is not negotiable, i.e. not successively transferable. Based upon this proposition, it might not be appropriate and necessary to propose that the rights of the consignee and the shipper to sue the carrier in the context of a straight bill would not be the same as those in the context of a negotiable bill of lading under Chinese law.

5.3.2. Rights of suit of the consignee and the shipper under a sea waybill

There is a lack of provisions governing sea waybills in the present Chinese Maritime Code, and in practice, where issues arise under this type of shipping document, the court have been relying on the related principles established by the C.M.I. Uniform Rules for Sea Waybills 1990. Article 3 of the Uniform Rules prescribes that

> "The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do.
>
> This rule shall apply if, and only if, it be necessary by the law applicable to the contract of carriage so as to enable the consignee to sue and be sued thereon. The consignee shall be under no greater liability than he would have been had the contract of carriage been covered by a bill of lading or similar document of title."

Pursuant to this provision, the principle about agency shall apply to the cases where the sea waybill is used, so as to enable the consignee to sue and be sued. The shipper

may be regarded as making the contract with the carrier as agent on behalf of the consignee named in the sea waybill. This rule does not contravene the general principles on agency of the Civil law in China.

Article 63 in General Principles of the Civil Law of the People's Republic of China is a provision on the doctrine of agency, which provides that:

> "Citizens and legal persons may perform civil juristic acts through agents. An agent shall perform civil juristic acts in the principal's name within the scope of the power of the agency. The principal shall bear civil liability for the agent's acts of agency..."[51]

Where such agency reasoning applies, the named consignee as the principal will acquire rights and be subject to liabilities under the contract of carriage evidenced by the sea waybill.

In the meantime, Article 3 of the Uniform Rules does not deprive the shipper of his title to enforce the contract or divest him of the contractual liabilities as he is also regarded as entering the contract on his own behalf. It is crucial to the utility of a sea waybill that the shipper should be capable of retaining his contractual rights until the time of delivery. Having a non-transferable sea waybill, he is able to direct the carrier to deliver to another person at his pleasure before delivery. Unlike a bill of lading shipper, who parts with his right to control the goods when he parts with the bill of lading, a waybill shipper will retain his right of disposal until delivery unless he contracts otherwise. It is fair to preserve the shipper's rights of suit against the carrier

[51] Article 63 of the General Principles of the Civil Law of the People's Republic of China; http://www.law-lib.com/law/law_view.asp?id=3633

under the sea way bill at a time when he retained rights of disposal, including the rights to have the goods delivered to himself.

5.3. 3. Recommendations for the reform of the Chinese Maritime Code

As discussed above, it has been established under Chinese law that a straight bill of lading falls within the range of bills of lading. No rational reason has arisen for modifying the status of this document in the Chinese Maritime Code. Thus it is suggested that the provisions in the reformed Chinese Maritime Code proposed in the previous chapters, regulating rights of suit under negotiable bills of lading, would apply to the straight bills of lading.

The application of the CMI Uniform Rules for Sea Waybills 1990 does not in practice give rise to difficulties in China on rights of suit under sea waybills and it might not be necessary to change this status either.

5.4. Conclusion-Legislative suggestions

As we have seen, both the status of a straight bill of lading and the positions of the consignee and the shipper under a sea waybill are settled under Chinese law, so it is not appropriate or desirable to provide any further reform in these respects. Since the position under Chinese law is that straight bills of lading are treated in the same manner as transferable bills of lading, the reform to transferable bills of lading proposed in this work should apply equally to straight bills of lading.

