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**Developing a scheme that governs the transfer of rights through
the bill of lading under Chinese law— a comparison with the
Anglo-American experience and the international approach.**

By

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Abstract

This thesis aims to establish a legal scheme under Chinese law for dealing with transfer of rights through the bill of lading in maritime trade. Although the current Chinese Maritime Code (CMC 1992) attempts to address such a transfer of rights, the rules in it are oversimplified and ambiguous, giving rise to confusion and uncertainty in practice. To reform current Chinese law in this regard, the thesis examines the existing solutions to the transfer of rights issues provided by English law, American law, and the Rotterdam Rules and its *travaux préparatoires*. Through comparing the aforesaid foreign solutions and analysing the coherence and compatibility of these solutions with China's economic, commercial and legal environment, this thesis suggests ways in which an effective and comprehensive legal scheme that governs transfer of rights through the bill of lading could be established under Chinese law.

This thesis starts with a historical review on how such a legal scheme has been developed in Anglo-American law and the international convention on seaborne cargo transportation (the Rotterdam Rules and its *travaux préparatoires*). Based on the implications of the historical review, this thesis revisits the CMC 1992 and uncovers two underlying deficiencies in it in terms of transfer of rights through the bill of lading. These are: the lack of a connection with the commercial trading of goods, and disharmony with China's civil law heritage. To address the deficiencies, this thesis sets out three key elements worthy of consideration, which are, the balance of interest between the carrier and the cargo interests, facilitation of paperless trading, and localization of foreign rules.

The aforesaid elements are examined when discussing the specific issues regarding the transfer of rights through the bill of lading in order to understand to what extent those foreign approaches can be accommodated neatly in Chinese law. Based on this, this thesis argues that under a future Chinese maritime law, similar to English law and American law, the rights that can be conveyed through the bill of lading should include the right to sue the carrier and the right to claim delivery of goods; whilst at the same time, the acquisition of the real right of goods covered by the bill should be addressed by the property law, and this should provide for a presumable effect of passing real rights of goods when the bill is duly negotiated. For

the right of control suggested by the Rotterdam Rules, in a future Chinese law, to a large extent it should continue to be subject to the freedom of contract although, similar to the American law, the notion of ‘control’ could be adopted and re-defined in terms of securing the singularity and exclusivity of the access to the electronic bill of lading in paperless trading. In addition, as to the legal manner in which those rights can be conveyed through the bill of lading, this thesis suggests that a future Chinese maritime law should follow the American approach, partially modelling the law governing the negotiable instruments, and incorporate the good faith purchaser rule into the bill of lading law and practice so as to vest the bill of lading with a certain degree of negotiability. In this way, the commercial value of the bill of lading as a reliable and tradeable document to secure its holder’s interest in shipping and trading practice would be enhanced. Also, in order to secure a balance between the parties that participate in cargo shipping and trading, this thesis argues that in some extraordinary situations the right of suit and the real rights of goods should not be locked into the bill of lading. Rather, they should be transferred between cargo interests by virtue of trade-related factors such as the assumption of cargo loss or damage and the intention of relevant cargo interests.

In brief, to thoroughly solve the problems arising from transfer of rights through the bill of lading in Chinese law, this thesis suggests that the legal scheme governing such a transfer should not only be established under the maritime law but also be supported by the property law. In this way, such a legal scheme would properly reflect the impartible connection between the carriage of goods and the commercial transaction of goods, optimizing its value in balancing interests between carrier and cargo interest, accommodating the use of the electronic bill of lading, and harmonizing the maritime law with other legislations in China.

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List of Abbreviation

BLA 1855: Bills of Lading Act 1855

BBL: Bolero Electronic Bill of Lading

BCMP: Bolero Core Messaging Platform

Bolero Title Registry: BTR

CMNI: Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway

COGSA 1992: Carriage of Goods by Sea Act 1992

Contract Law 1999: Contract Law of the People's Republic of China 1999

COSCO: China COSCO Shipping Corporation Limited

CMC 1992: Chinese Maritime Code 1992

CMI: Comité Maritime International

CMNI: Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway

CMR: Conventions on the Contract for the International Carriage of Goods by Road

CIM: Uniform Rules Concerning the Contract of International Carriage of Goods by Rail

CISG: United Nation Convention on Contracts for the International Sale of Goods 1980

FA 1889: Factors Act 1889(UK)

FBLA 1994: 49 USC ch.801: Bills of Lading (Federal Bills of Lading Act 1994)

GDP: Gross Domestic Product

Hague Rules: International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924

Hague Visby Rules: International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924), and Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968

Hamburg Rules: United Nations International Convention on the Carriage of Goods by Sea 1978

ICC: International Chamber of Commerce

L/C: Letter of Credit

LOI: Letter of Indemnity

Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air

PRC: The People's Republic of China

Property Law 2007: Property Law of the People's Republic of China 2007

Rotterdam Rules: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009

Tort Law 2009: Tort Law of the People's Republic of China 2009

UNCITRAL: United Nations Commission on International Trade Law

UNCTAD: United Nations Conference on Trade and Development

UK: The United Kingdom

US: The United States

UCC: Uniform Commercial Code (US)

UCP 600: Uniform Customs and Practice for Documentary Credits 600

Warsaw Convention: Convention for the Unification of Certain Rules Relating to International Carriage by Air

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Chapter One: Introduction

1.1 Research Background

A simple law to govern carriage of goods by sea between two parties, the carrier and the shipper,¹ would not be adequate for contemporary maritime practice which often involves multiple cargo interests, for example, the subsequent buyers of the goods, the bank financing the cargo transaction and the insurer. Whilst these parties are usually not the original parties to the contract of carriage, they may assume the substantial risk incidental to the cargo transportation. To deal with such a dilemma, these parties might seek to either secure their interest in the goods or acquire remedy for their loss or damage. From this, there arose a need to establish a mechanism that enables these parties to acquire certain title to the goods and/or rights towards the carrier. Over the past few centuries, the aforesaid mechanism has been associated with the transfer of the bill of lading.² Such a result can be attributed to the transferability or negotiability of the bill of lading³ and additionally the specific functions of the bill of lading in both shipping and trading practice.⁴ By virtue of such an ability and functions, the bill of lading is able to transfer rights from one cargo interest to another.

Many jurisdictions have developed explicit rules in the light of the significance of the aforesaid functions of the bill of lading in maritime commerce and the complexity of legal relationships caused by the transfer of the bill of lading. As two of the major seafaring countries of the world, the UK and the US have established comprehensive and effective

¹ The shipper is usually the party who concludes the contract of carriage with the carrier and/or the party who delivers the goods to the carrier for transit. In seaborne cargo trade, the shipper is usually the seller of the goods covered by the bill of lading.

² Richard Aikens, Richard Lord, Michael Bools, *Bills of Lading* (2nd edn, Informa Law 2016) 209.

³ Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Bloomsbury Professional 2008) 68. There exists different interpretations on the word 'transferability' and 'negotiability'. Generally speaking, the transferability means that the bill of lading is able to pass certain rights from one cargo interest to another without the involvement of the carrier. In addition, the rights acquired by the transferee of the bill is not greater than that was vested in the transferor. Compared to the transferability, if a bill of lading is with negotiability, the person to whom the bill of lading is negotiated by fulfilling certain legal requirements would acquire a better position than its transferor. In different jurisdictions, the bill of lading may be either transferable or negotiable. For example, under English law, the bill of lading is merely transferable, whereas American law provides bill of lading as a negotiable document. This issue is discussed in details in Chapter 4, 4.2.1, 4.2.2 and Chapter 5, 5.2.2.2 below.

⁴ For the evolution of such these functions, see Chapter 2, 2.2-2.4 below.

legal schemes that provide for how the rights in question are transferred through the bill of lading. Under such legal schemes, the scope of the transferable rights, the legal rationale for the transfer of rights, and the obligation incidental to such a transfer are all clearly addressed. In English law, the extent to which the contractual rights can be transferred by the bill of lading is mainly governed by the Carriage of Goods by Sea Act 1992 (COGSA 1992).⁵ Should the problems go beyond the coverage of the statutory rules, a number of devices developed at common law or equity could apply.⁶ In addition, the transfer of title to goods is often relevant to the function of the bill of lading as a ‘document of title’. The nature of such a function has been clarified by common law.⁷ Although American law shares the same common law heritage as English law, and the common law device may still be invoked in certain situations, the development of American statutory law has gone in a different direction. Under current American law, issues relating to the transfer of contractual rights and the transfer of title to the goods are both governed by 49 US Code Chapter 801-Bills of Lading (US Federal Bills of Lading Act 1994, FBLA 1994) and Uniform Commercial Code (UCC).⁸ Besides the national law, issues with regard to the transfer of rights through the bill of lading are receiving increasing attention at the level of international law and was discussed by the UNCITRAL working group when it drafted the most recent international convention governing carriage of goods by sea, the Rotterdam Rules.⁹ The rules in this regard can be

⁵ Under COGSA 1992, the right mainly refers to the contractual right of suit. See COGSA 1992, s2 (1) Subject to the following provisions of this section, a person who becomes (a) the lawful holder of a bill of lading 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.

⁶ Simon Baughen, *Shipping Law* (6th edn, Routledge-Cavendish, 2015) 33-50. These device may include agency, trust, assignment, implied contract, bailment and negligence.

⁷ Baughen (n6)8. For the interpretations of bill of lading as document of title at common law, see *Lickbarrow v Mason* (1794) 5 TR 683 (KB); *Sander Bros v Maclean & Co* (1883) 11 QB 327 (QB); *Sewell v Burdick* [1881-85] All ER 223, (1884) 10 App Cas 74 (HL); *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd’s Rep.252 (CA); *J.I Mac William Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S)* [2003] EWCA Civ 556, [2004] QB, affirmed [2005] UKHL 11; [2005] 2 AC 423; *Kuwait Petroleum Corporation v. I & D Oil Carriers Ltd.(The Houda)* [1994] 2 Lloyd’s Rep 541 (CA). These cases are discussed in Chapter 5, 5.2.1.1 below.

⁸ The Federal Bills of Lading Act 1994 is a replacement of the former Federal Bills of Lading Act 1916 (also known as ‘Pomerene Act 1916’), and has been recodified as 49 US Code, Chapter 801. In this thesis, the Federal Bills of Lading Act 1994 is referred to FBLA 1994. For the rules regarding the transfer of rights through the bill of lading, see FBLA 1994, §80104; §80105.

The uniform Commercial Code (UCC), firstly published in 1952, is one of a number of uniform acts that have been promulgated with the goal of harmonizing the law of sales and other commercial transactions across the United States of America. The rules on the transfer of rights through the bill of lading can be seen from UCC, art 7 Document of Title which is revised in 2003. See §7-501 (a) (5); §7-502.

⁹ UNGA United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ‘The Rotterdam Rules’ (adopted 11 December 2008, opened for signature 23 September 2009) (2009) UN Doc A/RES/63/122. For the rules bearing the notion of transfer of rights through bill of lading, see art 51, art 57 and art 58.

seen from a series of *travaux préparatoires* released by United Nations Commission on International Trade Law (UNCITRAL)¹⁰ and the final draft of the Rotterdam Rules.¹¹ As commented by Berlingieri,¹² the stipulations on transfer of rights through the bill of lading ‘set out principles obvious in a great many jurisdictions’. However, China is not among these.

In China, matters regarding ocean cargo transportation are now governed by Chinese Maritime Code 1992 (CMC 1992).¹³ As a product of the modernization of Chinese law in the 1990s, CMC 1992 is a legal attempt to adopt and directly transplant foreign and international law into domestic law, with the aim of integrating China into global maritime commerce.¹⁴ Whilst CMC 1992 has incorporated a large amount of foreign and international rules,¹⁵ the ‘transfer of rights’ concept has not been expressly mentioned. The rule that is most related to this point is paragraph 1 of Article 78, which reads: ‘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’.¹⁶ From this rule, the only certain implication is that the bill of lading has a contractual effect when it is transferred to the holder who is a third party to the contract of carriage. However, it leaves a number of questions requiring answers. These include the following: How does such a contractual relationship arise? What is the impact of the transfer of bill of lading on the shipper? What exact rights and obligations may be acquired and assumed by the holder? This vagueness has caused a great deal of uncertainty in the legal relationship between the carrier and the cargo interests involved in the transfer of the bill of lading. Furthermore, China has a civil law style legal system under which statutory law is the major legal source for the courts to handle disputes.¹⁷ Because of the ambiguity of Article 78 in CMC 1992, courts form different understandings of it when issues relating to the transfer of rights through the bill of lading come before them. This often leads, therefore,

¹⁰ The ‘*travaux préparatoires*’ (or the UNCITRAL Drafts) mentioned in this thesis refer to the preparatory documents drafted or released by Working Group III of UNCITRAL for construction of the Rotterdam Rules.

¹¹ Rotterdam Rules, art 51, art 57 and art 58. In addition, Article 47 may have certain implications on the transfer of ‘document of title’. This is discussed in Chapter 5, 5.2.3.

¹² Francesco Berlingieri, ‘Revisiting the Rotterdam Rules’ [2010] LMCLQ 583, 639.

¹³ Maritime Code of the People's Republic of China, Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on November 7, 1992, promulgated by Order No. 64 of the President of the People's Republic of China on November 7, 1992, and effective as of July 1, 1993.

¹⁴ Jianfu Chen, *Chinese Law: Context and Transformation* (1st edn, Martinus Nijhoff Publishers 2008) 71.

¹⁵ *ibid.* For details of the incorporation of foreign law and international convention by CMC 1992, see Chapter 3, 3.2 below.

¹⁶ CMC 1992, art 78 para 1.

¹⁷ Chen (n14) 67.

to conflicting judgments for cases with similar facts.¹⁸ Under such a circumstance, it is hardly credible that CMC 1992 can continue to effectively serve the needs of maritime commerce with other countries as was intended by its enactment. Consequently, it is necessary to reform CMC 1992 and establish more explicit rules that provide for the transfer of rights through the bill of lading.

1.2 Context for the Research – A Review of Existing Literature

CMC 1992 has been implemented for more than twenty years, with its enactment occurring in 1993. During this period, the Chinese shipping industry and its external economic, commercial and legal environment has witnessed great changes. As a result, calls for reform of current maritime law have been growing in recent years. Responding to these calls, a considerable number of studies have been conducted on this matter. The author proposes to summarize the observations that may be helpful to this research and pinpoint the gaps in these studies through a critical review of existing literature.

1.2.1 Some Observations Worth Considering by Current Research

From a general perspective on the reform of CMC 1992, a common implication observed in the existing studies is that the general legal framework and structure established by CMC 1992 should be maintained.¹⁹ This means that when reforming CMC 1992, the old rules on the existing matters should be updated. Emerging problems beyond the coverage of the current rules could be dealt with by drafting new rules under the corresponding chapters of CMC 1992, or adding new chapters to CMC 1992.²⁰ Such a style of legal reform can be

¹⁸ In current judicial practice, the inconsistent judgements often arise as to the transfer of title to sue the carrier and the legal nature of the expression 'bill of lading as document of title.' For details in the two respects, see Chapter 3, 3.3.1, 3.4.1 below; Chapter 4, 4.3.1, Chapter 5, 5.2.4 below.

¹⁹ Yongjian Zhang, 'Zaiyi Zhongguo Haishangfa Zhi Xiugai [Revisiting the reform of Chinese Maritime Law (author's translation)]' [2001] 1 Maritime Law Review 143, 146. Zhengliang Hu, 'Lun Haishangfa Xiugai De Biyaoxing [The necessity of reforming Chinese Maritime Law (author's translation)] [2003] 12 Dangdai Faxue [Contemporary Law Review (author's translation)] 142, 147; Wenzhen Sun, 'On the Amendment of Maritime Law in the Perspective of Microcosm' [2011] 1 International Business Research 58, 60.

²⁰ Tingzhong Fu, *Haishangfa, Gainian, Yuanli Yu Zhidu [The Principle of Chinese Maritime Law (author's translation)]* (1st edn, Law Press China, 2015) 61.

justified by the need to maintain the stability and continuity of maritime law.²¹ As interpreted by the advocates of such a legislative style,²² if current maritime law evolves dramatically within a short period, the merchants and carriers may not be able to accurately predict the legal consequence of their business activities. Under such a circumstance, their willingness to participate in maritime commerce may be undermined. It is submitted that such an interpretation makes sense, especially for the introduction of the transfer of rights through the bill of lading because it is something that directly determines the rights and obligations of the merchants and carriers. In order to gain a positive response from industry for the legal reform, the new rules which govern transfer of rights issues, at least those concerning transfer of the contractual right, should be inserted under Chapter 4 'Contract of Carriage of Goods by Sea' if at all possible.

On a further matter, it is widely agreed that the bill of lading is a document 'established in the transportation contract' but, in most situations, the bill is also 'proof of performance' of the contract governing the cargo transaction.²³ This is because of the reliance on the bill of lading by a bona fide buyer and the buyer's bank who are the third party to the contract of carriage.²⁴ By virtue of such a reliance, the bona fide buyer is able to acquire and transfer certain title to the goods by dealing with the bill of lading,²⁵ and the buyer's bank is also willing to accept the bill as a pledge for financing the sale of goods.²⁶ Normally, such a

²¹ Zhengliang Hu, 'Haishangfa Xiugai De Biyaoxing [The necessity of reforming Chinese Maritime Law (author's translation)]' [2003] 12 Dangdai Faxue [Contemporary Law Review (author's translation)] 142, 147.
²² Fu (n20) 65.

²³ Alexander von Ziegler, 'Transfer of rights and transport documents' (Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007) 1.

²⁴ *ibid.*

²⁵ For examples in this respect, see the following arguments and laws. In English law, 'the bill represents the goods and possession of the bill of lading is treated as equivalent to possession of the goods by it...' 'The holder can transfer the ownership of the goods during transit merely by indorsing the bill...The indorsement must be accompanied by an intention to transfer the ownership.' See John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 132-34. 'If the bill of lading is indorsed in blank, or to the buyer's order, and sent directly to the buyer, then the property may, and often will pass to the buyer.' See Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 380. In American Law, 'An indorsement and delivery of [bill of lading] operates to transfer the title to the goods...' See Georgios I Zekos, 'Negotiable Bills of Lading and their Contractual Role under Greek, United States and English Law (1998) 40 Managerial Law 5, 8. In addition, American law has statutory rule to link the transfer of title to goods with the negotiation of the bill of lading. See FBLA 1994, § 80105 (a). 'When a negotiable bill of lading is negotiated-the person to whom it is negotiated acquires the title to the goods that-(A) the person negotiating the bill had the ability to convey to a purchaser in good faith for value; and (B) the consignor and consignee had the ability to convey to such a purchaser.' See also UCC, §7-502 'a holder to which a negotiable document of title has been duly negotiated acquires thereby ... (2) title to the goods.'

²⁶ 'The bill can be used as security for a debt.' John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 133,135.

reliance derives from the function of the bill of lading as a ‘document of title’.²⁷ In this sense, the transfer of rights through the bill of lading, in a broader meaning, may not only refer to the transfer of rights stemming from the contract of carriage but also involve the conveyance of a right or interest attached to the goods.²⁸ This may also be the case in the context of Chinese law as the relevant legislation contains rules with such an implication.²⁹ In addition, the legal effect of the bill of lading as a ‘document of title’ has already been addressed in some research that discusses the legal effect of a transfer of a bill of lading under Chinese law.³⁰ Therefore, in order to set out a legal scheme that comprehensively solves the problems with regard to the transfer of rights through the bill of lading, the legislations need to be reformed may not only limited to CMC 1992 but rather include the legislation governing the transfer of real rights of goods.

As a final point, as noted by some scholars, the desire for international trade, foreign investment in China, and international economic cooperation has become the major driving force for the modernization of the Chinese legal system since 1978.³¹ On the law covering

²⁷ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 132-35; Paul Todd, *Bills of Lading and Bankers' Documentary Credits*, (4th edn, Informa 2007) 6.14-6.17.

²⁸ For examples regarding the transfer of right or interest attached to the goods through the bill of lading, see the following rules and arguments. Factor Act 1889 (FA 1889) (UK), s 1(4) :

The expression ‘document of title’ shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

FA 1889, s3 ‘Effect of pledges of documents of title: A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.’ See also Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4th edn, Informa 2007) 6.17, ‘More commonly, and certainly where a document of title is used, the pledge is constituted by transfer of documents.’ In addition, as a document of title, the transfer of the bill of lading may also contribute to the transfer of property of goods. See Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 372-89.

²⁹ The Chinese law has recognized that the pledge can be created by the bill of lading. See Property Law of the People's Republic of China (Adopted at the 5th session of the Tenth National People's Congress on March 16, 2007), art 223. ‘The following rights which an obligor or third party has the right to dispose of may be pledged: (3) Warehouse receipts and bills of lading...’ From this rule, it is logical to infer that the right of pledge could be transferred with the bill of lading.

³⁰ For the selective studies in this regard, see Xin Liu, *Tidan Quanli Yanjiu* [Study on bill of lading right (author’s translation)] (1st edn, China Intellectual Property Press 2008) 135-55; Wenjun Wang, *Tidan Xiangxia Haiyun Huowu Suopei zhi Qingqiuquan Jichu Yanjiu* [legal basis to establish the right of suit under the bill of lading (author’s translation)] (1st edn, Law Press China 2010) 59-80; Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 210-19; Zhiwen Li, *Hot issues in the Law of International Carriage of Goods* (1st edn, Law Press-China 2012) 285-86. All these studies recognize bill of lading as a kind of ‘document of title’ in Chinese law, and attempts to figure out the legal nature of such an expression in the sense of real right law.

³¹ Percy R. Luney, JR., ‘Traditions and Foreign Influences: Systems of Law in China and Japan’[1989] 52 Law and Contemporary Problems 129, 134; see also Daniel C.K. Chow, *The Legal System of the People’s Republic of China in a nutshell* (3rd edn, West Academic Publishing 2015) 63.

these subjects, experience from other jurisdictions as well as international law indicates that such a law ought to achieve a sense of balance between the different interest groups.³² In fact, this is already reflected in CMC 1992 which sets out its purpose as ‘regulating the relations arising from maritime transport and those pertaining to ships, to securing and protecting the legitimate rights and interests of the parties concerned, and to promoting the development of maritime transport, economy and trade’.³³ However, since the law has remained unchanged for 20 years, CMC 1992 has become less effective to serve the aforesaid purposes.³⁴ As such, a view has arisen that one important theme of reform in CMC 1992 is to re-balance the interests of the parties involved in ocean cargo transportation.³⁵ These parties in general can be classified into two interest groups: the carrier and the cargo interests.³⁶ This view goes on to opine that, as a national law, although CMC 1992 governs foreign-related maritime matters, the reform of maritime law should highlight the nation’s interest in foreign-related maritime commerce.³⁷ It is submitted that such a view is meaningful to this thesis as the establishment of a legal scheme on the transfer of rights through the bill of lading in essence has the aim of harmonizing the interests between the carrier, the shipper and the endorsee/consignee.³⁸ All the parties may have different nationalities and be located in different countries. In this sense, identifying the standpoint of China’s foremost interest in contemporary maritime trade, and based upon that achieving a legal tradeoff between the parties who have an interest in the transfer of the bill of lading, is the central aim of this thesis. Therefore, the balance of interest will be examined in every particular aspect of the transfer of rights through the bill of lading.

³² Wolfgang G. Friedmann, *Legal Theory* (5th edn, Columbia University Press, 1967) 334; Matthias Herdegen, *Principles of International Economic Law* (1st edn, Oxford University Press 2013) 93.

³³ CMC 1992, art 1.

³⁴ Tiansheng Li, *Chuanhuo Liyi Pinghen Yanjiu [The balance of interest between cargo owner and carrier (author’s translation)]* (1st ed, Law Press China 2012) 308-40.

³⁵ Li (n34)2-3; Zhengliang Hu, Shicheng Yu and Binggui Xia, *Rotterdam Rules: consequence and countermeasures* (1st edn, Beijing University Press 2014) 480.

³⁶ *ibid.*

³⁷ Li (n34) 3.

³⁸ Under the transfer of rights scheme, although the rights are transferred between cargo interests (usually from the shipper to the consignee/endorsee), the implementation of these rights either relies on the carrier’s cooperation, for example, the implementation of the right to claim delivery of goods, or; influences the carrier’s interest in cargo transportation, for instance, the exercise of the right to sue the carrier for recovering cargo loss or damage. In this sense, the construction of a legal scheme on transfer of rights should not only focus on balancing the interest between the cargo interests, but should also manage to achieve a sense of balance between the cargo interests and the carrier.

1.2.2 Gaps in Existing Studies

To develop a systematic legal scheme governing transfer of rights through the bill of lading, this author has reviewed a number of relevant pieces of research and through this has observed the disagreements over specific transfer of rights issues. For instance, for the contractual right to sue the carrier, there is a view that the shipper should not retain such a right once the bill of lading is transferred to the holder,³⁹ whereas an opposite view indicates that such a right should be vested in the shipper all the time as he is the party in a direct contractual nexus with the carrier.⁴⁰ Disagreement can also be found over the effect of the bill of lading in transferring the real rights of goods. On this issue, it has been argued that by virtue of being a ‘document of title’, the transfer of the bill of lading is identical to the transfer of property in goods.⁴¹ There is a further argument that the transfer of such a ‘document of title’ merely transfers the possession of goods⁴² or that the quality of ‘document of title’ does not confer any function in maritime law on the bill of lading.⁴³ Furthermore, since the Rotterdam Rules were opened for signature in 2009, the possible impact of the new international convention on China’s maritime practice is receiving increasing attention. To deal with the challenge brought by the Rotterdam Rules in the future,⁴⁴ the prevailing

³⁹ Jie Zhu, ‘Qianxi Sifa Shijian Zhong Dui Tuoyunren Suquan De Rending [the Shipper’s title to sue in judicial practice (author’s translation)]’ in Nainfu Liu (ed) *Annual of Chinese Maritime Trail 2008-2009* (Law Press, 2010) 209-16; Yuechuan Jiang, ‘Haishang Huowu Yunshu Zhong Huofang Suquan Rending [Cargo interest’s title to sue in the carriage of goods by sea (author’s translation)]’ (Dphil Thesis, Dalian Maritime University 2011) 129-33.

⁴⁰ Yu Guo, ‘Shipper’s right of suit against the carrier after assignment of bill of lading’ (2010) 6 *Annual of China Maritime Law* 50, 54-56; Tingzhong Fu, *Haishangfa, Gainian, Yuanli Yu Zhidu [The Principle of Chinese Maritime Law (author’s translation)]* (1st edn, Law Press China, 2015) 45; Feifei Deng, ‘Shipper’s right to sue in relation to carriage of goods by sea: the approach of Chinese court’ (2013) 19 *JIML* 196, 197-98.

⁴¹ Zhengliang Hu and Chong Cao, ‘A Reconsideration on the Functions of Bill of Lading as a Document of Title in Chinese Law’ (1996) 7 *Annual of China Maritime Law* 53,53-77; Xin Liu, *Tidan Quanli Yanjiu [Study on bill of lading right (author’s translation)]* (1st edn, China Intellectual Property Press 2008) 148-155; Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 216.

⁴² Huanning Wu, *Chinese Maritime Law* (1st edn, China University of Political Science and Law Press 1996) 93; Hai Li, ‘Reconsideration on Bill of Lading as Document of Title-And on the Nature of the B/L’ (1997) 7 *Annual of China Maritime Law* 41, 41-49; Yu Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author’s translation)]* (2nd edn, Peking University Press 2005) 169.

⁴³ Such an argument indicates that the bill of lading only has the legal function as ‘document of title’ in the law governing cargo transaction. See Yuzhuo Si, ‘Guanyu Wudan Fanghuo De Lilun Yu Shijian--Jianlun Tidan De Wuquanxing Wenti [Theory and Practice on Delivery of Cargo without Bills of Lading—the nature of Bill of Lading as Document of Title (author’s translation)]’ (2000) 00 *Annual of China Maritime Law* 18,18-29; Wenjun Wang, *Tidan Xiangxia Haiyun Huowu Suopei zhi Qingqiuquan Jichu Yanjiu [legal basis to establish the right of suit under the bill of lading (author’s translation)]* (1st edn, Law Press China 2010) 78; Zhengyi Guan, *Maritime Legal System from the Perspective of Civil Law* (1st edn, Law Press China 2015) 155-58.

⁴⁴ The Rotterdam Rules is still in the process of ratification and China has not been signatory country so far. Notwithstanding, the Rotterdam Rules may be binding on Chinese parties to the contract of carriage if the Rules come into force someday, regardless of whether China signs the Rules or not. This is because CMC 1992 allows

approach in China is that future maritime law should to some extent incorporate the new rules and concepts introduced by the Rotterdam Rules. This is the case with the transfer of rights through the bill of lading. In this regard, besides the general stipulations that have been recognized by most national laws, the Rotterdam Rules introduce a new right, the right of control, to the scope of the rights that can be transferred through the bill of lading, with the purpose of facilitating the upcoming paperless maritime practice and achieving a greater harmonization in international transport law and trade law.⁴⁵ In order to update CMC 1992 in line with the latest international approach, many studies recommend setting out rules on the right of control by modelling the provisions under the Rotterdam Rules.⁴⁶ However, other studies argue that this is not necessary.⁴⁷ As for the rationale of the transfer of rights through the bill of lading, generally there are two prevailing views: the ‘transfer of contract’ theory

the parties to the contract of carriage to freely decide the law applicable to the contract. See CMC 1992 art 269 ‘The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.’ Given that, once the Rotterdam Rules come into force in the future, it will inevitably influence China’s legal practice on carriage of goods by sea. See Liying Zhang, *The Influence of the Rotterdam Rules on China’s import and export* (1st edn, China University of Political Science and Law Press 2013) 79.

⁴⁵ The purpose can be seen from the following arguments.

Michael F Sturley, ‘Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules’ rights’ in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009) 27.

The need to update the law to facilitate electronic commerce explains a large share of the new subjects cover by the Rotterdam Rules...Before commercial parties will make the investment necessary to rely on e-commerce substitutes for bills of lading, they will need to know that the law provides predictable answers to such issues as the right of controlling party and transfer of rights-issues that Chapter 10 and 11 now address.

Alexander Von Ziegler, ‘Rotterdam Rules and underlying sale contract’ (2013) CMI Ybk PART II –The Work of the CMI 273, 275.

The Rotterdam Rules have now provided for such a system [The right of control]...It is surprising that such a provision has only now been introduced into the harmonized maritime law, and not earlier...Many Transport Conventions for land or air transport have had provisions on this issue for much longer, despite the fact that such issues are much less important there than in the context of maritime trade.

G J van der Ziel, ‘Delivery of the goods, rights of the controlling party and transfer of rights’ in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009) 245. ‘The relationship between the right of control under transport law and rights in the goods under the law of sale or property is that the former may facilitate the latter.’

⁴⁶ Zhaofang Zheng and Zhenkun Jia, ‘Tidan Yunshu Yu Huowu Kongzhiquan Wenti [The bill of lading and the Right of Control (author’s translation)]’ in Xiaonian Li (ed) *Selective papers on hot issues in international Maritime Law* (China Legal Publishing House, 2008) 60; Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 379-380; Yuzhuo Si, *the uniformity of international transport law* (1st edn, Beijing Normal University Publishing Group 2012) 275-79; Zhengliang Hu, Shicheng Yu and Binggui Xia, *Rotterdam Rules: consequence and countermeasures* (1st edn, Beijing University Press 2014) 497.

⁴⁷ Liang Zhao, ‘Judicial practice and reflection of legislation upon the right of control in the Rotterdam Rules in China’ (2009) 20 Annual of China Maritime Law 16, 21-22; Liying Zhang, *The Influence of the Rotterdam Rules on China’s import and export* (1st edn, China University of Political Science and Law Press 2013) 131-34.

and the ‘stipulation for another’ theory.⁴⁸ However, neither is fully coherent with the bill of lading practice.

After analysing the inconsistent views under the existing studies, the author noted that these studies displayed a number of deficiencies. First, a majority of the existing research merely focuses on one or two specific issues in relation to the transfer of rights through the bill of lading and fails to conduct a comprehensive and systematic analysis which would bring these issues together to discover the interplay between them. As a consequence, the existing studies have not touched on the underlying deficiencies in CMC 1992 which fundamentally contribute to these issues. Second, as mentioned before, any future Chinese maritime law, especially rules providing for solutions to the issues in relation to the transfer of rights through the bill of lading, should treat the balance of the interest between carrier and cargo interest as an important theme.⁴⁹ However, such a balance has not been considered in the existing research on specific transfer of rights issues. In this sense, it is doubtful whether the solutions suggested by the existing studies suffice to satisfy both the carrier and the cargo interest. Third, historically, the practice of the transfer of rights through the bill of lading can be traced back to fourteenth-century mercantile custom,⁵⁰ and later benefited much from the development of Anglo-American law.⁵¹ In this sense, this transfer *per se* is not a practice that has developed naturally from Chinese maritime commerce but rather borrowed from the foreign experience.⁵² However, few pieces of Chinese research have systematically looked

⁴⁸ The ‘transfer of contract’ theory suggests that the transfer of bill of lading would lead to the transfer of contract of carriage between the cargo interests. The ‘stipulation for another’ theory views the contract of carriage is contract concluded between the shipper and the carrier for the benefit of a third party (consignee or endorsee). Once the bill of lading is transferred to the third party, such a party should be entitled to exercise the rights under the contract of carriage. See Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 172-179. For detailed discussion on the two theories, see Chapter 3, 3.3.1 below.

⁴⁹ See discussion in 1.2.1 above.

⁵⁰ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 115.

⁵¹ Yu Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author’s translation)]* (2nd edn, Peking University Press 2005) 60; William Tetley, ‘Maritime Law as a Mixed Legal System’ (1999) 23 *Tulane Maritime Law Journal* 317,320. For detailed discussion in this regard, see Chapter 2, 2.3-2.4 below.

⁵² In history, China used to be a country following a Confucian philosophy of nature law, under which the aim of national law is to maintain social harmony. With the impact of the Confucian tradition, China had not developed advanced mercantile culture till the 1980s. Under such a circumstance, when drafting CMC 1992, the legislators transplanted a large amount of foreign laws and international conventions. In particular, the stipulations and judiciary insights on the function of bill of lading are deeply influenced by English law and American Law. See Percy R. Luney, JR., ‘Traditions and Foreign Influences: Systems of Law in China and Japan’ [1989] 52 *Law and Contemporary Problems* 129, 130-31; see also Daniel C.K. Chow, *the legal system of the People’s Republic of China in a nutshell* (3rd edn, West Academic Publishing 2015) 291; and also Yu

at how such a practice has been developed in international maritime commerce and the rationales by which the legal schemes on transfer of rights through the bill of lading are established in Anglo-American law and the Rotterdam Rules. Consequently, although some existing research suggests directly incorporating rules from Anglo-American law and the Rotterdam Rules as a solution for the outstanding problems in China,⁵³ whether such a ‘borrow to use’ approach fits neatly into the general legal system in China is questionable.

In the light of the foregoing deficiencies, it is not surprising to see a number of conflicting views on transfer of rights issues in Chinese academia. The existing studies are fragmented, incomplete and insufficient to fully solve the outstanding problems.

1.3 Objectives of the Research

The main objective of the thesis is to develop a framework under Chinese law which is able to thoroughly solve the outstanding problems regarding transfer of rights through the bill of lading and bring more clarity and certainty to bill of lading practices governed by Chinese law.

Ostensibly, the occurrence of these problems may be due to a lack of explicit stipulation on this subject in CMC 1992. However, in view of the strong inter-relationship between ocean cargo transport and commercial cargo transactions, and additionally the historical background under which CMC 1992 was drafted, these problems may have come into being for deeper reasons. Hence, the first sub-objective of this thesis is to explore the substantial reason behind these problems and then detect the underlying deficiencies of CMC 1992 in

Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author’s translation)]* (2nd edn, Peking University Press 2005) 9-63.

⁵³ For example, in Chinese academia, as to the legal nature of ‘bill of lading as document of title’ and the consequence of transfer of such a document of title, some argue that Chinese law should model English common law, indicating that as a document of title, the bill of lading merely represents goods. Accordingly, the transfer of such a bill of lading is equivalent to the transfer of possession of the goods covered by the bill, no more, no less. See Hai Li, ‘Reconsideration on Bill of Lading as Document of Title-And on the Nature of the B/L’ (1997) 7 *Annual of China Maritime Law* 41, 49. In addition, in China, there is increasing views suggest that the right of control provided by the Rotterdam Rules should be incorporated into future Chinese maritime law. See Zhiwen Li, *Hot issues in the Law of International Carriage of Goods* (1st edn, Law Press-China 2012) 260-61; Yuzhuo Si, *the uniformity of international transport law* (1st edn, Beijing Normal University Publishing Group 2012) 278-89.

this regard. Those deficiencies are expected to be addressed by the legal reform suggested by the thesis.

In addition, as a scheme would enable the rights to move from one cargo interest to another, the transfer of rights through the bill of lading would inevitably result in re-allocation of the risk arising from cargo transportation. Such a transfer would also influence the carrier's interest as it determines to whom the carrier should perform the obligation of delivery of goods and to what extent can the carrier discharge the liability for mis-delivery. At this point, the interest of the carrier and the interest of the cargo interests may conflict with each other.⁵⁴ This thereby requires the legal scheme on transfer of rights through the bill of lading to be able to reconcile these conflicting interests. With this in mind, the second sub-objective of this thesis is to develop interest-balanced solutions for the outstanding problems that have arisen under current Chinese Law.

Furthermore, since CMC 1992 is a product of legal transplant, and the thesis is also inspired by English law, American law and the Rotterdam Rules and its *travaux préparatoires* in terms of the legal stipulation of transfer of rights issues, the practical value of the Chinese legal reform suggested by this thesis to a large extent depends on how well these foreign and international experiences can be integrated into Chinese society. Therefore, the third sub-objective of the thesis is to envisage a localized legal scheme on transfer of rights through the bill of lading in the context of Chinese law. Such a legal scheme should incorporate the developed experience from Anglo-American law and the relevant international approach, whilst at the same time coordinating this with the Chinese legal system. On the economic level, such a scheme should enable Chinese enterprises to become more involved in international maritime commerce.

⁵⁴ This is particularly the case when the transfer of title to sue the carrier is involved. For details in this respect, see Chapter 4 below.

1.4 Research Questions

The central research question in this research is: *how could a systematic and effective legal scheme on transfer of rights through the bill of lading be established under Chinese law which would be able to solve the outstanding problems regarding the legal function of the bill of lading in transferring the contractual rights exercised towards the carrier and the rights relating to the goods?* A number of sub-questions are derived from this, which this thesis seeks to answer.

The first sub-question is: *Historically, is there any common characteristic shared by the national and international approach on developing the legal scheme governing transfer of rights through the bill of lading?* This question is discussed in Chapter 2, which systematically reviews how the legal scheme on transfer of rights through the bill of lading has been developed in selected national laws (Anglo-American law) and a recent international convention (the Rotterdam Rules and its *travaux preparatoires*).

The second sub-question is: *Compared to the foreign and international experience illustrated in Chapter 2, what are the underlying deficiencies in CMC 1992 that contribute to the failure of the current law to solve transfer of rights issues?* This question is considered in Chapter 3 by re-examining the major problems with the transfer of rights through the bill of lading that arise under current Chinese law.