CHAPTER 6: CONCLUSION

As explained in the first part of the thesis,[1] the Chinese Maritime Code 1993 is in line with the international maritime practice and legislation closely and consciously. For example, China has not ratified the Hague Rules, the Hague-Visby Rules or the Hamburg Rules, however, the Chinese Maritime Code 1993 has incorporated a number of principles and provisions from them. Therefore, in respect of the carriage of goods by sea, the Chinese Maritime Code is deemed as a combination of the Hague/Visby Rules and the Hamburg Rules. It will be not be unacceptable or new to adopt principles or provision with certain innovative changes from either English law or the Draft Instrument on transport law in the reformed Chinese Maritime Code.[2]

The problem with the present Chinese law in the area under examination is that it is extremely unpredictable for traders/carriers because of the nature of the Chinese judicial system, which does not have a system of binding precedent.[3]

It has been considered and elaborated in detail, in the earlier parts of the work, why there is a need for reform of the Chinese Maritime Code in respect of the cargo claimant's *locus standi*. In the meantime, legislative suggestions on the reform of the present Chinese Maritime Code in this regard have been put forward respectively at the end of each chapter where various aspects of the topic are examined. This chapter

[1] See Introduction at p 13.

[2] The Chinese Maritime Code 1993 is scheduled to be amended around 2010. After the first project on the reform of the CMC 1993 was conducted in 2000 and completed in 2002, the second project on the reform of the Chinese Maritime Code 1993 was conducted in 2006 and is supposed to be completed in 2008 by the research team from the Dalian Maritime University. The present work will be contributed to the final report on the reform.

[3] See Introduction at p 9.

intends to summarise and indicate the form the reform should take in order to achieve the best possible results. The proposed new provisions together with other recommendations on the reform of the present Chinese Maritime Code will be presented in this chapter.

It is suggested that all of the new provisions proposed in this work would be inserted into Section 4 of Chapter IV of the present Chinese Maritime Code, as this section entitled "Transport Documents" mainly deals with issues arising under the bills of lading whilst the whole Chapter IV is designed to cover most of the issues relating to "Contract of Carriage of Goods by Sea".

The first part of Art 78 as a source of controversy should be deleted[4]:

"The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading."

The Chinese Maritime Code (CMC) does not create a clear rule as to the acquisition of contractual rights by the holder of the bill of lading upon the transfer of the bills despite the fact that some courts recognise the holder's rights of suit by adopting a broad construction of Art 78 of the Chinese Maritime Code. Unsurprisingly, the lacuna in the CMC in this respect has resulted in the delivery of controversial and unjustified judgments in judicial practice.[5] Additionally, as examined in Chapter 3 on the Carrier Suing the Holder[6], the problems brought by this

[4] See *ante*, 4.2.3.; see *ante*, 4.3.; see *ante*, 4.3.4.

[5] See *ante*, 2.3.4.

[6] See *ante*, 4.2.4.

provision are not only related to rights but also liabilities of the parties concerned under the bills of lading. It is appropriate and necessary to get rid of this source of hardship.

New provision of Article 78 is:

"A person who becomes the lawful holder of a bill of lading shall, by virtue of becoming the holder of the bill, 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. If such a holder does not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffers such loss or damage."[7]

The lawful holder's entitlement to take action against the carrier in contract should be confirmed by a new provision without ambiguity in the reformed Chinese Maritime Code.[8] The holder is entitled to act on behalf of the party that suffered loss or damage.[9]

New provision of Article 79 is:

"The lawful holder is

(a) a person with possession of the order bill who, by virtue of being the person identified in the bill, is the shipper[10] **or the consignee of the goods to which the bill relates;**

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[7] See *ante*, 2.4.

[8] See *ante*, 2.3.4.

[9] See *ante*, 2.3.3.; *ante*, 2.3.4.

[10] See *ante*, 1.3.

(b) a person with possession of the order bill as a result of the completion, by delivery of the bill, of any indoresement of the bill;

(c) a person with possession of the blank endorsed order bill or the bearer bill as a result of any other transfer of the bill;

(d) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) or (c) above had not the transaction been effected at a time when the right (as against the carrier) to possession of the goods ceased to attach to possession of the bill in consequence of a due delivery of the goods.

A person shall be regarded for the purposes of this Code as having become the lawful holder of a bill of lading wherever he has acquired the bill in good faith.[11]"

The lawful holder of the bills of lading is entitled to sue the carrier in contract for loss or damage to the goods to which the bill of lading relates. A similar definition on the "holder" as the one in COGSA 1992 and the Draft Instrument could be adopted in supplementing the present Chinese Maritime Code.[12] A person shall be regarded for the purposes of this Code as having become the lawful holder of a bill of lading wherever he has acquired the holder of the bill in good faith.[13]

New provision of Article 80 is:

"Where, when a person becomes the lawful holder of the bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession

[11] See *ante*, 2.4.

[12] See *ante*, 2.3.4.

[13] See *ante*, 2.1.4.

of the goods to which the bill relates, in consequence of a due delivery of the goods, that person shall not have any rights transferred to him by virtue of the section above unless he becomes the holder of the bill-

(a) as a result of any transaction effected in pursuance of any contractual or other arrangements made before the time when the right (as against the carrier) to possession of the goods ceased to attach to possession of the bill in consequence of a due delivery of the goods; [14] **or**

(b) as a result of the rejection to a person by another person of goods or document delivered to the other person in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill.[15]**"**

The right (as against the carrier) to possession of the goods will cease to be attached to possession of the bill in consequence of a due delivery of the goods.[16] Under some exceptional circumstances a bill of lading can be effectively indorsed so as to pass contractual rights even after delivery had been made.[17] This includes the case where a person becomes the holder of a bill of lading in pursuance of a reindorsement of a bill of lading following rejection of the goods or document, the shipper is remitted to the rights of suit against the carrier by reason of the reindorsement.[18]

[14] See *ante*, 2.4.

[15] See *ante*, 1.3.2.

[16] See *ante*, 2.3.4.

[17] See *ante*, 2.3.4.

[18] See *ante*, 1.2.1.4.

New provision of Article 81 is:

"Where rights are transferred by virtue of the operation of subsection (78)[19] above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives, where that document is a bill of lading, from a person's having been an original party to the contract of carriage."[20]

The shipper will lose rights of suit against the carrier in contract for loss or damage when someone else acquires them. The justification for adding a provision such as section 2(5) of COGSA 1992 into the Chinese Maritime Code is explained in Chapter 1.[21]

New provision of Article 82 is:

"Where, in the case of any document to which this Act applies- a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage, but contractual rights have not been vested in that person by virtue of section (78) of this code[22], the other person, without having to prove that it itself has suffered loss or damage, shall be entitled to exercise those rights for the benefit of this person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are

[19] It refers to the proposed provision on the transfer of rights on the holder See *post*, 6. 4.

[20] See *ante*, 1.3.1.

[21] See *ante*, 1.1.4.

[22] It refers to the proposed provision on the transfer of rights on the holder

exercised".[23]

In cases where goods are shipped under a bill of lading which is never delivered to the buyer or which is delivered to him without a requisite endorsement resulting in contractual rights not being transferred to the consignee/endorsee, the shipper should be entitled to recover damages in respect of the buyer's loss.[24]

Art 86 should be deleted:

"If the goods were not taken delivery of at the port of discharge or if the consignee has delayed or refused the taking delivery of the goods, the Master may discharge the goods into warehouses or other appropriate places, and any expenses or risks arising therefrom shall be borne by the consignee".[25]

This provision will be replaced with a reformed clause with a new rule establishing the requirements which should be satisfied for the imposition of liabilities upon the holder of the bills of lading.[26] This new provision is set out below:

New provision of Article 83 is:

"The person in whom rights are vested by virtue of subsection (78)[27] **–**

(a) takes or makes a formal demand of delivery from the carrier of any of the goods to which the document relates;

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[23] See *ante*, 1.3.2.

[24] See *ante*. 1.2.3.4.

[25] See *ante*, 4.3. and 4.14.

[26] See *ante*, 4.3. and 4.1.4.