The third sub-question is: *In any future Chinese law, to what extent should rights, whether a contractual right or a real right of goods, be transferred with the bill of lading?* This question is considered in Chapters 4, 5 and 6, which address the following issues respectively: whether the transfer of a bill of lading necessarily extinguishes the shipper's contractual right to sue the carrier; the legal consequence of transferring the bill of lading as a 'document of title'; whether the right of control suggested by the Rotterdam Rules should be legally recognized as a transferable right attached to the bill of lading. These issues are discussed with reference to the corresponding approach provided by English law, American law, the Rotterdam Rules and its *travaux preparatoires*. By analyzing the compatibility and the coherence of each approach with China's legal, commercial and economic background, solutions to these issues under a future Chinese law are suggested.

The final fourth sub-question is: *In a future Chinese law, for what legal rationale and in what legal manner should the transfer of rights scheme in question work.* This question is considered in Chapter 4, which explores the legal basis for the bill of lading to transfer the contractual right to sue the carrier. Ancillary to this question is a further question in Chapter 5, which explores under what conditions would the transfer of the bill of lading give rise to the legal effect of transferring the real rights of goods, and at what time would such an effect cease? The aforesaid questions in Chapter 4 and Chapter 5 are answered mainly by comparing the national approaches provided by English law and American law, and examining their adaptability with the legal environment and export traders' expectations in China. Additionally, the Rotterdam Rules are analyzed where necessary.

1.5 Research Methodology

This thesis adopts a mixed method comprising comparative, doctrinal analysis and law and economics approaches to explore the various issues raised by the research.

1.5.1 Comparative Legal Analysis

In general, the thesis adopts a comparative method to investigate the issues highlighted in the work. As mentioned above, the ultimate purpose of this study is to reform current Chinese law governing bills of lading and suggests a legal scheme that would solve the problems associated with the transfer of rights through the bill of lading. To achieve this aim, a comparative analysis conducted between Chinese law and some selected foreign laws governing similar matters is an important aid since these foreign laws can provide examples of how particular problems are resolved elsewhere, and perhaps act as a model.⁵⁵ As noted by Tetley, in the last two centuries modern maritime law has benefited a great deal from English common law.⁵⁶ This is particularly true for the development of modern rules

⁵⁵ Mathias Seims, *Comparative Law* (1st edn, Cambridge University Press 2014) 4.

⁵⁶ William Tetley, 'Maritime Law as a Mixed Legal System' (1999) 23 *Tulane Maritime Law Journal* 317, 320.

governing transfer of rights through the bill of lading. Many important functions of the bill of lading in international maritime practice, for example, the ‘document of title’, originated from English common law.⁵⁷ In addition to the common law heritage, English law has also made a great contribution to the formation of statutory rules on the transfer of rights through the bill of lading. The COGSA 1992, which is regarded as a remarkable achievement in this respect, has been referenced by many other countries such as South Africa and Singapore to improve their national laws.⁵⁸ As a country inheriting the common law heritage from English law, the US has additionally over the last century developed a different statutory mode on the transfer of rights through the bill of lading. Such a mode has also been proved successful to solve the problems in this area.⁵⁹ On the level of international law, the Rotterdam Rules and its *travaux preparatoires* have brought some new features to this legal field. Although CMC 1992 itself is a product of legal transplant, due to the timing of the drafting work of CMC 1992 it did not benefit from the aforesaid foreign and international experiences. Therefore, it is meaningful to revisit English law, American law, the Rotterdam Rules and its *travaux preparatoires*. By comparing their stipulations on transfer of rights through the bill of lading and the underlying rationale for such stipulations, what can be implied for the reform of Chinese law in this respect are analyzed. Combining these implications with China’s legal, commercial and economic background, solutions for the outstanding problems in Chinese law are proposed in a built-to-suit way.

1.5.2 Doctrinal Analysis

In this thesis, doctrinal analysis constitutes an important part of the comparative study between Chinese law, Anglo-American law and the international rules (the Rotterdam Rules and its *travaux preparatoires*).⁶⁰ Such a research method allows the author to examine a variety of sources on transfer of rights through the bill of lading which not only include primary sources such as legislation and case law but also cover secondary sources such as

⁵⁷ Torsten Schmitz, ‘The bill of lading as a document of title’ (2011) *Journal of International Trade Law and Policy* 255, 260. The legal clarification of such a function can be traced back to *Lickbarrow v Mason* (1794) 5 TR 683 (KB). This case is discussed in Chapter 5, 5.2.1.1 below.

⁵⁸ William Tetley, *Marine Cargo Claims*, vol 1 (4th edn, Thomson Carswell 2008) 464.

⁵⁹ *ibid* 466-86.

⁶⁰ ‘Comparative legal analysis can be undertaken doctrinally or by reference to a particular social phenomenon you are hoping to find a solution to.’ Caroline Morris and Cian Murphy, *Getting a PhD in Law* (1st edn, Hart Publishing 2011) 37.

academic books and articles.⁶¹ By doctrinally examining these materials, the different legal approaches towards the specific issues relating to transfer of rights through the bill of lading are compared and analyzed to determine which is more helpful to remove the ambiguity under CMC 1992.⁶² In addition, these foreign and international approaches are viewed under the context of general Chinese law to determine whether they are compatible with China's legal system.⁶³

1.5.3 Law and Economics: a Contextual Approach

The contextual approach is another instrument applied in the comparative analysis of different approaches to the transfer of rights through the bill of lading. According to the contextual approach, law should be studied 'within a broader context in which the law was formed and operates' as law is usually determined by the society's need.⁶⁴ This is also the case when the national law covering international business matters is concerned. Nowadays, with the development of international business, states often compete with each other for getting a better position in the international business activities.⁶⁵ As a consequence, the formation and reform of national law relating to international business has not simply been market-based but to a large extent reflects a nation's economic policy in international business activities.⁶⁶ CMC 1992 is a typical example in this regard as it reflects China's policy to promote the foreign-related ocean cargo transport and transaction, and its intention to protect the interest of the parties getting involved in these foreign-related marine activities.⁶⁷ Basically, this should also be the case in the future Chinese maritime law; however, the focus of China's maritime policy and the emphasis on the legal protection afforded to relevant parties, may be changed due to the variation in the economic status of

⁶¹ 'The black letter (Doctrinal analysis) research aims to systematize, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources.' Mike Mc Conville and Wing Hong Chui, *Research Methods for Law* (1st edn, University of Edinburgh Press Ltd 2007) 4.

⁶² *ibid.*

⁶³ One important function of doctrinal analysis is to bring consistency and coherence to a set of rules that might appear at first glance to be an unrelated or jumbled mass.' Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing Ltd, 2011) 31.

⁶⁴ Nicholas HD Foster, 'Comparative Commercial Law: Rules or Context?' in Esin Orucu and David Nelken (eds), *Comparative Law-A Handbook* (1st edn, Hart Publishing 2007) 267-69.

⁶⁵ *ibid.*, 264-65.

⁶⁶ *ibid.*

⁶⁷ CMC 1992, art 1 'This Code is enacted with a view to regulating the relations arising from maritime transport and those pertaining to ships, to securing and protecting the legitimate rights and interests of the parties concerned, and to promoting the development of maritime transport, economy and trade.'

the industrial groups to which these parties belong.⁶⁸ As such, when exploring the solutions for some outstanding problems in the transfer of rights through the bill of lading in Chinese law, this thesis analyzes to what extent the rules on this under English law, American law, the Rotterdam Rules and its *travaux préparatoires* are able to serve China's economic needs in establishing rules to cover transfer of rights issues. In this way, the proposed legal scheme on transfer of rights through the bill of lading would be accommodated more thoroughly and efficiently into China's economic environment.

1.6 Outline of Chapters

Chapter one illustrates the background, the need, and the basic strategies for this research. Other seafaring countries⁶⁹ and international law⁷⁰ have developed explicit rules governing transfer of rights through the bill of lading. However, this is not the case with CMC 1992 which has clarified neither the extent of the transferable rights among the cargo interests, including the contractual rights exercised towards the carrier and the rights attached to the goods, nor the rationale for transferring these rights through the bill of lading.⁷¹ The lack of authoritative and conclusive guidance on these two aspects has caused enormous uncertainty in practice. To thoroughly solve the problems present in these, this chapter argues that it is necessary to revisit how the legal scheme on transfer of rights through the bill of lading has been developed in Anglo-American law and the Rotterdam Rules.⁷² This will bring to the fore the underlying deficiencies in CMC 1992 with reference to what can be implied from the aforesaid rules. In an effort to address these deficiencies, a comparative study is proposed

⁶⁸ Li (n34) 351-52. The 'relevant industrial groups' mentioned herein refer to carriers and cargo traders who has interest in carriage of goods by sea (cargo interests). For details of such change, see discussion in Chapter 3, 3.6.1 below.

⁶⁹ For example, in the UK, the main act providing the solutions to the transfer of rights issues is COGSA 1992. For the issues beyond the scope of COGSA 1992, the solutions can be found at common law and equity. In the US, FBLA 1994 and UCC have provided systematic and comprehensive rules on transfer of rights through the bill of lading. The rules do not only target paper bill of lading, but also cover the transfer of electronic bill of lading. Similar to the English law, in the US, the issues left outside the governance of statutory law is subject to common law. For example, in American law, the condition under which the holder will assume the contractual liability to the carrier is subject to common law. This is discussed in Chapter 4, 4.2.2.

⁷⁰ The international rules governing transfer of rights through the bill of lading can be found in the Rotterdam Rules, Chapter 10, Chapter 11 and the rules governing right of suit in the UNCITRAL Drafts.

⁷¹ See discussion in Chapter 1, 1.1 above.

⁷² See discussion in Chapter 1, 1.5.1 above.

of the aforementioned jurisdictions and convention. The comparison is not conducted solely between the laws *per se* but includes the commercial and economic rationale of the laws. In this way, the future rule governing transfer of rights issues under Chinese law, though it has assimilated the foreign experience, can be coherent and compatible with the Chinese legal, commercial and economic environment.

Chapter two reviews the origin and development of the legal regime governing transfer of rights through the bill of lading in English law, American law and the Rotterdam Rules.⁷³ Through such a historical review, this chapter underlines the need for statutory intervention to clarify the issues relating to transfer of rights through the bill of lading and uncovers the different value orientations present in English and American law at this point.⁷⁴ More importantly, this chapter indicates that the key for the construction of this legal scheme is to properly reflect the inherent connection between the carriage of goods and the transaction of cargo, despite the fact that such a legal scheme to a large extent would be established under the law governing carriage of goods by sea.⁷⁵

Chapter three looks at the current rules and legal practice on the transfer of rights issues in China. By analyzing the debates on the problems in Chinese law and with reference to the conclusion of Chapter 2, this chapter argues that one underlying deficiency of CMC 1992 lies in its failure to legally establish the connection between the transfer of rights through the bill of lading and the underlying transaction of goods, thereby resulting in a disequilibrium between different interest holders.⁷⁶ Subsequently, through a discussion from both an economic and legal perspective, this chapter seeks to identify proper guidelines to improve current Chinese law. The economic observation evaluates the conflicting interests, arguing

⁷³ In general, this historical review of Anglo-American law and the Rotterdam Rules covers two topics, which are, the transfer of contractual right against the carrier and the transfer of rights arising from bill of lading as document of title. See discussion from Chapter 2, 2.2 to 2.5 below.

⁷⁴ See discussion in Chapter 2, 2.4 below.

⁷⁵ See discussion in Chapter 2, 2.6 below.

⁷⁶ Such a disequilibrium reflects from two aspects. First, as indicated in 3.2, Chapter 4 of CMC 1992, which governs the carriage of goods by sea, focuses on limiting carrier's liabilities rather than clarifying the right of cargo interest in cargo transit. As a result, the legal status of the cargo interests (shipper, consignee, and endorsee) is less crystalized than the carrier. Second, the current rule on transfer of rights through the bill of lading (article 78 of CMC) simply provides that the relationship between the holder and the carrier is governed by the bill of lading. This rule neglects the fact that in some situations the shipper, who is parted with the lawful possession of the bill of lading, may still need to exercise contractual right to sue the carrier. Article 78 does not provide legal ground for the shipper to sue in the foregoing situation. As a result, the balance of interest between the carrier and the cargo interest is undermined. The problem is addressed in Chapter 3, 3.3.1, and the detailed discussion can be found in Chapter 4, 4.3.1.

that the reform of Chinese maritime law should be conducted by adopting a ‘trade holistic’ view, which should cast more consideration on the protection of cargo interests, especially the export traders.⁷⁷ Under such guidance, the legal scheme governing transfer of rights in a future Chinese maritime law should re-balance the interests of the carrier and cargo interests, and also be able to streamline shipping and trading practice as a whole. In addition, such a legal scheme should fit in with the commercial trend of paperless maritime practice.⁷⁸ The legal analysis reveals the dissonance between CMC 1992 and other relevant legislations in China, which constitutes another underlying deficiency of CMC 1992.⁷⁹ This highlights that the future rule on transfer of rights through the bill of lading established in Chinese law, though to a large extent inspired by Anglo-American law, should be harmonized with China’s civil law.⁸⁰

Chapter four targets a specific issue relating to the transfer of rights through the bill of lading – the transfer of the right to sue the carrier. This issue is discussed here by first exploring the legal basis for the holder’s title to sue by comparing the compatibility of relevant English and American law with Chinese law. Taking the protection of Chinese export traders’ interest and coherence of law into account, this chapter argues that the holder’s title to sue, though to large extent invoked on a contractual basis, should be linked with the *bona fide* purchaser rule. As a result, the bill of lading would become a more reliable document in securing the holder’s right towards the carrier, whilst also protecting the integrity and the consecutiveness of the underlying string sale.⁸¹ Such a result generally fulfils Chinese export traders’ expectations on the commercial value of the bill of lading. Second, this chapter attempts to answer the question whether the shipper should still be entitled to sue the carrier in contract

⁷⁷ See discussion in Chapter 3, 3.6.1 below.

⁷⁸ See discussion in Chapter 3, 3.6.2 below.

⁷⁹ See discussion in Chapter 3, 3.5 below.

⁸⁰ See discussion in Chapter 3, 3.6.3 below. In general, China is claimed to be country with a civil law tradition although in some legislations the influence of common law can also be seen. John Shijian Mo, ‘Legal Culture and Legal Transplants—Convergence of Civil Law and Common Law Traditions in Chinese Private Law’ (Reports to the XVIIIth International Congress of Comparative Law, Washington, D.C. 2010) 2.

According to General Principles of the Civil Law of the People's Republic of China 1986, art 2:

The Civil Law of the People's Republic of China shall adjust property relationships and personal relationships between civil subjects with equal status, that is, between citizens, between legal persons and between citizens and legal persons.

Pursuant to this rule, in a broad meaning, the civil law in China does not only refer to the General Principles of the Civil Law of the People's Republic of China 1986, but also include other legislations which govern the matters mentioned in this Article, for example, the contract law, the property law, the tort law, etc. In this thesis, the concept ‘civil law’ is also used in this way.

⁸¹ See discussion in Chapter 4, 4.2.3 below.

after the transfer of bill of lading. In this regard, this thesis summarizes the situations where the shipper usually intends to exercise such a right and observes that English law,⁸² American law⁸³ and the *travaux préparatoires* of the Rotterdam Rules⁸⁴ all develop exceptional rules which allow the shipper under the aforesaid situations to sue the carrier in contract even though these rules contain different legal requirements for the shipper to invoke such a right. By comparing the different approach on establishing such legal requirements, this chapter indicates that the *travaux préparatoires* of the Rotterdam Rules may provide a simple and well-balanced model for a future Chinese law. Based on that, this chapter concludes that the shipper who suffered substantial loss as a consequence of the carrier's breach of duty should be entitled to sue the carrier in contract even though the bill of lading has been transferred to the holder, provided that the shipper is able to prove that the holder does not suffer the same loss.⁸⁵

Chapter five concerns the rights in relation to goods. Under current Chinese law, such a right is usually construed with regard to the legal effect of the bill of lading as a 'document of title', which gives the holder exclusive control over the goods. The existing interpretation of such a concept either equates it with 'document of property' or 'document of possession of goods'. However, neither of them is in line with the China's property law and theory.⁸⁶ To clarify the legal nature of such a concept and make it fit neatly into the Chinese legal system, the thesis revisits the evolution of such a concept in Anglo-American law and the latest development under the Rotterdam Rules, demonstrating that such a concept could be understood in two senses. Within the scope of maritime law, such a concept can be construed as the contractual right to claim delivery of goods from the carrier. By virtue of such a concept, the cargo interest must present the original bill of lading when claiming delivery of goods from the carrier otherwise the carrier is entitled to refuse to make the delivery. So too, the carrier can only discharge his liability for misdelivery if the delivery is made against surrender of the

⁸² In English law, the shipper in such situations may sue in bailment. See discussion in Chapter 4, 4.3.2 below.

⁸³ In American Law, the shipper in such a situation may sue by proving title to goods or assumption of loss or damage to goods. See discussion in Chapter 4, 4.3.3 below.

⁸⁴ According to the UNCITRAL Drafts, the shipper in such situations may sue if he is able to prove that the holder did not suffer the same loss or damage. UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art 68 (b). Such an approach is discussed in Chapter 4, 4.3.4 below.

⁸⁵ See discussion in Chapter 4, 4.3.5 below.

⁸⁶ See discussion in Chapter 5, 5.2.4.1 below.

original bill by the cargo interest.⁸⁷

In order to maintain the coherence of law and complete the exclusivity of control over the goods that can be acquired by the holder of a bill of lading, this thesis recommends making some modifications in property law by extending the application of the good faith purchaser rule to the procurement of a bill of lading in maritime commerce. Unless contrary consent is proved, the real right of goods should be deemed to be transferred to the holder of the bill of lading if the holder acquired the bill by paying a reasonable price in good faith.⁸⁸ Last but not least, to prevent trafficking of the bill of lading, this chapter indicates that both the contractual and proprietary effect of transferring the bill of lading as a document of title should cease once the goods covered by the bill have been delivered to a person entitled to them. The bona fide purchaser who suffered loss after that can only sue the carrier for compensation of his loss.⁸⁹

Chapter six examines whether the right of control needs to be provided by a future Chinese law as a right that can be transferred with the bill of lading. This chapter analyzes the legal nature of such a right under the Rotterdam Rules, indicating that the right of control in this nature is a right to unilaterally alter the agreed contract of carriage by the relevant cargo interests.⁹⁰ The chapter then reviews a number of international rules which provide for analogous concepts and determines that the right of control is of little help in efforts to harmonize and modernize the international shipping and trading law,⁹¹ nor does it help to improve current international practice in respect of using the electronic bill of lading.⁹² Combining the aforesaid implications with the *status quo* of China's legal and commercial environment, this chapter concludes that at current stage there is no need to provide the right of control as a transferable right attached to the bill of lading.⁹³ In addition, by analyzing the real need of the carrier and the cargo interest in this regard, and comparing the approaches provided by English law and American law, this thesis ultimately suggests that a future Chinese law should explicitly exempt the carrier from the liability for misdelivery if the

⁸⁷ See discussion in Chapter 5, 5.2.4.2 below.

⁸⁸ See discussion in Chapter 5, 5.2.4.1 below.

⁸⁹ See discussion in Chapter 5, 5.3.4 below.

⁹⁰ See discussion in Chapter 6, 6.2.1 below.

⁹¹ See discussion in Chapter 6, 6.2.3 below.

⁹² See discussion in Chapter 6, 6.3 below.

⁹³ See discussion in Chapter 6, 6.2.4 and 6.3 below.

carrier disposes of the goods by following the instructions sent by a cargo interest provided by the law.⁹⁴ It also suggests that the concept of ‘control’ should be introduced into the rules governing the electronic bill of lading so as to replicate the exclusivity of the rights that can be acquired by a person holding a paper bill of lading.⁹⁵

Chapter seven summarizes the findings of each chapter and closes with a set of recommendations on establishing a predictable, well-balanced and coherent transfer of rights legal scheme in China.⁹⁶ The intention of this chapter is to provide China with some specific guidelines on how it could merge its economic policy and business reality into the legal reform regarding transfer of rights by the bill of lading, and how it could develop a legal scheme in this regard that is coherent with existing legal systems and strike a better balance among the two interest groups: carrier and cargo interest. By referring to the Anglo-American views and the latest international approach, this thesis recommends that the Chinese legal reform should be conducted from a trade holistic perspective.⁹⁷ Regarding the scope of the transferable rights that should be governed by statutory law, the contractual right to sue, the right to claim delivery and some indicative rules regarding the acquisition of real right of goods should be included.⁹⁸ As to the rationale and legal manner of transferring the bill of lading, this chapter highlights two points. Firstly, it recommends that the good faith purchaser rule is introduced into a law governing the transfer of the bill of lading with the purpose of maintaining the tradability of the bill. In this sense, the legal nature of the bill of lading would be close to a negotiable instrument which itself is capable to vest certain rights in its holder, although for a bill of lading such a capability is always subject to the underlying transaction of goods. Secondly, a flexible manner governing transfer of rights should be established, which couples the transfer of the bill of lading with some trade-related factors such as the assumption of cargo loss or damage and the intention of the parties involved in the cargo transaction.⁹⁹

⁹⁴ See discussion in Chapter 6, 6.4.3 below.

⁹⁵ *ibid.*

⁹⁶ Based on the findings of this thesis, at last Chapter 7 provides suggestions to establish a series of rules on transfer of rights through the bill of lading in a future Chinese law. See Chapter 7, 7.3 below.

⁹⁷ See discussion in Chapter 7, 7.2.1 below.

⁹⁸ See discussion in Chapter 7, 7.2.2 below.

⁹⁹ See discussion in Chapter 7, 7.2.3 below.

1.7 Limitation of the Study

Due to the restrictions of time and scope for this research, this thesis cannot avoid suffering from certain limitation. As to the scope of the study, this thesis only targets the instance where the negotiable or transferable bill of lading is issued rather than looking at the whole spectrum of the transfer of rights between cargo interests in maritime trade.¹⁰⁰ As a result, the rules envisaged by this thesis on transfer of rights only apply to the negotiable or transferable bill of lading. Other shipping documents, for instance, the straight bill of lading, the sea waybill and the delivery order, are left outside the coverage of this thesis. As shown from the experience in other jurisdictions,¹⁰¹ these documents may also have a certain ability to transfer rights between cargo interests although they are not as transferable or negotiable as the bill of lading (order bill and bearer bill) targeted by this thesis. In this sense, the legal scheme on transfer of rights suggested by this thesis is not complete.

¹⁰⁰ The negotiable or transferable bill of lading discussed in this thesis includes two type of bill of lading in practice, which are, the order bill of lading and the bear bill of lading.

¹⁰¹ As suggested by laws in other jurisdictions, a complete legal scheme governing transfer of rights should also include the stipulations on transfer of rights through other types of shipping documents. For example, see COGSA 1992, s2 (1).

Subject to the following provisions of this section, a person who becomes... (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...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.

Chapter Two: Historical review of the legal scheme governing the transfer of rights between cargo interests

2.1 Introduction

Although the purpose of the research is to reform Chinese law by developing a proper legal scheme that governs the transfer of rights through the bill of lading, it would be useful to set out historical information to see how such a legal scheme has developed in other jurisdictions and the international convention.

The historical review starts from the second section which explores the origin of such a legal scheme. This section demonstrates how the bill of lading began to develop its effect in proving the entitlement to goods and its contractual effect between the cargo interest and the carrier under *Lex mercatoria*. The third section subsequently looks at how these two effects evolved as ‘document of title’ and ‘title to sue’, which now has been deemed as two major issues governed by the legal scheme on the transfer of rights through the bill of lading. The common law contribution in this respect is illustrated. After that, in the fourth section, the development of Anglo-American statutory law is examined so as to figure out how these statutory rules underpin the legal scheme on transfer of rights through different ways. Since the Rotterdam Rules was drafted, the issues regarding transfer of rights have also become concerns of the international convention on carriage of goods by sea. Such an international approach is discussed in the fifth section, aiming to identify the up-to-date development on the law and philosophy with respect to the transfer of rights through the bill of lading. Lastly, this chapter ends with the common implications observed from the historical review of the evolution of the transfer of rights legal scheme. These implications are expected to be helpful to establish such a legal scheme in China.

2.2 The origin of transfer of rights scheme under *Lex mercatoria*

As mentioned in Chapter 1, the current legal schemes that cover transfer of rights are mainly operated through the bill of lading; in this sense, the development of a transfer of rights scheme is closely related to the evolution of the legal function of the bill of lading. As to the origin of the bill of lading, it is known that the bill of lading was not created by statutory law nor was it a product of case law. As one of the most common documents employed in commercial practice, the bill of lading was generated from the custom of merchants.¹ In this section, the origin of the key function of the bill of lading will be discussed in the context of *Lex mercatoria*.

2.2.1 The Origin of Bill of Lading as Proof of Entitlement to Goods

The bill of lading originated in the fourteenth century when maritime trade in the Mediterranean was growing significantly.² Since then, a record of proof of shipment has become essential. At that time, such a function was performed by the ship's register which was signed by the ship's mate.³ Although these types of records are often regarded as the antecedent of the modern bill of lading, which served as a receipt of goods from the shipper, there was no separate copy of such records issued as during those periods the merchants usually travelled with their goods.⁴ This changed with the development of new trading practices.⁵ Since the scope of maritime trade was expanding geographically, travelling with goods had become more of an inconvenience to merchants.⁶ Under such circumstances, merchants began to demand copies of the ship's register from the carrier and that one be sent to his correspondents to advise the shipment of goods and other information concerning the disposal of goods.⁷ Although this is quite similar to the transfer of the bill of lading in contemporary practice, it does not mean that a copy of the ship's register (the early bill of

¹ Chester B. McLaughlin, 'The Evolution of the Ocean Bill of Lading' (1926) 35 The Yale Law Journal 548, 549.

² McLaughlin (n1) 550; John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 115.

³ Bennett William Porter, *The History and Present Position of the Bill of Lading as Document of Title* (1st edn, CUP 1914) 7.

⁴ Enrico Bensa, *The Early History of Bills of Lading* (1st edn, Caimo & C 1925) 6.

⁵ Michael D. Bools, *The Bill of Lading, a document of title to goods, an Anglo-American Comparison* (1st edn LLP 1997) 1.

⁶ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 115.

⁷ Bensa (n4) 7; Porter (n3) 4.

lading) represented any right in relation to the delivery of goods as the carrier would be able to know to whom the delivery should be made from his own register.⁸

The requirement for the bill of lading to represent certain entitlements in relation to goods started in the sixteenth century when trade practice underwent a further change.⁹ Although goods may not have been traded as frequently as today, sometimes the sellers would dispatch the goods before identifying a specific buyer.¹⁰ Such a new trading practice inevitably gave rise to the need to transfer the bill of lading.¹¹ Under such circumstances, it might be impossible for the carrier to know to whom the delivery should be made until the goods arrived at the destination. As a result, the verification of the identity of the receiver became difficult for both the carrier and the person who wished to claim the delivery. Such a consequence thereby brought a new expectation for the function of the bill of lading, namely, to evidence certain entitlements with respect to the delivery of goods so that its holder could exercise the rights against the carrier by presenting the bill of lading.¹² Nowadays, many bills of lading contain clauses that set out such a function, for instance: ‘One original Bill of Lading must be surrendered duly endorsed in exchange for the cargo or delivery order whereupon all other Bills of Lading to be void’.¹³

Despite not being expressly provided, it can be inferred from the aforesaid clause that the bill of lading confers on its holder the right to claim delivery from the carrier. In the US, such a function is not only found in the clause of the bill of lading but is also expressly provided by legislation. In accordance with FBLA 1994:

... a common carrier may deliver the goods covered by a bill of lading to (3) a person in possession of a negotiable bill if (A) the goods are deliverable to the order of that person; or (B) the bill has been indorsed to that person or in blank by the consignee or another endorsee.¹⁴

⁸ Bools (n5) 3.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ Euro Marine Logistics NV Bill of Lading Terms & Conditions (*EML*) < <http://www.euro-marine.eu/billOfLadingConditions.html>> accessed 09 June 2017.

¹⁴ FBLA 1994, §80110.

Consequently, the phenomenon that the bill of lading may enable its holder to procure delivery from the carrier has become a common rule in commercial practice.

2.2.2 The Contractual Function of Bill of Lading

It is commonly agreed that the early bill of lading was invented to serve as a receipt for goods rather than being intended to operate as a contract of carriage.¹⁵ One important reason for this is that the early bill of lading did not contain a separate agreement of carriage.¹⁶ As to the relationship between the shipper and the carrier, it was often governed by the charterparties.¹⁷ A representative work with respect to shipping practice in 1622 stated that: ‘No ship should be freighted without a Charterpartie, meaning a Charter or Covenant between two parties, the Master and the Merchant ...’.¹⁸ The aforesaid words clearly suggest that the conclusion of a charterparty between a shipper and carrier was common practice during that period. In another early work, Jacob argued that ‘Charterparties of Affreightment settle the Agreement, and the Bills of Lading the Contents of the Cargo, and bind the Master to deliver the Goods in good Condition at the Place of Discharge according to the Agreement ...’.¹⁹ From the aforesaid argument, it can be seen that the contents of the bill of lading were no more than evidence of the status of cargo. Although the carrier was bound to deliver the goods, such an obligation derived from the charterparties rather than the bill of lading. In addition, if the bill of lading was not considered to perform any contractual function when it was in a shipper’s hand, there would be no reason to treat the bill of lading differently when it came to a transferee’s hand.²⁰ Therefore, at that time there was no need to conceive the bill of lading as a contractual document as there would usually exist a pre-concluded charterparty.

Although the issuance of a bill of lading without a charterparty was not prevalent in the early history of the bill of lading, it is simplistic to state that no bills of lading at that time embodied a contract of carriage.²¹ With the growing amount of cargo carried per ship, concluding a

¹⁵ Wilson (n6) 118; McLaughlin (n1) 556.

¹⁶ Bools (n5) 5.

¹⁷ *ibid* 7.

¹⁸ Gerard De Malynes, *Constuedo, vel Lex Mercatoria*, or *The Ancient Law-Merchant* (reprint 1997, Adam Islip 1622) 134.

¹⁹ Giles Jacob, *Lex Mercatoria: or, The Merchant’s Companion* (2nd edn, E. and R. Nutt, and R. Gosling, for B. Motte, J. Clarke, J. Lacy 1729) 82.

²⁰ Bools (n5) 7.

²¹ Bools (n5) 4-5.

charterparty with every merchant became impossible for the carrier. To cope with such a problem, in some rare cases the bill of lading was issued with a full agreement as it usually is today. A leading example can be found in the case of *The White Angel* in which a bill was issued with clauses three times longer than ordinary sixteenth century bills.²² With these clauses, the issues with respect to the payment of freight and obligation of delivery were fully addressed. This made the bill of lading resemble the modern bill of lading which has a certain contractual effect.²³ In addition, it is submitted that the development of a bill of lading's contractual effect was also potentially linked with the bill's function regarding the delivery of goods. As discussed in 2.2.1, with the prevalence of the practice of selling goods in transit, the transferee of the bill of lading expected it to entitle him to procure delivery from the carrier,²⁴ or *vice versa*, the bill of lading itself should constitute the carrier's promise to deliver. Such an evolution in the bill of lading's function is evidenced by the development of *Lex mercatoria* during that period. This can be seen from an early definition of the bill of lading:

Bills of Lading, is a memorandum, of acknowledgement, signed by the master of the ship; and given to a merchant, or any other person, containing an account of the goods which the master has received on board from that merchant or other person, with a promise to deliver them at the intended place, for a certain salary.²⁵

This argument clearly illustrates that the bill of lading embodied a promise by the carrier to deliver goods in return for freight. Such arrangements may reflect a sort of contractual effect.²⁶ In this sense, the time that the bill of lading started to have a contractual effect can be traced back to the sixteenth century, at the same time as the delivery function developed, despite the majority of bills of lading not being issued with independent contractual terms at that time. Such a result is also evidenced by two sixteenth century bills of lading, *The Thomas* and *The Marye*, which were signed by both shippers and masters and are regarded as 'indentures'.²⁷

²² Samantha Peel, 'The Development of the Bill of Lading: its future in the maritime industry' (Dphil Thesis, University of Plymouth 2002) 79.

²³ *The White Angel* (1549) Select Pleas vol.II, 59.

²⁴ Bools (n5) 4.

²⁵ Malachy Postelthwayt, *The Universal Dictionary of Trade and Commerce, translated from the French of the Celebrated Monsieur Savory* (2nd edn, John and Paul Knapton 1751-1757) cited from Bools (n5) 7.

²⁶ Peel (n22) 81.

²⁷ *ibid.*

2.3 The Common Law

As can be seen from the discussion in 2.2, both the delivery function and the contractual function of the bill of lading originated by virtue of *Lex mercatoria*; however, it might be easier to acknowledge the existence of these functions rather than clarifying their legal source. This may be attributed to the nature of *Lex mercatoria* which is essentially a system of trading custom and practice common to merchants. As to the functions of the bill of lading, they were recognized by merchants based on their experience rather than from legal reasoning.²⁸ One might assume that this was adequate at the early stage of maritime trade. However, this was not the case since the relationship between cargo interests and carrier became more and more complicated in the eighteenth century. Once a dispute arose, questions about the legal foundations of the relevant function of the bill of lading appeared to be unavoidable. Since then, common law has contributed to solving such problems.²⁹

2.3.1 The ‘Document of Title’

Although the Law of Merchant recognized that the bill of lading may enable its holder to claim delivery from the carrier, it was not clear where such a function came from.³⁰ The debate in this respect surrounded the question of whether such a function was established on the property of goods. In other words, whether the transfer of the bill of lading would transfer the proprietary right of goods. This question haunted the English courts throughout the eighteenth century, and was first answered in the landmark case of *Lickbarrow v Manson*.³¹ In this case, there were competing claims to a single cargo from two cargo interests. The King’s Bench finally denied the consignor’s right of stoppage after the bill of lading had been

The term ‘indentures’ comes from the medieval English ‘indenture of retainer’, a legal contract written in duplicate on the same sheet, with the copies separated by cutting along a jagged (toothed, hence the term ‘*indenture*’) line so that the teeth of the two parts could later be refitted to confirm authenticity. Each party to the deed would then retain a part. The term is used for any kind of [deed](#) executed by more than one party.

²⁸ Bools (n5) 4.

²⁹ William Tetley, ‘Maritime Law as a Mixed Legal System’ (1999) 23 *Tulane Maritime Law Journal* 317,320.

³⁰ Bools (n5) 4.

³¹ (1794) 5 TR 683 (KB).

endorsed to a *bone fide* third party by reason that the property in goods had been passed at that time.³² Such a judgment was supported by the jury of merchants who stated that:

... bills of lading, are negotiable and transferable by the shipper or shippers of such goods to any other person or persons by such shipper or shippers endorsing such bills of lading...and delivering or transmitting the same so indorsed ...; and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons.³³

The wording of the aforesaid verdict appears to link the transfer of property of goods with the endorsement and transfer of the bill of lading. After that case, the bill of lading was commonly conceived as a 'document of title'.³⁴ However, in fact, the jury's verdict did not mention whether the transfer and endorsement of the bill of lading would always move the property of goods.³⁵ The answer to this question can be found in the later cases. In *Sanders Bros v Maclean & Co*,³⁶ Bowen LJ held that:

Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of goods.³⁷

A similar argument can be found in the subsequent case of *Sewell v Burdick*,³⁸ in which Lord Bramwell held that:

The truth is that the property does not pass by the endorsement but by the contract in pursuance of which the endorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not endorsed...My concern is to show that the property passes by the contract. So if the contract was one of pledge, the property would be bound by the contract, at least, as to all who had notice of it, though the bill of lading was not handed over.
...³⁹

³² *ibid.*

³³ *ibid* 685.

³⁴ Simon Baughen, *Shipping Law* (6th edn, Routledge-Cavendish 2015) 8.

³⁵ Anthony Rogers, Jason Chuah, Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (4th edn, Routledge 2016) 301.

³⁶ (1883) 11 QB 327 (CA).

³⁷ *ibid* 341.

³⁸ [1881-85] All ER 223, (1884) 10 App Cas 74 (HL).

³⁹ *Sewell v Burdick* [1881-85] All ER 223, 241 (Lord Bramwell).

The aforesaid verdicts clearly indicate that both the nature and the timing of the property that will be passed depend on the intention of the parties to the contract governing cargo transactions rather than mere transfer and/or endorsement of the bill of lading. The focus on the bill of lading's effect of passing property suggested in *Lickbarrow v Manson* was thus altered. Although such a result may not be coherent with the literal meaning of the notion of 'bill of lading as a document of title', it properly mirrors the trading practice in which the parties to the sale contract usually have other arrangements on passing the property of goods.⁴⁰ Given this, nowadays, when the expression 'document of title' is employed to describe the legal quality of the bill of lading at common law, it is never equated to the expression 'document of property'. As noted by Mustill LJ in *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)*⁴¹:

I put [document of title] in quotation marks, because although it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning ... The Bills of Lading fulfils two distinct function. 1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable 'key to the warehouse.' 2. It is a document which, although not itself capable of directly transferring the property in the goods to which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed.⁴²

This statement clearly suggests that the expression 'bill of lading as a document of title' at common law merely refers to the constructive possession of goods, and the transfer of such a document of title itself is nothing to do with the transfer of property in goods.

2.3.2 The Title to Sue

Another contribution of common law in dealing with the transfer of rights issue is in attempts to solve problems regarding the title to sue of the cargo interest who is not the original party to the contract of carriage. The significance of this type of problem has grown since more parties have begun to engage in maritime trade. As a result, the transportation of goods became an issue that not only involves the original parties to the contract of carriage but also

⁴⁰ Carole Murray, David Holloway and Daren Timson-Hunt, *Export Trade: The law and Practice of International Trade* (11th edn, Sweet & Maxwell 2007) 30.

⁴¹ [1990] 1 Lloyd's Rep 252 (CA).

⁴² *ibid* 270.

influences a broad range of cargo interests, such as a bank financing the underlying sales of goods, the sub-buyer of cargo resold on afloat, etc. These parties usually suffered substantial risk arising from the carriage of goods but at the same time might not be able to sue the carrier for recovering their loss or damage as a consequence of the carrier's default.⁴³ In English law, such a result is mainly attributed to privity of contract by which a third party to the contract will neither be able to impose any contractual obligation nor be entitled to enforce any contractual right.⁴⁴ This means that only the original parties to the contract of carriage can bring a contractual action against each other. The position under American law was similar although privity of contract was not as strict as under English law.⁴⁵ In early American legal practice, the bill of lading was not regarded as being able to transfer the contractual right but could be treated as the contract of carriage binding the shipper/consignor and the carrier.⁴⁶ However, there were indeed some rare cases where the assignment of the bill of lading 'carries the right to bring an action against the carrier for loss or non-delivery'.⁴⁷ Notwithstanding, whether such an action could be independently initiated by the assignee for his own benefit was questionable. In *The Davenport National Bank v Homeyer*,⁴⁸ it was held that 'the shipper's assignee could only bring an action in his assignor's name and for his use'.⁴⁹ Although the bill of lading might be conceived to possess some sort of contractual effect as it reflects the carrier's promise of delivery,⁵⁰ it is insufficient to conclude that such a contractual effect would be transferred to a third party with the bill of lading.⁵¹ In this sense, the party other than the original party to the contract of carriage usually found himself difficult to sue the carrier in the contract even though they might have the bill of lading in hand.

⁴³ Bernard Eder, Howard Bennett, Steven Berry, David Foxton, Christopher Smith, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell Ltd 2011) 40.

⁴⁴ Vernon V. Palmer, *The path to Privity: the History of Third Party Beneficiary Contracts at English Law* (1st edn, The Lawbook Exchange, Ltd 1992) 1.

⁴⁵ Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 210.

⁴⁶ Georgios I Zekos, 'Negotiable Bills of Lading and their Contractual Role under Greek, United States and English Law' (1998) 40 *Managerial Law* 5, 8.

⁴⁷ *Robinson; McLeod & Co v Memphis & Charleston R Co* (1881) 9 Fed 129, 141.

⁴⁸ (1869) 45 Mo 145.

⁴⁹ *ibid* 149.

⁵⁰ See discussion in 2.2.2 above.

⁵¹ 'An indorsement and delivery (of bill of lading) ...operates to transfer the title to the goods..but not as an assignment of the contract...' *Cox v Vermont Cent Co.* (1898) 49 NE 97, 100. Cited from Zekos (n46).

To cope with such difficulty, some legal remedies have gradually been developed at common law. The early attempt in this respect can be found in *Dunlop v Lambert*,⁵² where the House of Lords held that the consignor was entitled to claim substantial damages from the carrier even though he did not suffer actual loss. Such damages were held on trust for the benefit of the consignee who suffered substantial loss as a consequence of the carrier's default.⁵³ The *Dunlop v Lambert* rule was re-affirmed in the later case of *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)*.⁵⁴ However, the House of Lords also held that such a rule would only be applied to the situation where a contractual nexus could not be established between the carrier and the consignee.⁵⁵ Such situations are rare after the enactment of Carriage of Goods by Sea Act 1992. Therefore, although the *Dunlop v Lambert* rule may still be regarded as good law, the application of such a device has become quite limited.⁵⁶ Another important common law device is the 'implied contract' principle which assumes an implied contract between the carrier and the third party cargo interest if certain requirements are satisfied. In *Brandt v Liverpool Brazil & River Plate SN Co Ltd*⁵⁷ the court made an inference that there should be an implied contract between the consignee and the carrier, and the term of such an 'implied contract' is the same as the express contract between the carrier and the shipper.⁵⁸ However, there has been no consistent rule on the construction of such an 'implied contract.' As a result, the English courts often show a restrictive attitude towards the application of the 'implied contract' principle.⁵⁹ In *Compania Portorasti Commerciale S.A. v Ultramar Panama Inc and others (The Captain Gregos No.2)*,⁶⁰ it was held that mere delivery of goods without paying any consideration to the carrier in return for such delivery, as well as the absence of a certain level of cooperation between the parties in respect of delivery of goods, did not suffice to constitute an 'implied contract'.⁶¹ Basically, whether there exists an 'implied contract' is subject to the judge's discretion according to the facts of the case.

Besides the aforesaid device established in contract, the common law may also allow the cargo interests to bring actions in conversion and/or in bailment. However, the extent of these

⁵² (1839) 6 Cl & Fin 600, 7 ER 824 (HL).

⁵³ *ibid.*

⁵⁴ [1977] AC 774 (HL).

⁵⁵ *ibid* 847 (Lord Diplock).

⁵⁶ William Tetley, *Marine Cargo Claims, vol 1* (4th edn, Thomson Carswell 2008) 455-56.

⁵⁷ [1924] 1 KB 575 (CA).

⁵⁸ *ibid.*

⁵⁹ Baughen (n34) 36.

⁶⁰ [1990] 2 Lloyd's Rep 395 (CA).

⁶¹ *ibid.*

actions was ambiguous in the eighteenth century and neither is it clear today.⁶² In general, the vulnerable remedies provided by the common law are insufficient to meet the merchant's expectation in practice. To improve the situation, a more effective and stable scheme that enables the third party to benefit from the contract of carriage is needed.

2.4 The Statutory Intervention

As can be seen from 2.3, although common law partially solved the problems regarding the transfer of rights,⁶³ the unstable and inconsistent solutions provided by common law to some extent made the situation more complex and fragmented when the transfer of a contractual right was involved. To bring more certainty to the legal relationship between carriers and third party cargo interests, a statutory intervention is necessary.

The first legislative response to establish such a scheme was the UK Bills of Lading Act 1855 (BLA 1855) in which the transfer of the right to sue under the contract of carriage by consignment and endorsement of the bill of lading was statutorily recognized, provided that the property in goods had passed together with such consignment or endorsement.⁶⁴ One significant feature herein is that the Act linked the transfer of title to sue under the contract of carriage with the transfer of property in goods. This arrangement gave rise to a difficulty when exercising the right to sue by the holder of the bill of lading to whom the property in goods was not passed 'by reason of such consignment or endorsement'.⁶⁵ In commercial practice, there are indeed many cargo interests who hold the bill of lading in hand but without vesting with the property of goods at the same time. For instance, the bank to whom the bill of lading is transferred as a pledge by reason of financing the sale of goods⁶⁶ or the buyers to the sale contract under which passing of property is of little relevance to the consignment or

⁶² Paul Todd, 'The bill of lading and delivery: the common law actions' (2006) LMCLQ 539, 539.

⁶³ For instance, common law has contributed much to the interpretation of 'bill of lading as document of title'. See discussion in 2.3.1.

⁶⁴ BLA 1855, s1.

⁶⁵ Baughen (n34) 37.

⁶⁶ *Sewell* (n38) In this case, the House of Lord held that the bank was not an eligible claimant pursuant to BLA 1855 as merely the security interest rather than the general property had been passed to the bank by endorsement of the bill of lading. The security interest did not meet the requirements of 'property' provided by BLA 1855.

endorsement of the bill of lading.⁶⁷ Under BLA 1855, these parties were not able to bring a contractual suit against the carrier to recover loss or damage nor were they able to seek an alternative remedy by suing in tort or bailment.⁶⁸

To solve the aforesaid problems caused by BLA 1855, the Law Commission drafted a new Act to replace the BLA 1855. The new Act came into force on the 16th September 1992 and has been known as COGSA 1992. Basically, under COGSA 1992 the scheme governing transfer of the contractual right provided by BLA 1855 is maintained. However, the link between the transfer of property and transfer of contractual title to sue has been removed. Instead, the new Act introduced the term 'lawful holder', and provides that the party who wishes to be vested with and/or exercise the contractual right of suit against the carrier shall prove himself to fall within one of the categories of 'lawful holder'.⁶⁹

The first category of 'holder' is the person who possesses the bill 'by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates'.⁷⁰ This category deals with the situation where a named consignee is in possession of the bill of lading. In such circumstance, a mere delivery of the bill to him suffices to make him become the 'holder'.⁷¹ The second category of 'holder' is the person who possesses 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'.⁷² This rule qualifies two kinds of transferees who physically possess the bill as the 'holder.' One is the transferee who obtains the bill by delivery with indorsement; the other is the transferee who holds the bill as a result of mere delivery. As to the former, the bill to whom is transferred should be the order bill of lading; as to the latter, the bill to whom is delivered should be the bearer bill.⁷³ The third category of holder is the person who possesses the bill,

⁶⁷ *The Delfini* (n 41). In this case, the bill of lading was endorsed after the goods had been delivered to the buyer. The court held that the endorsement was nothing to do with the transfer of property because the bill of lading had become 'spent' at the time when it was endorsed to the buyer.

⁶⁸ Baughen (n34) 37.

⁶⁹ COGSA 1992, s2 (1) 'Subject to the following provisions of this section, 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.'

⁷⁰ COGSA 1992, s5(2)(a).

⁷¹ Treitel and Reynolds (n45) 225.

⁷² COGSA 1992, s 5(2)(b).

⁷³ Treitel and Reynolds (n45) 226.

as a result of any transaction by virtue of which he would have become a holder falling within the above two paragraphs 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.⁷⁴

This rule indicates that the concept of ‘holder’ may include the transferee who obtains the bill of lading at a time when the bill has ceased to give a right to possess the goods. Nevertheless, to fall within this category, the transferee should prove that the transaction based on the bill of lading is transferred shall not effect at a moment when the bill has ceased to give a right to possess the goods. Further conditions for being a ‘holder’ under such a situation can be found in section 2 (2), which provides,

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.

In general, from the requirements of being a ‘lawful holder’, it can be seen that COGSA 1992 builds up the connection between the transfer of contractual title to sue and the underlying transaction of goods, although through an implied way, namely, by limiting the transferability of the bill of lading. This is evidenced by the following things.

First, the construction of the three categories of ‘holder’ suggests that the bill of lading’s capability to transfer contractual right to sue only exists before the bill of lading stops to give a right to possess the goods unless certain requirement is fulfilled. With such an arrangement, once the goods are delivered to a person who is entitled to them pursuant to the sale contract, the bill of lading will no longer have any effect in transferring the contractual right against the carrier. This means a valid transfer of contractual right to sue by the bill of lading under COGSA 1992 shall always be backed up with a legitimate transaction of goods.⁷⁵

⁷⁴ COGSA 1992, s 5(2)(c).

⁷⁵ Rhidian Thomas, ‘A comparative analysis of the transfer of contractual rights under the English Carriage of Goods by Sea Act 1992 and the Rotterdam Rules’ (2011) 17 JIML 437, 450.

Second, the limitation of the transferability of the bill of lading can also be seen from the legal requirement on 'indorsement' if an order bill of lading is concerned. According to Section 5 (2) (b), to make the transferee of an order bill qualify as a 'lawful holder', an indorsement is necessary in addition to the physical delivery of the order bill.⁷⁶ Although such an operation is not alien to shipping practice, the application of the Section 5(2) often leads to the examination of the underlying trading relationship when determining the legal effect of such an indorsement in English judicial practice. For instance, in *Aegean Sea Traders Corp v Repsol Petroleo SA (The Aegean Sea)*,⁷⁷ the bill of lading was wrongfully indorsed to a party who was not supposed to be the holder. Thomas J held that the indorsee was not qualified as the 'holder' provided by COGSA 1992 as 'the person receiving [the bill] has to receive it into his possession and accept delivery before he becomes the holder'.⁷⁸ This led to an assumption that the indorsement mentioned in COGSA 1992 would only be effect if it was accompanied with the consent of the transferor and the transferee, which meant that the transferor and transferee should have requisite intention to agree the person to whom the indorsement is made to become the 'holder'.⁷⁹ Later, such an assumption to some extent was approved in *Bank of Communications Co Ltd, Hangzhou Branch v. Universal Shipping Group Inc (The Dolphina)*,⁸⁰ where Ang Saw Ean. J stated that '...any indorsement must surely mean any valid indorsement.'⁸¹ This means that COGSA 1992 does not apply to any indorsement made with fraud.⁸² Since it is no doubt that the cause or reason for a valid indorsement shall be based on a legitimate transaction of cargo, the enquiry into the validity of an indorsement reinforces the link between the transfer of contractual right to sue the underlying transaction of cargo. However, it should be noted that the rules for such an enquiry may not be stable in English judicial practice. In *Standard Chartered Bank v Dorchester LNG Ltd (The Erin Schulte)*,⁸³ the bills of lading were indorsed to a bank for payment of cargo covered by the bill; however, the Bank rejected the bill and refused to issue the payment under the Letter of Credit (L/C) to the seller. Although the bank had never returned the bill and finally issued the payment after the seller initiated the L/C proceeding against the bank.

⁷⁶ COGSA 1992, section 5(2) (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...'

⁷⁷ [1998] 2 Lloyd's Rep 39 (QB).

⁷⁸ *ibid* 59-60.

⁷⁹ Treitel and Reynolds (n45) 226.

⁸⁰ [2011] SGHC 273.

⁸¹ *ibid* [166] (Belinda Ang Saw Ean. J).

⁸² *ibid* [175] (Belinda Ang Saw Ean. J).

⁸³ [2013] EWHC 808 (Comm), [2013] 2 Lloyd's Rep 388.

It was questioned if the bank could be conceived as a lawful holder of the bill of lading by reason of the indorsement.⁸⁴ At the High Court (Commercial Division), Teare J was reluctant to look at the parties' intention behind the indorsement, and argued that 'delivery of an indorsed bill of lading is a simple act, though one which requires the requisite intention on the part of the deliveror and deliveree....'.⁸⁵ However, such an argument was overruled by the Court of Appeal.⁸⁶ As stated by Moore-Bick LJ, 'Once SCB (the Bank) had unequivocally rejected the bill of lading, it could not unilaterally change its mind and decide to take it up.'⁸⁷ Such a statement re-affirmed the necessity of the parties' intention for constituting a valid indorsement. Nevertheless, it is still unknown how the aforesaid verdict will influence the subsequent cases.

Third, in order to acquire the contractual title to sue the carrier, the claimant has to meet a requirement of being 'in good faith'.⁸⁸ Although COGSA 1992 does not provide the explanation on the term 'good faith', the term should bear the same implication as that under the Bills of Exchange 1882 and the Sale of Goods Act 1979.⁸⁹ According to these Acts, if something is deemed to be done in good faith, it should be done 'honestly, whether it is done negligently or not.'⁹⁰ The examination of 'good faith' will inevitably lead to the enquiry into the underlying transaction of goods since such a good faith can be negated if the holder acquired the bill of lading by fraud or stealing rather than a legitimate transaction of goods. .⁹¹ Moreover, if the holder's predecessor who procured the bill by an unlawful reason and then transferred the bill of lading to the holder, even though the holder himself obtained the bill of lading in good faith, the holder is still unable to acquire the legal status as a lawful holder because of his predecessor's dishonest conduct.⁹² In this sense, the test of 'good faith' may not only involve the transaction between the current holder and his predecessor, but also trace back to all historical transactions regarding the transfer of the bill of lading.

Fourth, as to the two situations where the holder may still acquire the right to sue the carrier

⁸⁴ *ibid.*

⁸⁵ Paul Todd, 'Bank as Holder under Carriage of Goods by Sea Act' [2013] LMCLQ 275, 282.

⁸⁶ *The Erin Schulte* [2014] EWCA civ 1382, [2015] 1 Lloyd's Rep 97.

⁸⁷ *The Erin Schulte* [2014] EWCA civ 1382 [33] (Moore-Bick LJ).

⁸⁸ COGSA 1992, s5(2)

⁸⁹ Treitel and Reynolds (n45) 231.

⁹⁰ Bills of Exchange Act 1882, s 90; Sale of Goods Act 1979, s 61(3).

⁹¹ Treitel and Reynolds (n45) 230-232.

⁹² Treitel and Reynolds (n45) 231.

even though the bill of lading has been exhausted when the bill is transferred to him,⁹³ both of the situations are closely related to arrangement and performance of underlying transaction of goods. Section 2(2) (a) refers to the situation where the goods are sold and then delivered to the buyer, while the bill of lading is not transferred to the buyer before the delivery of goods.⁹⁴ Section 2(2) (b) deals with the situation where the goods and/or the document are rejected by the receiver. It is submitted that such a situation often arises due to the failure of performance of the sale contract. For instance, if the buyer notices that the goods delivered to him were damaged due to the carrier's breach of duty in transit, the buyer may be reluctant to assume the relevant loss or damage though the risk of transaction may have been passed to him at that time. As a result, the buyer may reject the goods and transfer the bill of lading back to the seller.⁹⁵

Besides conferring the right of suit on the holder of the bill of lading, COGSA 1992 provides the condition for the holder to assume liability under the bill of lading; this is that the liability will be imposed on the holder only if the holder exercises the right transferred to him with the bill of lading.⁹⁶ Such an operation is favourable to banks and other cargo interests who only have security interests over the goods to which the bill of lading is related, since they will not assume the liability under the bill of lading if they do not take delivery or make a claim against the carrier as provided by COGSA 1992.⁹⁷ Generally, under COGSA 1992, the transfer of contractual right of suit through the bill of lading must be with a lawful reason, which is strictly linked with the 'legitimate trading and commercial transactions of cargo'.⁹⁸ In accordance with the Law Commission, the ultimate aim of such an arrangement is to prevent 'the trafficking of the bill of lading simply as a piece of paper which give causes of

⁹³ COGSA 1992, s 2(2).

⁹⁴ Treitel and Reynolds (n45) 261.

⁹⁵ Treitel and Reynolds (n45) 262-263.

⁹⁶ COGSA 1992, s3 (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.

⁹⁷ Baughen (n34) 44-45.

⁹⁸ Thomas (n75) 450.

action against the sea carrier'.⁹⁹ In this sense, although COGSA 1992 was drafted to facilitate cargo interests' title to sue, the arrangement on this issue provided by COGSA 1992 reflects an intention to safeguard the carrier's interests. Since the enactment of the COGSA 1992, most problems regarding the transfer of contractual rights under the bill of lading have been solved under English law.

Although the US used to share the same jurisdiction as the UK, it developed its own way to establish the scheme governing the issues with respect to transfer of rights through bill of lading. Such a result is largely attributed to the concern on the convenience of commercial transactions.¹⁰⁰ To facilitate commercial transactions of goods, FBLA 1916 aimed to enhance the negotiability of the bill of lading.¹⁰¹ This is also the case under FBLA 1994. With such a concern, FBLA 1994 does not only provides for the contractual effect of a negotiable bill of lading to a *bona fide* cargo interest who is the third party to the contract of carriage,¹⁰² but also addresses how the title to goods is transferred through the bill of lading, which reads:

The person to whom (the bill of lading) is negotiated acquires the title to the goods if (a) the person negotiating the bill had the ability to convey to a purchaser in good faith for value; and (b) the consignor and consignee had the ability to convey to such a purchaser.¹⁰³

Although FBLA 1994 links the transfer of title to goods with the negotiation of the bill of lading, it does not change the general common law position at this point, namely, the mere fact of transferring the bill of lading will not create the effect of transferring property of goods. Under FBLA 1994, the transfer of title to goods by negotiation of the bill of lading is subject to the good faith purchase of goods with consideration. Indeed, once the seller receives the corresponding payment of goods, normally there will be no reason for him to retain the bill

⁹⁹ Law Commission and Scottish Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea 1992* (Law Com No.196, Scot Law Com No.130, 1991) para 2.43.

¹⁰⁰ *The Mary Ann Guest* (1847) 16 Fed. Cas 956 (Fed. Cas. No.9, 197, aff'd No.9, 196) Brett DJ held, 'For the convenience of commercial transactions, bills of lading have been allowed to become negotiable instruments; and upon the faith of them it is usual and customary for commission merchants to make advances. By endorsements of the bill of lading, the holder of it becomes, as against all the world, the owner of the goods.'

¹⁰¹ Robert Force, A. N. Yiannopoulos, Martin Davies, Henry Hull, *Admiralty and Maritime Law* (1st edn Beard Books 2006) 215 See also Henry Hull, 'The Federal Uniform Bills of Lading Act' (1917) 3 *The Virginia Law Register*, New Series 329, 339

¹⁰² FBLA 1994, §80105 (a) (2) 'The common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person'.

¹⁰³ FBLA 1994, §80105 (a) (1).

of lading and the title to goods to which the bill relates. In this sense, the arrangement under FBLA 1994 reflects the general commercial practice that the bill of lading is usually negotiated against payment. FBLA 1994 further provides that the effect caused by the negotiation of the bill of lading, either the contractual effect or the title to goods, will not be affected if there existed any fault in the previous history of negotiation of the bill of lading.¹⁰⁴ Reading these rules as a whole, it can be seen that the negotiability of the bill of lading is quite similar to negotiable instrument such as bill of exchange.¹⁰⁵ Such a position is re-affirmed in UCC, in which the 'due negotiation' of a document of title is defined as the negotiation 'in the manner stated in this subsection to a holder that purchases (the document) in good faith without notice of any defense against or claim to it on the part of any person and for value ...'.¹⁰⁶ In addition, UCC provides that the holder to whom a document of title is duly negotiation acquires '(2) the title to goods ... (4) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this article ...'.¹⁰⁷

As can be seen from the above discussion, the statutory intervention under English law focuses on the transfer of contractual rights whereas the US law adopts a broader view that covers the transfer of both contractual effect and the title to goods to which the bill of lading relates. In addition, the manner of transfer provided by the legislation in the two jurisdictions is also different. The COGSA 1992 embodies many factors to guarantee that the transfer of contractual rights through the bill of lading is effective only if the goods covered by the bill is traded legitimately, whereas under FBLA 1994 and UCC the bill of lading can be negotiated without reference to the causes of previous negotiation or transfer of the bill of lading. Such results may be attributed to the different rationales for devising these schemes. Notwithstanding these differences, in current English and American law, most issues with respect to the transfer of rights, for example, the title to sue, have been covered by statutory

¹⁰⁴ FBLA 1994, §80104 (b).

Validity not affected.--The validity of a negotiation of a bill of lading is not affected by the negotiation having been a breach of duty by the person making the negotiation, or by the owner of the bill having been deprived of possession by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill is negotiated, or a person to whom the bill is subsequently negotiated, gives value for the bill in good faith and without notice of the breach of duty, fraud, accident, mistake, duress, loss, theft, or conversion.

¹⁰⁵ Zekos (n46) 9.

¹⁰⁶ UCC, §7-501(5).

¹⁰⁷ UCC, §7-502.

law.

2.5 The Recent International Approach

As can be seen from the Anglo-American experience and developments over the past two centuries, nowadays the majority of issues with respect to the transfer of rights are governed by uniform statutory law. However, this was not the case on an international law level until the adoption of the Rotterdam Rules. The new convention and its *Travaux préparatoires* (the UNCITRAL Drafts) contain a number of rules addressing the issues with respect to transfer of rights among cargo interests. The construction of these rules is closely related to the recent trade reality and reflects some new features in comparison with the existing national legislations.¹⁰⁸

2.5.1 The Impact of E-commerce

It is noteworthy that a significant incentive to bring the transfer of rights issues into the international convention on carriage of goods by sea is to promote the development of e-commerce in maritime trade.¹⁰⁹ In the mid-1990s, United Nations Commission on International Trade Law (UNCITRAL) and Comité Maritime International (CMI) cooperated with each other to explore potential ways to use the electronic alternatives to the paper bills of lading.¹¹⁰ Such an exploration was mainly based on the ‘functional equivalent’ approach which means that the electronic alternatives should perform the same function as the paper bill.¹¹¹ Even though the content of such an approach is defined clearly at a theoretical level, how to achieve this approach in practice, especially when the bill of lading is involved, is

¹⁰⁸ The previous international conventions in this respect (Hague Rules, Hague-Visby Rules and Hamburg Rules) only focus on the matter regarding carrier’s liability, whereas the Rotterdam Rules extends its governance to some trade related issues such as transfer of rights, right of control, etc.

¹⁰⁹ Michael F. Sturley, ‘Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules’ in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (1st edn, Lawtext Publishing Ltd 2009) 27.

¹¹⁰ *ibid* 11.

¹¹¹ Caslav Pejovic, ‘Document of Title in Carriage of Goods By Sea: Present Status and Possible Further Directions’ (2001) JBL 461, 494.

problematic even today.

On the one hand, although the functions of a paper bill of lading are well known in commercial practice, the underlying law in this respect varies across jurisdictions.¹¹² What are the exact rights and obligations of the shipper, the consignee and the intermediate bill of lading holder? Much law in this area is still non-statutory and mainly based on trade practice and case law.¹¹³ As noted by UNCTRAL:

Existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.¹¹⁴

These gaps have to be filled with uniform rules so as to facilitate the usage of an electronic bill of lading with similar functions as the paper in a global range. In other words, the legal effect of the bill of lading, not only to the cargo interest who concludes the contract of carriage with the carrier, but also to the cargo interests who are the third party to that contract, has to be uniformly codified.¹¹⁵

On the other hand, as mentioned before, the core effect of the bill of lading as a document of title lies in its capability of transferring constructive possession of goods to its holder, and such possession is rooted in the physical possession of an original document of title.¹¹⁶ In this sense, the holder can exercise exclusive control over the goods by dealing with the paper bill of lading. However, as to the electronic bill of lading, it cannot be physically possessed, therefore it cannot be produced on delivery nor endorsed to a new holder.¹¹⁷ Also, the safety of electronic message has been doubted due to the rising threat of cyberattack in global

¹¹² G J van der Ziel, 'Delivery of the goods, rights of the controlling party and transfer of rights,' in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (1st edn, Lawtext Publishing Ltd 2009) 245.

¹¹³ *ibid* 243.

¹¹⁴ UNGA 'Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Nine Session 51st Session, Supplement No.17' (1996) UN. Doc A/51/17, 210.

¹¹⁵ Van der Ziel (n112).

¹¹⁶ See discussion in 2.3.1 above.

¹¹⁷ Pejovic, 'Document of Title in Carriage of Goods By Sea: Present Status and Possible Further Directions' (n111) 493.

range.¹¹⁸ This means that the exclusivity of the right to goods carried by the electronic message might not be secured. To solve these problems, it is necessary to devise a legal mechanism to safeguard the security of possession and transfer of the electronic bill of lading, whilst also to make such a kind of possession and transfer achieve similar consequences as possession and transfer of the paper bill of lading.

Nowadays, the relevant industries have started to transform their traditional trading process into a paperless mode. However, the old international conventions on carriage of goods by sea did not provide a corresponding legal framework to support such a transformation. Such a legislative gap greatly impedes the use of electronic shipping documents in maritime practice as the merchants are usually reluctant to invoke a new device unless the legal effect of using such a device is predictable.¹¹⁹ This may explain why the Rotterdam Rules introduced Chapter 11 ‘Transfer of rights’ and Chapter 10 ‘Right of control’.¹²⁰ The former recognizes that the contractual rights can be transferred not only with the negotiable transport document but also with the electronic equivalent.¹²¹ The latter manages to introduce the concept of ‘right of control’, which is a right designed to be easily transferred in an electronic environment and to unify the legal effect of the negotiable electronic transport record with the traditional paper bills of lading.¹²² These Rules demonstrate the legal attempt at the international level to pave the way for a smoother electronic maritime trade.

2.5.2 The ‘Trade Holistic’ Perspective

Another factor that contributes to the introduction of provisions regarding transfer of rights by the Rotterdam Rules is the ‘trade holistic’ perspective which indicates that the carriage of goods should be viewed within a context in connection with the underlying trade.¹²³ Indeed, the contract of carriage is potentially connected with the contract governing underlying transaction of goods even though privity exists in each contract. Generally, such connections

¹¹⁸ UK P&I Club, ‘Legal Briefing on Electronic Bills of Lading’ (*UK P&I Club*, May 2017) <https://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/2017/Legal_Briefing_e_bill_of_Lading_WEB.pdf> accessed 10 June 2017.

¹¹⁹ Sturley (n109).

¹²⁰ *ibid.*

¹²¹ According to the definition of ‘negotiable transport document’ provided by Article 1.15, the ‘negotiable transport document’ under the Rotterdam Rules shall include the traditional meaning of ‘order bill’ and ‘bear bill’. In this sense, the ‘negotiable’ used here only means ‘transferable’.

¹²² Van der Ziel (n112) 248.

¹²³ Alexander Von Ziegler, ‘Rotterdam Rules and underlying sale contract’ (2013) *CMI Ybk* 273, 277.

can be viewed in the following aspects. First, the carriage of goods by sea originated to fulfil the demand under the sale contract, namely, to overcome the geographic distance between the seller and the buyer and deliver the goods from the former to the latter.¹²⁴ Second, the bill of lading, with the legal nature as ‘document of title’, plays an essential role in closing the gap between the time of payment and the time of delivery under the sale contract.¹²⁵ For example, under the FOB trade the seller usually expects to be paid once they fulfil the obligation to deliver the goods to the carrier whilst the buyer may be reluctant to pay until they receive the goods at the destination. Nowadays, the conflict between these different expectations can be solved by banks’ financing services by which the bill of lading is tendered to the bank by the seller as a symbolic delivery of goods in return for negotiation of the payment under a Letter of Credit (LC) arranged by the buyer.¹²⁶ In this sense, although the bill of lading is a document issued under the contract of carriage, its legal nature provides a vital link between the contract of carriage and the sale contract. Third, according to the international trade terms, the risk usually passes before or upon shipment;¹²⁷ however, the goods will only be of value to the buyer if they arrive at the destination in good condition. If the goods are damaged or lost in transit due to the carrier’s breach of duty, the buyer may protect his interest through rejecting the goods or accepting the goods with a discounted price. In such situations, the party, who assumes the actual loss or damage and wishes to sue the carrier for compensation, is usually the shipper.¹²⁸ In this sense, the trading arrangement between the seller and the buyer may influence the title to sue the carrier under the contract of carriage.

The aforesaid facts suggest that there exists an interaction between shipping and trading. Such interactions are enhanced in the context of string sales, under which a number of parties who are interested in goods, such as the sellers, buyers, sub-buyers, banks and insurers are involved.¹²⁹ During such string sales, each sale will constitute an independent loop of transaction of goods. However, there usually would be just one contract of carriage to serve the entire underlying sales and one set of bills of lading passed through the relevant cargo

¹²⁴ *ibid* 275-76.

¹²⁵ *ibid* 276.

¹²⁶ *ibid*.

¹²⁷ For examples in this respect, see the following trade terms provided by Incoterms 2010: EXW, FCA, CPT, CIP, FAS, FOB, CFR.

¹²⁸ This situation is discussed in details in Chapter 4, 4.3 below.

¹²⁹ Ziegler (n123) 276-77.

interests until the goods were ultimately delivered.¹³⁰ This to some extent means, the law on carriage of goods should not only cover the issues regarding carrier's liability but also 'safeguard the smooth performance of the complicated and fragile transactions'.¹³¹ This may explain why the Rotterdam Rules extend their coverage to include some trade-related issues, eg, the right of control, which is expected to facilitate the realization of the seller's right of stoppage and the running of electronic bill of lading; and the transfer of rights,¹³² which is an attempt to fill up the gaps left by the previous international conventions on the legal effect of the bill of lading to a cargo interests who is the third party to the contract of carriage.¹³³

2.5.3 The 'Pragmatic' Philosophy

Under the Rotterdam Rules, the general principles of transfer of rights are provided by Chapter 11. Since the Rotterdam Rules are intended to govern the contract of carriage,¹³⁴ the rights mentioned herein only refer to the contractual right deriving from the contract of carriage. Under Chapter 11, the transfer of contractual rights by a negotiable bill of lading¹³⁵ and its electronic equivalent is provided in the following way:

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person: (a) Duly endorsed either to such other person or in blank, if an order document; or (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.¹³⁶

One noticeable feature of this rule is that there is no limitation on the time when such a

¹³⁰ Ziegler (n123) 277.

¹³¹ *ibid.*

¹³² Van der Ziel (n112) 246. 'Electronic commerce systems will not work unless clear rules exist to address the right of control...diluting the right of control would be very short-sighted.' The author also announced this argument at the CMI meeting, see 'Issues of Transport Law, Report of the Sixth Meeting' (2001) CMI Ybk 354.

¹³³ UNGA 'Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Nine Session 51st Session, Supplement No.17'(n114).

¹³⁴ Rotterdam Rules, art 5.

¹³⁵ The 'negotiable' here only means 'transferable'. Text to n121.

¹³⁶ Rotterdam Rules, art 57.

transfer of right will cease.¹³⁷ As to a negotiable bill of lading, ostensibly, once it is issued, any transfer without enquiry into the purpose will continuously transfer the contractual right to the holder before the bill is surrendered to the carrier.¹³⁸ It is not clear what practical impact this rule will cause since the Rotterdam Rules are still in the process of ratification. However, some critics have argued that Chapter 11 is ‘too skeletal to be of value’¹³⁹ and Article 57 is ‘very loosely drafted’¹⁴⁰ and leaves ‘negotiation alone as the key to the transfer of rights, with ostensibly no restriction as to context, leading to the possibility of speculative trading in contractual rights’.¹⁴¹ Responding to such criticism, some drafters of the Rotterdam Rules argue that this is because of the ultimate aim of the Rules is to achieve greater harmonization and modernization of the rules governing ocean cargo transportation rather than realizing logical elegance.¹⁴² Such an argument reflects a ‘pragmatic’ philosophy, which gives rise to dual requirements to the Rotterdam Rules.¹⁴³ On the one hand, to realize the modernization and harmonization, the Rotterdam Rules shall provide uniform rules covering a broader scope of issues that has not been covered by previous conventions, for example, the transfer of rights and the right of control. On the other hand, some proposals, for example, the chapter ‘Title to Sue’ under the UNCITRAL Drafts, have to be deleted from the final draft of the Rotterdam Rules due to rejection by the delegations from relevant industries although they are rational at a theoretical level.¹⁴⁴ Nevertheless, the imperfection of the Rotterdam Rules should not entirely negate its positive value to current maritime law and practice. As Berlingier’s comments on Chapter 11 transfer of rights, ‘while Article 57 sets out principles that are obvious in a great many jurisdictions, nevertheless it may be of some assistance in those jurisdictions where they are not so obvious and, therefore, may ensure a greater uniformity’.¹⁴⁵ Accordingly, although it still have a long way to achieve a general acceptance of the Rotterdam Rules on the level of international law, at current stage the Rotterdam Rules and the UNCITRAL Drafts may provide models for national legislators to regulate those issues that have not been covered by the shipping law in their jurisdictions.

¹³⁷ Baughen (n34) 157.

¹³⁸ Thomas (n75) 447.

¹³⁹ Anthony Diamond QC, ‘The Rotterdam Rules’ [2009] LMCLQ 445, 532.

¹⁴⁰ Thomas (n75) 447.

¹⁴¹ Thomas (n75) 450.

¹⁴² Sturley (n109) 30.

¹⁴³ Sturley (n109) 24.

¹⁴⁴ Sturley (n109) 25.

¹⁴⁵ Francesco Berlingieri, ‘Revisiting the Rotterdam Rules’ [2010] LMCLQ 583, 639.

2.5.4 Some New Features

Compared to the previous international conventions on carriage of goods by sea, the Rotterdam Rules bear some new features that are articulated as below.

2.5.4.1 Emphasis on Assumption of Loss or Damage

Although Chapter 11 Transfer of rights under the Rotterdam Rules suffer criticism for its failure to reflect the potential connection between the transfer of rights and the underlying trade,¹⁴⁶ this may not be the case in the rules on exercise and transfer of title to sue the carrier under the UNCITRAL Drafts.¹⁴⁷ For instance, according to the UNCITRAL Drafts,

Article 67 Variant B. Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage..¹⁴⁸

Article 68. In the event that a negotiable transport document or negotiable electronic transport 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 itself having suffered loss or damage itself; (b) When the claimant is not the holder, it must, in addition to 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.¹⁴⁹

¹⁴⁶ Thomas (n75) 450.

¹⁴⁷ UNCITRAL 'Report of Working Group III (Transport Law) on the work of its eighteenth session (27 November 2006) A/CN.9/616, 30. 'The chapter of "Right of suit" was "overly ambitious and that is was unlikely that the working group could reach a consensus on the substance dealt with therein.' As a result, the chapter of 'Right of suit' was deleted in its entirety from the final draft of the Rotterdam Rules.

¹⁴⁸ UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art 67 Variant B.

¹⁴⁹ UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art 68 (b).

From the aforesaid rules, it can be seen that the assumption of cargo loss or damage plays a crucial role in determining cargo interests' contractual right to sue. Although Article 68 (a) provides that the holder of such a negotiable transport document is entitled to sue the carrier no matter whether he suffered loss or not, in a previous version of this article the UNCTRAL indicated that the action brought by the holder in such a situation is deemed to be for the benefit of the person who assumes the actual loss or damage.¹⁵⁰ In addition, the UNCITRAL asserts that the person who suffers actual loss or damage does not necessarily rely on the cooperation of the holder to bring an action for his benefit. Pursuant to Article 68 (b), if the person, besides proving his own loss or damage, can also prove the holder does not suffer the same loss or damage, then the person is permitted to sue the carrier directly even without possession of a negotiable transport document. In such an instance, the proof of loss or damage substitutes the possession of a negotiable transport document to become an independent cause of action that enables the cargo interest to sue. In commercial reality, the matter of who ultimately assumes the substantial loss or damage is often up to the trading arrangement between the seller and the buyer, despite the cargo is damaged or lost due to the carrier's breach of duty under the contract of carriage.¹⁵¹ In this sense, the UNCITRAL Drafts link the contractual right to sue the carrier with the underlying transaction of cargo through the proof of cargo loss or damage.

2.5.4.2 Extension of the Transferable Contractual Right

Under the Rotterdam Rules, the rules related to the transfer of rights through the bill of lading are not restricted within Chapter 11 'Transfer of Rights'. In Chapter 10, the right of control is also described as a transferable right deriving from the contract of carriage.¹⁵² Such a right can be transferred from one cargo interest to another not only in a traditional situation where the paper bill of lading is issued but also in the paperless context where an electronic bill of

¹⁵⁰ UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 January 2002) A/CN.9/WG.III/WP21, art 13.2.

In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. 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.

¹⁵¹ In international trade, once the cargo loss or damage occurs, usually the buyer and the seller will negotiate with each other to decide who should actually assume the loss or damage. This situation is discussed in detailed in Chapter 4, 4.3.1 below.

¹⁵² Rotterdam Rules, art 1.12 ' "Right of Control" of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.'

lading is employed.¹⁵³ Under the Rotterdam Rules, the meaning of right of control is composed of three aspects:

- (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
- (b) The right to obtain delivery of goods at a scheduled port of all, or in respect of inland carriage, any place en-route; and
- (c) The right to replace the consignee by another person including the controlling party.¹⁵⁴

The content of right of control is not a complete novelty to transport law as an analogous concept ‘right of disposal’ can be found in international conventions governing other modes of cargo transportation.¹⁵⁵ The content of right of control is also not alien to the law governing sale of goods where a similar concept ‘right of stoppage’ exists. Nevertheless, whether it is the right of disposal or the right of stoppage, normally these rights are not vested in a party who is the third party to the contract of carriage.¹⁵⁶ This means, in the pre-Rotterdam Rules era, these rights in their nature are not transferable, and basically not applicable to the seaborne cargo trade where a bill of lading is issued. When drafting the Rotterdam Rules, CMI noted the gap among the law governing ocean cargo transport, the law on other modes of cargo transport, and the law on sale of goods. To close the gap, CMI suggested the ‘right of disposal’ provided by the law on other modes of cargo transport and the ‘right of stoppage’ under the law governing sale of goods, should be ‘translated’ into the rights under the contract of carriage.¹⁵⁷ Also, CMI argued that such kinds of rights were helpful to the carrier who would need to know from whom he could request instructions regarding management of goods and with whom he should negotiate the issues with respect to such instructions.¹⁵⁸ For these reasons, CMI and UNCITRAL envisaged the concept of ‘right of control’ to describe such kinds of rights under the international convention on ocean cargo transport. In this sense, the Rotterdam Rules extend the scope of the transferable right under the contract of carriage

¹⁵³ Rotterdam Rules, art 51.1 (b) ‘The controlling party is entitled to transfer the right of control to another person...’; Then article 51.3 and article 51.4 respectively provides the transfer of right of control in the situations where the a negotiable transport document and a negotiable electronic transport record is issued.

¹⁵⁴ Rotterdam Rules, art 50.

¹⁵⁵ Liang Zhao, ‘The right of control in carriage of goods’ [2014] LMCLQ 393, 403-10.