[27] It refers to the proposed provision on the transfer of rights on the holder

(b) institutes a formal court procedure against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or made a formal demand of delivery from the carrier of any of those goods,

that person shall become subject to the liabilities imposed on it under that contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the bill of lading."[28]

The holder-consignee/endorsee is liable to the carrier where he enforces his contractual rights and the liabilities imposed on him are limited.[29] It is suggested that the holder shall only become subject to the liabilities imposed on it under the contract of carriage to the extent that those liabilities are incorporated in or ascertainable from the bill of lading.[30]

The provision in Art 88 in respect of the carrier's rights to sue the shipper as a source of controversy should be deleted:

"If the proceeds fall short of such expenses, the carrier is entitled to claim the difference (between the proceeds from the auction at port of discharge and the related fees and charges) from the shipper."

New provision of Article 84 is:

"The transfer and endorsement of the transport document to others or the

[28] See *ante*, 4.3. This proposed provision is similar to Article 62 (2) of the Draft Instrument.

[29] See *ante*, 4.3. and 4.1.4.

[30] See *ante*, 4.2.4.

imposition of liabilities under any contract on any person[31] shall be without prejudice to the liabilities under the contract of any person as an original party to the contract."[32]

In cases where the consignee/indorsee did not take or refused to take delivery of the cargo, it is justified that the shipper should be liable to the carrier under the contract of carriage evidenced by the bill of lading.[33] It is also justified to preserve the liability of the shipper in cases where contractual liability is imposed on the holder who enforces contractual rights.[34]

Art 69 will be conserved[35]:

"The shipper shall pay the freight to the carrier as agreed. The shipper and the carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document."

The second part of Art 78 will not be modified[36] but is proposed to appear as new Article 85:

"Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in respect of loading incurred at the

[31] See *ante*, The carrier suing the holder. 4..3.

[32] See *ante*, 3.4.

[33] See *ante*, 3.3.3.1.

[34] See *ante*, 3.3.3.2.

[35] See *ante*, 4.3. and 4.2.4.

[36] See *ante*, 4.3. and 4.2.4.

loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the holder of the bill of lading."

The holder will not assume certain liabilities, which should only be the shipper's liabilities under the contract of carriage although the holder might assume such liabilities if they were ascertainable from the negotiable document.[37]

The position of the present Chinese law on the shipper's rights to sue under charterparty and sue in tort should not be modified.[38]

The approach of entitling the shipper to sue in bailment should not be adopted under the Chinese legal system.[39]

Both the status of a straight bill of lading and the positions of the consignee and the shipper under a sea waybill are settled under Chinese law, so it is not appropriate or desirable to provide any further reform in these respects[40]. Since the position under Chinese law is that straight bills of lading are treated in the same manner as transferable bills of lading, the reform to transferable bills of lading proposed in this work should apply equally to straight bills of lading.

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[37] See *ante*, 4.2.4.

[38] See *ante*, 1.3.2.

[39] See *ante*, 1.3.2.

[40] See *ante*, 5.3.3.

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APPENDIX 1

BILLS OF LADING ACT 1855

WHEREEAS, by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:

1. Every consignee of goods named in a bill of Lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

APPENDIX 2

CARRIAGE OF GOODS BY SEA ACT 1992

An Act to replace the Bills of Lading Act 1855 with new provision with respect to bills of lading and certain other shipping documents

[16th July 1992]

1. Shipping documents etc to which Act applies

(1) This Act applies to the following documents, that is to say—

(a) any bill of lading;

(b) any sea waybill; and

(c) any ship's delivery order.

(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—

(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and

(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

(a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and

(b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where [an electronic communications network] or any other information technology is used for effecting transactions corresponding to—

(a) the issue of a document to which this Act applies;

(b) the indorsement, delivery or other transfer of such a document; or

(c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may—

(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and

(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

2. Rights under shipping documents

(1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) 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.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order—

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person,

the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

3. Liabilities under shipping documents

(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

4. Representations in bills of lading

A bill of lading which—

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

5. Interpretation etc

(1) In this Act—

"bill of lading", "sea waybill" and "ship's delivery order" shall be construed in accordance with section 1 above;

"the contract of carriage"—

(a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and

(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

"holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below;

"information technology" includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or , in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates—

(a) cease to exist after the issue of the document; or

(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

6 Short title, repeal, commencement and extent

(1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

(2) The Bills of Lading Act 1855 is hereby repealed.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.