¹⁵⁶ Caslav Pejovic, ‘Stoppage in Transit and Right of Control: Conflict of Rules?’ (2008) 20 Pace International Law Review 129, 137.

¹⁵⁷ CMI, ‘Issues of Transport Law’ (2000) CMI Ybk, 161-62.

¹⁵⁸ UNCITRAL ‘Possible future work on transport law (2001) A/CN.9/497, para 43.

as most rights covered by the right of control used to be matters can only be exercised by a party who is the original party to the contract of carriage.

2.6 Conclusion

From the aforesaid historical review, it can be seen that the transfer of rights through the bill of lading in different jurisdictions are not regulated by following a single model. However, two common implications are apparent.

First, although the legal scheme governing transfer of rights through the bill of lading is rooted in the law governing contract of carriage, the origin and evolution of such a scheme is driven by the development of cargo trading. As can be seen from *Lex mercatoria*, the proof and transfer of certain entitlement to goods by the bill of lading was generated to facilitate sale of goods in transit. Such a trading mode also contributed to the origin of the bill of lading's contractual effect. In the later stage, under the governance of common law, the interpretation on the entitlement to goods represented and transferred by the bill of lading underwent transformation from 'property of goods' to 'constructive possession of goods'. Such a transformation to a large extent can be attributed to the trade reality under which the merchants are free to decide the timing for passing the property. As to the transfer of the contractual right through the bill of lading, the exceptions to the doctrine of 'privity of contract' were developed in order to facilitate the cargo interest, who is the third party to the contract of carriage, to sue the carrier for recovering cargo loss or damage. As mentioned before, who actually assumes the cargo loss or damage is often a matter for negotiation between the buyer and the seller even though the ultimate cause for such loss or damage is the carrier's breach of contract of carriage. The impact of trade related matters on the construction of the legal scheme on transfer of rights can also be found in statutory laws. For example, in English law, trading bills of lading separately from legitimate transactions of goods is strictly prohibited. Accordingly, COGSA 1992 provides a number of rules to restrict the transferability of the bill of lading, and asserts that the transfer of a contractual right of suit is only valid in the instance where the underlying transaction of goods is genuine.¹⁵⁹

¹⁵⁹ See discussion in 2.4 above.

Compared to the English law, the American law focuses on the convenience of commercial transactions of goods covered by the bill. From such a perspective, FBLA 1916 and its substitute FBLA 1994 reinforce the transferability of the bill of lading by conferring negotiability to it. Such an arrangement makes the legal effect of negotiation of a bill of lading similar to negotiation of a fully negotiable instrument such as bill of exchange.¹⁶⁰ Besides the right under the contract of carriage, the person to whom the bill of lading is negotiated may also acquire the title to goods regardless of any fault in the previous life of the bill of lading.¹⁶¹ In this sense, the bill of lading under American law possesses more tradability than its English counterpart.¹⁶² On an international level, the influence of trading arrangement between the buyer and the seller to the performance of contract of carriage is highlighted in the UNCITRAL Drafts and the Rotterdam Rules. The account on this point can be found in many aspects. As to the rationale for the UNCTRAL Drafts and the Rotterdam Rules to cover issues regarding transfer of rights through bill of lading, it can be attributed to the ‘trade holistic’ perspective and the perspective of facilitating paperless trade. These new perspectives also confer some new features on the rules covering transfer of rights. For example, by considering the potential connection between the assumption of cargo loss or damage and the commercial transaction of goods, the UNCITRAL Drafts suggested taking the assumption of loss or damage as an independent cause of action to enable the cargo interest to sue under certain circumstance.¹⁶³ Also, the Rotterdam Rules introduced the concept of ‘right of control’, which is expected to facilitate the realization of seller’s right of stoppage and pave the way for paperless trading in maritime context.¹⁶⁴ Furthermore, by introducing the right of control, the scope of the transferable rights deriving from the contract of carriage is expanded. Although these new rules have suffered criticism and some of them even was removed from the final draft of the Rotterdam Rules, such a result is attributed to the ‘pragmatic’ philosophy of which the primary aim for drafting the Rotterdam Rules is to achieve a greater uniformity of international transport law. In this sense, the Rotterdam Rules and the UNCITRAL Drafts may still be viewed as examples for national legislators to improve their national law on carriage of goods by sea. In brief, all above observations indicate that the legal interventions on transfer of rights issues, regardless of their different

¹⁶⁰ *ibid.*

¹⁶¹ FBLA 1994, §80105 (a) (1), §80104 (b).

¹⁶² Bools (n5) 63.

¹⁶³ UNCITRAL ‘UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]’ (8 September 2005) A/CN.9/WG.III/WP56, art 68 (b).

¹⁶⁴ See discussion in 2.5.1 and 2.5.2 above.

forms, to a large extent is attributed to the development of cargo trading and should be able to serve merchants' need in trading practice. To be more specific, among the trade related factors, the merchant's expectations on the function of the bill of lading, links the carriage of goods by sea and the underlying transaction of goods as a whole. In this sense, the legal scheme that governs the transfer of through the bill of lading, either within national law or in international convention, should properly reflect such a linkage.

Second, the formation of such a scheme is highly reliant on the statutory intervention. It is undeniable that the early development of the scheme is rooted in mercantile custom, and also benefited a lot from common law; however, the problems regarding transfer of rights was not settled thoroughly until the enactment of statutory rules.¹⁶⁵ This is particularly as to the transfer of title to sue in the context of string sale, where one contract of carriage and one set of bills of lading will serve multiple sales of goods till the goods are delivered to the ultimate buyer. Under such a situation, the party who assumes the risk arising from carriage of goods by sea are usually not the parties who concluded contract of carriage with the carrier. Due to the doctrine of privity of contract, this party may find himself difficult to invoke a contractual action against the carrier if he suffered loss or damage in consequence of the carrier's default. Such a dilemma did not only exist in a jurisdiction that strictly abides by the doctrine of privity of contract (eg, the UK), but also haunted jurisdictions where the 'third party beneficiary' was recognized (eg, the US). The reason for the latter is that a transferee of the bill of lading, who may not be known to the carrier, can hardly be conceived as a third party on whom the carrier and the shipper both agree to confer the benefit under the contract of carriage.¹⁶⁶ Therefore, as suggested by Anglo-American experience, a statutory intervention is necessary and is probably the most efficient way to handle such a dilemma and legally switch the position that had been firmly recognized by existing law. This is also the rationale of the Rotterdam Rules providing for transfer of rights. As noted by both UNCITRAL and CMI, the scattered rules in this area cannot be harmonized without statutory intervention. In this sense, although the industries may have their own ways to cope with the issues regarding transfer of rights through bill of lading, it would be better if some of the issues could be

¹⁶⁵ See discussion in 2.4 above.

¹⁶⁶ Treitel and Reynolds (n45).

settled by statutory law. In this way, the legal status of the parties involved in such a transfer of rights would become more certain and predictable.

The aforesaid implications are crucial to regulate the issues regarding transfer of rights through bill of lading, whether in national law or in international convention; however, they were not properly considered when drafting CMC 1992. In the next chapter, the problems under current Chinese law are reviewed and the possible directions of reform are discussed by reference to the observations in this chapter.

Chapter Three: Overview of Chinese Maritime Code 1992: Debates, problems and direction of reform

3.1 Introduction

Unlike the Anglo-American experience and Rotterdam Rules, the current Chinese Maritime Code 1992 (CMC 1992) does not explicitly address the transfer of rights issue. Although several rules do exist that to some extent follow the philosophy of transfer of rights,¹ these rules were drafted in a loose way and fail to cover many important aspects of the transfer of rights issue. In addition, the wording of these rules appears to be over-simplistic, which brings ambiguity and confusion to legal practice. These defects to a large extent may be attributed to the historical background during which CMC 1992 was drafted. In the second section, such a background is reviewed so as to gain a better understanding of the rationale behind CMC 1992. Then, the rules related to the transfer of rights through the bill of lading and the problems caused by it, and those matters left untouched by current Chinese law, are respectively analysed in the third and the fourth section. Based on the issues demonstrated by the third section and the fourth section, whilst also taking the implications shown from Chapter 2 on evolution of the legal scheme governing transfer of rights in other jurisdictions, the underlying deficiencies embedded in CMC 1992 are uncovered in the fifth section. Finally, to address these deficiencies, the general directions of Chinese law reform are set out.

3.2 The Legislative Background of CMC 1992

CMC 1992 had been drafted since 1951, was adopted in 1992, and finally came into force on 1 July 1993.² The whole procedure of drafting witnessed the development of the shipping

¹ Under the CMC 1992, the most relevant rule in this regard is Article 78 which provides that the legal relationship between the carrier and the holder is governed by the bill of lading. In addition, Article 77 to some extent also reflects the perception of transfer of rights through the bill of lading as it addresses the conclusive effect of the bill of lading to a third party. For details, see discussion in 3.3 below.

² Tiansheng Li, *Chuanhuo Liyi Pinghen Yanjiu [The balance of interest between cargo owner and carrier (author's translation)]* (1st edn, Law Press China 2012) 308.

industry since the establishment of the People's Republic of China. At that time, the traditional maritime industry in China had suffered severe damage due to World War II and the domestic war which lasted three years.³ At the beginning of the 1950s, the total tonnage of cargo vessels in China only amounted to 0.3 percent of the global total, which was far below the world average.⁴ Due to this, China's cargo transportation relied heavily on foreign ships. Although the Chinese government started to rebuild the domestic maritime industry from the 1960s, due to the 'Cultural Revolution' and the unstable political environment the development of the shipping industry remained slow until 1978 when economic reform began in China. Since then, China has transferred to an 'Open Door' economic policy, welcoming and encouraging cross-border trade with other countries.⁵ However, at the time, the under-developed shipping industry did not have the capacity to serve the increasing foreign trade. To change this, the Chinese government made great efforts to support the development of domestic shipping industry, with the purpose of shaping a powerful merchant fleet.⁶ One significant instance was that, in the 1990s, all major shipping companies in China became government owned and run.⁷ This allowed them to receive more support than the privately-owned companies.⁸ In addition, these companies, for instance, China Ocean Shipping (Group) Company (COSCO), even had the opportunity to directly participate in the drafting work of the Maritime Code.⁹ From a review of China's shipping history from the 1950s to the 1990s, it is not surprising to see that most rules under CMC 1992 related to ships and carriers, for example, Chapter 2 Ships, Chapter 4 Contract of Carriage of Goods by Sea, and Chapter 8 Collision of ships. In particular, as to Chapter 4 governing the relationship between the carrier and the cargo interests, it focuses on limiting carrier's liability in cargo transportation.¹⁰ To a large extent, this reflected the economic policy during that period and provided legal

³ Xinchun Tong, 'The development of shipping industry in China (1949-2010)' (*China Economic History*, 31 October 2012) <<http://economy.guoxue.com/?p=7575>> accessed 15 May 2017.

⁴ *ibid.*

⁵ Sharon Li and Colin Ingram, *Maritime Law and Policy in China* (2nd edn, Routledge 2013) 2.

⁶ Li (n2) 308-09.

⁷ Li (n2). A typical example of such kind of shipping company is China Ocean Shipping (Group) Company (COSCO), which has been the largest shipping company in China.

⁸ Li (n2).

⁹ Yu Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)]* (2nd edn, Peking University Press 2005) 178.

¹⁰ For examples in this regard, see CMC 1992, art 47 on seaworthiness; art 49 on deviation, art 51 on carrier's immunities of liability; art 52 on carriage of live animal; art 53 on deck cargo; art 54 on scope of carrier's liability; art 55 on calculation of indemnity for cargo loss or damage; art 56 on limitation of the amount of indemnity for cargo loss or damage; art 57 on limitation of carrier's liability for delay of delivery; art 58 on application of the defence and limitation of liability provided for in this Chapter; art 60 on division of liability assumed by the carrier and the actual carrier; art 64 on limitation of total compensation that can be requested from the carrier and the actual carrier.

support for the development of the shipping industry.¹¹ In this sense, CMC 1992 was mainly drafted from the carrier's perspective.

Another significant feature of CMC 1992 is the philosophy of legal transplant which had been adopted by the legislators since the first draft of the Maritime Code. This was then followed throughout the subsequent stages of legislation.¹² At the very beginning, the Maritime Code was drafted by studying and translating from Russian maritime law.¹³ Based on that, the first draft of the Maritime Code was finished in 1963. However, since 1966 drafting work was interrupted due to the 'Cultural Revolution' which lasted into the early 1980s when China re-opened its doors to the world.¹⁴ Since then, foreign trade and cargo shipping have both undergone significant developments. Meanwhile, the maritime related cases were also growing rapidly, reaching 20 percent average annual growth from 1990 to 2000.¹⁵ A legal framework is urgently needed in order to tackle the legal issues in this area. Under such a context, the legislators (State Council Legislative Affairs Bureau, Ministry of Transport and Ministry of Foreign Trade and Economic Cooperation) accelerated the process of the drafting work and adjusted the guidance of the Maritime Code which suggested that the Maritime Code should be in line with the latest international standards and common practice.¹⁶ Under such guidance, CMC 1992 borrowed widely from a great number of rules found in relevant international conventions. For example, as to Chapter 4 Contract of Carriage of Goods by Sea, it was drafted on the basis of the Hague Rules, Hague-Visby Rules and the Hamburg Rules, from which many substantial rules were translated and incorporated directly into Chinese law without significant change.¹⁷ Besides the international conventions, CMC 1992 also referenced the non-compulsory rules in commercial practice. For example, Chapter 10 General Average incorporates the rules from The York-Antwerp Rules 1974, which is not mandatory but commonly followed by most shipping countries.¹⁸ In addition, the legal transplant under CMC 1992 not only includes the international rules but also the

¹¹ Yuzhuo Si, *Maritime Law Monograph* (2nd edn, China Renmin University Press 2010) 7-8.

¹² Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)]* (n9) 9.

¹³ Li and Ingram (n5) 3.

¹⁴ Si, *Maritime Law Monograph* (n11) 1.

¹⁵ Li and Ingram (n5) 2.

¹⁶ Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)]* (n9) 10.

¹⁷ *ibid* 10-11.

¹⁸ Si, *Maritime Law Monograph* (n11) 9.

national law in other jurisdictions. For instance, as to Chapter 12 Contract of Marine Insurance, it was drafted on the basis of the UK Marine Insurance Act 1906.¹⁹

The wide transplant of foreign rules by CMC 1992 made it a landmark piece of regulation as it accomplished the modernization of maritime law in only around 40 years whereas this was achieved in over a century in other major shipping countries.²⁰ However, criticism was also made of such heavy legal transplant, especially the direct transplant of international conventions by CMC 1992. As noted by Griggs:

In the interests of achieving as much uniformity as possible, this method may be welcomed; however, it does serve to increase the opportunities for doubt and confusion. Hopefully, this method of incorporation will not become too widespread.²¹

Unfortunately, such a concern appears to have been well-founded given the past two decades of implementation of CMC 1992 from which much uncertainty and incongruity has arisen. The debates and problems specifically linked with the transfer of rights through the bill of lading are discussed below.

3.3 The Debates on Current Rules covering Transfer of Rights under CMC 1992

Under CMC 1992, the term ‘transfer of rights’ is not expressly employed. However, some rules that reflect the nature of such a term do exist. They are Articles 77 and Article 78 in Chapter 4 which provides for the contract of carriage of goods by sea. Article 77 reads as follows,

Except for the note made in accordance with the provisions of Article 75 of this Law, 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

¹⁹ Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author’s translation)]* (n9) 10.

²⁰ Ben Beaumont and Philip Yang, *Chinese Maritime Law and Arbitration* (1st edn, Simmonds & Hill Publishing Ltd 1994) 61.

²¹ Griggs Patrick J S, ‘Uniformity of Maritime Law--An International Perspective’ (1998-1999) 73 *Tulane Law Review* 1551, 1578.

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.²²

The aforesaid rule indicates that the clauses on the bill of lading, at least for those clauses regarding the description of cargo, legally bind the carrier and the third party who has an interest in the goods. Based on that, it is not difficult to infer that the bill of lading is able to play a contractual role between the carrier and the third party.²³ Such an implication is underlined by Article 78 which provides 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. Neither the consignee nor the holder of the bill of lading shall be liable for the demurrage, dead freight and all other expenses in respect of loading occurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the consignee and the holder of the bill of lading.²⁴

Article 78 clearly recognizes the bill of lading's contractual effect when it is transferred to a third party, which means that the third party is able to acquire certain contractual rights against the carrier by virtue of holding the bill of lading. In this sense, CMC 1992 attributes the transfer of contractual right to the transfer of bill of lading. Basically, such an approach is in line with the mercantile custom and legislative arrangement in many jurisdictions as it was established on the basis of referencing these foreign experiences.²⁵ However, unlike the jurisdictions where the approaches on transfer of rights gradually evolved from long-term commercial and judicial practice (for instance, COGSA 1992 in the UK and FBLA 1994 in the US), CMC 1992 seems to directly borrow the approach without further considering its compatibility and coherence with the existing legislation and legal theories in China.²⁶ Such operation inevitably gives rise to controversy on the legal rationale behind the relevant rules. In addition to that, the wording of Articles 77 and 78 does not suggest what kind of rights the bill of lading exactly transfers from one cargo interest to another. The loosely drafted rules

²² CMC 1992, art 77.

²³ Wenjun Wang, *Tidan Xiangxia Haiyun Huowu Suopei zhi Qingqiuquan Jichu Yanjiu* [legal basis to establish the right of suit under the bill of lading (author's translation)] (1st edn, Law Press China 2010) 65.

²⁴ CMC 1992, art 78.

²⁵ Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun* [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)] (n9) 163.

²⁶ Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun* [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)] (n9) 163-65.

therefore have left much space to construe the extent of the transferable contractual right. Recently, the question as to whether the right of control should be regarded as one such transferable contractual right has created much interest.²⁷

3.3.1 The Debates on the Legal Standing of Article 77 and Article 78

Although Articles 77 and 78 set out the contractual relationship between the carrier and the person to whom the bill of lading is transferred, they do not mention how such a legal consequence is produced. In other words, the legal grounding of such a contractual relationship is not clear. Some scholars argue that such a contractual right was established based on the ‘transfer of contract’ theory by which the transfer of a bill of lading would lead to the transfer of the contract of carriage.²⁸ The holder of the bill of lading thereby obtained the legal status as an original party to the contract.²⁹ Such an idea may be due to the impact of English law.³⁰ However, it is not fully compatible with the prevailing contract law and maritime law in China. First, according to the contract law,³¹ the transfer of a contract is invalid without the approval from the original party of the contract but the fact is that the transfer of bill of lading is not subject to the approval of the carrier. Therefore, it is difficult to explain why the rights and obligations under the contract of carriage can be transferred to a third party without the carrier’s consent.³² Second, if the contract of carriage can be transferred together with the transfer of bill of lading, besides acquisition of all rights conferred by the contract, the transferee shall also bear all obligations under the contract as if he is the original party of the contract. Nevertheless, this is not true under CMC 1992 which provides that some contractual obligations are always to be borne by the shipper throughout the period of transit. One significant example in this respect is the shipper’s obligation to provide accurate information and documentation regarding the goods shipped to the carrier.³³

²⁷ The controversy on this question arose from the introduction of the Right of Control by the Rotterdam Rules in 2009.

²⁸ Zhiwen Li, ‘On the Holder of the Bill of Lading and the Rights, Obligations and Liabilities’ (2001) 12 Annual of China Maritime Law 269, 278.

²⁹ *ibid.*

³⁰ Yu Guo, *Tidan Falv Zhidu Yanjiu [Study on the law of bill of lading (author’s translation)]* (1st edn, peking university press 1997) 163; Wang (n23) 105.

³¹ Contract Law of the People’s Republic of China 1999 (Contract Law 1999), art 88.

³² Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 351.

³³ CMC 1992, art 67:

The shipper shall perform all necessary procedures at the port, customs, quarantine, inspection or other competent authorities with respect to the shipment of the goods and shall furnish to the

Another example concerns the shipper's obligation to pay the freight. In the case where the carrier exercises lien on goods in accordance with Article 87 and no one takes delivery of the goods within 60 days from the date of a ship's arrival at the port of discharge, the carrier is entitled to request the auction of goods and requires the shipper rather than the consignee/endorsee to pay the freight and other related charges if the price of auction is not enough to cover his expense in keeping the goods.³⁴

In consideration of the limits of the 'transfer of contract theory', another argument, which has been termed 'contract for the benefit of a third party', was developed so as to explain the origin of the contractual right acquired by the holder of the bill of lading.³⁵ According to the theory, the contract of carriage concluded by the shipper and the carrier should be regarded as for the benefit of the prospective holder of the bill of lading.³⁶ Advocates of the theory state that this 'contract for the benefit of a third party' was established on the basis of the 'stipulation for another' principle which has been recognized by Contract Law 1999.³⁷ However, in fact, the 'contract for the benefit of a third party' theory in the context of

carrier all relevant documents concerning the procedures the shipper has gone through. The shipper shall be liable for any damage to the interest of the carrier resulting from the inadequacy or inaccuracy or delay in delivery of such documents.

Art 68 (1):

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 be taken. In case the shipper fails to notify the carrier or notified him inaccurately, the carrier may have such goods landed, destroyed or rendered innocuous when and where circumstances so require, without compensation. The shipper shall be liable to the carrier for any loss, damage or expense resulting from such shipment.' and Art 69 (1) 'The shipper shall pay the freight to the carrier as agreed.

³⁴ CMC 1992, art 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.

Art 88:

If the goods under lien in accordance with the provisions of Article 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 the 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 sale 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 to make the refund and such surplus amount has not been claimed at the end of one full year after the auction sale, it shall go to the State Treasury.

³⁵ Si, *Maritime Law Monograph* (n11) 100.

³⁶ *ibid.*

³⁷ Wang (n23) 102.

maritime law is not fully coherent with the principle of ‘stipulation for another’ under Contract Law 1999. First, as to the contractual right of suit, the holder of the bill of lading usually wishes to obtain title to sue the carrier directly. However, such expectation might not be realized if the ‘contract for the benefit of a third party’ theory is construed by following the ‘stipulation for another’ principle under Contract Law 1999 which provides that:

Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract.³⁸

Had the aforesaid rule been strictly adhered to, the contractual right should always subsist on the side of the shipper rather than the third party cargo interest. Obviously, such a result does not fulfill the aim of developing the ‘contract for the benefit of a third party’ theory.³⁹ Second, the ‘contract for the benefit of a third party’ theory appears to suggest that it is the contract of carriage rather than the bill of lading that governs the relationship between the holder and the carrier.⁴⁰ However, this is not the case under CMC 1992 which expressly provides that the relationship between the carrier and holder of the bill of lading is governed by the clauses in the bill of lading.⁴¹ In addition, according to the ‘contract for the benefit of a third party’ theory, the carrier could have, in respect of the holder, availed itself of any defense it has against the shipper.⁴² However, such a result conflicts with CMC 1992 by which the carrier may not be allowed to invoke such a defence against the holder, provided that such a defence is not expressed in the bill of lading.⁴³ Therefore, although the ‘contract for the benefit of a third party’ theory may accurately explain the origin of the holder’s contractual right, it does not suffice to interpret why the bill of lading prevails over the contract of carriage when the

³⁸ Contract Law 1999, art 64.

³⁹ Wang (n23) 110.

⁴⁰ According to the ‘Contract for the Benefit of Third Party’ theory, the contract of carriage itself is a contract concluded for the benefit of third party, which to some extent means that the holder, who is the third party to the contract of carriage, is entitled to bring a contractual action against the carrier by virtue of the contract of carriage rather than by virtue of holding the bill of lading. Wang (n23) 116-17.

⁴¹ CMC 1992, art 78.

⁴² Contract Law 1999, art 82 ‘Upon receipt of the notice of assignment of rights, the obligor may assert against the assignee any defences it has against the assignor.’

⁴³ According to Article 77, the contractual effect of bill of lading will become conclusive when it arrives to the holder who is the third party to the contract of carriage. Accordingly, if the bill of lading does not contain the clause which enables the carrier, in respect of the holder, availed itself of any defence it has against the shipper, then the carrier should not be allowed to invoke such a defence against the holder.

bill is transferred to a third party ‘who has acted in good faith in reliance on the description of the goods contained therein.’⁴⁴

As can be seen from the above, neither theory fully accommodates the existing legal theory and bill of lading practice. The controversial legal grounding of Articles 77 and 78 therefore gives rise to a difficulty in identifying the legal status of relevant parties. One practical question that arises therefrom is the shipper’s title to sue after transferring the bill of lading to a third party.⁴⁵ On some occasions, the shipper (usually the seller) may suffer actual loss or damage even though both the risk and the bill of lading have passed to the consignee/endorsee (usually the buyer).⁴⁶ Since CMC 1992 provides little hint as to whether the shipper is still entitled to sue the carrier in a contract under such a circumstance, the disputes surrounding this issue in practice are usually subject to the judges’ discretion, which often leads to inconsistent judgments in different courts.⁴⁷

3.3.2 The Debates on the Scope of Contractual Rights that can be Transferred

Another question that needs clarification is the scope of the contractual right that can be transferred through the bill of lading. Instead of explicitly addressing the rights and obligations of the carrier and the cargo interest under the contractual nexus constructed by

⁴⁴ CMC 1992, art 77.

⁴⁵ Yu Guo, ‘Shipper’s right of suit against the carrier after assignment of bill of lading’ (2010) 6 Annual of China Maritime Law 50, 51.

⁴⁶ A typical example can be seen from *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company*, Higher People’s court of Guangdong Province, No. Yuegaofaminsizhongzi 104/2012, cited from Feifei Deng, ‘Shipper’s right to sue in relation to carriage of goods by sea: the approach of Chinese court’ (2013) 19 JIML196. In this case, the buyer (endorsee) rejected the goods which were damaged at a time when both the bill of lading and risk had been transferred to him. To mitigate the loss in an efficient way, the seller (shipper) accepted the buyer’s rejection and resold the goods at a reduced price to another party. As a result, the buyer assumed the substantial loss. The detailed discussion on this case can be seen in Chapter 4, 4.3.1 below.

⁴⁷ The examples of inconsistent judgements can be seen from the following cases. *Hainan Tonglian Shipping Company v. Minmetals International Nonferrous Metals Trading Company* [1996] Supreme People’s the court of People’s Republic of China (China Foreign-Related Commercial and Maritime Trial , 30 December 2001) <<http://www.ccmt.org.cn/shownews.php?id=102>> accessed 05 May 2017. In this case, the Court held that the shipper (seller)’s contractual right to sue the carrier was extinguished after the transfer of bill of lading to another party. Similar judgement can also be found in *Beijing Wen-yang Imp. & Exp. Co. Ltd. v Shanghai COSCO Shipping Co. Ltd* [1999] Higher People’s Court of Tianjin Municipality, cited from Wei Wang, *Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading-A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea* (1st edn Law Press, 2010)141-42. On the contrary, in *PICC Property and Casualty Company Limited of China Shenzhen Branch* (n46), the court held that the shipper was always vested in the contractual right to sue no matter whether the bill of lading has been transferred or not, on the ground that the shipper was a party to the original contract of carriage.

the bill of lading, Article 78 leaves these issues to the clauses in the bill of lading. This may cause little confusion regarding the parties' obligations during transit and the carrier's right for freight, which are usually expressly provided by the provisions on the bill of lading.⁴⁸ However, this is not the case when the cargo interest's rights are involved. In contemporary practice, especially in liner shipping, there are few bills of lading that contain clauses specifically on this issue.⁴⁹ That may be because, nowadays, most bills of lading are formal contracts and the clauses on the back of which are unilaterally laid down by the carrier.⁵⁰ From the carrier's perspective, there is less need for him to insert the clauses addressing cargo interest's rights into the bill of lading. Such a result is common in commercial practice but may not be favourable to the cargo interest if the bill of lading is under the governance of CMC 1992. In such an instance, neither CMC 1992 nor the bill of lading itself gives the cargo interest clear guidance on the exact right that he can exercise against the carrier. In recent years, the most debatable issue arising therefrom is the cargo interest's right of control.

In fact, although the term 'right of control' was recently introduced into the spectrum of maritime law, the contents of such a term are not alien to shipping practice. When goods are in transit, sometimes the cargo interest may send the carrier some instructions on disposal of goods, for example, requesting the carrier to change the person to whom the delivery should be made, or redirect the goods to another destination. Even though such a request is brought against the carrier, it is submitted that the fundamental reason to generate such a request derives from the trade parties' arrangement on the transaction of goods.⁵¹ In the current stage, such a right is rarely mentioned by the clauses in the bill of lading nor is it expressly addressed by CMC 1992. This means that whether such a request should be exerted by the carrier is subject to negotiation and agreement between the cargo interest and the carrier. However,

⁴⁸ For example, see Appendix 9 Terms of conditions of COSCO Container Lines Bill of Lading, art 4,5,6,7,8, 12,13.

⁴⁹ For example, as shown by Appendix 9 Terms of conditions of COSCO Container Lines Bill of Lading, there is no such clauses.

⁵⁰ *New Zealand Shipping Co. v A.M. Satterthwaite & Co.* [1975] AC 154 (UKPC), 167-68. Lord Wilberforce stated that 'The bill of lading brought into existence a bargain unilateral...' See also Georgios I Zekos, 'Negotiable Bills of Lading and their Contractual Role under Greek, United States and English Law (1998) 40 Managerial Law 5, 9. For the definition of 'Formal Contract', see Arthur Linton Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (2nd edn, West Publishing Company, 1963) 10. 'A formal contract is one, the legal operation of which is dependent upon on the form in which it is made, the mode of expression, and not upon the sufficiency of the consideration that is given in relation for it, or upon any change of position by the promise in reliance upon it.'

⁵¹ *Caslav Pejovic*, 'Stoppage in Transit and Right of Control: Conflict of Rules?' (2008) 20 Pace International Law Review 129, 131-34.

such a situation has been changed by the Rotterdam Rules which statutorily defines such a request as the ‘right of control’ vested in certain cargo interest.⁵² In addition, the Rotterdam Rules provide that such a right is able to be transferred from one cargo interest to another with the bill of lading.⁵³ Influenced by the Rotterdam Rules, a number of scholars argue that the ‘right of control’ should be introduced into future Chinese maritime law as a rights that derives from the contract of carriage, whilst also can be transferred through the bills of lading.⁵⁴ It is asserted that such an operation will not only harmonize the shipping and trading practice⁵⁵ but also facilitate the carrier to fulfil the obligation of delivery.⁵⁶ In addition, the advocates of the aforesaid argument believe that the introduction of ‘right of control’ will legally pave the way for e-commerce in maritime trade.⁵⁷ In contrast, opponents argue that the ‘right of control’ may place an extra burden on the carrier as the carrier needs to properly identify the legal status of the controlling party and execute the instruction sent from the controlling party. These matters are not the carrier’s responsibility in traditional shipping practice.⁵⁸ Since the Rotterdam Rules have not been enacted, the exact impact of rules on the ‘right of control’ remains unknown. Such a situation adds more uncertainty to the question of whether the ‘right of control’ should be incorporated into future Chinese maritime law.

3.4 Debates and Problems with respect to the Issues Left Untouched by CMC 1992

Although Articles 77 and Article 78 recognize that the bill of lading is able to transfer a contractual right from one cargo interest to another, the issues on transfer of rights that have

⁵² The Rotterdam Rules, art 51. According to this article, the shipper, the holder of all original negotiable transport document, and the holder of an electronic transport record may become the controlling party in different circumstances.

⁵³ *ibid.*

⁵⁴ Zhiwen Li, *Hot issues in the Law of International Carriage of Goods* (1st edn, Law Press-China 2012) 265, See also Tingzhong Fu, ‘The comments on some legal issues in respect of the right of control’(2008) 1 Annual of China Maritime Law 30, 32; Si and Li (n32) 379; Zhaofang Zheng and Zhenkun Jia, ‘Tidan Yunshu Yu Huowu Kongzhiquan Wenti [The bill of lading and the Right of Control (author’s translation)]’ in Xiaonian Li (ed) *Selected Papers on Hot Issues in International Maritime Law* (1st edn, China Legal Publishing House 2008) 53.

⁵⁵ Zhiwen Li, *Hot issues in the Law of International Carriage of Goods* (1st edn, Law Press-China 2012) 261.

⁵⁶ Tingzhong Fu, ‘The comments on some legal issues in respect of the right of control’(2008) 1 Annual of China Maritime Law 30, 33.

⁵⁷ Li (n55) *Hot issues in the Law of International Carriage of Goods* (n53) 243.

⁵⁸ Zengjie Zhu, Huanning Wu, Yongjian Zhang and Yu Guo, *Lutidan Guisze Shiyi [understanding Rotterdam Rules (author’s translation)]* (1st edn, China Commerce and Trade Press 2011) 209.

arisen in practice are far more than that. On the one hand, in commercial practice, the transfer of a bill of lading is often viewed as equal to a transfer of the goods, based on which the bill of lading is often described as a ‘document of title’ by Chinese courts, practitioners and scholars, despite the fact that the legal nature of such an expression has not been defined by CMC 1992 nor by other relevant legislations.⁵⁹ Such a legislative blank inevitably leads to controversy when explaining what exact right or interest related to goods the bill of lading is able to transfer to its holder. On the other hand, although CMC 1992 recognizes the contractual effect of the bill of lading between the carrier and the cargo interest who is the third party to the contract of carriage, it does not address how such a contractual right moves from the original party of contract of carriage to a third party. Also, there exists no judicial precedent in this respect that is legally binding on subsequent cases.⁶⁰ In consequence of that, the manner of the transfer of rights through the bill of lading remains unclear under the current legal regime. The debates and problems in the aforesaid two respects will be discussed next.

3.4.1 Debates over the Expression ‘Bill of Lading as Document of Title’

As discussed in 3.2, maritime law in China was established by transplanting the rules from international conventions and the national laws of other jurisdictions. In fact, the legal transplant was not limited to statutory rules but also included some legal concepts developed through mercantile custom and common law. One significant example of such legal concepts is the expression ‘bills of lading as document of title’ whose development benefits a great deal from English common law.⁶¹ However, unlike English law, the definition of such an expression under Chinese law has never reached uniformity.

In early 1990s, the dominant view on this point was that the bill of lading should be regarded as a document representing the property of goods; this led to the conclusion that the transfer of the bill of lading would transfer the property of the goods together.⁶² Such an idea was also

⁵⁹ Renjian Wu, ‘Jixi Tidān Wuquan Pingzheng De Gongneng Neihan [Analysis of the legal nature of the bill of lading as document of title (author’s translation)]’ [2008] 18 Annual of China Maritime Law 242, 245-46

⁶⁰ In China, the precedents are not binding on the subsequent cases although the precedents published by Supreme People’s Court are instructive to judicial practice. Basically, the judges shall make the decisions by following the statues rather than the precedents.

⁶¹ Wu (n59) 243.

⁶² Wang (n23) 21-22.

evidenced by the judicial practice during that period. For example, in the case *Xingli Company, Guangao Company v National Trade Co Ltd (India), Balapool Company (Malaysia), Kupock Company (Malaysia), Narin Company (Malaysia)*,⁶³ the Supreme Court held that, as the bill of lading was a ‘document of title’, the person who had the bill in hand should be regarded as the owner of cargo covered by the bill.⁶⁴ From the aforesaid dictum, it can be seen that the Court equated the term ‘document of title’ with ‘document of property’. Later, such an interpretation was criticized for distorting the original meaning of the expression ‘bill of lading as document of title’ in English common law.⁶⁵ As mentioned in 2.3.1, at common law, ‘title’ in the expression ‘bill of lading as document of title’ refers to the constructive possession of goods rather than the ownership of the goods. No doubt, sometimes the property may be transferred together with the bill of lading; however, it can hardly be concluded that such a legal consequence will happen all the time.⁶⁶ With the increasing complexity of maritime trade in China, such an argument appears to be outdated since it is incompatible with the occasions where the cargo interests have different arrangements on passing the property of the goods.⁶⁷

Due to the weaknesses of the property theory, another argument, which asserts that the bill of lading is a document representing the constructive possession of the goods, has received more and more support.⁶⁸ Such an idea is closer to the original meaning of ‘bill of lading as document of title’ at common law, and it is also compatible with the reality of trade in which the transfer of a bill of lading and the transfer of property do not occur at the same time. Notwithstanding, it may not be easy to fully accommodate such an idea into the existing civil law and property law in China under which the concept of ‘property’ is defined as ‘the owner's right to lawfully possess, utilize, profit from and dispose of his property’.⁶⁹ Such a definition indicates that the ‘possession’ merely refers to a kind of *fait juridique* that is subject to the property rather than an independent right.⁷⁰ Whether the possession can be protected

⁶³ [1991] Supreme People's the court of People's Republic of China, 1 Gazette of the Supreme People's Court 47.

⁶⁴ *ibid* 48.

⁶⁵ Hai Li, ‘Reconsideration on Bill of Lading as Document of Title-And on the Nature of the B/L’ (1997) 7 Annual of China Maritime Law 41, 49

⁶⁶ Paul Todd, *Contracts for the Carriage of Goods By sea* (1st edn, BSP professional Books 1988) 5.

⁶⁷ Si and Li (n32) 212.

⁶⁸ Guo, *Tidan Falv Zhidu Yanjiu [Study on the law of bill of lading (author's translation)]* (n30) 87.

⁶⁹ General Principles of the Civil Law of the People's Republic of China 1986, art 71.

⁷⁰ Huixing Liang and Huabin Chen, *Real Right Law* (5th edn, Law Press China 2014) 389-91, 401-02.

by law depends on whether such possession is established on the basis of a rightful property.⁷¹ In this sense, the idea that defines the ‘title’ as a kind of possession may not be favourable to the holders of bills of lading since their interests in goods may always be in a precarious status.⁷² To secure their interests, before accepting the bill of lading, the prospective holders have to enquire into the details of all the previous transactions of cargo so as to identify the property status of goods to which their interests may be subject. It would appear that such a requirement would not satisfy the merchant’s expectations about the function of the bill of lading in commercial practice.

In consideration of the defects of the aforesaid two theories, a new proposition which argues that the bill of lading shall be vested with different qualities when it is in different commercial contexts has been raised recently. According to the proposition, the legal effect of the bill of lading as a ‘document of title’ only exists when transacting the goods, whereas at the stage of transporting the goods the transfer of the bill of lading only leads to the transfer of the *right in personam*, namely, the contractual right deriving from the original contract of carriage.⁷³ Ostensibly, this theory covers all possible results that the transfer of a bill of lading may lead to. However, it is more like a summary of the roles that the bill of lading possibly play in different commercial stages rather than giving a substantial answer to the question of the exact interest in goods that the bill of lading may confer on its holder. In addition, this theory negates the bill of lading’s legal effect as a ‘document of title’ in the shipping stage.⁷⁴ However, from a historical perspective, such a legal effect was actually developed from the shipping practice.⁷⁵ By virtue of such a legal effect, once the carrier delivers the goods against presentation of an original bill of lading, the carrier is usually able to discharge his obligation of delivery not only against the person who presented the bill but also against all other parties who may have an interest in the goods. Such a consequence cannot be achieved if the bill of lading only carries a contractual right. Moreover, the function theory divides the maritime trade into separate stages and defines the bill of lading’s function respectively in each stage.

⁷¹ *ibid.*

⁷² If the ‘title’ represented by the bill of lading only refers to the ‘possession’, the holder’s interest to goods may be challenged by the person who is vested in ownership or other real rights of goods.

⁷³ Si, *Maritime Law Monograph* (n11) 178-83.

⁷⁴ Si, *Maritime Law Monograph* (n11) 99, See also Yuzhuo Si, ‘Guanyu Wudan Fanghuo De Lilun Yu Shijian-Jianlun Tidan De Wuquanxing Wenti [Theory and Practice on Delivery of Cargo without Bills of Lading—the nature of Bill of Lading as Document of Title (author’s translation)]’ (2000) 00 Annual of China Maritime Law 18, 20.

⁷⁵ See discussion in Chapter 2, 2.3.1 above.

To some extent, this ignores the potential connection between the transportation of goods and the underlying transaction of goods. Such an arrangement may make the legal function of the bill of lading more fragmented, thereby adding more complexity to unifying such a function by statutory law.

In addition, the recent judicial interpretation on delivery of cargo without presentation of the original bill of lading appears to bring more confusion to defining the nature of the interest in goods that can be transferred through the bill of lading. The Supreme People's Court interpreted it thus:

Where any loss is caused to the holder of an original bill of lading due to delivery of goods by a carrier without the original bill, the holder may request the carrier to bear the liability for breach of contract or tort.⁷⁶

Such an interpretation recognizes that the holder of the bill of lading may have title to sue in tort against the carrier. However, the interpretation itself does not address how the holder can establish such a tortious action and then make the carrier assume the liability in tort. In this sense, the judicial interpretation provides little hint to identify the exact interest in goods that can be transferred through the bill of lading, which may be an essential element for the holder to invoke such a tortious action.⁷⁷

3.4.2 The Problems regarding the Manner of Transfer of Rights

Another unaddressed problem under CMC 1992 is the exact manner of transfer of rights through the bill of lading; in other words, in which way the rights are transferred from one cargo interest to another. One practical issue in this respect is the exhaustion of the bill of lading's effect in transfer of rights, namely, at what time will the bill of lading cease to transfer the rights, either the rights in contract or the interest in goods, to its holder. Such an issue may not be triggered if the bill of lading is transferred pursuant to the normal trading

⁷⁶ Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading (adopted on 16 February 2009, entered into force on 5 March 2009), art 3.

⁷⁷ According to Article 6 of Tort Law of the People's Republic of China, 'one who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.' This means that the holder, who wishes to bring a tortious action against the carrier for making delivery without presentation of an original bill of lading, should prove that he has certain interest in the goods covered by the bill.

process and withdrawn by the carrier once the goods are delivered at the destination. However, the trade reality is far more complex than that. For the situation where the bill of lading arrives at the destination later than the goods, in order to dispose of the goods in a timely manner the carrier and the cargo interest may agree to deliver the goods against a letter of indemnity (LOI) rather than an original bill of lading. Such an operation easily gives rise to trafficking of the bill of lading after delivery of the goods. If another cargo interest receives the bill of lading due to such trafficking, it is questionable whether the cargo interest is still able to acquire any entitlement by possession of the bill of lading.⁷⁸ In judicial practice, different courts may have different approaches on this point.⁷⁹

Besides the exhaustion of the bill of lading's effect in transfer of rights, the validity of the bill of lading to a *bona fide* holder of the bill of lading also needs clarification.⁸⁰ In maritime trade, it is common for goods to be resold many times before ultimately arriving at their destination. In such an instance, the bill of lading is often used to represent goods that are passing from one cargo interest to another. If some defects occur in one sales transaction (for instance, the bill of lading is acquired by an intermediate holder by fraud), it is questionable whether the subsequent *bona fide* holder of the bill of lading is still entitled to acquire the rights transferred through the bill of lading. Although the debates on this question are largely academic,⁸¹ the practical value of such an issue should not be ignored as the extent to which an innocent party can rely on the bill of lading will influence the merchant's expectations about the usage of the bill of lading in commercial practice.⁸² Due to the importance of this

⁷⁸ *Gree Yinshi Ltd (Zhuhai) and Nantong Bank (Zhuhai Branch) v WangFoong Transportation Ltd (HK)*, Higher People's Court of Guangdong Province, No. Yuegaofajingerzhongzi 289/2000 (*Find Law*, 28 December 2009) <<http://china.findlaw.cn/hshs/haishanghetong/tdzj/957.html#p1>> accessed 23 May 2017. In this case, the bill of lading was pledged to the bank at a time when the goods had been delivered to the consignee against a LOI. It was quite arguable if the bank was entitled to the right of pledge of goods in such a situation. This case is discussed in details in Chapter 5, 5.3.4 below.

⁷⁹ For example, in the first instance of the aforesaid case (No. Guanghaifashenzi 040/1998), the Maritime Court of Guangdong Province held that the pledge of bill of lading to the bank was void as the goods covered by the bill had been delivered. The bank should not be able to acquire any right to goods by virtue of holding the bill. However, such judgement was overruled in the second instance, where the High Court of Guangdong Province held that the bill of lading would keep on performing its effect as 'document of title' unless it was surrendered to the carrier, and thus the bank was entitled to the pledge of goods covered by the bill.

⁸⁰ The *bona fide* holder of the bill of lading herein refers to the cargo interest who receives the bill of lading by paying reasonable price of the goods covered by the bill and without knowing any defect in the previous life of the bill of lading.

⁸¹ Till the submission of this thesis, no reported case specifically on this issue had been found. For academic comments on this issue, see Si and Li (n32) 215-17.

⁸² Michael D. Bools, *The Bill of Lading, a document of title to goods, an Anglo-American Comparison* (1st edn, LLP 1997) 84.

issue, both UK law and US law have developed definite answers to this question.⁸³ Likewise, to bring more certainty to the legal effect of transferring the bill of lading, the future Chinese maritime law should expressly provide for the validity of the bill of lading to a *bona fide* holder.

3.5 The Underlying Deficiencies in CMC 1992

As can be seen from the discussion in 3.3 and 3.4, the debates and problems under Chinese law may be directly attributed to the silence and the ambiguity of CMC 1992 on many specific aspects of the transfer of rights. However, the underlying deficiencies in CMC 1992 amount to more than that.

First, as can be seen from Chapter 2, the evolution of the legal scheme on transfer of rights is closely related to the development of cargo trading. From a historical perspective, the initial rule regarding transfer of rights, namely, the transfer of the bill of lading may transfer certain entitlements to goods, was devised to serve the merchants' need to resell goods in transit.⁸⁴ Since then, with the development of maritime trade, different commercial modes on transaction of goods have been invented by merchants. Under such a situation, the mercantile custom regarding the transfer of rights has gradually evolved into a systematic legal scheme covering a wide range of transfer of rights issues so as to meet merchants' various demands in contemporary trade practice.⁸⁵ In this sense, despite the fact that the legal scheme covering transfer of rights is usually established under the shipping law, the construction of such a legal scheme shall properly reflect the potential connection between the transfer of rights and the underlying transaction of cargo. Such a principle has been adopted by both UK law and US law in which the law governing the transfer of rights, either

⁸³ The UK law developed the answer to this issue through common law, while the US Law provides for the issue by statute (FBLA 1994). Bools (n82) 63-84.

⁸⁴ See discussion in Chapter 2, 2.2.1 above.

⁸⁵ For instance, the transfer of title to sue was envisaged to facilitate the merchants to claim cargo loss or damage in consequence of carrier's default. In commercial practice, who ultimately assumes such loss or damage is often subject to the trading arrangement under the sale contract. In addition, as to the right of control, it was envisaged to fulfil the merchants' need to divert the good. Such a need often arises due to the variation of the trading arrangement under the sale contract. Also, the right of control is expected to facilitate the commercial trend of paperless trading. These matters are discussed in details in Chapter 4 and 6.

the experience from the common law or the statutory law, has embodied such a connection.⁸⁶ In this way, the transfer of the rights through the bill of lading has been legally tied in with the genuine transaction of goods. Nevertheless, this is not the case under CMC 1992 which simply provides that the legal relationship between the carrier and the consignee or holder of the bill of lading is governed by the clauses in the bill of lading. From the wording of the rules, it is difficult to find any connection between the transfer of rights through the bill of lading and the underlying transaction of goods, neither expressly nor impliedly. In fact, the outstanding problems under CMC 1992 are highly relevant to the arrangement and performance of the contract that governs the underlying trade relationship. For instance, as to the shipper's title to sue, normally this issue only arises when the shipper has suffered substantial loss or damage, and the assumption of such loss or damage is often subject to negotiation between the seller (shipper) and the buyer (consignee or endorsee). As to the right of control, normally such a right may be invoked when there is a change to the original transaction of goods. For example, the controlling party (seller) may instruct the carrier to deliver the goods to another person if the original receiver (original buyer) for some reason refused to fulfil the obligation of payment under the sale contract. In addition, the causes of the two major problems regarding the manner of transfer, namely, the question of whether the bill of lading is still capable of transferring rights after the goods have been discharged and the question whether the *bona fide* holder of the bill of lading is entitled to obtain indefeasible rights to a large extent can be attributed to the performance of the contract governing the underlying transaction of goods. In general, the aforesaid questions cannot be properly answered if they are detached from their connection with the underlying transaction of goods. In this sense, failure to reflect such a connection constitutes one of the biggest deficiencies in CMC 1992.

Second, as can be seen from the legislative background of CMC 1992, this code was established according to the philosophy of legal transplant. Due to this, a large amount of rules from international conventions and national laws of other jurisdictions have been incorporated into CMC 1992.⁸⁷ Besides the legislation, the philosophy of legal transplant can also be found in judicial practice. The legal concepts from other jurisdictions, especially

⁸⁶ See discussion in Chapter 2, 2.6 above.

⁸⁷ Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)]* (n9) 11.

some concepts developed from common law, have been widely employed by Chinese courts to explain some issues outside the governance of CMC 1992.⁸⁸ Through the philosophy of legal transplant, China developed a modern maritime legal regime in a short period. Notwithstanding, the broad transplant of foreign rules and legal concepts has also brought negative effects. One significant example in this respect is the incompatibility of these foreign rules and concepts with the civil law heritage in China. For instance, as indicated in 3.3.1, it is difficult to accommodate Articles 77 and 78 into any existing theory at contract law that can explain the legal basis of the rights obtained by the holder of the bill of lading. This is also the case with the legal nature of the expression ‘bill of lading as document of title’ in which the ‘title’ normally refers to the ‘constructive possession’ of goods at common law. However, in Chinese law there is no such counterpart whose legal effect is equal to ‘constructive possession’. In this sense, the imprudent legal transplant without proper consideration of the compatibility with the existing legislations and theories, especially those with civil law heritage, constitutes another significant deficiencies of CMC 1992.

3.6 The Trend towards Reform

It is undeniable that CMC 1992 needs to be reformed in order to address the legislative deficiencies and establish a more effective legal scheme to solve the practical problems that arise. The pending question, though, is what shape the reform should take. In other words, what is the trend of the future rules that cover the transfer of rights issue? As discussed in 3.5, one significant deficiencies in current law is the lack of connection with the underlying transaction of goods. To close such a loophole, the findings from the Chapter 2, which reveals a new perspective to govern the transfer of rights issues, namely, the ‘trade holistic view’, may be helpful. Under such a perspective, the transfer of rights issue should be viewed in the broad context integrated with the trading practice rather than the mere shipping practice.⁸⁹ If

⁸⁸ For example, the term ‘document of title’, which was developed at common law, is usually employed by Chinese courts to explain the legal effect of the bill of lading in transfer of real right of goods covered by the bill. This is the case in *China Resources Textile Materials Co., Ltd. (H.K.) v. Guangdong Zhanjiang Shipping Agency Company, Zhanjiang Textiles Enterprise (Group) Company and Shenzhen Special Economic Zone Import and Export Trade (Group) Company* [1994] 4 Gazette of the Supreme People's Court 155; *Xingli Company, Guangao Company v. National Trade Co. Ltd. (India), Balapool Company (Malaysia), Kupock Company (Malaysia) and Narin Company (Malaysia)* [1991] 1 Gazette of the Supreme People's Court 47.

⁸⁹ This is the perspective adopted by the Rotterdam Rules, which has been discussed in Chapter 2, 2.5.2.

this were done when reforming CMC 1992, it would be crucial to understand the reality of China's maritime economy and the emerging commercial need. In addition, in terms of the incompatibility of maritime law with other laws in China, the relationship between CMC 1992, other related legislations (such as the Contract Law 1999, Property Law 2007, etc.) and the International Convention on the Carriage of Goods by Sea should be reconsidered. In this section, the influential elements in the two aspects will be analysed in order to suggest possible ways to reform.

3.6.1 Balance the Interest between the Carrier and the Trader

As mentioned in Chapter 1, rebalancing the interest between the carrier and the traders who participate in the transfer of the bill of lading is key to establishing proper rules governing transfer of rights issues. In this sense, one essential factor in contemporary economic reality that needs to be considered is the economic status of the two interest groups, and how to achieve a new sense of balance of their interests under future legislation.

The discussion in 3.2 has shown that the CMC 1992 was drafted from the carrier's perspective in the way it focuses on limiting the carrier's liability rather than identifying the cargo interest's right. Such a legislative arrangement to a large extent can be attributed to the urgent need to shape and develop the shipping industry at that time.⁹⁰ Compared to such a need, the development of trade appeared to be the secondary purpose under the CMC 1992.⁹¹ However, this may no longer be the case now. The reason can be seen from the following facts.

First, the past two decades witnessed a massive growth in China's shipping power, which fundamentally changed the weak position of China's shipping industry in the 1990s. According to the statistics issued by UNCTAD,⁹² up to the end of July 2016 China had a merchant fleet whose dead weight tonnage amounted to 15 billion, which was around 9% of

⁹⁰ Li (n2) 234.

⁹¹ Such argument can be evidenced by the wording of article 1 of CMC 1992, which provides that 'this Code is enacted...to promoting the development of maritime transport, economy and trade.'

⁹²United Nations Conference on Trade and Development (UNCTAD) 'Review of Maritime Transport' (2016) UNCTAD/RMT/2016 (UNCTAD/RMT/2016).

the total loading capacity of the world's merchants and ranked it in third place globally.⁹³ Such a figure doubled in comparison with the one in 1992 when the CMC 1992 had only just been enacted.⁹⁴ Also, COSCO has become the world's fourth biggest liner shipping company.⁹⁵ In 2015, COSCO reached 17,637,100 actual container carryings, with a share of 11.4% of the global liner shipping market. This figure ranked it in second place globally following Maersk.⁹⁶ Furthermore, with the guidance of the CMC 1992, the more than two decades' practice has made Chinese carriers, especially those in liner shipping, familiar with the risk arising from normal business operations and shipping practice, with developed strategies to cope with the risk.⁹⁷ Additionally, with the development of navigation and ship building technology, there are far fewer dangers in shipping than there were 20 years ago. Based on the aforesaid facts, it can be seen that the shipping industry in China has taken shape and even become competitive in the international shipping market. Given this, in terms of balancing the interest between the carrier and the cargo interest, there appears to be no economic basis to protect carriers' interest in particular under a future Chinese maritime law.

Second, China's import and export trade has also developed quickly in the past two decades. In the early 1980s when the drafting work of the CMC 1992 was restarted, the ratio of China's dependence on import and export trade was only around 10%.⁹⁸ This figure has greatly increased since China joined the WTO in 2001; it soared to 70% in 2004 and thereafter has hovered around the 50% to 70% mark annually.⁹⁹ However, such a figure witnessed a significant drop in 2009 due to the influence of the global financial crisis and since then has been around 30% to 50% annually.¹⁰⁰ The recent decline of import and export has not only dragged down the growth of China's GDP¹⁰¹ but also suppressed merchandise shipping

⁹³ *ibid* 37.

⁹⁴ United Nations Conference on Trade and Development (UNCTAD) 'Review of Maritime Transport' (1992) TD/B/CN.4/27, 63.

⁹⁵ UNCTAD/RMT/2016, 37.

⁹⁶ *ibid* 39.

⁹⁷ For instance, COSCO has established a systematic electronic platform which manages its vessels and shipping documents. Such a platform is able to connect COSCO's agents at all scheduled port of the vessels' routes, and effectively track the vessel and shipping documents. In addition, COSCO has developed its own strategies to mitigate the risk in bill of lading practice. See appendix 8 COSCO manual of bills of lading.

⁹⁸ Caisheng Zeng, 'Woguo Waimaoyicundu De Bianhua Qushi Fenxi Jiqi Guoji Bijiao [Comparative analysis of the change of China's dependence on foreign trade (author's translation)]' (2008) 5 *Beifang Jingji* [North Economics (author's translation)] 45, 47.

⁹⁹ *ibid* 48-50.

¹⁰⁰ China's degree of dependence on foreign trade (2007-2017) (*Stock-ai*) < <https://stock-ai.com/eom-99-cnDDTT.php>> accessed 07 June 2017.

¹⁰¹ As shown from the Data issued by World Bank, accompanying with the decline of import and export after the financial crisis, the growth of China's GDP has slowed down. See World Bank Database, 'World

demand. It is reported that since 2008 China's shipping market has started to suffer pressure due to excessive capacity and such a tendency continues.¹⁰² Such a phenomenon reflects the impetus that import and export trade has on a nation's shipping industry and its law-making in this regard. As noted by Lorenzon:

The main reason why vessels are built, registered, chartered and insured is not maritime at all: vessels sail to carry goods bought in one market to be sold in another. The real purpose of the entire commercial shipping industry and its regulatory and contractual framework is to make international trade possible, safe and efficient.¹⁰³

The aforesaid view indicates that the shipping industry and its legal framework are not self-serving but rather in existence to serve cargo transactions. Also, in the interrelationship between the shipping industry and trading industry, the trading industry creates the demand for the shipping industry and consumes the capacity of transportation provided by the shipping industry.¹⁰⁴ In this sense, the interplay between the shipping industry and trading industry is analogous to the relationship between the manufacturer and the consumer, which means the development of the shipping industry relies heavily on the transport demand arising from trading activities.¹⁰⁵ Accordingly, an effective measure that should be taken to revive China's shipping market is to boost the growth of import and export trade.

Third, over a long period since the 1980s, China's economic model was featured as export-driven.¹⁰⁶ The repaid growth of the export sector led to the dissemination of new technologies and business practices to other economic sectors, and drove the nation's productivity gains

Development Indicators--Preview of China from 1990-2016' <<http://databank.worldbank.org/data/reports.aspx?source=2&country=CHN>> accessed 07 June 2017.

¹⁰² China's Shipowner Association, 'Zhongguo Chuandong Xiehui Jizhuangxiang Yunshu Zhuanye Weiyuan hui 2009 Niandu Baogao [2009 Annual Report of China Shipowner's Association, Container Transport Committee (author's translation)]' (*China's Shipowner Association*, 22 August 2016) <<http://www.csoa.cn/doc/410.jsp>> accessed 07 June 2017; see also Shanghai Shipping Exchange, 'Stable Demand Pushing Market Recovering' (Chinese Shipping 06 June 2017) <http://info.chineseshipping.com.cn/eninfo/ENMarketReport/201706/t20170606_1290315.shtml> accessed 07 June 2017.

¹⁰³ Filippo Lorenzon, 'International Trade and Shipping Documents' in Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 93-94.

¹⁰⁴ Li (n2) 42-44.

¹⁰⁵ *ibid.*

¹⁰⁶ Brendan Coates, Dougal Horton, and Lachlan McNamee, 'China: prospects for export-driven growth' (2012) 4 Economic Roundup Issue <<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Economic-Roundup-Issue-4/HTML/article4>> accessed 07 June 2017.

and wage increases.¹⁰⁷ Although recently China has attempted to shift such an export-driven model to a consumption-driven model so as to cope with the challenge brought by the decline of external demand after the global economic recession,¹⁰⁸ China's exports are still taking the largest share of global export trade whilst also contributing a significant proportion to China's GDP.¹⁰⁹ According to a statistic issued by the WTO, China's merchandise export amounted to 2,274,949 Million USD in 2015, ranking it as number one worldwide,¹¹⁰ and total export (both merchandise and service) accounted for 22% of China's GDP.¹¹¹ Also, China is a country with a vast territory and a variety of natural resources. As a result of the economic growth and technology development over the last two decades, China now has a large well-educated and trained labour force.¹¹² All these factors mean that China is in good position to develop and refine its domestic manufacturing, thus maintaining its economic status as a major merchandise export nation.¹¹³ Moreover, the importance of export is reflected in its impact on other sectors. In addition to the shipping sector as mentioned above, import is also influenced by the status of export. For example, the radical decline of China's merchandise import trade in 2015 to a large extent is attributable to the shrinking of the export of processed manufacturing goods since the latter resulted in the decline of demand for importing raw materials and spare parts.¹¹⁴ Export is also deemed as a strategy to solve China's problem regarding industrial overcapacity. This is particularly the case under China's recent 'One Belt, One Road' economic policy¹¹⁵ which attempts to improve and

¹⁰⁷ *ibid.*

¹⁰⁸ Louise Keely, 'Uncommon Sense: China's Transition to a Consumer-led Economy-And How Business Can Help' (*NewsWire*, 8 April 2015) <<http://www.nielsen.com/us/en/insights/news/2015/uncommon-sense-chinas-transition-to-a-consumer-led-economy-and-how-businesses-can-help.html>> accessed 07 June 2017.

¹⁰⁹ WTO Database, 'Trade Profile of China' <

<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>> accessed 07 June 2017.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² John Knight, Deng Quheng and Li Shi, 'China's Expansion of Higher Education: the Labour Market Consequences of a Supply Shock' (*Centre for the Study of African Economies*, April 2016) <<https://www.csae.ox.ac.uk/workingpapers/pdfs/csae-wps-2016-04.pdf>> accessed 07 June 2017.

¹¹³ Li (n2) 311.

¹¹⁴ Ministry of Commerce of the People's Republic of China Comprehensive Department, 'Zhongguo Jinkou Dafu Xiajiang De Yuanyin [The reasons for the decline of China's import (author's translation)]' (*Ministry of Commerce of the People's Republic of China Comprehensive Department*, 5 November 2015) <<http://zhs.mofcom.gov.cn/article/Nocategory/201511/20151101156432.shtml>> accessed 07 June 2017.

¹¹⁵ UNCTAD/RMT/2016, 21.

'One Belt, One Road' is China's recent economic initiative launched in 2013. This initiative aims to establish new trading routes, links and business opportunities by further connecting China, Asia, Europe, Africa and countries with economies in transition along five routs...The surface transport component focuses on linking China to Europe through Central Asia and the Russian Federation; China with Western Asia through Central Asia; and China with Western Asia through Central Asia; and China with South East Asia, South Asia and the Indian Ocean; while the

create new foreign business opportunities with China by linking it with other regions in the world through new trading routes, both by road and sea.¹¹⁶ It is argued that one important aim of such a policy is to ‘help China export its excess capacity to many developing countries on the principle of mutual benefit’.¹¹⁷ Therefore, based on all the facts above, it can be seen that with the current economic background export is still an important stimulus to China’s economy growth, creating demands for other sectors and relieving productivity overhang.

Fourth, private-owned enterprises have become the backbone of China’s export trade.¹¹⁸ In 2016, these contributed 46% of China’s total exports, which is higher than the contribution made by state-owned enterprises and foreign-invested enterprises.¹¹⁹ However, within the number of private-owned enterprises in China, small and medium-sized enterprises take up a large proportion.¹²⁰ Compared to most carriers, these enterprises lack systematic and standardized management.¹²¹ As a result, these enterprises are relatively less able to resist the legal and commercial risks in international trading and shipping practice.¹²²

In sum, compared to the 1990s, the aforesaid indicators show that the economic basis for Chinese law governing the relationship between carrier and trader has changed. In order to re-balance the two interest groups, it is submitted that a future maritime law should concern itself more with the traders’ interest, especially the traders’ demand to facilitate export trade and their rights in outbound cargo transportation. Also, when constructing the regulatory framework addressing these rights, a future law should adopt an efficient way of linking these rights with the underlying transaction of goods. In this way, a future maritime law would not only serve shipping practice but also smooth the whole procedure of maritime trade.

maritime transport component focuses on linking China with Europe through the Indian Ocean and China with the southern Pacific Ocean.

¹¹⁶ *ibid.*

¹¹⁷ Michael D Swaine, ‘Chinese Views and Commentary on the “One Belt, One Road” Initiative’ (2015) 47 (6) Hoover Institution <<http://www.hoover.org/research/chinese-views-and-commentary-one-belt-one-road>> accessed 07 June 2017.

¹¹⁸ Ministry of Commerce of the People’s Republic of China Comprehensive Department, ‘Zhongguo Duiwai Maoyi Xingshi Baogao (2016 Nian Qiuji) [The Report of China’s Foreign Trade (2016 Autumn) (author’s translation)] (*Ministry of Commerce of the People’s Republic of China Comprehensive Department*, 2 November 2016) <<http://zhs.mofcom.gov.cn/table2016//rep01.pdf>> accessed 07 June 2017.

¹¹⁹ *ibid.*

¹²⁰ Zeng (n98) 48.

¹²¹ *ibid.*

¹²² *ibid.*

3.6.2 The Development of E-commerce in Maritime Trade

Another important trade-related factor is the development of e-commerce in maritime trade. As discussed before, one important aim of the introduction of the rules that cover transfer of rights by the UNCITRAL Draft and the Rotterdam Rules is to encourage the commercial use of electronic transport documents as substitutes to traditional paper documents in maritime trade.¹²³ In China, such a commercial trend has already received much support. As noted by some scholars, in China many issues regarding transfer of rights, for instance, the transfer of title to sue, are relevant to the carrier's release of cargo without presenting the original bill of lading.¹²⁴ To cope with the situation, there is an increasing call for maritime trade to go paperless to avoid the delay from delivering the paper shipping document.¹²⁵ Nowadays, such a perception is not limited to a discussion within academia; some substantial progress has already been achieved through commercial and legislative efforts. For example, in 2000, one of the major Chinese shipping companies COSCO signed up to the Bolero Association, which is one of most successful platforms for the operation of the electronic bill of lading.¹²⁶ Recently, Bank of China has established a cooperative relationship with the Royal Bank of Scotland (RBS) to use the Bolero system and has successfully completed its electronic presentation of documents via the Bolero platform.¹²⁷ On the legislative level, the Electronic Signature Law was enacted in 2005. This has provided the legal basis for the use of electronic shipping documents.¹²⁸ All these achievements demonstrate that China is open to electronic maritime trade. Notwithstanding, similar to other jurisdictions, the major outstanding problem in Chinese law is how to make the electronic bill of lading become a 'functional equivalent' to the traditional paper bill of lading.¹²⁹ To solve the problem, the first step is to identify the legal consequence of transfer of a traditional paper bill of lading.¹³⁰ As CMC 1992 keeps silent on this point, a future maritime law should provide explicit rules that

¹²³ See discussion in Chapter 2, 2.5.1.

¹²⁴ Wei Wang, *Law and Practice for the Delivery of Goods without presentation of Original Bills of Lading* (1st edn, Law Press 2010) 5.

¹²⁵ *ibid* 295.

¹²⁶ Felix W H Chan, 'E-commerce all at sea: China welcomes digital bill of lading under the Electronic Signature Law 2005' (2006) 3 *Oklahoma Journal of Law and Technology* 31, 44.

¹²⁷ 'RBS and Bank of China achieved ground breaking Bolero deal' (*Bolero*, 23 August 2013) <<http://www.bolero.net/about-us/news/18-boleronews/95-rbs-and-bank-of-china-achieved-groundbreaking-bolero-deal>> accessed on 10 June 2017.

¹²⁸ Chan (n126) 38.

¹²⁹ Wang (n124) 298-99.

¹³⁰ *ibid*.

address the transfer of rights through the traditional paper bill of lading. Both the scope of the transferable rights and the manner of transfer should be clarified. The rules covering the aforesaid issues should be drafted in a way that is compatible with the trend towards facilitating e-commerce in maritime trade.

3.6.3 Harmonization of the Foreign Elements with the Domestic Legal System

Through a historical review of the development of the legal scheme that covers transfer of rights, it may be concluded that such a legal scheme bears inherent similarities with international law. As can be seen from Chapter 2, such a scheme originated from early cross-border commercial practices in the Mediterranean; and the later development of such a scheme benefited a great deal from the Anglo-American experience.¹³¹ By interweaving the legal legacies of different sources, the transfer of rights legal scheme established in domestic laws and international law has generated a common position, namely, that transfer of the bill of lading may give certain rights to the transferee.¹³² This is also the position adopted by the CMC 1992. However, unlike the UK and the US where the legal schemes governing transfer of rights were developed from long-term commercial and legal practice, the approach adopted by the CMC 1992 is a copy of foreign rules which lack proper standing in the context of Chinese law.¹³³ Therefore, how to localize these foreign elements to adapt them to China's situation is a challenge in the reform of the CMC 1992.

First, the reference to and transplant of the foreign rules should adapt to China's legal environment. Recently, with the adoption of the Rotterdam Rules in 2009, there have been increasing calls for the CMC 1992 to be modified to bring it into line with the latest international convention.¹³⁴ Indeed, although it is hotly-debated whether China should join the Rotterdam Rules,¹³⁵ the fact is that once the Convention is enacted it might be binding on Chinese traders and shipping companies automatically even if China is not a member state

¹³¹ See discussion in Chapter 2, 2.2-2.4 above.

¹³² COGSA 1992, s2 (1); FBLA 1994, §80105 (a); the Rotterdam Rules, art 57. Although all these rules recognize the bill of lading's capacity in transfer of certain right to its holder, the rationales and the manners of transfer under these rules are different.

¹³³ See discussion in 3.3.1

¹³⁴ Yuzhuo Si, *the uniformity of international transport law* (1st edn, Beijing Normal University Publishing Group 2012) 199.

¹³⁵ *ibid*

of the Convention.¹³⁶ To avoid such a situation, it is reasonable that the reform of the CMC 1992 takes the provisions and philosophy of the Rotterdam Rules and its *travaux préparatoires* (the UNCITRAL Drafts) into consideration to ensure a future Chinese law is in line with latest international practice. However, it might be difficult to infer the exact legal standing of the rules in the Rotterdam Rules and the UNCITRAL Drafts since the ultimate purpose of the international convention is to harmonize different rules and regulations between different jurisdictions rather than unify the underlying rationale of these rules. Therefore, when borrowing rules from the Rotterdam Rules and the UNCITRAL Drafts, it is essential to build up a legal standing coherent with China's legal system so as to underpin these rules in the context of Chinese law. This is also the case when referencing and transplanting English law and American law. As noted by some scholars, China's maritime law and practice has been deeply influenced Anglo-American law.¹³⁷ As a result, maritime law and practice in China lacks coherence with other Chinese legislations such as contract law, property law, etc.¹³⁸ In order to harmonize maritime law with these legislations, the revisiting of Anglo-American law should not only focus on the connotations of relevant concepts and rules but also on the rationales behind these concepts and rules. Only those with legal rationales that can be accommodated into Chinese law, not only maritime law but also other legislations such as contract law, property law, etc, should be adopted in the law reform.

Second, reference to and transplant of the foreign rules should be able to serve China's economic policy regarding maritime trade. As observed by scholars of law and economics, these two fields interact with each other;¹³⁹ on the one hand, economic growth promotes the law-making process, on the other hand, one of the main tasks of law is to empower economic

¹³⁶ According to Article 5 (1) of the Rotterdam Rules, 'the Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State: (a) The place of receipt; (b) The port of lading; (c) The place of delivery; or (d) The port of discharge. Pursuant to this provision, when Chinese traders and shipping company conclude contracts of carriage with foreign business partners, if any of the aforesaid elements (a)-(d) is located in a contracting State of the Rotterdam Rules, the Rotterdam Rules will apply no matter whether China is a contracting country of the Rotterdam Rules.

¹³⁷ Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)]* (n9) 179.

¹³⁸ See discussion in 3.4.1. For example, in China, document of title, which is a term developed at English common law, is widely employed when describing the legal quality of the bill of lading and the legal effect of transfer of the bill. Due to the silence of current Chinese law in this regard, the legal practitioners and the judges usually directly apply the property law theory to explain the legal nature of the term; however, the past years of practice have proved that such a way of explanation is not satisfying.

¹³⁹ David Kidney, 'International Legal Theory—Law and the Political Economy of the World' 3 *Leiden Journal of International Law* (2013) 26, 35.

development.¹⁴⁰ This then requires that the impact of these foreign rules on China's economic environment should be examined. Only those whose economic impact are in line with China's economic policy should be considered for adoption in a future Chinese law. Moreover, as legislation which has the purpose of facilitating China's maritime trade,¹⁴¹ maritime law should also take Chinese merchant's needs and expectations into consideration. Accordingly, when establishing the transfer of rights scheme under a future maritime law, reference to and transplant of the foreign rules should be able to serve future bill of lading practice in China's maritime trade and fulfil Chinese merchants' expectation of the commercial value of the bill of lading.

Third, as a product of the transplant of foreign rules, the maritime law in China also possesses unique factors which place it in an independent position in China's legal system. Such uniqueness is reflected by the fact that maritime law has developed its 'own law of contract-of sale (of ships), of service (towage), of lease (chartering), of carriage (of goods by sea), of pledge, of agency, of insurance, etc'.¹⁴² Also, it contains international elements although it is by nature a national law.¹⁴³ Last but not least, since the early days of its development maritime law has had its own courts and judicial procedures.¹⁴⁴ All these factors confer on maritime law a certain level of independence from other law, which makes the maritime law itself like a complete legal system.¹⁴⁵ Given this, perhaps the rational way to harmonize the relationship between maritime law and other law in China is to respect the inherent independence of maritime law. As to some issues that are not fully compatible with civil law heritage, it would be better if maritime law developed its own rules to provide for an explanation rather than directly applying those laws with a civil law heritage. These rules should be indicative, containing certain elements from other law so that it is able to coherently connect maritime law with other relevant legislations whilst also ensuring that the reform of maritime law does not go beyond the contractual framework governing the relationship between the carrier and the cargo interests. Other relevant legislations should also be considered for modification so as to underpin such a reform of maritime law. In this way, a

¹⁴⁰ *ibid* 36.

¹⁴¹ CMC 1992, art 1.

¹⁴² William Tetley, 'Maritime Law as a Mixed Legal System' (1999) 23 *Tulane Maritime Law Journal* 317, 326.

¹⁴³ *ibid*.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid*.

future maritime law would not only try to fit in with the general legal system in China but also be able to keep its independent features.

3.7 Conclusion

As noted by some scholars, the law and its development to a large extent is driven by economic policies, especially in the developing world.¹⁴⁶ The CMC 1992 is a typical example of this. By reviewing the legislative background of the Code, it can be seen that the substantial aim of the CMC 1992 was to favour the development of the domestic shipping industry as this can be considered to have been the most pressing economic policy under that historical background.¹⁴⁷ In addition, to accelerate the law-making process and ensure that maritime law and practice are in line with international law and practice, the drafters, legal practitioners and judges have referenced and incorporated a number of foreign rules and theories.¹⁴⁸ Although such an arrangement might have played a positive role in the early stages of the development of maritime law and practice, the past two decades of legal practice has uncovered many problems caused therefrom. As to the transfer of rights through the bill of lading, the relevant rules under the CMC 1992 are too sketchy; neither the scope of the transferable rights nor the manner of transfer is clearly addressed.¹⁴⁹ In addition, the rules and legal concepts borrowed from other jurisdictions are difficult to adapt to the civil law heritage in China.¹⁵⁰ The substantial reasons for these problems may be attributed to drafters' carelessness in two respects: one is the potential connection between the transfer of rights

¹⁴⁶ Tom Ginsburg, 'Does Law Matter for Economic Development? Evidence From East Asia' (2000) 34 *Law & Society Review* 829, 845.

¹⁴⁷ As mentioned in Chapter 3, 3.2 above, the pressing economic policy under that historical background is to promote the development of domestic shipping industry so as to establish a powerful merchant fleet.

¹⁴⁸ As indicated in Chapter 3, 3.2 above, these foreign rules include international conventions, national laws from other seafaring countries such as the UK, the US. In addition, in judicial practice, some common law theory has also been referenced and borrowed to interpret the maritime issues. As shown in 3.4.1, the common law concept 'bill of lading as document of title' is often invoked by Chinese courts to construe the legal effect of the bill of lading although the legal nature of such a concept has not been clarified at Chinese law.

¹⁴⁹ See discussion in Chapter 3, 3.3.2 and 3.4.2 above.

¹⁵⁰ This can be seen from two aspects: first, Article 77 and 78 is not fully compatible with Chinese contract law and theory. Second, the existing interpretations on the expression 'bill of lading as document of title' does not coherent with Chinese property law. See discussion in Chapter 3, 3.3.1, 3.4.1 and 3.5 above.

through the bill of lading and the transaction of goods; and the other is the way to harmonize foreign rules transplanted from other jurisdictions with the civil law heritage in China.¹⁵¹

To cope with these problems and keep current transfer of rights rules up to date with contemporary legal and commercial practice, a systematic legal scheme with more certainty should be established under a future maritime law in China. One essential factor that may influence the construction of such a legal scheme is the economic *status quo* of the carrier and the cargo interests in China, which are two main stakeholders that are involved with the legal issues on transfer of rights.¹⁵² Through reviewing the past development of China's shipping industry and trading industry, it can be observed that, nowadays, China's shipping power has been greatly enhanced,¹⁵³ whereas the trade sector, especially the export traders, although it plays a significant role in China's economy whilst also creating a demand for shipping, appears to be too weak to deal with the risk arising from ocean cargo transportation.¹⁵⁴ Under such a situation, perhaps the carrier-centred perspective should be switched to a 'trade holistic' perspective under which the reform should view the transfer of right issues within a more general picture which is integrated with cargo trading although these issues to a large extent will still be rooted in the sphere of shipping law.¹⁵⁵ In this sense, a future legal scheme covering transfer of rights should not only serve shipping practice but also be able to promote the development of trade, especially China's export trade. To achieve such an aim, the future rules should properly reflect the connection between the transfer of rights and the underlying cargo transaction. In this way, the traders may acquire more favourable positions in carriage of goods as their certain interest in a transaction of goods would be considered when determining the legal issue regarding transfer of rights. Also, they may have more choice to realize their rights, both against the carrier and over the goods.¹⁵⁶

¹⁵¹ See discussion in Chapter 3, 3.5 above.

¹⁵² See discussion in Chapter 3, 3.6.1 above.

¹⁵³ For the economic status of China's shipping and trading sector, see discussion in Chapter 3, 3.6.1 above.

¹⁵⁴ As shown from the recent report issued by Ministry of Commerce of the People's Republic of China Comprehensive Department, the private-owned enterprise have contributed the largest proportion of China's export trade. Most of these enterprises are small and medium sized enterprises which are relatively weak to cope with the risk arising from seaborne cargo trade. See discussion in Chapter 3, 3.6.1 above.

¹⁵⁵ The 'trade holistic' perspective mentioned here is suggested by the drafter of the Rotterdam Rules, which asserts that the carriage of goods by sea should be viewed within a context in connection with the transaction of goods, and the law on carriage of goods by sea should safeguard and smooth the underlying transaction of goods. See Alexander Von Ziegler, 'Rotterdam Rules and underlying sale contract' (2013) CMI Ybk 273, 277. This perspective is discussed in Chapter 2, 2.5.2 above.