APPENDIX 3

DRAFT INSTRUMENT ON TRANSPORT LAW [1]

Article 1. Definitions

For the purposes of this Convention:

(a) "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

(j) "Holder" means

(i) a person that is for the time being in possession of a negotiable transport document and

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed, or

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(ii) the person to which a negotiable electronic transport record has been issued or

[1] See the Preliminary Draft Instrument on the carriage of goods by sea, Working Group III on Transport Law, United Nations Commission on International Trade Law at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html for the latest version (A/CN.9/WG.III/WP.56 in September 2005). Relevant provisions rather than all provisions of the Draft Instrument are presented in this part of the work.

transferred and that has exclusive control of that negotiable electronic transport record.

(k) "Consignee" means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic transport record.

(n) "Transport document" means a document is issued pursuant to a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:

(i) it evidences the carrier's or a performing party's receipt of goods under a contract of carriage, or

(ii) it evidences or contains a contract of carriage.

(o) "Negotiable transport document" means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognised as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable" or "not negotiable".

(p) " Non-negotiable transport document" means a transport document that does not qualify as a negotiable transport document.

Article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When no negotiable transport document or no negotiable electronic transport record has been issued, the following paragraphs apply

(a) If the name and address of the consignee is not referred to in the contract particulars the controlling party must advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;

(b) the carrier must deliver the goods at the time and location mentioned in Article 11(4) to the consignee. As a prerequisite for delivery, the consignee must produce proper identification.

Article 62. Liability of holder

1. Without prejudice to article 59, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of being a holder.

2. Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes [any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record] [the liabilities

imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic transport record].

3. For the purpose of paragraph 1 and 2 [and article 46], any holder that is not the shipper does not exercise any right under the contract of carriage solely by reason of the fact that it:

(a) Under article 7 agrees with the carrier to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document, or

(b) Under article 61 transfers its rights.

Article 63. When no negotiable transport document or negotiable electronic transport record is issued

If no negotiable transport document or no negotiable electronic transport record is issued, the following paragraphs apply to the transfer of rights under a contract of carriage:

(a) The transfer is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer;

(b) The transferability of the rights purported to be transferred is governed by

the law applicable to the contract of carriage; and

(c) Regardless of the law applicable pursuant to paragraphs (a) and (b),

(i) A transfer that is otherwise permissible under the applicable law may be made by electronic means,

(ii) A transfer must be notified to the carrier by the transferor or, if applicable law permits, by the transferee, and

(iii) If a transfer includes liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.

Article 67. Parties

1. Without prejudice to articles 68 (a) and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:

(a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(c) any third person to which the shipper or the consignee has assigned its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage.

Article 68. When negotiable transport document or negotiable electronic transport record is issued.

In the event that a negotiable transport document or negotiable electronic record is issued:

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and

(b) When the claimant is not the holder, it must, in addition to its burden of proof proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.

APPENDIX 4

CHINESE MARITIME CODE 1993[1]

Article 41

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.

Article 42

"Consignee" is the person who is entitled to take delivery of the cargo at the port of discharge.

Article 47

The carrier shall, before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article 49

The carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an act deviating from the provisions of the preceding paragraph.

[1] Relevant provisions rather than all provisions of the Chinese Maritime Code are presented in this part of the work.

Article 58

The defense and limitations of liability[2] provided for in this Chapter (Chapter IV on contract of carriage of goods by sea) shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, *whether the claimant is a party to the contract or whether the action is founded in contract or in tort.* The provisions of the preceding paragraph shall apply if the action referred to in the preceding paragraph is brought against the carrier's servant or agent, and the carrier's servant or agent proves that his act was within the scope of his employment or agency.