¹⁵⁶ By building up the connection with the transaction of goods in the future rules on transfer of rights through the bill of lading, it is expected that the export traders would be easier to recover his loss caused by the carrier's

In addition, since e-commercialization has become a common goal of shipping and trading development globally, the legal scheme on transfer of rights under Chinese maritime law should be in line with such a commercial trend. In other words, the construction of such a legal scheme should facilitate the wide application of electronic bills of lading.¹⁵⁷

Given that maritime law bears the inherent characteristics of international law and contains many foreign elements, another crucial factor that deserves consideration is the harmonization of foreign rules and theories so as to make these foreign elements adapt to China's situation. This requires that the further transplant of foreign rules should be cautious, only the rules with rationales compatible with China's legal, economic and commercial environment should be considered to be adopted as a possible way to reform the CMC 1992.¹⁵⁸ Also, past experience has proved that the mechanical application of civil law rules and theories is unable to resolve the conflict between maritime law and civil law heritage. To harmonize the maritime rules with China's civil law heritage, perhaps a better way of approaching this is to respect the uniqueness and independence of maritime law while at the same time constructing some indicative rules which can connect with those legislations with civil law heritage.¹⁵⁹ In this way, a well-balanced and localized legal scheme on transfer of rights through the bill of lading, which is able to effectively link the transfer of rights through the bill of lading and the underlying transaction of cargo, could be established in a future maritime law. To achieve this aim, Chapters 4, 5, 6 look at the specific issues that may be caused by transfer of rights through the bill of lading and their solutions, based on the principles established in this chapter.

default (This is discussed in Chapter 4, 4.3.1, 4.3.5), and meanwhile the export traders' interest in transaction of goods would be better guaranteed (This is discussed in Chapter 4, 4.2.3, 5.2.4).

¹⁵⁷ See discussion in Chapter 3, 3.6.2 above.

¹⁵⁸ See discussion in Chapter 3, 3.6.3 above.

¹⁵⁹ *ibid.*

Chapter Four: Transfer of Title to Sue the Carrier

4.1 Introduction

As indicated in Chapter 3, a significant problem regarding transfer of rights through the bill of lading under CMC 1992 is that the scope of the transferable rights is not clear.¹ Notwithstanding, it is undeniable that the contractual right to sue the carrier falls within the scope of such transferable rights since Article 78 recognizes the contractual effect of the bill of lading between the carrier and the holder of the bill. However, the current rule does not indicate the underlying rationale of such a stipulation and this has given rise to confusion over the theoretical ground for the holder's contractual right to sue the carrier. It should be noted that such confusion may not only be a problem for the contractual right to sue but also lead to chaos over the rationale for transferring other rights through the bill of lading because the transfer of the contractual right to sue the carrier is usually deemed to be the central part of the transferability or negotiability of the bill of lading.² Given this, a more convincing explanation for how the holder is vested with the contractual right to sue is urgently needed. In addition, as a result of the confusion over the legal basis for the holder's contractual right to sue the carrier, the shipper's legal status after the transfer of the bill of lading is not certain. A practical problem that arises from this is whether the shipper is still entitled to bring a contractual action against the carrier after a bill of lading has been transferred to the holder.³ Judicial practice in China so far has witnessed a number of inconsistent decisions on this issue. To reduce the uncertainty in relation to cargo interests' title to sue and pave the way for clarifying the rationale behind transferring other rights through the bill of lading, this chapter attempts to rebuild the legal basis for the holder's contractual right to sue and determine whether the shipper should still have the contractual right to sue the carrier after the transfer of the bill of lading.

¹ See discussion in Chapter 3, 3.3.2 above.

² Michael D. Boels, *The Bill of Lading, a document of title to goods, an Anglo-American Comparison* (1st edn, LLP 1997) 88.

³ See discussion in Chapter 3, 3.3.2 above.

The second section seeks to identify the legal basis for the holder's contractual right to sue under a future Chinese maritime law. Since such a legal basis is usually rooted in national law, the section starts by reviewing English law and American law and then comparing their differences on this point. More importantly, the study of the Anglo-American experience uncovers two factors that are worthy of consideration when building up the legal basis for the holder's title to sue under a domestic law. These factors are the merchant's expectation of the commercial value of the bill of lading and the domestic law on the doctrine of good faith purchase. Based on the status of the aforesaid two factors in China, the section examines the compatibility of the English approach and American approach with China's commercial and legal environment, and finally interprets the legal basis for the holder's contractual right to sue the carrier in a way that is able to facilitate China's export trade⁴ and legally connect the exercise and transfer of a contractual right of suit with the underlying transaction of goods.⁵

The third section targets the specific issue of the shipper's title to sue after the transfer of the bill of lading. The section first examines Chinese judicial practice in this regard and summarizes the situations where such an issue would arise. By analysing the causation between the assumption of loss or damage by the shipper and the carrier's breach of contractual duty, and noting the significance of the contractual right of suit to the shipper in the aforesaid situations, the section suggests that the shipper should be allowed to bring a contractual action against the carrier to recover his loss or damage under certain conditions, irrespective of whether the bill of lading has been transferred or not. In order to put forward such conditions in a future Chinese maritime law, the section then examines different approaches provided by English law, American law and the UNCITRAL Drafts. By comparing their coherence and compatibility with the relevant judicial practice and legislations in China, this section finally proposes the solution to the problem of the shipper's title to sue after the transfer of the bill of lading by referencing the UNCITRAL Drafts.⁶

⁴ The economic implications shown from Chapter 3, 3.6.1 suggest that a future legal scheme on the transfer of rights through the bill of lading should facilitate China's export trade.

⁵ As indicated by Chapter 3, 3.5 above, the lack of connection with the transaction of goods constitutes an underlying deficiency of CMC 1992 in terms of transfer of rights through the bill of lading.

⁶ In this chapter, the UNCITRAL Drafts refer to those documents which discussed the cargo interests' right of suit. To be specific, these documents includes: UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 January 2002) A/CN.9/WG.III/WP21; UNCITRAL 'Report of Working Group III (Transport Law) on the work of its eleventh session'(4 April 2003) A/CN.9/526; UNCITRAL

The fourth section concludes the findings of this chapter. Based on the legal basis of the holder's contractual right of suit and the solution to the shipper's contractual right of suit after the transfer of the bill of lading, the legal manner in which the bill of lading is able to transfer rights, at least those in a contractual sense, is uncovered. Such a manner is expected to legally connect the transportation of goods with the transaction of goods and, more importantly, to re-balance the interest between the carrier and the cargo interests in a broad context that integrates the shipping and trading practice as a whole.

4.2 The Legal Basis for the Holder's Title to Sue

In today's cargo claim, the person who holds the bill of lading with a lawful reason is entitled to sue the carrier in contract. This is a common occurrence but the legal basis for such a scenario varies among jurisdictions. This variation also occurs between English law and American law even though they used to share the same jurisdiction. In this section, the different approaches adopted by English law and American law are reviewed so as to draw some inspiration to reconstruct the legal basis for the holder's title to sue in Chinese law.

4.2.1 The English Approach

As mentioned in Chapter 3, some Chinese scholars attribute the ground for the holder's contractual right of suit to the transfer of contract of carriage by the bill of lading and claim that such an interpretation is borrowed from English law.⁷ To examine whether this is true, the English approach to the transfer of contract through the bill of lading is revisited here.

Under English law, even though the transfer of the bill of lading may transfer the rights under the contract of carriage, this does not mean that the entire contract of carriage will be

'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (4 September 2003) A/CN.9/WG.III/WP32; UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56; UNCITRAL 'Report of Working Group III (Transport Law) on the work of its eighteenth session (27 November 2006) A/CN.9/616.

⁷ See discussion in Chapter 3, 3.3.1 above.

transferred with the bill of lading. As stated by Lord Esher MR in *Leduc v Ward*:⁸

... the bill of lading is after all only evidence of the agreement, which is really made before it is given, and it is only evidence of it with regard to the terms which it contains. It does not necessarily contain the whole of the terms of the contract of carriage⁹

A more explicit statement of this point can be found in *The Heidberg*¹⁰ where Judge Diamond QC stated:

Bills of lading are transferable documents which come into the hands of consignees and indorsees who may be the purchasers of goods or banks. The transferee of the bill of lading does not, however, take precisely the same contract as that made between the shipper and the shipowner (of which the bill of lading is merely the evidence). What is transferred to the consignee or indorsee consists, and consists only, of the terms which appear on the face and reverse of the bill of lading. Thus collateral oral terms are not transferred.¹¹

Such a statement clearly indicates that the bill of lading only transfers the contractual rights that are identifiable from the terms of the bill of lading. This is significantly different from the aforesaid Chinese approach of ‘transfer of contract’ which moves the entire contract of carriage, not only the rights but also the obligations provided by the original contract of carriage, together with the bill of lading.¹² Therefore, English law does not provide a rationale to justify the ‘transfer of contract’ approach developed in Chinese academia.

In addition to the common law practice, the transfer of rights approach is also reflected in COGSA 1992 which statutorily recognizes the legal effect of a bill of lading in the transfer of the contractual right to sue. According to COGSA 1992, the ‘lawful holder’ of a bill of lading is transferred to and vested in ‘all right of suit under the contract of carriage’.¹³ In *East*

⁸ (1888) 20 QBD 475 (CA).

⁹ *ibid* 477.

¹⁰ *Partenreederei M/S ‘HEIDBERG’ and Vega Reederei Friedrich Dauber v. Grosynor Grain and Feed Co. Ltd., Union Nationale Des Cooperatives Agricoles De Cereales and Assurances Mutuelles Agricoles (The “Heidberg”)*

[1994] 2 Lloyd's Rep 287 (QB).

¹¹ *ibid* 304.

¹² Wenjun Wang, *Tidan Xiangxia Haiyun Huowu Suopei zhi Qingqiuquan Jichu Yanjiu* [legal basis to establish the right of suit under the bill of lading (author's translation)] (1st edn, Law Press China 2010) 100-102. See also Chapter 3, 3.3.1 above.

¹³ COGSA 1992, s 2(1).

West Corporation v DKBS 1912 A/S,¹⁴ the aforesaid statutory rule was construed as ‘all the rights arising under the contract’ which, to some extent, is wider than its literal meaning.¹⁵ It is argued that the arrangement under COGSA 1992 aims to facilitate the rights under the original contract of carriage to pass down the chain of sellers, banks and buyers who usually have the possessory rights to the goods until the goods are ultimately delivered at the destination.¹⁶ In this sense, although COGSA 1992 only governs a contractual relationship between the cargo interest and the carrier, the statutory rules potentially link the transfer of the contractual right to sue the carrier with the underlying transaction of goods since whether the aforesaid parties (seller, bank and buyer) are entitled to possessory rights to the goods depends on these parties’ intentions in cargo transactions.¹⁷ Such a result is also evidenced by the further requirement provided by COGSA 1992 for being a ‘lawful holder’. According to Section 5(2) of COGSA 1992, the ‘lawful holder’ is defined as a person who ‘becomes the holder of the bill of lading in good faith’.¹⁸ The ‘good faith’ mentioned here may be defeated not only by the dishonest action committed by the holder and/or the transferor in the current loop of the transfer of the bill of lading but also by any defect that occurred in previous loops.¹⁹ This means that the contractual rights obtained by the holder would not be greater than his predecessors. In this sense, the bill of lading in English law is merely a transferable document.²⁰

Apart from the transfer of contractual rights, COGSA 1992 also provides that the holder to whom the contractual rights are transferred only assumes the corresponding liability if the

¹⁴ [2003] EWCA Civ 83, [2003] 2 ALL ER 700.

¹⁵ Anthony Rogers, Jason Chuah, Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (4th edn, Routledge 2016) 328.

¹⁶ Simon Baughen, *Shipping Law* (6th edn, Routledge-Cavendish, 2015) 8.

¹⁷ For the transfer of possessory right to the goods, see discussion in Chapter 5, 5.2.1.1 below.

¹⁸ COGSA 1992, s 5(2). COGSA 1992 does not express the definition of such a ‘good faith’; however, some hints can be found from the Bills of Exchange Act 1882 and the Sale of Goods Act 1979. Both of the Acts provide that ‘a thing is deemed to be done in good faith within the meaning this Act when it is in fact done honestly, whether it is done negligently or not.’ The requirements of being a ‘lawful holder’ under COGSA 1992 and their connection with the underlying transaction of goods have been discussed in Chapter 2, 2.4 above.

¹⁹ For example, if the bill of lading is transferred to the holder from a person ‘who had to his knowledge himself acquired the bill by fraud or theft,’ even though the holder may acquire the bill by a lawful reason and without knowledge of such a fraud or theft, the holder may still not satisfy the requirement of ‘good faith’ provided herein. See Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 231.

²⁰ In English law, although sometimes the word ‘negotiability’ is used to describe the bill of lading, it is argued that such a word only refers to the conveyance of the bill of lading and the legal effect therefrom, which is no more than the transferability. Under the English law, the bill of lading is not as negotiable as the bill of exchange. See Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 304, See also *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd’s Rep 439 (PC), 446.

holder actually exercises the rights transferred to him.²¹ However, such an arrangement is usually ignored when the transfer of rights approach is invoked in Chinese academia and legal practice to explain the legal ground for Article 78 of CMC 1992.²² Based on the aforesaid discussion, it may be concluded that the original contents of the transfer of rights approach which developed from English law is not properly reflected in the Chinese approach to ‘transfer of contract’, despite such an approach being said to be transplanted from English law.

4.2.2 The American Approach

In spite of once sharing the same jurisdiction with the UK, the US has developed a different route to enable the holder to sue the carrier in contract.

Under American law, the bill of lading is often described as ‘a memorandum of contract of affreightment concluded between the carrier and the shipper’.²³ Early evidence of such a description can be found in *Luckenbach S.S Co v American Mills Co.*²⁴ In this case, a bill of lading issued after the cargo had been destroyed by fire was conceived of as evidence of the contract concluded by the shipper and carrier at an earlier time when the cargo was handed over to the carrier. Such a verdict indicates that the bill of lading would take the place of the contract of carriage to govern the relationship between the carrier and the shipper if the original contract was not available. Such an implication was further developed in another case. In *West Transmarine Corp. v Charles H. Levitt & Co., Inc.*,²⁵ the court held that a bill of lading constituted a ‘final memorial of the parties’ which was binding to the shipper and the carrier even though there had existed an oral contract between the parties before the issuance

²¹ COGSA 1992, s3 (1) ‘Liabilities under shipping documents.’

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.

²² See discussion in Chapter 3, 3.3.1 above.

²³ Thomas J Schoenbaum, *Admiralty and Maritime Law* (3rd edn, West Group 2001) 537.

²⁴ 24 F.2d 704 (5th Cir. 1928).

²⁵ 25 F.2d 275 (2d Cir.1928).

of the bill of lading.²⁶ A similar view can also be found in *Louisville E & St LR v Wilson*,²⁷ where Mitchell J stated:

The bills of lading must be regarded either as complete contracts, into which all the oral negotiations of the parties are merged, or they are entirely without force or effect as evidence of the terms and conditions upon which the goods were to be transported...²⁸

From the aforesaid judicial practice, it can be seen that American law tends to treat the bill of lading as a complete contract governing the relationship not only between the carrier and the third party to whom the bill is negotiated but also between the carrier and the shipper. Any oral contract between the shipper and the carrier concluded prior to the issuance of a bill of lading would be superseded by a bill of lading issued later.²⁹ Given this, the legal effect of the bill of lading under American law is more independent from the contract of carriage than its English counterpart. Such a position has now been incorporated into statutory law. Under FBLA 1994, the carrier is ‘obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person’.³⁰ On the one hand, this rule reaffirms the conclusive effect of the bill of lading on the relationship between the carrier and the holder to whom the bill of lading is negotiated. On the other hand, from the wording ‘under the terms of the bill the same as if the carrier had issued the bill to that person’, it may be inferred that the bill of lading also dominates the relationship between the carrier and the shipper as the shipper is usually the person to whom the bill of lading is issued directly from the carrier.

Moreover, under American law, the independent quality of the bill of lading is strengthened by introducing the doctrine of good faith purchase into the rules governing the negotiation of the bill of lading. Pursuant to FBLA 1994, a person to whom the bill is negotiated ‘in good faith for value’ is entitled not only to the contractual rights against the carrier but also the title to goods.³¹ Such a stipulation directly connects the holder’s contractual right to sue the carrier with the performance of the underlying transaction of goods. In addition, under American

²⁶ *ibid* 277.

²⁷ 138 U.S. 501 (11 S.Ct. 405, 34 L.Ed. 1023), 21 N.E. 341.

²⁸ *ibid* 342.

²⁹ Schoenbaum (n23) 538.

³⁰ FBLA 1994, § 80105 (a) (2).

³¹ FBLA 1994, § 80105 (a) (1) .

law, the conditions for ‘due negotiation’ of the bill of lading are provided in a similar way to those for negotiation of a negotiable instrument such as a bill of exchange.³² Like the bill of exchange, the validity of negotiation of a bill of lading is not affected by any defect that existed in the previous life of the bill of lading.³³ In view of the aforesaid stipulation, under American law the bill of lading in essence is deemed to be a negotiable instrument which is able to confer its holder particular rights such as title to sue by virtue of being such a type of document.³⁴ In this sense, it may be more accurate to say that the right to sue the carrier is ‘created’ rather than ‘transferred’ by the bill of lading.³⁵ Such a position is significantly different from the English approach under COGSA 1992 which provides the transfer of rights under a contractual framework and is nothing to do with the transfer of property of goods. More importantly, unlike FBLA 1994, the extent to which the rights can actually be transferred by the bill of lading under COGSA 1992 is always subject to the previous history of transferring the bill of lading.

As to the assumption of contractual liability by the holder, FBLA 1994 keeps silent. However, this does not mean that the issue is left untouched. Under American law, the question of liability is mainly subject to the common law device of ‘implied contract’,³⁶ which was formed in *Cock v. Taylor*.³⁷ In this case, the holder’s request for delivery of goods and his action of presentation of the bill of lading to the carrier were regarded as evidence of a

³² As to the conditions for negotiation of bill of lading, see UCC, § 7-501 (5) .

A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.

For the negotiation of a negotiable instrument, see § 3-20.

...to the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

³³ FBLA 1994, § 80104 (b).

The validity of a negotiation of a bill of lading is not affected by the negotiation having been a breach of duty by the transferor who made the negotiation of the bill, ‘or by the owner of the bill having been deprived of possession by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill is negotiated, or a person to whom the bill is subsequently negotiated, gives value of the bill in good faith and without notice of the breach of duty, fraud, accident, mistake, duress, loss, theft, or conversion.

³⁴ Bools (n2) 199.

³⁵ *ibid* 89-91.

³⁶ *ibid* 108.

³⁷ (1811)13 East 399, 402-03.

contract arising between the holder and the carrier.³⁸ The nature of such an implied contract was interpreted in *Dougal v. Kemble and Another*,³⁹ where Best C.J stated,

Whoever obtains the delivery of the goods under such a bill of lading, contracts, by implication, to pay the freight due on them. There is no assignment of contract, no shifting of liability. The receiver of the goods is an original contractor to pay the freight of them.⁴⁰

Two things can be observed from the aforesaid statement. Firstly, the person who exercises the rights under the bill of lading should undertake to pay the freight. Secondly, such an undertaking is attributed to the implied new contract between the holder and the carrier rather than the assignment of the original contract of carriage. This means that the holder would only assume the contractual liability to the carrier if an implied contract could be established between the holder and the carrier. Bools sets out how to invoke such an implied contract:

Where the holder presents, or agrees to present the bill of lading which contains a clear statement requiring payment of charges, the person who takes delivery may be deemed to promise to pay those charges if the carrier delivers the goods according to the terms of the bill of lading, and an implied contract will then arise.⁴¹

As shown in the aforesaid summary, the transfer of a bill of lading does not necessarily make the holder assume contractual liability unless the holder exercises the right under the bill of lading, for example, in claiming delivery of goods. Such a position in principle is identical with that under COGSA 1992, namely, the mere fact of transferring a bill of lading does not impose the liability on the holder. However, compared with English law, a difference can be observed, which is, under American law the liability in question is subject to the terms of the bill of lading which constitute an implied contract between the carrier and the holder, whereas under COGSA 1992 such a liability derives from the original contract of carriage.

³⁸ *ibid.*

³⁹ (1826) 3 Bing 383, 13 ECLR 16, 19.

⁴⁰ Bools (n2) 389.

⁴¹ *ibid.*

4.2.3 Clarification of the Legal Basis for the Holder's Title to Sue under Chinese Maritime Law

4.2.3.1 The Comparative Implications of the Anglo-American Experience

As shown from the previous discussion, English law and American law have developed two different approaches to theoretically justify the holder's contractual right to sue the carrier. Under the former, such a right is established purely under a contractual framework with a potential connection with the transaction of goods while the latter provides such a contractual right under a hybrid scheme which combines the movement of the contractual right with the title to goods. In this sense, the connection between the contractual right to sue the carrier and the underlying transaction of goods under American law is more visible than under English law. Another difference between the two jurisdictions is the transferability of the bill of lading. Under English law, the bill of lading is merely a transferable document but American bills are vested with a quasi-negotiability like bills of exchange. This means that the contractual right to sue acquired by the holder to whom the bill of lading was duly negotiated is not influenced by any defect that occurred in the previous life of the bill of lading, while under English law the contractual right acquired by the holder is always subject to the previous transfers of the bill of lading.

The aforesaid differences may essentially be attributed to the underlying commercial value of the bill of lading that is intended to be achieved by each approach. As noted by Bools, such a value in English law is to secure the title of goods whereas in American law it is to smooth the consecutive cargo transactions.⁴² This may explain why under English law the holder of a bill of lading cannot acquire better rights than the transferor, while under American law, through due negotiation, the bill of lading is able to vest its holder with greater rights than that entitled to by the transferor.⁴³ In this sense, the bill of lading under American law offers greater reliability to the holder, and thereby possesses more tradability than its English counterpart. The aforesaid implications indicate that, when clarifying the theoretical ground for the holder's title to sue in Chinese law, the overriding commercial value of the

⁴² Bools (n2) 63.

⁴³ Such indefeasible rights include both the contractual rights under the bill of lading and the title to goods. For the latter, it is discussed in Chapter 6.

bill of lading in China' seaborne cargo trade should be taken into account, so as to ensure that such a ground would suffice to serve the commercial practice.

In addition, it is submitted that the different understandings of the good faith purchaser rule in English law and American law also have an impact on the transfer of contractual rights through the bill of lading. In English law, the good faith purchaser rule does not generally apply to the transfer of the property of goods.⁴⁴ Also, since the bill of lading under English law is defined as a symbol of goods which is treated identically to the goods themselves,⁴⁵ it is logical that the good faith purchaser rule has no bearing on the legal effect of the transfer of bill of lading. As a result, the transfer of the contractual right to sue under English law is independent of the transfer of the title to goods. Such a position is underlined by COGSA 1992 which abolishes the compulsory nexus between the title to sue and the property of goods that was established by BLA 1855.⁴⁶ Despite a similar view also presented in early American law,⁴⁷ consideration over 'convenience of commercial transaction' and the customary usage of the bill of lading has finally prevailed over the concern to protect the real owner's title to goods.⁴⁸ Accordingly, the bill of lading under American statutory law has finally evolved into a quasi-negotiable document, whose effect, either in the sense of property law or in the sense of contract law, is linked with the good faith purchaser rule. Based on the aforesaid findings, although only the contractual right of suit is discussed here, in order to harmonize the relationship between the law on transaction of goods and the law on carriage of goods, the coherence of the theoretical ground for such a right with the national law on the good faith purchaser rule should be considered as well. This should also be the case when discussing the legal basis for transferring the contractual right of suit through the bill of lading in Chinese maritime law.

⁴⁴ However, some exceptional occasions have been provided by SOGA 1979, s24, 25, 26 and 47. In these occasions, the person receiving the goods in good faith and without notice of the defects happened in the previous trading of the goods may acquire better legal status than his predecessor.

⁴⁵ Bools (n2) 93.

⁴⁶ BLA 1855, s1.

⁴⁷ This can be seen from *Shaw v. Merchant's National Bank of St Louis* (1879) 25 L.Ed. 892, 894. As stated by Strong J in US Supreme Court,

... True [the bill of lading] is a symbol of ownership of the goods covered by it—a representative of those goods. But if the goods themselves be lost or stolen no slae of them by the finder or thief, thought to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such a effect?

⁴⁸ Bools (n2) 65.

Furthermore, as shown by the Anglo-American experience, a complete scheme governing the transfer of rights through the bill of lading should not only concern the transfer of contractual rights but also address the assumption of contractual liabilities. Although the rationale for assumption of such liabilities differs between English law and American law, a common position can be observed, which is that the liabilities are not triggered by the holder merely due to possession of a bill of lading. This is also the position under the Rotterdam Rules,⁴⁹ which suggests that such a way of assumption of liability has, to a large extent, become a common trend in international shipping practice. To remain consistent with such a common trend and fill up the blank in this respect under CMC 1992, such a way of assuming liability is worth considering in the planned legal reform. This then requires that the theoretical ground for the holder's contractual right to sue should be able to cover the assumption of liability in this way.

To sum up, the Anglo-American experience shows two influencing factors for construction of the legal ground for the holder's contractual title to sue. One is the commercial value of the bill of lading and the other is the national approach to the good faith purchaser rule. In the next section, both factors are examined in the context of Chinese law so as to envisage a proper legal ground for the holder's contractual right to sue and the liability therefrom.

4.2.3.2 The Expected Commercial Value of the Bill of Lading in China

Chapter 3 has provided some hints as to the commercial value of the bill of lading that is intended to be achieved under a future Chinese maritime law. As suggested by that chapter, in consideration of the driving effect of export trade to China's maritime industry and its significant contribution to China's GDP, an underlying aim of the maritime legal reform is to facilitate such trade.⁵⁰ In export trade, the goods covered by the bill of lading may be re-sold many times at sea before arriving at their destination. As a symbol of goods, the bill of lading may also be passed through a number of parties and the true relationship between these parties may be hard to identify. In such a situation, the security and smooth proceeding of the transactions becomes the main concern of the traders involved in the cargo transactions. In this sense, as a means of bolstering export trade, it is sensible to provide a bill of lading as a

⁴⁹ Rotterdam Rules, art 58 'a holder that is no the shipper and that does not exercise any under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.'

⁵⁰ See discussion in Chapter 3, 3.6.1 above.

reliable document that can be trusted by the traders in cargo transactions. The American approach, which attributes the transfer of the contractual right of suit to the negotiability of the bill of lading, seems better suited than the English ‘transfer of contract’ approach to construe the legal basis for the holder’s title to sue in Chinese law. The reasoning behind this is set out below.

First, with the requirement of paying for value in good faith to acquire the title to sue under the bill of lading, American law prevents the possibility of a fraudster or thief who has procured the bill of lading by unlawful means from bringing an action against the carrier.⁵¹ Also, to a large extent it guarantees that the right of suit is vested in the party who has substantial interest in the cargo claim.⁵² Such a consequence fulfils both the seller’s interest and the buyer’s interest in the cargo transaction, and is also in line with the current Civil Procedure Law of China which provides that ‘the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case when bringing an action against the defendant’.⁵³ However, this would not be the case were the English ‘transfer of contract’ approach applied. Since COGSA 1992 does not require any value as a consideration for transfer of the contractual right of suit to the holder, the holder who is vested with the contractual right to sue the carrier may not necessarily be the party who has a substantial interest in the claim. Although COGSA 1992 allows the party who sustains the actual loss to recover his loss by relying on an action brought by the holder on his behalf,⁵⁴ such a stipulation does not seem possible under Chinese law as the civil procedure rule requires the claimant to be the person who has ‘a direct interest’ in the claim.⁵⁵

Second, under American law, when the contractual right to sue is acquired by a good faith purchaser of the bill of lading, such a right cannot be defeated by any defect in the previous transfer of the bill of lading. Such a result greatly enhances the reliability of the bill of lading

⁵¹ Bools (n2) 93.

⁵² The reason is that by paying up the corresponding value for holding the bill of lading, the holder is supposed to be vested in certain interest in the goods covered by the bill. Once the goods are lost or damaged owing to the carrier’s default, the holder who is vested in the contractual right of suit through negotiation of the bill is usually the party who suffered such a loss or damage. However, under American law there still exists some exceptional cases where the party who assumes the substantial loss or damage of goods is the shipper, even though at that time the bill of lading has been negotiated to another party. See *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al*, 296 F. Supp 2d 91 (D.P.R.2003). This case will be discussed in details in 4.3.2 below.

⁵³ Civil Procedure Law of the People’s Republic of China (2012 Amendment), art 119 (1).

⁵⁴ COGSA 1992, s2 (4).

⁵⁵ Civil Procedure Law of the People’s Republic of China (2012 Amendment), art 119 (1).

in maritime trade. Compared to American law on this point, English law provides less security to the holder as the holder's right of suit may vanish as a consequence of a dishonest action in the previous transfer of the bill of lading. As mentioned before, under a future Chinese maritime law, to smooth the consecutive transactions of goods, it is hoped that the bill of lading will become a document that can be trusted and relied on by the holder.⁵⁶ In this sense, the American approach which confers negotiability on the bill of lading seems more suited to such an expectation than the English one.

Third, the American approach may also favour the FOB seller who performs the shipper's obligation in carriage of goods by sea.⁵⁷ Under CMC 1992, such a FOB seller may fall into the category of 'actual shipper' whose legal status is given equal status to the shipper.⁵⁸ Notwithstanding, the FOB seller is usually not the party who concludes the contract of carriage with the carrier. To protect himself in a commercial practice, the FOB seller often requires the carrier to issue the bill of lading directly to him.⁵⁹ In such a situation, if the contract contained in the bill of lading is different from the original contract of carriage, a difficulty may arise in identifying which contract governs the relationship between the FOB seller and the carrier. Should the bill of lading govern it, such a result is not consistent with Article 78 of CMC 1992 which only indicates that the holder's rights are subject to the bill of lading.⁶⁰ Nevertheless, if the original contract of carriage governs it, it is not fair to the FOB seller as he may know little about the contract of carriage to which he is not a party.⁶¹

⁵⁶ See discussion in the first paragraph of 4.2.3.2 above.

⁵⁷ The FOB trade takes a large proportion of China's exporting trade. See Liying Zhang, *The Influence of the Rotterdam Rules on China's import and export* (1st edn, China University of Political Science and Law Press 2013) 132; See also the statistic issued by World Trade Organization: <<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>> accessed 07 June 2017.

⁵⁸ CMC 1992, art 42.3: 'Shipper' means:

- a) The person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier;
- b) The person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.

⁵⁹ This is the situation in *Beijing Wen-yang Imp. & Exp. Co. Ltd. v Shanghai COSCO Shipping Co. Ltd* [1999] Higher People's Court of Tianjin Municipality, cited from Wei Wang, *Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading-A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea* (1st edn, Law Press 2010)141-42. The details of the case is discussed in 4.3.1 below.

⁶⁰ CMC 1992, art 78 para 1. '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.'

⁶¹ Based on the wording of art 42.3 and art 78, it can be inferred that the 'holder' provided by CMC 1992 should refer to the party, other than the shipper, who is the third party to the contract of carriage. In practice, it usually refers to the endorsee or consignee to whom the bill of lading is endorsed and/or transferred. Accordingly, the FOB seller to whom the bill of lading is directly issued cannot be deemed as the 'holder' under CMC 1992.

Such a dilemma⁶² can be settled if the bill of lading is viewed as a contract that is completely independent of the antecedent contract as it is under American law. In this way, once the bill of lading is issued to the FOB seller, the bill of lading will become the only contract governing the relationship between the FOB seller and the carrier. As a result, the FOB seller is able to justify his contractual right to sue the carrier simply by having the bill of lading in possession.

Fourth, in many situations the holder acquires the bill of lading merely for being a secured creditor. This is particularly the case for the bank which finances the sale of goods covered by the bill of lading and holds the bill as a pledge. It would be unfair to this type of holder if any liability were to arise only because of their possession of the bill of lading.⁶³ Such an undesirable result could be avoided if a future Chinese law modelled the American law and provided a bill of lading as a negotiable document. According to the general principle applied to the negotiable instrument in Chinese law, the holder of a negotiable instrument does not assume any liability unless the holder enforces the rights under the instrument.⁶⁴ Once a similar quality is vested in the bill of lading, the way in which the holder may assume the liability under the bill of lading would be equal to that under Anglo-American law and the Rotterdam Rules, namely, the holder of a bill of lading would have no obligation imposed on him nor would he assume any liability therefrom merely for holding the bill. Although such a result may also be achieved through the ‘transfer of contract’ approach as under COGSA 1992, modelling the law on the negotiable instrument may be a simpler way to solve this problem as there would be no need to further explain why the obligation and liability do not move together with the rights. Once the general principle for the assumption of liability by the holder is established, two further requirements at this point could be added by referencing

⁶² Although no reported case has been found in this respect, it is submitted that a future Chinese maritime law should ascertain the conclusive effect of the bill of lading to the FOB seller who performs as an actual shipper, with the purpose of avoiding possible disputes arising at this point.

⁶³ Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 286.

⁶⁴ In accordance with the Negotiable Instruments Law in China (Negotiable Instruments Law of the People's Republic of China, 2004 Amendment), the Negotiable Instruments mentioned here include bill of exchange, promissory note and cheque (art 2). Normally the holder of these instruments does not assume any liability unless the holder exercises the rights arising out of the negotiable instruments to claim payment according to the amount specified in the negotiable instruments (art 4, para 4). To exercise the rights, the holder shall put his/her signature or seal to the negotiable instruments according to the legal procedures and present the instruments (art 4, para 2). In addition, for a bill of exchange payable at a fixed date after sight, the holder shall make presentation for acceptance to the payer within one month starting from the date of issuance of the bill of exchange. Otherwise the holder shall lose the right of recourse against the prior holder (art 40). See also Yuechuan Jiang, ‘Haishang Huowu Yunshu Zhong Huofang Suquan Rending [Cargo interest’s title to sue in the carriage of goods by sea (author’s translation)]’ (Dphil Thesis, Dalian Maritime University 2011) 86.

the well-drafted rules under COGSA 1992. First, the liability assumed by the holder should be limited to those identifiable from the bill of lading. Second, the holder would only assume liability under the bill of lading if he exercised the rights transferred to him by the bill of lading, for instance, the contractual right of suit.⁶⁵

4.2.3.3. The Compatibility of the Bill of Lading Practice with the Good Faith Purchaser Rule

Current Chinese law has recognized that the real rights⁶⁶ of goods can be *bona fide* acquired.⁶⁷ In maritime practice, the bill of lading is usually treated as a symbol of the goods.⁶⁸ Given this, it is logical to conclude that the rights under the bill of lading can also be acquired by a good faith purchaser who has paid to acquire the bill. In this sense, similar to American law, the bill of lading in Chinese law has the potential to be treated in the same way as a negotiable instrument.⁶⁹

In addition, where the bill of lading is provided as a negotiable document, then as under American law the contractual right to sue vested in the holder of a bill of lading should be understood as stemming from the bill of lading itself rather than from the antecedent contract of carriage. Such an argument to some extent is coherent with the literal meaning of Article 78 which provides 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’. From the wording of the provision, it is not difficult to see that the drafter of CMC 1992

⁶⁵ Other contractual rights that may be transferred by the bill of lading are discussed in chapter 5&6 below.

⁶⁶ Property Law of the People's Republic of China 2007 (Property Law 2007), art 2. ‘The term ‘real right’ as mentioned in this Law refers to the exclusive right of direct control enjoyed by the holder according to law over a specific property, including ownership, usufructuary right and real rights for security.’

⁶⁷ Property Law 2007, art106 ‘Where a person untitled to dispose a real property or movable property transfers the real property or movable property to an assignee, the owner has the right to recover the real property or movable property. Except it is otherwise prescribed by law, once it is under any of the following circumstances, the assignee shall obtain the ownership of the real property or movable property (1) The assignee accepted the real property or movable property in good faith; (2) The real property or movable property is transferred at a reasonable price.’

⁶⁸ Yuzuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 185.

⁶⁹ In this thesis, the negotiability of the bill of lading is deemed as influential in both transfer of the contractual right exercised towards the carrier and the transfer of the real rights of goods. This chapter targets the contractual right to sue, therefore, only the influence on the transfer of contractual rights is discussed here. For the influence of negotiability on the transfer of real rights of goods, see chapter 5, 5.2.4.1 below.

intended the bill of lading to be a complete and independent contract analogous to the bill of exchange. In this sense, vesting the bill of lading with negotiability does not conflict with current maritime law.

Furthermore, as noted in Chapter 3, one underlying deficiency in CMC 1992 is the lack of a proper connection between the transfer of rights through the bill of lading and the transaction of goods.⁷⁰ Such a deficiency would be remedied if the transfer of a contractual right to sue could be attributed to the negotiability of the bill of lading. This is because, to entitle the holder to sue the carrier in contract, due negotiation of a bill of lading which requires the holder to pay for the corresponding value in good faith is necessary. As a result, in judicial practice, Chinese courts must examine the elements regarding cargo transaction, such as the parties' intention and the payment of value for the goods when determining the holder's contractual right to sue the carrier. If this could be done, then the contractual right to sue the carrier and the underlying transaction of goods would be linked in a direct way. In fact, such an operation is not alien to Chinese courts. For example, in *JiaJia Import & Export Trading Ltd (Ningbo) v Mediterranean Shipping Company*,⁷¹ in order to determine whether the appellant, who claimed to be the legitimate buyer of the goods and had the bill of lading in its possession, was entitled to sue the carrier for rejection of delivery, the court fully examined the trading relationship between the appellant and the seller, and concluded that the appellant did not obtain the bill of lading by virtue of a genuine cargo transaction. Also, there was no convincing evidence could prove that the appellant acquired the bill of lading by paying up the value for the goods and in good faith. Accordingly, the Court held that the bill of lading presented by the appellant was not a genuine bill issued by the carrier, and the carrier was not bound to deliver the goods to the appellant. Although the dispute arising in this case is not directly related to the holder's title to sue for cargo loss or damage, the reasoning given by the Court shows that Chinese courts usually tend to enquire into the performance of the underlying transaction of goods when determining the relationship between the carrier and the holder of the bill of lading. Therefore, if the bill of lading were provided as a negotiable document in a future law, current judicial practice on dealing with cargo claims would not be altered significantly.

⁷⁰ See discussion in Chapter 3, 3.5 above.

⁷¹ Higher People's Court of Shanghai Municipality, No. Hugaominsihaizhongzi 13/2008 (*Phulaw*) <http://www.pkulaw.cn/cases/Payz_1970324837830033.html> accessed 23 May 2017.

4.2.3.4 Will Negotiability Encourage Trafficking of the Bill of Lading?

Once the legal ground for the holder's contractual right to sue is attributed to the negotiability of the bill of lading, then the bill may be negotiated to a holder who acts as a bona fide purchaser after the goods have been delivered. According to the doctrine of bona fide purchase, in such an instance the holder should still be entitled to sue the carrier to recover his loss or for damage caused by the carrier's default.⁷² A concern that may arise here is whether such a result might encourage trafficking in bills of lading independent of the genuine transaction of goods covered by the bill. In English law, such a concern was noted during the drafting of COGSA 1992 by the Law Commission and Scottish Law Commission:

By extending rights of suit to those acquiring the bill of lading after delivery, 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.⁷³

Due to the aforesaid reason, COGSA 1992 established the general position that the person to whom the bill of lading is transferred after the delivery of goods no longer acquires the contractual right of suit.⁷⁴ Likewise, in Chinese law, in further examining whether it is safe to take the negotiability of a bill of lading as legal ground for the holder's contractual right to sue, the potential risk of trafficking in bills of lading should be assessed. This is done in the following paragraphs.

Under American law, due negotiation of a bill of lading requires the transferee to have acted in good faith. As mentioned before, such a requirement mitigates the risk that the rights under the bill are acquired by a malicious person.⁷⁵ It is believed that this would also be the case if

⁷² Whether the holder in such an instance is entitled the real right of goods is discussed in chapter 5, 5.3.4 below.

⁷³ Law Commission and Scottish Law Commission Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea 1992* (Law Com No.196, Scot Law Com No.130, 1991) para 2.43.

⁷⁴ This position is subject to the exceptions stipulated by COGSA 1992, s2 (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.

⁷⁵ See discussion in Chapter 4, 4.2.3.2 above. See also Bools (n2) 93. 'The good faith requirement will prevent thieves and fraudsters recovering against the carrier, and to impose a requirement of value would prevent bare agents from recovering...'

a similar requirement of good faith were to be introduced into Chinese law on the transfer of the bill of lading.

Unlike English law, under Chinese law the cargo claim will not be upheld by the court if the cargo claimant fails to prove that he sustained substantial cargo loss or damage as a consequence of the carrier's default.⁷⁶ Under such a premise, it can hardly be believed that a party that does not actually participate in a genuine cargo transaction is able to prove such a loss or damage and the causation between the loss or damage and the carrier's breach of duty.

In normal maritime practice, it is unlikely for the bill of lading to still be in circulation after the goods covered by the bill have been delivered. This is because the original bill of lading, at least one of the originals, should have been surrendered to the carrier in return for delivery of goods. A possible reason for acquiring the bill of lading after delivery of the goods is that the carrier made delivery without surrendering the bill of lading.⁷⁷ If this is the case, there is no doubt that the carrier breached his contractual duty of delivery and should be liable for any loss or damage caused therefrom. In such a situation, if the bill of lading for some reason is negotiated to a good faith purchaser thereafter, it will be unfair to the good faith purchaser if he loses the contractual right to sue the carrier to recover his loss since the good faith

⁷⁶ This can be seen from the Contract law of the People's Republic of China 1999 (Contract Law 1999), art 112. If one party fails to perform its contractual obligations, or the performance of its contractual obligations fails to conform to the agreement, and the other party still suffers from other damages after the performance of the obligations or adoption of remedial measures, such party shall compensate the other party for such damages.

See also *Shenzhen Yingtai Import & Export Ltd v. Huafeng International Logistic (Shanghai) Ltd, Shenzhen Branch*, Higher People's Court of Guangdong Province, No. Yuegaofaminsizhongzi 98/2012 (CCMT, 28 November 2014) <<http://www.ccmt.org.cn/shownews.php?id=15185>> 28 May 2017. In This case, the carrier delivered the goods to the buyer without presentation of the original bill of lading by the buyer. Although the carrier breached his duty under the contract of carriage, it was held that the shipper (seller) was not entitled to sue the carrier for indemnity as the shipper (seller) himself did not suffer any loss caused by the carrier's default.

⁷⁷ This may also happen if the bill of lading are issued as a set rather than a single copy. In such a situation the carrier is able to discharge his obligation of delivery once he delivers the goods against presentation of one original bill of lading, regardless of the existence of other originals. This may arise the possibility that other originals are kept in circulation after the delivery of goods and thereafter are acquired by a bona fide purchaser. The *bona fide* purchaser in this instance would not be able to sue the carrier as the carrier has fulfilled his obligation of delivery. However, it does not meant that the *bona fide* purchaser has no way to recover his loss. The *bona fide* purchaser may bring an action against his predecessor from whom he obtained the bill based on the trading arrangement. This is a question purely in the sense of sale of goods, which is beyond the scope of discussion in the thesis.

purchaser may no longer be able to expect the actual delivery of goods to him.⁷⁸ In addition, such an argument to a large extent is in line with the view held by the Supreme People's Court that 'where any loss is caused to the holder of an original bill of lading due to delivery of goods by a carrier without the original bill of lading, the holder may request the carrier to bear the liability for breach of contract or tort'.⁷⁹

To sum up, under Chinese law, it is feasible to treat the bill of lading as a negotiable document, at least in a contractual sense.⁸⁰ The holder's contractual right to sue thereby could be attributed to the negotiability of the bill of lading that is analogous to a negotiable instrument. Once the bill of lading is duly negotiated to a holder who paid a reasonable value in good faith, the holder would acquire the right to sue the carrier irrespective of any defect in the previous life of the bill of lading. Such a result will not only fulfil Chinese export traders' expectations about the commercial value of the bill of lading in securing and supporting a smooth export cargo transaction, but is also coherent with the existing legislation and judicial practice on the doctrine of good faith purchaser and the holder's title to sue. More importantly, by incorporating the requirement of the good faith purchaser into the rules governing the transfer of a contractual right to sue the carrier, a direct connection between the transfer of a contractual right to sue and the underlying transaction of goods would be embedded into a future Chinese maritime law.

As a consequence of the negotiability, the person who acquires the bill of lading in good faith for value after the delivery of goods may be vested with the contractual right to sue the carrier. Although such a result is ostensibly undesirable to the carrier, whether such a contractual right to sue can actually be enforced also depends on other factors such as proof of loss or damage and the causation between such a loss or damage and the carrier's breach of duty. These factors guarantee that the contractual title to sue can only be transferred and implemented on the basis of a genuine cargo transaction. In this sense, vesting a bill of lading with a certain amount of negotiability in a future Chinese law would not encourage trafficking in bills of lading, which would give rise to a cause of action against the carrier. Rather, owing

⁷⁸ If the goods has been delivered to a party who is entitled to the goods, the good faith purchaser will not be able to require the actual delivery. This is discussed further in chapter 5, 5.3.4 below.

⁷⁹ Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading 2009, art 3.

⁸⁰ Whether the bill of lading is negotiable in the sense of property law is discussed in chapter 5, 5.2.4.1 below.

to such a negotiability, the validity of the contractual right to sue transferred through the bill of lading would be greatly reinforced as such a right cannot be defeated by any defect in the previous life of the bill of lading. Moreover, such a right may survive even though the goods covered by the bill of lading have been delivered. It is believed that such a consequence would enhance merchants' confidence in the commercial value of the bill of lading under a future Chinese law.

4.3 The Shipper/Seller's Title to Sue After the Bill of Lading has been Transferred

4.3.1 Should the shipper still be Entitled to Sue the Carrier in Contract After the Transfer of the Bill of Lading?

If a future law recognizes that the holder's contractual right to sue is derived from the negotiability of the bill of lading, then the shipper seems to have no ground to retain the contractual right to sue the carrier once the bill of lading is transferred to the holder. However, it has to be admitted that, in practice, the shipper may sustain a substantial loss caused by the carrier's default even though the bill of lading has been transferred to another party. By reviewing the judicial practice in China, it can be stated that the aforesaid issue often arises in two situations.

The first situation is where the goods are delivered without presentation of the original bill of lading. For example, in *Beijing Wen-yang Imp. & Exp. Co. Ltd. v Shanghai COSCO Shipping Co. Ltd.*,⁸¹ the FOB seller, Beijing Wen-yang Imp. & Exp. Co. Ltd (Wenyang), delivered the goods in question to an agent of the carrier (Shanghai COSCO Shipping Co. Ltd) for shipment. The agent then issued the bill of lading on behalf of the carrier to Wenyang after receiving the pre-paid freight from Wenyang. As per the requirement on the L/C, the FOB buyer was named as 'shipper' on the bill of lading and the consignee was 'to order of the buyer'. Later, the goods were delivered to the buyer at Singapore without presentation of the original bill of lading. Subsequently, Wenyang's request for payment was rejected by the

⁸¹ [1999] Higher People's Court of Tianjin Municipality, cited from Wei Wang, *Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading-A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea* (1st edn, Law Press 2010)141-42.

bank on the ground that the bill of lading was not endorsed by the buyer. The bank then sent all the documents back to Wenyang. To recover its loss, Wenyang brought a contractual action against the carrier for misdelivery of the goods but this was dismissed by the court. The reason given by the court was that there was no contractual relationship between Wenyang and the carrier since Wenyang was neither the party named on the bill of lading nor the party to whom the bill of lading was duly endorsed.⁸² Similar facts can be found in *Zhejiang Textiles Import & Export Group Ltd. v Taiwan Uniglory Marine Corporation*.⁸³ In this case, the goods in question were sold by *Zhejiang Textiles Import & Export Group Ltd* (Zhejiang Textiles) to Company K. As the beneficiary named on the L/C, Zhejiang Textiles received the documents under the L/C issued by Hbz Finance Limited. As required by the documents, the shipper on the bill of lading was named as ‘AL Hosan For Import and Export/Al Faris For Import’ and the consignee was named as ‘to order of High Education and Scientific Research of Iraq’.⁸⁴ After paying the carrier for the freight, the shipper acquired the whole set of original bills of lading from the carrier (Taiwan Uniglory Marine Corporation) and then submitted the bills to Bank of Communication (Hangzhou Branch of China) for payment from Hbz Finance Limited. When the goods arrived at the destination, they were released to an agent of High Education and Scientific Research of Iraq by the carrier without presenting any original bill of lading. Later, all documents under the L/C including the whole set of original bills of lading were returned to Zhejiang Textiles as no payment under the L/C was received.⁸⁵ The returned documents had no endorsement from High Education and Scientific Research of Iraq. Zhejiang Textiles then sued the carrier in contract for making delivery without presentation of the original bill of lading. In contrast to the *Wenyang* case, the claim by Zhejiang Textiles was upheld by the court. As discovered by the court, Zhejiang Textiles had been responsible for booking the space on the vessel, paying for the freight and handing the goods over to the carrier, so Zhejiang Textiles could be

⁸² Although the judgement denied Wenyang’s legal status as the shipper, it is submitted that Wenyang should be deemed as the shipper by the reason that it actually performed the shipper’s obligation to hand over the goods to the carrier. In this sense, Wenyang should have fulfilled the requirement of being an ‘actual shipper’ provided by article 42.3(b) of CMC 1992 (Text to n 58).

⁸³ (2005) Higher People’s Court of Shanghai Municipality, cited from Xinlong Ying, *Selected maritime cases of Shanghai Maritime Court China* (1st edn, Law Press China 2011) 87-88. In this case, the goods were sold under a CIF term.

⁸⁴ In this case, the cargo transactions with the receiver ‘High Education and Scientific Research of Iraq’ was done through multiple agents. Although not authoritatively reported, it was very likely that the shipper ‘AL Hosan For Import and Export/Al Faris For Import’ and the buyer ‘company K’ were the receiver’s agents.

⁸⁵ The reported case does not indicate how the buyer claimed delivery of goods without presentation of the original bill of lading. However, in commercial practice, the carrier may agree to release goods to the buyer once the buyer is able to provide a LOI which exempts the carrier from the liability for misdelivery.

deemed to be an ‘actual shipper’ that had a contractual nexus with the carrier. In addition, the court noted that the bill of lading was finally sent back to the shipper. According to the verdict, although the shipper was not the holder provided by Article 78 of CMC 1992 as the bill of lading was not properly endorsed, the shipper was still entitled to sue the carrier by virtue of its legal status as ‘actual shipper’.⁸⁶

The second situation where the shipper may sue the carrier after the transfer of the bill of lading is when the goods are rejected by the receiver due to damage caused by the carrier’s default. In commercial practice, to mitigate the loss and maintain the subsequent business relationship, the shipper/seller may accept such a rejection and resell the goods to another party at a reduced price. For example, in *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company (PICC)*,⁸⁷ the goods in question were sold by Haze to Entel. After receiving the goods, the carrier issued a bill of lading which named Haze as ‘shipper’ and Entel as ‘notify party’, and marked the consignee as ‘to order’. When the goods arrived at the destination (Turkey), Entel endorsed the bill of lading and surrendered it to the carrier in return for a delivery order. After that, the goods were damaged during discharge. The inspection of the damaged cargo suggested that it was better to sell the goods locally as the cost of further examination and transportation back to China would be higher than their insurance value. After being informed of such a result, Entel rejected the goods. Later, Entel asked the carrier to return the bill of lading and sent it back to Haze. In order to reduce the loss in a timely manner, Haze accepted the rejection and agreed to cancel the L/C. The damaged goods were finally sold to another local buyer at a reduced price. After compensating Haze for the insured loss and subrogating all Haze’s rights of claim, the insurer PICC sued the carrier for the cargo damage caused by the carrier’s breach of duty. The carrier for its part argued that PICC had no right of suit on the ground that the bill of lading had been endorsed and surrendered to the carrier by Entel before the goods were damaged. Therefore, the dispute revolved around whether Haze was still entitled to sue the carrier after the bill of lading was endorsed and surrendered to the carrier. After examining the facts of the case, the court made two findings. First, Haze’s legal status

⁸⁶ Hai Xin and Dan Shan, ‘Jiaohuo Tuoyunren Zhi Quanli Baohu [The legal protection towards the shipper who delivers the goods to the carrier (author’s translation)]’ Xinlong Ying (ed) *Selected maritime cases of Shanghai Maritime Court China* (1st edn, Law Press China 2011) 88-89.

⁸⁷ Higher People’s court of Guangdong Province, No. Yuegaofaminsizhongzi 104/2012, cited from Feifei Deng, ‘Shipper’s right to sue in relation to carriage of goods by sea: the approach of Chinese court’ (2013) 19 JIML 196, 197.

as shipper should exist at all times, irrespective of the transfer of the bill of lading. Second, Haze was the only party who sustained substantial cargo damage after the transfer of the bill of lading. Based on the aforesaid findings, the Court held that Haze was entitled to sue the carrier for compensation even though the bill of lading had been endorsed and surrendered to the carrier when the damage occurred.

Although in the aforesaid cases the courts arrived at different conclusions on the shipper's title to sue, one common fact was that the shippers were the only parties who assumed the substantial loss caused by the carriers' breach of contractual obligations, and such a result was closely related to either the particular trading arrangements⁸⁸ or the commercial negotiation after the damage to the goods.⁸⁹ In this sense, it appears to be unfair to the shipper if he is not allowed to bring a contractual action against the carrier to recover his loss since the goods in question were damaged due to the carrier's default in cargo transit, and the shipper indeed suffered substantial loss therefrom. One may argue that the shipper may have an alternative remedy of suit in tort under such circumstances. However, the shipper would bear a heavier burden of proof under a tortious action than under a contractual action. This is because, as required by the Tort Law of China, besides proof of the tortfeasor's infringement of the claimant's 'civil right and interest',⁹⁰ the claimant in a tortious action is obliged to prove that the tortfeasor is at fault when committing the infringement.⁹¹ This thereby brings difficulty to the cargo claimant since the carrier's fault may be difficult to assess when the

⁸⁸ For example of such particular trading arrangement, see the arrangement between the buyer and the seller on naming the parties in the bill of lading in the case of *Beijing Wen-yang* (n81). Such an arrangement can also be found in the case of *Zhejiang Textiles* (n83).

⁸⁹ This is the situation happened in the case of *PICC Property and Casualty Company Limited of China Shenzhen Branch* (n87).

⁹⁰ Tort Law of the People's Republic of China 2009 (Tort Law 2009, adopted at the 12th session of the Standing Committee of the Eleventh National People's Congress on December 26, 2009, and came into force on July 1, 2010), art. 2.

Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. "Civil rights and interests" used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honour, right to self-image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.' From this article, it can be seen that Chinese law adopts a broad definition on the 'Civil Rights and interests.

In cargo claims, the assumption of substantial loss or damage by the claimant may suffice to constitute the 'interest' provided by Tort Law 2009. See Yuechuan Jiang, 'Haishang Huowu Yunshu Zhong Huofang Suquan Rending [Cargo interest's title to sue in the carriage of goods by sea (author's translation)]' (Dphil Thesis, Dalian Maritime University 2011) 163.

⁹¹ Tort Law 2009, art 6 'One who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.'

goods are under the carrier's custody at high sea.⁹² This may also explain why in modern shipping practice the suit in contract is usually a preferred option for the cargo claimant. Therefore, to maintain the fairness of the law and properly balance the interest between the carrier and the cargo interest, it would be helpful to develop a rule which conditionally enables the shipper to sue after the transfer of the bill of lading. It should be noted that such rules have been established in both English law and American law although the ways in which the actions can be invoked differ. In addition, a legislative attempt to vest the contractual right to sue in a non-holder claimant can also be found in the UNCITRAL Drafts.⁹³ The aforesaid national and international experience are reviewed below so as to uncover some clues with which to settle the outstanding problem regarding the shipper's title to sue in Chinese law.

4.3.2 The English Approach

In order to protect the carrier from multiple claims,⁹⁴ COGSA 1992 extinguishes the shipper's contractual right to sue once the bill lading is transferred to a lawful holder.⁹⁵ However, the shipper may still be able to sue the carrier in bailment.⁹⁶ In English law, bailment may

⁹² An exception here is the situation where the goods are delivered without against surrender of the original bill of lading. In this instance, the carrier's fault is obvious since the carrier at any rate is obliged to make delivery against surrender of bill of lading.

⁹³ For instance, see UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 January 2002) A/CN.9/WG.III/WP21, art 13.3.

In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.

UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (4 September 2003) A/CN.9/WG.III/WP32, art 65.

In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is not the holder, such claimant must, in addition to its burden of proof 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.

UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art 68 (b).

When the claimant is not the holder, must, in addition to 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.

⁹⁴ Law Commission and Scottish Law Commission Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea 1992* (Law Com No.196, Scot Law Com No.130, 1991) para 2.34 (ii).

⁹⁵ COGSA 1992, s2 (5) (a).

⁹⁶ Under the UK law, the shipper may have more than one alternative remedy other than the contractual remedy provided by COGSA 1992, for example, besides the title to sue in bailment, the shipper may also choose to sue the carrier in tort if he could prove that either the ownership or the immediate possession of goods is vested in him when the carrier's breach of duty occurred. However, the establishment of title to sue in tort in English law

constitute an independent cause of action at common law even though it comprises both a tortious element and contractual element.⁹⁷ A typical example of suit in bailment is *East West Corporation v DKBS 1912 A/S*⁹⁸ where the seller (the shipper) and the buyer (named as notify party on the bill of lading) agreed that the goods should be delivered at the destination against payment. However, the goods were finally released to the buyer without presentation of the original bill of lading and at that time only partial payment of goods was fulfilled by the buyer.⁹⁹ Although the seller (the shipper) was divested of the contractual right to sue by virtue of Section 2(5) of COGSA 1992,¹⁰⁰ he was held to be entitled to sue the carrier in bailment. It should be noted that such a judgment was made on the ground of the particular facts in respect of a cargo transaction. First, although the bills of lading were endorsed to the bank by the seller (shipper), the seller (shipper) did so merely to request the bank to collect payment on his behalf and the seller retained the property of goods at all times. Second, the seller instructed the bank that the bills should not be transferred to the buyer until the full payment of goods was received.

In consideration of these facts, the Court of Appeal held that the immediate possession of goods was vested in the seller (shipper) 'at all material times' and the seller (shipper) at all times acted for itself.¹⁰¹ Also, the Court asserted that the bank was merely the agent of the seller although the bank acquired the status as a lawful holder pursuant to COGSA 1992.¹⁰² This means that the relationship of bailment between the seller (shipper) and the carrier was in existence at all times, and for which the seller (shipper) was entitled to sue the carrier directly.¹⁰³ The reasoning of this case shows that even if the suit in bailment is made against the carrier, if the claimant is the shipper who has parted with possession of the bill of lading, the court may examine the underlying trade relationship between the shipper and the endorsee/consignee so as to determine the validity of the shipper's title to sue. In this sense,

mainly depends on the arrangement of cargo transaction rather than the contractual relationship between the carrier and the shipper. That's why the suit in tort is not mentioned here.

⁹⁷ Simon Baughen, 'Misdelivery and the Boundaries of Contract and Tort' [2003] 4 LMCLQ 413,417.

⁹⁸ [2003] EWCA Civ 83, [2003] 2 ALL ER 700.

⁹⁹ *ibid.* In this case, the seller instructed the bank to transfer the bill of lading to the buyer only if the full payment of goods were received.

¹⁰⁰ After shipment of goods, the seller (shipper) indorsed the bills of lading to his bank for collecting payment on the seller's behalf. Therefore, according to Section 2 (1) of COGSA 1992, the lawful holder of the bill of lading in this case is the seller's bank rather than the seller.

¹⁰¹ *East West Corporation* (n98) 701.

¹⁰² *ibid.*

¹⁰³ *ibid.*

the shipper's title to sue in bailment is potentially linked with the underlying transaction of goods.

4.3.3 The American Approach

Similar to CMC 1992, FBLA 1994 does not expressly indicate the shipper's status after the negotiation of the bill of lading. Notwithstanding, in early American juridical practice, a general approach held by American courts was that the shipper would be divested of his right to sue the carrier once the shipper negotiated the bill of lading to another party.¹⁰⁴ Nevertheless, the underlying reason for extinguishment of the shipper's title to sue may be attributed to the shipper's separation of title to the goods rather than merely parting with the possession of the bill of lading. This is because American law requires the claimant to be the 'real party in interest'¹⁰⁵ and such an interest in judicial practice is usually construed as a proprietary right, such as ownership,¹⁰⁶ lien or pledge¹⁰⁷ of the goods. According to FBLA 1994, if the bill of lading is duly negotiated from the shipper to the holder, then the title to the goods covered by the bill will be moved from the shipper to the holder.¹⁰⁸ This means that the shipper will no longer be the party who has a real interest in either the bill of lading or the goods covered by it. Consequently, the shipper is no longer a qualified claimant in a contractual suit.

However, such a position is not as stable as it is under English law. In American common law practice, exceptional occasions have been developed where the shipper is entitled to sue the

¹⁰⁴ Bools (n2) 95-96.

¹⁰⁵ US Federal Rule of Civil Procedure 2014, s17 (a) (1) 'An action must be prosecuted in the name of the real party in interest...' For the judicial interpretation of the 'real party in interest', see *Sumimoto Corp. of America v. M/V Saint Venture*, 683 F.Supp. 1361, 1368 (M.D.Fla.1988). 'The "real party in interest" usually refer to the party who has 'actual and substantial interest' rather than the "nominal, formal, or technical interest" to the subject matter.'

¹⁰⁶ For example, in *Thyssen Steel v. Palma Armadora* 1984 AMC 1133 (S.D.N.Y. 1983), aff'd without opinion, 742 F.2d 1441 (2 Cir. 1984), it was held that the seller was not a real party in interest to the claim for the reason that the title to goods had been transferred to the buyer when the buyer paid up the value of the goods. See also *U.S. v. Central Gulf* 669 F.2d 243, 1984 AMC 2882 (5 Cir.1983), the US was held entitled to sue the carrier for short delivery as the US retained the title to the goods till the goods arrived at the destination.

¹⁰⁷ *Munson S.S. Line v Rosenthal (The Pan America)* 6 F.Supp.374, 1934 AMC 46 (S.D.N.Y.1933) In this case, the consignee, who had a lien or special property to the cargo, was held as having sufficient interest to sue the carrier for damage caused to the goods.

¹⁰⁸ FBLA 1994, §80105.

(a) Title.--When a negotiable bill of lading is negotiated--(1) the person to whom it is negotiated acquires the title to the goods that-- (A) the person negotiating the bill had the ability to convey to a purchaser in good faith for value; and (B) the consignor and consignee had the ability to convey to such a purchaser.

carrier regardless of the title to the goods and possession of the bills of lading. As noted by Tetley, these occasions include a) the consignee/endorsee ratifying the shipper's capacity to sue on his behalf; b) the shipper acting as the buyer/consignee or endorsee's agent in replacing and repairing the damaged cargo; and c) the buyer/consignee or endorsee rejecting the goods and the shipper/seller accepting the rejection.¹⁰⁹ More importantly, under American law, a party who sustains loss or damage to 'a proprietary interest' is also deemed to be an eligible claimant.¹¹⁰ This further increases the possibility that the shipper's title to sue the carrier is upheld by the court, irrespective of title to goods and possession of the bill of lading. For example, in *Marine Office of America Corp., et al., v LILAC Marine Corporation, et al.*,¹¹¹ the goods in question were sold CIF. Both the title to goods and the risk had been passed to the buyer/endorsee when the goods were damaged by virtue of the carrier's default at transit.¹¹² Despite this, the goods were initially rejected by the buyer/endorsee when the damage to the goods was revealed during the cargo inspection at the destination. To mitigate the loss, the buyer and the seller eventually reached an agreement that made the buyer accept the partially damaged goods at a discounted price. The seller thereby assumed the substantial loss due to the deduction of the invoice price paid by the buyer.¹¹³ In view of the aforesaid fact, the Court held that the seller/shipper was entitled to bring a contractual action against the carrier to recover his loss.¹¹⁴ As shown from the verdict, the assumption of substantial loss or damage may make a party become a 'real party in interest'.¹¹⁵ Also, where the cargo loss or damage caused by the carrier's default is suffered by a party other than the holder of bills of lading, the fact of assuming substantial loss or damage would enable the party to sue the carrier. A similar arrangement can be found in the UNCTIRAL Drafts.

4.3.4. The UNCITRAL Approach

Although the UNCITRAL rules governing cargo interests' title to sue were finally omitted from the adopted final draft (the Rotterdam Rules) due to significant disagreement among

¹⁰⁹ William Tetley, *Marine Cargo Claims, vol 1* (4th edn, Thomson Carswell 2008) 472.

¹¹⁰ Schoenbaum (n23) 535.

¹¹¹ 296 F. Supp 2d 91 (D.P.R.2003).

¹¹² *ibid* 97.

¹¹³ *ibid* 100.

¹¹⁴ *ibid*.

¹¹⁵ This can also be evidenced by *C. Itoh & Co. (America), Inc.v. M/V Hans Leonhardt*, 719 F.supp. 479, 500, 1990 AMC 733 (E.D. La.1989), in which the court stated that the claimants would be entitled to sue the carrier if they suffered the commercial loss in question.

the delegations from different jurisdictions,¹¹⁶ this does not mean that the UNCITRAL approach itself is without any value. As an approach aimed at harmonizing the law across different jurisdictions, the UNCITRAL approach may be regarded as a hybrid product that deliberately combines the characteristics of many jurisdictions. In this sense, the UNCITRAL approach may provide a model for the jurisdictions where the issues in respect of title to sue have not been explicitly provided by their national laws.¹¹⁷

The UNCITRAL approach lays an emphasis upon the influence of the assumption of loss or damage on the implementation of the contractual right to sue the carrier. This is particularly the case as to the title to sue of the claimant who sustains loss or damage but fails to prove himself as a holder.¹¹⁸ According to the UNCITRAL Drafts, if a person, besides proving his own loss or damage caused by the carrier's breach of duty, can also prove that the holder has not suffered the same loss or damage, then that person is permitted to sue the carrier directly even without possession of the bill of lading.¹¹⁹ This in essence makes the assumption of loss or damage the sole and independent factor that enables the cargo interest to sue. Although this may also be the case in American judicial practice,¹²⁰ the UNCITRAL rules are the first legislative attempt to separate the contractual right of suit from the possession of the bill of lading. This may grant better protection to the shipper who sustains substantial loss or

¹¹⁶ UNCITRAL 'Report of Working Group III (Transport Law) on the work of its eighteenth session (27 November 2006) A/CN.9/616, 30. 'The chapter of "Right of suit" was "overly ambitious and that is was unlikely that the working group could reach a consensus on the substance dealt with therein.' As a result, the chapter of 'Right of suit' was deleted in its entirety.

¹¹⁷ Francesco Berlingieri, 'Revisiting the Rotterdam Rules' [2010] LMCLQ 583, 639. 'While Article 57 sets out principles that are obvious in a great many jurisdictions, nevertheless it may be of some assistance in those jurisdictions where they are not so obvious and, therefore, may ensure a greater uniformity.' Although the author's original argument only refers to Article 57 (transfer of rights) under Rotterdam Rules, it is submitted that such an argument should also apply to the rules under the UNCITRAL Drafts, as the Drafts share the same purpose as the Rotterdam Rules.

¹¹⁸ Under the UNCITRAL Drafts, the shipper may fall within the definition of 'holder'. For example, according to 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art.1(j).

Holder means a person 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.

According to this rule, if the bill of lading for some reasons is transferred back to the shipper from the previous holder, even at this time the bill of lading is not transferred in a proper way, for instance, without the holder's indorsement, the shipper may still acquire the legal status as holder if he is named as shipper on the bill of lading. Accordingly, the shipper should be able to sue the carrier in contract as a holder. Nevertheless, the aforesaid rule may not apply to the situation where the shipper performs the obligation as an actual shipper but is not named as the shipper on the bill of lading, such as the situation under the case of *Beijing Wen-yang* (n81). For details of the case, see 4.3.1 above.

¹¹⁹ Text to (n93).

¹²⁰ *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al*, 296 F. Supp 2d 91 (D.P.R.2003).

damage but has parted with possession of bills of lading since the shipper would not necessarily rely on an action brought by the holder on his behalf or the unstable common law remedies to recover his loss. In addition, the requirement of proving the exclusivity of the loss or damage assumed by the claimant is expected to reduce the carrier's risk of suffering multiple claims brought by more than one claimant. In this sense, the balance of interest between the carrier and the cargo interest would not be struck out were the UNCITRAL approach applied. In addition, such an approach reveals an intention to protect the cargo interests' substantial interest rather than mechanically vesting the contractual title to sue in a certain single party such as the holder of the bill of lading.¹²¹

4.3.5 Comparisons Useful for Reforming CMC 1992

Comparing the aforesaid three foreign approaches, it can be seen that the American law and the UNCITRAL Drafts are better at protecting the shipper's substantial interest than English law. Under COGSA 1992, the shipper is at no point allowed to sue the carrier after the bill of lading has been transferred to a lawful holder, even if the shipper is the party who sustains substantial loss caused by the carrier's breach of duty under the contract of carriage. In contrast, under American law the plaintiff is required to prove a certain interest, either in the sense of proprietary right to the goods or in the form of assuming substantial loss or damage in the cargo claim. The latter may even enable the shipper who has parted with the lawful possession of the bill of lading to sue the carrier. Such a position is further developed by the UNCITRAL Drafts, which expressly allow a non-holder claimant such as the shipper who has transferred the bill of lading to another party, to bring a contractual action to sue the carrier if he can prove that the loss was assumed by himself only. The assumption of loss or damage weighs much more heavily on exercising the contractual right to sue the carrier in the UNCITRAL Drafts than English law. It is worth noting that in maritime practice the question of who ultimately assumes the cargo loss caused by the carrier's breach of duty is usually subject to the performance of the contract governing transaction of goods and the negotiation between cargo interests under such a contract.¹²² In this sense, the American law

¹²¹ UNCITRAL 'Report of Working Group III (Transport Law) on the work of its eleventh session' (4 April 2003) A/CN.9/526, para 152; UNCITRAL 'Report of Working Group III (Transport Law) on the work of its eighteenth session (27 November 2006) A/CN.9/616, para 117. All these documents suggest that the cargo claimant should have 'sufficient interest' to the cargo claim.

¹²² For example, in the case of *Zhejiang Textiles* (n83), although the goods were sold CIF, after the goods were delivered to the buyer without presentation of the original bill of lading at the destination, it was the

and the UNCITRAL Drafts appear to view the cargo interests' title to sue in a broader context, combining the carriage of goods with the transaction of goods. Such a perspective may be of help to settle the problem regarding the shipper's title to sue under current Chinese law as the typical occasions¹²³ where the problem often arises are related to the trading arrangement. In addition, as mentioned before, under Chinese law the general principle that applies to a claim for damage requires the claimant to be the party who actually suffered loss owing to the defendant's breach of contractual duty.¹²⁴ Such a principle also applies to cargo claims.¹²⁵ Therefore, as to the outstanding problem of the shipper's title to sue under current Chinese law, it is sensible to envisage the solution on the basis of proving certain loss or damage assumed by the shipper.

It should be noted here that English law provides the shipper with an alternative remedy other than suit in contract, which is suit in bailment. Bailment in English common law is deemed an independent cause of action even though it contains some contractual characteristics.¹²⁶ As suggested by the verdict of *East West Corporation v DKBS 1912 A/S*,¹²⁷ although the shipper's contractual right is divested after the transfer of the bill of lading, the relationship of bailment between the shipper and the carrier may still exist. The shipper thereby may sue the carrier by virtue of bailment regardless of whether the bill of lading is transferred or not.

shipper/seller who actually assumed the loss as the buyer rejected to make the payment of goods. In the case of *PICC Property and Casualty Company Limited of China Shenzhen Branch* (n87), the shipper/seller is the party who ultimately assumed the loss since the damaged goods were rejected by the original buyer and then had to be sold with a deducted price. See also Law Commission and Scottish Law Commission Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea 1992* (Law Com No.196, Scot Law Com No.130, 1991), para 2.34 (iii). 'The question of who bears the risk of a loss will depend on the sale contract...'

¹²³ As discussed in 4.3.1 above, the two occasions are: a) the goods are delivered without presentation of the original bill of lading. b) The damaged goods are rejected by the receiver.

¹²⁴ This can be seen from both contract law and civil procedure law in China. See Contract law 1999, art 112.

If one party fails to perform its contractual obligations, or the performance of its contractual obligations fails to conform to the agreement, and the other party still suffers from other damages after the performance of the obligations or adoption of remedial measures, such party shall compensate the other party for such damages.

See Civil Procedure Law of People's Republic of China (2012 Amendment), art 119 (1). 'The plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case when bringing an action against the defendant'.

¹²⁵ For example, in *Jinghan (Shenzhen) Trading, Ltd v. Li Tong Logistic, Ltd and A-Sonic Marine (HK) Ltd*, Dalian Maritime Court, No. Dahaishangchuzi 385/2006 (CCMT, 9 March 2013) <<http://www.ccmf.org.cn/shownews.php?id=12737>> accessed 23 May 2017, the claimant is the party who performed the shipper's obligation but was not named as 'shipper' in the bill of lading. Although the court recognized the legal status of the claimant as the shipper provided by CMC 1992, the court dismissed the claimant's title to sue the carrier on the ground that the claimant didn't suffer any substantial loss caused by the carrier's default.

¹²⁶ Baughen, 'Misdelivery and the Boundaries of Contract and Tort' (n97).

¹²⁷ [2003] EWCA Civ 83, [2003] 2 ALL ER 700.

However, such a result could hardly be achieved under Chinese law. Although Chinese law does contain some analogous concepts, these concepts are described as certain types of contract, which come under the scope of contract law.¹²⁸ Accordingly, there is less likelihood of introducing a suit in bailment into a future Chinese law as an alternative remedy for the shipper. However, this does not mean that the English approach is of no help for solving the problem regarding the shipper's title to sue in Chinese law. As mentioned in 4.3.1, under COGSA 1992, the main purpose for divesting the shipper's title to sue after the transfer of the bill of lading is to avoid the multiple claims suffered by the carrier. It is submitted that such a purpose is also meaningful to Chinese law since the balance of interest between the carrier and the cargo interests would be undermined if the carrier could be sued by more than one cargo interest for the same reason.

To achieve the purpose of avoiding multiple claims whilst at the same time allowing the shipper who has transferred the bill of lading to sue the carrier for recovering his loss or damage, it seems necessary for the shipper to prove that he has an exclusive interest to the cargo claim. On this point, the UNCITRAL Drafts have provided simple and explicit guidance – as well as proving his own loss or damage, the shipper should also prove that the holder has not suffered the same loss or damage. Such a rule to a large extent coincides with the aforesaid Chinese judicial practice where the shippers' contractual right to sue the carrier was upheld by the courts.¹²⁹ As shown from the facts of *Zhejiang Textiles*¹³⁰ and *PICC*,¹³¹ the shippers, whose contractual right of suit was upheld by the courts, were the only parties that had sustained a substantial loss caused by the carriers' default. It should also be noted that in such a situation the holder who does not suffer any loss usually lacks incentive to sue since the Chinese law requires the claimant to prove his loss. Therefore, once the shipper is able to provide sufficient evidence to prove that the holder did not assume the claimed loss, such as the agreement between him and the holder on distributing the cargo loss or damage, the carrier will not face dual actions from both the shipper and the holder. In this sense, the

¹²⁸ The doctrine of bailment and the relevant legal scheme under the Anglo-American law does not exist in Chinese law. The analogous concepts are 'Storage Contracts' and 'Warehousing Contracts' which are provided by Contract Law 1999. The storage contract is defined as 'a contract whereby the depository keeps the deposit delivered by the depositor, and eventually returns it thereto' See Contract law 1999, art 365; and the warehousing contract is defined as 'a contract whereby the safekeeping party stores the goods delivered by the depositor, and the depositor pays the warehousing fee.' See Contract law 1999, art 381A.

¹²⁹ See discussion in 4.3.1 above.

¹³⁰ Text to n83.

¹³¹ Text to n87.

UNCITRAL Drafts are compatible with China's legal environment. Moreover, as can be seen from the two situations where the shipper needs the title to sue the carrier to recover his loss,¹³² although the bills of lading may be sent back to the shipper, at that time the bills of lading would usually lose their normal value to continue serving the transaction of goods as the goods covered by the bills have either been rejected or been delivered. Consequently, it seems unnecessary to lock the contractual right to sue into the bill of lading at all times as the bill of lading at some point may be transferred, not for serving the commercial transaction of goods¹³³ but rather to ensure the party who suffered loss as a consequence of the carrier's breach of duty is properly compensated. In this sense, the UNCITRAL Drafts provide a more flexible remedy for the cargo interests to recover their loss.

Based on the aforesaid comparisons, it may be concluded that a future Chinese maritime law should model the UNCITRAL approach, thus enabling the shipper to exercise a contractual right to sue the carrier even though the bill of lading has been transferred to another party. To exercise such a right, the shipper should not only prove that he suffered substantial loss or damage caused by the carrier's default but also prove that such a loss or damage was not suffered by the holder of the bill of lading. Such an arrangement is coherent with the existing civil procedure rules governing cargo claims. More importantly, it reflects a holistic perspective on apportioning a title to sue between the cargo interests in a comprehensive context which integrates the shipping practice with the trading practice in its entirety. In so doing, it is believed that the shipper's interest and the carrier's interest will both be secured and the fairness of law will be restored.

4.4 Conclusion

In CMC 1992, although Article 78 is commonly invoked as the statutory ground for underpinning the holder's contractual right to sue the carrier, the rationale behind this rule has never been unanimously agreed.¹³⁴ As a consequence of that, the way in which the contractual right to sue is moved from the shipper to a third party holder remains unsettled.

¹³² Text to n123.

¹³³ See discussion in 4.2.3.2 above.

¹³⁴ See chapter 3, 3.3.1 above.

It is also questionable whether the shipper is still entitled to sue the carrier after the transfer of bill of lading. This chapter has resolved the aforesaid questions, whilst also has discovered a clue to set up the legal way of transferring other rights through the bill of lading.