Article 68

At the time of shipment of dangerous goods, the shipper shall, in compliance with the regulations governing the carriage of such goods, have them properly packed, distinctly marked and labelled and notify the carrier in writing of their proper description, nature and the precautions to the taken. In case the shipper fails to notify the carrier or notified him inaccurately, the carrier may have such goods landed, destroyed, without compensation. The shipper shall be liable to the carrier for any loss, damage or expense resulting from such shipment (of dangerous goods).

Article 69

The shipper shall pay the freight to the carrier as agreed. The shipper and the carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document.

[2] The provisions regarding the exemption and limitation of the liabilities of the carriers under the Chinese Maritime Code are principally drafted by reference to the Hague Rules and are substantially identical with those under Hague Rules.

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 against surrendering the same. A provision in the document stating that the goods are to be delivered to a named person or to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

Article 72

When the goods have been taken over by the carrier or have been loaded on board, the carrier shall, on demand of the shipper, issue to the shipper a bill of lading. The bill of lading may be signed by a person authorized by the carrier. A bill of lading signed by the Master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

Article 77

Except for the note made in accordance with the provision of Art 75 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.

Article 78

The relationship between the carrier and the consignee and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading. Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in respect of loading incurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the consignee and the holder of the bill of lading.

Article 79

The negotiability of a bill of lading shall be governed by the following provisions:

(1) A straight bill of lading is not negotiable;

(2) An order bill of lading may be negotiated with endorsement to order or endorsement in blank;

(3) A bearer bill of lading is negotiable without endorsement.

Article 80

Where a carrier has issued a document other than a bill of lading as an evidence of the receipt of the goods to be carried, such a document is prima facie evidence of the conclusion of the contract of carriage of goods by sea and the taking over by the carrier of the goods as described therein.

Such documents issued by the carrier shall not be negotiable.

Article 86

If the goods were not taken delivery of at the port of discharge or if the consignee has delayed or refused the taking delivery of the goods, the Master may discharge the goods into warehouses or other appropriate places, and any expenses or risks arising therefrom shall be borne by the consignee.

Article 87

If the freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien to a reasonable extent on the goods.

Article 88

If the goods under lien in accordance with the provisions of Art 87 of this Code have not been taken delivery of within 60 days from the next day of the ship's arrival at the port of discharge, the carrier may apply to the court for an order on selling the goods by auction; where the goods are perishable or the expenses for keeping such goods would exceed their value, the carrier may apply for an earlier sale by auction.

The proceeds from the auction shall be used to pay off the expenses for the storage and auction sale of the goods, the freight and other related charges to be paid to the carrier. If the proceeds fall short of such expenses, the carrier is entitled to claim the difference from the shipper, whereas any amount in surplus shall be refunded to the shipper. If there is no way of making the refund and such surplus amount has not been

claimed at the end of one complete year after the auction sale, it shall go to the State Treasury.

Article 94

The provisions in Article 47 and Article 49 of this Code shall apply to the shipowner under voyage charter party. The other provisions in this Chapter (on Voyage Charter Party) regarding the rights and obligations of the parties to the contract shall apply to the shipowner and the charter under voyage charter only in the absence of relevant provision or in the absence of provisions differing therefrom in the voyage charter.

Article 95

Where the holder of the bill of lading is not the charterer in the case of a bill of lading issued under a voyage charter, the rights and obligations of the carrier and the holder of the bill of lading shall be governed by the clauses of the bill of lading. However, if the clauses of the voyage charterparty are incorporated into the bill of lading, the relevant clauses of the voyage charter party shall apply.

Article 127

The provisions concerning the rights and obligations of the shipowner and the charterer in this Chapter (on Time Charter Party and Bareboat Charter party) shall apply only when there are no different stipulations in this regard in the charterparty.

APPENDIX 5

THE PROPOSAL TO REFORM THE CHINESE MARITIME CODE 1993[1]

The first part of Art 78 as a source of controversy should be deleted:

"The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading."

New provision of Article 78 is:

"A person who becomes the lawful holder of a bill of lading shall, by virtue of becoming the holder of the bill, 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. If such a holder does not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffers such loss or damage."

New provision of Article 79 is:

"The lawful holder is

(a) a person with possession of the order bill who, by virtue of being the person identified in the bill, is the shipper or the consignee of the goods to which the bill relates;

(b) a person with possession of the order bill as a result of the completion, by delivery of the bill, of any indoresement of the bill;

(c) a person with possession of the blank endorsed order bill or the bearer bill as a

[1] Further explanation for each proposed provision can be found in previous chapters.

result of any other transfer of the bill;

(d) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) or (c) above had not the transaction been effected at a time when the right (as against the carrier) to possession of the goods ceased to attach to possession of the bill in consequence of a due delivery of the goods.

A person shall be regarded for the purposes of this Code as having become the lawful holder of a bill of lading wherever he has acquired the bill in good faith."

New provision of Article 80 is:

"Where, when a person becomes the lawful holder of the bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, in consequence of a due delivery of the goods, that person shall not have any rights transferred to him by virtue of the section above unless he becomes the holder of the bill-

(a) as a result of any transaction effected in pursuance of any contractual or other arrangements made before the time when the right (as against the carrier) to possession of the goods ceased to attach to possession of the bill in consequence of a due delivery of the goods; or

(b) as a result of the rejection to a person by another person of goods or document delivered to the other person in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill."

New provision of Article 81 is:

"Where rights are transferred by virtue of the operation of subsection (78) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives, where that document is a bill of lading, from a person's having been an original party to the contract of carriage."

New provision of Article 82 is:

"Where, in the case of any document to which this Act applies- a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage, but contractual rights have not been vested in that person by virtue of section (78) of this code, the other person, without having to prove that it itself has suffered loss or damage, shall be entitled to exercise those rights for the benefit of this person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised".

Art 86 should be deleted:

"If the goods were not taken delivery of at the port of discharge or if the consignee has delayed or refused the taking delivery of the goods, the Master may discharge the goods into warehouses or other appropriate places, and any expenses or risks arising therefrom shall be borne by the consignee".

New provision of Article 83 is:

"The person in whom rights are vested by virtue of subsection (78) –

(a) takes or makes a formal demand of delivery from the carrier of any of the goods to which the document relates;

(b) institutes a formal court procedure against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or made a formal demand of delivery from the carrier of any of those goods,

that person shall become subject to the liabilities imposed on it under that contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the bill of lading."

The provision in Art 88 in respect of the carrier's rights to sue the shipper as a source of controversy should be deleted:

"If the proceeds fall short of such expenses, the carrier is entitled to claim the difference (between the proceeds from the auction at port of discharge and the related fees and charges) from the shipper."

New provision of Article 84 is:

"The transfer and endorsement of the transport document to others or the imposition of liabilities under any contract on any person shall be without prejudice to the liabilities under the contract of any person as an original party to the contract."

Art 69 will be conserved:

"The shipper shall pay the freight to the carrier as agreed. The shipper and the

carrier may agree that the freight shall be paid by the consignee. However, such an agreement shall be noted in the transport document."

The second part of Art 78 will not be modified but is proposed to appear as new Article 85:

"Neither the consignee nor the holder of the bill of lading shall be liable for demurrage, dead freight and all other expenses in respect of loading incurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the holder of the bill of lading."

The position of the present Chinese law on the shipper's rights to sue under charterparty and sue in tort should not be modified.

The approach of entitling the shipper to sue in bailment should not be adopted under the Chinese legal system.

Both the status of a straight bill of lading and the positions of the consignee and the shipper under a sea waybill are settled under Chinese law, so it is not appropriate or desirable to provide any further reform in these respects. The new provisions proposed in this work will regulate not only negotiable bills of lading but also straight bills of lading.