First, in order to clarify the theoretical ground for the holder's title to sue in contract, two principles can be observed from English law and American law. One is that the explanation should fulfil the traders' expectation of the commercial value of the bill of lading. The other is that the explanation should be coherent with the national approach on the doctrine of good faith purchaser.¹³⁵ By examining the two principles under Chinese law, this chapter argues that the American approach,¹³⁶ which treats the bill of lading as a complete contract independent from the contract of carriage and owes the movement of contractual right to sue between the cargo interests to the negotiability of the bill of lading, is appropriate to be referenced by a future Chinese law to construe how the holder is vested with the contractual right of suit. There are two reasons for this. In terms of fulfilling the merchants' expectation of the commercial value of the bill of lading, the export traders' interest would be better guaranteed if the bill of lading were vested with a certain amount of negotiability since such negotiability is helpful to enhance the reliability and tradability of the bill of lading.¹³⁷ Also, the negotiability would protect the holder from having any kind of obligation imposed merely for holding the bill of lading. Furthermore, the independent effect of the bill of lading deriving from the negotiability would ensure the bill became the only contract governing the relationship between the carrier and the FOB seller who is not the party concluding the contract of carriage with the carrier. In this sense, the FOB seller's position as an 'actual shipper' against the carrier would be secured.¹³⁸ From the aspect of coherence with existing Chinese law on good faith purchaser, it is reasonable to extend the existing law, which currently applies to the *bona fide* acquisition of goods themselves, to cover also the acquisition of the bill of lading because the bill of lading is usually regarded as a symbol of the goods in commercial practice.¹³⁹ If this could be done, the good faith purchaser rule would to a large extent make the holder, who has the contractual right to sue, the same person

¹³⁵ See discussion in Chapter 4, 4.2.3.1 above.

¹³⁶ FBLA 1994, § 80105 (a), § 80104 (b); see also UCC, § 7-501 (5).

¹³⁷ See discussion in Chapter 4, 4.2.3.2 above.

¹³⁸ *ibid.* This is particular the case to the FOB seller who is not named in the bill of lading, but requires the carrier to issue the bill of lading directly to him. This is the facts of the case *Beijing Wen-yang* (n81).

¹³⁹ Si and Li (n68)

who indeed had suffered loss caused by the carrier's breach of contractual duty.¹⁴⁰ It is because of the conditions of the good faith purchaser rule that the good faith purchaser is required to pay a reasonable value for procuring the rights under the bill of lading. By paying the value, the good faith purchaser would be the one who actually assumed the loss if the goods were damaged in transit. Such a result is also coherent with the existing civil procedure law and contract Law which respectively require that the claimant is the party who has an interest in the claim, and the claimant should prove his loss when claiming damages from the defendant.¹⁴¹

As to the outstanding problem regarding the shipper's contractual right to sue after the transfer of the bill of lading, this chapter noted that such a problem often arises either where the goods are delivered without presentation of the original bill of lading or where the goods are rejected by the original receiver due to the damage caused by the carrier's default.¹⁴² Under either of the aforesaid circumstances, the shipper/seller is innocent but ultimately assumes the substantial cargo loss. Although such a result to some extent is related to the trading arrangement between the shipper/seller and the endorsee/buyer, it is undeniable that the cargo is damaged due to the carrier's breach of duty. More importantly, under both of the aforesaid situations, the bill of lading would lose its commercial value to serve the underlying transaction of goods.¹⁴³ Therefore, it appears meaningless to insist that the contractual right to sue is only vested in the holder of the bill of lading, instead of also allowing the shipper, who indeed suffered the cargo loss or damage caused by the carrier's default, to sue the carrier for compensation, no matter whether the bill of lading is lawfully transferred back to him or not. To justify the shipper's title to sue in such a situation, the UNCITRAL Drafts contribute a simple and effective approach to improve current Chinese law.¹⁴⁴ In accordance with such an approach, if the shipper, apart from proving his own loss, is also able to prove that the holder has not suffered the same loss, he should be entitled to bring a contractual

¹⁴⁰ See discussion in Chapter 4, 4.2.3.2, 4.2.3.4.

¹⁴¹ Contract Law 1999, art 112; Civil Procedure Law of the People's Republic of China (2012 Amendment), art 119 (1).

¹⁴² See discussion in Chapter 4, 4.3.1 above.

¹⁴³ See discussion in Chapter 4, 4.3.1 and 4.3.5 above.

¹⁴⁴ The UNCITRAL approach can be seen from UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 January 2002) A/CN.9/WG.III/WP21, art 13.3; UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (4 September 2003) A/CN.9/WG.III/WP32, art 65; UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art 68 (b). Text to (n93). In this chapter, art 68 (b) is discussed in details as it is the last version of the article.

action against the carrier. It is submitted that such an arrangement shows an equal consideration for the shipper's interest and the carrier's interest. On the one hand, the shipper could be granted a statutory ground to establish the contractual action as a remedy; on the other hand, by imposing the requirement of proving the exclusive assumption of loss on the shipper, the danger of multiple claims brought against the carrier would be avoided because under Chinese law the party who does not actually suffer loss lacks the motivation and legal ground to sue.¹⁴⁵

Based on the aforesaid findings, it can be seen that transforming the bill of lading into a quasi-negotiable instrument will not radically change current bill of lading practice under Chinese law but rather would be helpful in achieving the expected commercial value of the bill of lading in China's export trade. Moreover, by applying the good faith purchaser rule to the transfer of contractual right to sue and adding a requirement of proving the exclusivity of loss suffered by the shipper who intends to sue the carrier after the bill of lading has been transferred, the legal connection between the contractual right to sue and the underlying transaction of goods will be established. However, if the good faith purchaser rule could be linked with the transfer of the contractual right to sue by the bill of lading, would it also mean that the ownership or other proprietary right to the goods covered by the bill could be transferred in the same way? This question is discussed in the next chapter.

¹⁴⁵ See discussion in Chapter 4, 4.3.4, 4.3.5 above.

Chapter five: Transfer of rights deriving from bill of lading as document of title

5.1 Introduction

In current maritime trade, the transfer of the bill of lading from the seller to the buyer is usually regarded as a symbolic delivery of the goods. With possession of the bill of lading, the buyer can re-sell the goods when they are still in transit, pledge the goods to raise finance or claim delivery of the goods from the carrier upon arrival of the vessel.¹ Such roles were developed from mercantile custom and are usually attributed to the legal quality of a bill of lading as a document of title.²

In China's commercial and judicial practice, the expression 'bill of lading as document of title' is frequently invoked to demonstrate that the bill of lading is able to vest its holder with a certain right to deal with the goods.³ However, the legal nature of such an expression has never been thoroughly clarified.⁴ Due to the silence of CMC 1992 on this point, various interpretations have been developed which seek to harmonize such an expression with other relevant laws in China. As discussed in Chapter 3, the existing interpretations are made mainly from the perspective of property law. Under such a perspective, these have focused on what kind of real right of goods can be acquired by the person who holds the bill of lading.⁵ The answers given to this question have mainly been phrased in terms of property of goods or possession of goods.⁶ In addition, a new approach termed the 'function theory' has recently become established which denies the role of the bill of lading as a document of title in the stage of cargo transportation in order to overcome the conflict that such an expression has experienced with other laws in China.⁷ However, as indicated before, neither of the aforesaid

¹ Indira Carr, *International Trade Law* (5th edn, Cavendish Publishing 2013) 173-78.

² *ibid.*

³ Xin Liu, *Tidan Quanli Yanjiu* [*Study on bill of lading right* (author's translation)] (1st edn, China Intellectual Property Press 2008) 135.

⁴ For controversy in this regard, see Chapter 3, 3.4.1 above.

⁵ *ibid.*

⁶ *ibid.*, see also Xin Liu (n3); Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 237-42.

⁷ The 'function theory' argues that the bill of lading shall be vested with different qualities when it is in different commercial contexts. According to the theory, the legal effect of the bill of lading as a 'document of title' only

interpretations has done a satisfactory job of terminating the controversy over the expression ‘bill of lading as document of title’ in Chinese law.⁸ In order to reduce the uncertainty of application of such an expression and determine a proper way to accommodate it into China’s maritime practice, this chapter attempts to clarify the nature of the bill of lading as a document of title in a way that is coherent with China’s economic and legal environment.

Since it is generally accepted that the expression ‘bill of lading as document of title’ in current Chinese practice is borrowed from Anglo-American law,⁹ the second section of this chapter revisits English law and American law in an effort to identify the true meaning of such an expression at both common law and statutory law.¹⁰ This section also looks at the latest development relevant to such an expression in the Rotterdam Rules, with the aim of uncovering the emerging evolution of such an expression at the level of international law. By comparing the compatibility and coherence of the aforesaid foreign and international approaches with China’s economic policy with regard to foreign-related seaborne cargo trade and its domestic legal environment, the expression ‘bill of lading as document of title’ or, in other words, the extent to which the bill of lading is able to impart the right to deal with the goods to its holder, is clarified in the context of Chinese law.

The third section seeks to determine the time when the bill of lading ends its life as a document of title. As a legal ground which enables the holder to deal with the goods by handling the bill of lading, the legal effect of a document of title must cease at a certain time as otherwise there may arise the danger of trafficking the bill of lading, thus separating it from the lawful transaction of the goods covered by the bill of lading. In this regard, as noted by Chapter 3, a problem may arise under current Chinese law if the goods are delivered against a letter of indemnity (LOI) rather than an original bill of lading.¹¹ If a *bona fide* party subsequently acquires the bill of lading by paying a consideration for the goods, it is questionable whether the party is still entitled to acquire any interest in the goods by virtue

exists in the context of commercial transaction of goods. Yuzhuo Si, *Maritime Law Monograph* (2nd edn, China Renmin University Press 2010) 98-99. This theory is discussed in Chapter 3, 3.4.1 above.

⁸ See discussion in Chapter 3, 3.4.1 above.

⁹ Hai Li, ‘Reconsideration on Bill of Lading as Document of Title-And on the Nature of the B/L’ (1997) 7 *Annual of China Maritime Law* 41, 42; See also Wenjun Wang, *Tidan Xiangxia Haiyun Huowu Suopei zhi Qingqiuquan Jichu Yanjiu* [*legal basis to establish the right of suit under the bill of lading (author’s translation)*] (1st edn, Law Press China 2010) 65.

¹⁰ *ibid.*

¹¹ See Chapter 3, 3.4.2 above.

of holding the bill of lading. Existing Chinese law does not provide an explicit answer to this question. To remove such ambiguity, this section examines Anglo-American law and the Rotterdam Rules on the exhaustion of the legal effect of a bill of lading as a document of title, and uncovers a common position held by these laws. Based on this, this section proposes a solution in Chinese law which clarifies the time at which the bill of lading should cease to be a document of title and the remedies for the *bona fide* holder after that time.

The fourth section concludes the findings of the previous two sections, indicating what kind of rights could be transferred by the bill of lading as a document of title in Chinese law and the time when the aforesaid rights should no longer be transferred by the bill. Also, this section illustrates the manner in which the legal reform regarding the aforesaid matters could be accommodated into the existing legal framework in China.

5.2 How to Define a Bill of Lading as a ‘Document of Title’?

5.2.1 Bill of Lading as Document of Title in English Law

In English law, the notion of bill of lading as a document of title was first construed at common law and later interpreted by statutory law. In this section, both the common law approach and the statutory approach are examined in order to determine the general position of English law on the notion.

5.2.1.1 The Interpretation in English Common Law

In English common law, the exploration of the nature of the bill of lading as a document of title can be traced back to *Lickbarrow v Mason*,¹² which is deemed a landmark case in this regard. In this case, the jury recognized the mercantile custom that a bill of lading which expresses that ‘the goods to have been shipped by any person or persons to be delivered to order or assigns’ was ‘negotiable and transferable’.¹³ The jury went on to say that by endorsing and delivery, or transmission of such a bill of lading, the property of goods would

¹² *LickBarrow v Mason* (1794) 5 TR 683 (KB).

¹³ *ibid* 685.

be transferred.¹⁴ Although such a verdict appeared to link the transfer of a bill of lading with the transfer of property of goods, it did not mention whether such a linkage is necessary; in other words, whether the endorsement or delivery of the bill of lading would always lead to the consequence of transferring the property. The position was clarified in the later cases of *Sanders Bros v Maclean & Co*¹⁵ and *Sewell v Burdick (The Zoe)*¹⁶ where the court asserted that the general property of the goods did not necessarily pass to the holder of a bill of lading merely by endorsement and delivery of the bill unless the parties had such an intention. The aforesaid argument is still true today. However, over-emphasis on the 'title' that can be transferred by the bill of lading as a document of title has suffered criticism that it may lead to misunderstanding the bill of lading simply as a 'document of ownership'.¹⁷ In today's practice, such an over-emphasis has been rectified. As stated by Mustill LJ in *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)*,¹⁸ 'I put ['document of title'] in quotation marks, because although it is often used in relation to a bill of lading, it does not in this context bear its ordinary meaning ...'.¹⁹ He subsequently noted two functions that the bill of lading can perform as a document of title:

First, it is a symbol of constructive possession of the goods which can transfer constructive possession by endorsement and transfer; it is a transferable 'key to warehouse.' Second, it is a document which, although not itself capable of directly transferring the property in the goods to which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed.²⁰

Mustill LJ's opinion implies that the legal nature of the bill of lading as a document of title has more to do with the possession of goods rather than the property of goods. Even in the case where the transfer of property is involved, the true value of the bill of lading lies in its role in serving the transfer of property of goods rather than its own capacity to transfer the property of goods. In this sense, as a document of title, the transfer of the bill of lading may be linked with the transfer of property but such a linkage is not necessary. A similar principle also applies to the constructive possession of goods that the bill of lading may represent as a

¹⁴ *ibid.*

¹⁵ *Sanders Bros v Maclean & Co* (1883) 11 QB 327 (CA).

¹⁶ [1881-85] All ER 223, (1884) 10 App Cas 74 (HL).

¹⁷ Ewan Mckendrick, *Goode on Commercial Law* (14th edn, Penguin Books 2010) 981.

¹⁸ [1990] 1 Lloyd's Rep 252 (CA), 270.

¹⁹ *ibid.*

²⁰ *ibid.*

document of title. In English law, although it has been commonly regarded that the bill of lading is able to transfer constructive possession of goods to its holder, this is only a presumption that is rebuttable if the seller and the buyer did not intend this.²¹ In this sense, the notion of ‘bill of lading as document of title’ in substance gives its holder little right in the sense of property law. However, this does not mean that such a notion has no value at all. One thing that should be noted is that the expression ‘key to warehouse’ has frequently been invoked to describe the legal effect of the bill of lading as a document of title.²² Based on this, an interpretation from another angle, which focuses on the impact of the bill of lading on the delivery of goods, has been made.²³

A leading case which expressed such an interpretation is *Rafaela S*,²⁴ in which the House of Lords held that the straight bill of lading should be regarded as a similar kind of document of title as the transferable bill of lading.²⁵ Thus, the goods covered by the straight bill of lading should be delivered against presentation of the straight bill.²⁶ Although only the straight bill of lading is involved in this case, the reasoning given by the court highlights the principle that, as a document of title, the bill of lading should be surrendered to the carrier as proof of right to claim delivery of goods. In this sense, the notion ‘bill of lading as document of title’ is related to the requirement of the presentation rule, which covers the following

²¹ This can be seen from *The Future Express* [1992] 2 Lloyd’s Rep 79 (QB), 96.

...once it is held that the effect of a transfer of a bill of lading depends on the presumed intention of the parties, then it makes sense only to recognize that the parties have used a bill of lading to pass constructive possession of the goods to the transferee if it was intended that following the transfer the transferee should have some property in or possessory right to the goods...

²² For instance, see *Barber v Meyerstein* (1870) 4 LR 317 (HL), 330. Willes J said that,

During [the period of the bill’s operation]...the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a symbol of possession, and practically the key to the warehouse...

See also *Sanders v Maclean & Co* (1883) 11 QBD 327 (CA), 341. Bowen LJ said, the bill of lading ‘is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be’. See also *The Delfini* [1990] 1 Lloyd’s Rep 252, 270. Mustill LJ stated, ‘it is a symbol of constructive possession of the goods which can transfer construction possession by endorsement and transfer; it is a transferable key to warehouse.’

²³ Paul Todd, *Principles of the carriage of goods by sea* (1st edn, Routledge 2016) 348. ‘A document of title, then, is the key to the warehouse... Its presentation allows the holder to take delivery of the goods from the carrier, when they arrive at the port of discharge...’

²⁴ *J.I Mac William Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 WLR 554, [2005] 1 Lloyd’s Rep 347.

²⁵ *The Rafaela S* [2005] UKHL 11 [20]. The House of Lord also noted that the straight bill of lading is a document of title for the purpose of Hague-Visby Rules rather than the traditional common law which focused on the right of possession of the goods vesting in the holder of the document. See *The Rafaela S* [2005] UKHL 11 [44].

²⁶ *The Rafaela S* [2005] UKHL11 [45].

aspects:

(a) if the shipowner delivers other than against production of an original document, he should be liable to the holder of the original document; (b) the shipowner should be entitled to refuse to deliver except against production of an original document; (c) the shipowner should be protected if he delivers against production of an original document; (d) the shipowner must deliver against production of an original.²⁷

One thing that should be noted here is that under English law the rationale for presentation of the bill of lading is usually construed on a contractual basis. For example, in *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)*,²⁸ whether the carrier was entitled to refuse to deliver the goods without presentation of an original bill of lading was questioned. Millett LJ stated that ‘under a bill of lading contract ... the shipowners are obliged to deliver cargo only against presentation of a bill of lading’.²⁹ A similar statement was given by Leggatt LJ who held that:

... under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession.³⁰

From the aforesaid statement, it can be seen that in English common law the contractual basis suffices to justify the presentation rule.³¹

5.2.1.2 The Statutory Interpretation

The statutory definition of ‘bill of lading as document of title’ can be found in the Factors Act 1889 (FA 1889), and was later incorporated into the Sale of Goods Act 1979 (SOGA

²⁷ Todd (n23) 349.

²⁸ [1994] 2 Lloyd’s Rep 541 (CA).

²⁹ *ibid* 556.

³⁰ *ibid* 553.

³¹ It has to be admitted that the presentation rule may also be justified on the basis of possessory right or property to the goods; however, merely the fact of possession of a bill of lading does not suffice to prove such a possessory right or property as they are subject to the intention of the parties expressed in the underlying transaction of goods. See Michael D Bools, *The Bill of Lading, a Document of Title to Goods--- an Anglo-American Comparison* (1st edn, LLP 1997) 170, 180-84. Therefore, compared to the proof of possessory right or property to the goods, the contractual basis of presentation rule is more obvious and easier to be established. For instance, pursuant to COGSA 1992, the lawful possession of a bill of lading would suffice to set up such a contractual basis. This may explain why since 1992, the presentation rule is often explained from a contractual perspective under English law.

1979).³² The definition can be read in two parts. The first part illustrates several kinds of document that fall within the term document of title. Those documents include ‘any bill of lading, dock warrant, warehouse keeper’s certificate and warrant or order for delivery of goods’.³³ The second part contains a general description of the documents not listed in the first part. These documents are ‘used in the ordinary course of business as proof of the possession or control of goods’ or authorize or purport to authorize, ‘either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented’.³⁴ It is submitted that the aforesaid statutory approach is generally consistent with the position set up at common law for the following reasons. First, the statutory definition of document of title focuses on identifying what types of documents constitute a document of title in ordinary commercial practice. This is in line with the common law approach which underlines the practical value of the notion of ‘bill of lading as document of title’ rather than dwelling on the exact ‘title’ that this term refers to.³⁵ Second, the FA 1889 highlights the function of the document of title in proving ‘possession or control of goods’.³⁶ In this sense, it restates the common law position that the bill of lading is not equal to a ‘document of property’ and attributes the true value of the bill to its capacity to enable its holder to deal with the goods through operation of the bill. Third, the FA 1889 emphasizes that the usage of ‘document of title’ should conform to the ‘ordinary course of business’. This is consistent with the historical development of the concept ‘document of title’ at common law. For example, in the early case of *Lickbarrow v Mason*,³⁷ mercantile custom played a decisive role when determining whether the order bill of lading was a ‘document of title’.³⁸ The presentation rule on bill of lading in delivery of goods also originated from mercantile custom.³⁹ Moreover, in many nineteenth century cases, proof of mercantile custom was required when identifying whether other shipping documents, such as the delivery order, the mates’ receipt, etc., constituted the document of title at common law.⁴⁰ On this point, the FA 1889 followed in the footsteps of previous common law.

³² Factors Act 1889 (FA 1889), s1(4); Sale of Goods Act 1979 (SOGA 1979), s 61(1).

³³ FA 1889, s 1(4).

³⁴ *ibid*.

³⁵ Mckendrick (n17); Todd (n23).

³⁶ FA 1889, s 1(4).

³⁷ (1794) 5 TR 683(KB).

³⁸ Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 354.

³⁹ See Chapter 2, 2.2 above.

⁴⁰ Treitel and Reynolds (n38).

Two characteristics of English law can be uncovered by examining both the common law approach and the statutory approach to the bill of lading as a document of title: first, the English law attaches more importance on what the bill of lading can do as a document of title than what exact title the bill of lading can impart; second, under English law, the bill of lading itself does not suffice to confer its holder any proprietary right or possessory right to the goods unless the parties participating in the cargo transaction so intend. Accordingly, as a document of title, the practical value of the bill of lading in English law is not in the sense of property law but rather lies in the presentation rule that can be established solely on a contractual ground.

5.2.2 Bill of Lading as Document of Title in American Law

5.2.2.1 The Interpretation of American Common Law

Similar to its English counterpart, in early American common law practice the interpretation of the bill of lading as a document of title was made in the sense of transferring property of goods covered by the bill. For instance, in *United States v Delaware Insurance Co.*,⁴¹ the Circuit Court held that:

The indorsement of a bill of lading, for a cargo whilst at sea, for a valuable consideration, transfers the property, although actual possession is not and cannot be taken by the assignee. The possession of the master is constructively the possession of the owner of the goods, and the right of possession follows the right of property, according as that may change from one person to another.

From this, it may be inferred that the transfer of the bill of lading would transfer a certain kind of possession of goods to its holder. Such an inference was evidenced in *The Bank of Rochester v Jones*⁴² where the New York Court of Appeal stated that:

[T]he delivery of the carrier's receipt to the bank was a good symbolical delivery of the flour [goods]. It was as effective in transferring the possession as the delivery of the keys of a warehouse, or the receipt of a storekeeper.⁴³

In this regard, American common law shares many similarities with English common law as

⁴¹ (1823) 4 Wash.C.C.418, 422-23.

⁴² (1851) 4 Comst 497.

⁴³ (1851) 4 Comst 497, 507.

both of them deny the necessary link between a simple transfer of a bill of lading and the transfer of the property of goods. Instead, they highlight the possessory function of the bill of lading, which is based on the presumption that property rights would be transferred by the bill.⁴⁴ Notwithstanding, compared to English common law, American common law appeared to get into difficulties when developing another function of the bill of lading as a document of title, namely, the function in respect of delivery of goods.⁴⁵ Although in practice, the person to whom the bill of lading was endorsed and/or delivered was normally regarded as entitled to delivery of the goods,⁴⁶ the legal rationale for such an entitlement was less clear until the intervention of statutory law in this regard.⁴⁷

5.2.2.2 The Statutory Interpretation

In American statutory law, the issues in respect of the notion ‘bill of lading as document of title’ are addressed by FBLA 1994 and the UCC. Unlike the common law position, statutory law appears to make ‘document of title’ equivalent to ‘document of property’. This can be seen from §7-502 of UCC which provides that a holder of a negotiable document of title is entitled to acquire ‘title to the goods’ if the bill of lading has been ‘duly negotiated’ to the holder. According to the requirement of ‘due negotiation’ provided by UCC, the holder to whom the bill is negotiated should purchase the bill ‘in good faith without notice of any defense against or claim to it on the part of any person and for value’.⁴⁸ Similar provisions can also be found in FBLA 1994, which provides that:

- (a) When a negotiable bill of lading is negotiated--the person to whom it is negotiated acquires the title to the goods that--(A) the person negotiating the bill had the ability to convey to a purchaser in good faith for value; and (B) the consignor and consignee had the ability to convey to such a purchaser.⁴⁹

Through the aforesaid rules, American statutory law has constructed a linkage between the

⁴⁴ Michael D Bools, *The Bill of Lading, a Document of Title to Goods---- an Anglo-American Comparison* (1st edn, LLP 1997) 157.

⁴⁵ *ibid.*

⁴⁶ For example, in *United States v. Delaware Insurance* (1823) Co.4 Wash.C.C.418, 422. The judge held that the property of goods did not pass to the consignee/endorsee, but meanwhile admitted that the consignee/endorsee was entitled to demand the goods from the carrier. The judgement was ambiguous on what ground the consignee/endorsee was entitled to do so.

⁴⁷ Bools (n44) 170.

⁴⁸ UCC, § 7-501(5).

⁴⁹ FBLA 1994, § 80105 (a).

legal effect of the bill of lading as a document of title and the doctrine of good faith purchase.⁵⁰ Accordingly, the title that can be imparted by the bill of lading as a document of title refers to the property of goods under UCC and FBLA 1994.⁵¹ The person who holds the bill of lading under American law is usually the one entitled to the property of the goods.⁵²

In addition, FBLA 1994 addresses the function of the bill of lading on delivery of goods. In accordance with §80110 (a) (2):

Except to the extent a common carrier establishes an excuse provided by law, the carrier must deliver goods covered by a bill of lading on demand of the consignee named in a non-negotiable bill or the holder of a negotiable bill when the holder offers to indorse and give the bill to the carrier.⁵³

Subsequently, paragraph (f) of the section provides that the title or right to goods entitled by a third party does not enable the carrier to exempt himself from liability for failure to make delivery to the holder unless such a failure is caused by enforcement of a legal process.⁵⁴ From these rules, it can be seen that the carrier under FBLA 1994 is obliged to deliver goods against surrender of an original bill of lading unless otherwise provided by the law. These provisions in essence are no different from the presentation rule recognized by English common law. However, by virtue of these provisions, the holder of an original bill of lading under the American law acquires the statutory right to claim delivery of goods from the carrier.

Although not expressly addressed, the carrier should normally be discharged the obligation of delivery once the goods are delivered against presentation of an original bill of lading.⁵⁵ An exceptional occasion provided by FBLA 1994 is when the delivery is not made to a person who is entitled to possession of goods.⁵⁶ When this happens, the carrier is liable to a person

⁵⁰ Bools (n44) 63.

⁵¹ See also Bools (n44) 28 'The word property is not used in the UCC and title is therefore used throughout in connection with it.'

⁵² FBLA 1994, § 80101 (4) "'holder" means a person having possession of, and a property right in, a bill of lading.'

⁵³ FBLA 1994, § 80110 (a) (2).

⁵⁴ FBLA 1994, § 80110 (f).

Third person claims not a defense.--Except as provided in subsections (b), (d), and (e) of this section, title or a right of a third person is not a defense to an action brought by the consignee of a nonnegotiable bill of lading or by the holder of a negotiable bill against the common carrier for failure to deliver the goods on demand unless enforced by legal process.

⁵⁵ Bools (n44) 161.

⁵⁶ FBLA 1994, § 80111 (a) (1).

‘having title to or a right to possession of goods’.⁵⁷ Viewing the aforesaid rules in conjunction with §80110 (b)(1),⁵⁸ it can be seen that the carrier may justify his delivery made to a person entitled to immediate possession of goods but not against presentation of an original bill of lading.⁵⁹ In such a circumstance, to protect himself from liability for wrongful delivery the carrier has the burden of proof that the title to goods or immediate possession of goods is vested in the person to whom the delivery was made.⁶⁰ If the carrier is not able to identify whether the person who claims delivery is entitled to title or possession of goods, the carrier is allowed to take reasonable time to verify the person’s right or bring the issue before the courts as an interpleader.⁶¹ In the light of this, FBLA 1994 underlines that the goods should be delivered to the person who is entitled to them rather than a person who merely has a contractual nexus with the carrier.

Notwithstanding, such a consequence does not impose an additional obligation on a carrier to investigate the real status of title to goods. As can be seen from subparagraph 1 of §80111, the carrier is exempted from liability for misdelivery if the goods are delivered to ‘a person in possession of a negotiable bill if (A) the goods are deliverable to the order of that person; or (B) the bill has been indorsed to that person or in blank by the consignee or another indorsee’.⁶² §80111 goes on to say that the carrier is liable for delivering the goods to the

General rules.--A common carrier is liable for damages to a person having title to, or right to possession of, goods when- (1) the carrier delivers the goods to a person not entitled to their possession unless the delivery is authorized under section 80110(b)(2) or (3) of this title.

⁵⁷ *ibid.*

⁵⁸ FBLA 1994, § 80110 (b). ‘Persons to Whom Goods May Be Delivered. - Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to ---(1) a person entitled to their possession.’

⁵⁹ Bools (n44)162.

⁶⁰ Bools (n44)163.

⁶¹ FBLA 1994, § 80110 (d) (e).

(d) Adverse claims.--If a person other than the consignee or the person in possession of a bill of lading claims title to or possession of goods and the common carrier knows of the claim, the carrier is not required to deliver the goods to any claimant until the carrier has had a reasonable time to decide the validity of the adverse claim or to bring a civil action to require all claimants to interplead.

(e) Interpleader.--If at least two persons claim title to or possession of the goods, the common carrier may-- (1) bring a civil action to interplead all known claimants to the goods; or (2) require those claimants to interplead as a defense in an action brought against the carrier for nondelivery.’

⁶² FBLA 1994, § 80111 (a) (1).

General rules.--A common carrier is liable for damages to a person having title to, or right to possession of, goods when--(1) the carrier delivers the goods to a person not entitled to their possession unless the delivery is authorized under section 80110(b)(2) or (3) of this title.

FBLA 1994, § 80110 (b).

Persons to Whom Goods May Be Delivered. --Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to--(3) a person in possession of a

aforesaid person if the delivery is made ‘after being requested by or for a person having title to, or right to possession of, the goods not to make the delivery;’ or at the time of delivery, ‘the carrier has information it is delivering the goods to a person not entitled to their possession’.⁶³ Based on the aforesaid rules, it may be concluded that, once the goods are delivered to a person who surrendered the original bill of lading, the goods should be deemed as delivered to a party who has title to them unless the carrier is aware of any defect in the person’s entitlement to the goods or any adverse claim to the goods. In this sense, under FBLA 1994, the presentation rule would provide the carrier with a similar scope of protection as under English common law.

On balance, in American law, whether a bill of lading can fulfil its legal function as a document of title greatly depends on its legal effect in transferring property and/or immediate possession of goods. Although at common law there is no necessary link between the transfer of bill of lading and the transfer of property or immediate possession of goods, such a link is established under FBLA 1994 through incorporating the requirement of good faith purchase. In addition, FBLA 1994 provides that the carrier is directly obligated to the person to whom the bill lading is duly negotiated ‘under the terms of the bill as if the carrier had issued the bill to that person.’⁶⁴ By virtue of such arrangements, the goods delivered to a person against surrender of the original bill of lading is deemed as delivered to the person who is entitled to the goods, and whilst also has contractual nexus with the carrier. The carrier thereby is entitled to discharge his obligation of delivery. On this point, American law is different from English law as under the latter merely the contract effect of the bill of lading between the carrier and the holder would suffice to justify the presentation rule.⁶⁵

negotiable bill if (A) the goods are deliverable to the order of that person; or (B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.

⁶³ FBLA 1994, § 80111 (a) (2) (3).

General rules.--A common carrier is liable for damages to a person having title to, or right to possession of, goods when--(2) the carrier makes a delivery under section 80110(b)(2) or (3) of this title after being requested by or for a person having title to, or right to possession of, the goods not to make the delivery; or (3) at the time of delivery under section 80110(b)(2) or (3) of this title, the carrier has information it is delivering the goods to a person not entitled to their possession.⁷

⁶⁴ FBLA 1994, § 80105 (a) (2). For detailed discussion of this provision, see Chapter 4, 4.2.2 above.

⁶⁵ See discussion in 5.2.1.1 above.

5.2.3 Bill of lading as Document of Title under the Rotterdam Rules

Under the Rotterdam Rules, although the bill of lading is not expressly mentioned as a document of title, it is argued that the legal effect of the document of title is still retained to a certain extent, albeit in an implied way.⁶⁶ Such an argument is made based on a series of provisions governing the delivery of goods when a negotiable transport document is issued.⁶⁷ As provided by Article 47.1:

When a negotiable transport document or a negotiable electronic transport record has been issued:

- (a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:
 - (i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or
 - (ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;
- (b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met.⁶⁸

The aforesaid rule clearly recognize that the negotiable transport document, namely the bill of lading discussed in this thesis, will be presented in return for delivery of goods or otherwise the carrier is entitled to refuse to make the delivery. Such a position is similar to the Anglo-American approach on presentation of a bill of lading in delivery of goods. In this sense, the function of a bill of lading as a document of title under the Rotterdam Rules is realized through the restatement of the presentation rule.

⁶⁶ Tingzhong Fu, 'Analysis of the function of bill of lading as a document of title under the Rotterdam Rules' (2010) 2 Annual of China Maritime Law 19, 20.

⁶⁷ The negotiable transport document employed by the Rotterdam Rules refers to the transferable or negotiable bill of lading in different national laws. See UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 January 2002) A/CN.9/WG.III/WP21, 1.14.

The use of the word 'negotiable' has been much discussed, and it is undoubtedly true that in some countries the use of the word is not technically correct when applied to a bill of lading. One may consider to use the word 'transferable' as being more neutral.

⁶⁸ Rotterdam Rules, art. 47.1 (a) (b).

5.2.4 How to Understand ‘Bill of Lading as Document of Title’ in Chinese law?

As can be seen from Anglo-American law and the Rotterdam Rules, the expression ‘bill of lading as document of title’ may be interpreted in different ways. Nevertheless, no matter what interpretation is made, the aforesaid national laws and international convention tend to ensure that the holder of a bill of lading is vested with a certain exclusive right in relation to the goods, either in the sense of property law, in the sense of the presentation rule in delivery of goods, or in both senses. Nevertheless, the situation in China is far from that clear. The silence of the law and the different explanations in academia and practice have created substantial divergence and controversy in this respect. As a jurisdiction that heavily relies on statutory law to guide judicial practice, the most efficient way to sweep away the confusion under current Chinese law is to establish a uniform definition in a future law. To envisage such a definition, this section examines the aforesaid two types of interpretations from Anglo-American law and the Rotterdam Rules in the context of Chinese law. A discussion then follows on the extent to which they can be adapted to China’s economic and legal environment.

5.2.4.1 Should ‘Document of Title’ be understood as ‘Document of Property’?

Anglo-American common law rejects the necessary linkage between the transfer of property and the transfer of a bill of lading. However, American law later developed statutory rules that connect the negotiation of the bill of lading with the doctrine of good faith purchase. By virtue of such a statutory arrangement, the property of goods can be transferred together with the bill of lading provided that the bill is duly negotiated to a good faith purchaser for value. This to some extent means that as a document of title the bill of lading can be regarded as a special document which itself suffices to confer the proprietary right of goods to its holder.⁶⁹ This contrasts with English statutory law in which the property of goods has never been locked into the bill of lading. The transfer of property always depends on the exact intention of the trading parties rather than the transfer of the bill of lading.⁷⁰ Instead of the property of goods, as a document of title the bill of lading is regarded as carrying no more than the possessory right to the goods, either in common law or statutory law.⁷¹ In this sense, it may

⁶⁹ Bools (n44)199.

⁷⁰ SOGA 1979, s17.

⁷¹ See discussion in 5.2.1 above.

be concluded that English law is more favourable to the true owner of the goods while American statutory law provides more security to the cargo interests who possess the bill of lading in good faith for value. Such a result makes the American bill of lading a more tradable document than its English counterpart in serving the underlying transaction of goods, especially in the case where a long chain of sales is involved.⁷² In general, English law and American law reflect two different legislative orientations: to safeguard the owner's title to the goods or to smooth the consecutive transactions of goods in the long chain of sales.⁷³

Given the above, it is necessary to determine which approach should be adopted by a future Chinese law. From an economic aspect, as shown in Chapter 3, a future Chinese law is expected to give more attention to the export sellers' interests to improve their relatively weak position in commercial negotiation in international trade and their predominant role in China's economy.⁷⁴ Compared to the English approach, the American approach, which provides the bill of lading with a certain kind of tradability, is more aligned with Chinese export traders' general expectation of the commercial value of the bill. This is because in international trade where the letter of credit (L/C) is commonly employed to finance the cargo transaction, the buyer and his bank would be willing to issue the payment of goods to the seller against receiving the bill of lading only if they consider the bill a trustworthy document.⁷⁵ In other words, the bill of lading should be able to give its holder a sufficient guarantee to control and dispose of the goods covered by the bill. In this sense, to what extent the export seller could secure his interest in cargo trading greatly depends on what kind of right or interest in relation to the goods can be carried by the bill of lading as a document of title. In the context of Chinese law, it would be favourable to the export seller if the legal effect of the bill of lading as a document of title could be construed in connection with the real right of goods⁷⁶ rather than a mere fact of possession of goods. This is because it is

⁷² Bools (n44) 199.

⁷³ Bools (n44) 62.

⁷⁴ See discussion in Chapter 3, 3.6.1 above.

⁷⁵ Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 185. This is particular the case when a CIF term is involved. Under a CIF term, the payment of goods is usually due so long as tender of bill of lading with other documents required by the letter of credit. See Mckendrick (n17) 1045.

⁷⁶ In Chinese law, the term 'Real Right' refers to 'the exclusive right of direct control enjoyed by the holder according to law over a specific property, including ownership, usufructuary right and real rights for security.' See Property Law of the People's Republic of China 2007 (Property Law 2007), art 2. In the thesis, the term 'Real Rights' include the ownership and the pledge of goods.

believed that such a result would facilitate the finance of cargo trading.

On the legal aspect, presuming that the capability of the bill of lading as a document of title is interpreted as a kind of possession of the goods, then such a possession should be coherent with the existing real right theory on possession. In Chinese law, the possession is commonly conceived of as a kind of *fait juridique* which should be established on the basis of a certain real right as otherwise the possession would not be protected by law.⁷⁷ This is clearly reflected in the following rule:

In case a real property or movable property is possessed by a possessor, the holder (of real rights of the property) may request the return of original object and its fruits, but shall pay necessary expenses to the bona fide possessor for the maintenance of this real property or movable property.⁷⁸

As can be seen, possession itself does not suffice to provide a guarantee to the possessor as such a possession may at any time be challenged by the person who has ownership or another real right to the property. This means that possession under Chinese law has never been viewed as an independent right, and the legal protection that can be acquired by virtue of possession is not predictable. In this sense, if the bill of lading merely enables its holder to possess the goods, the bill may be of little value to its holder as his possession of goods deriving from holding the bill may easily be defeated by the person who is entitled to the real right of goods.⁷⁹ Such a result would increase the risk borne by the bank that finances the transaction of goods and the ultimate buyer who is at the end of a long chain of cargo transactions. These parties may procure the bill of lading for value and in good faith but have limited access to the true status of the real rights of goods. In this instance, the aforesaid parties' expectation on possession of goods would be defeated by any person who acquired the ownership of goods by virtue of previous trading arrangements that are unknown to the bank and/or the buyer. If this is true, it is doubtful that the banks and the buyers would still be willing to accept the bill of lading either as a pledge to finance the sale of goods or as a condition to issue the payment. Even worse, the prevailing maritime trading practice, which is centred on the reliance of the bill of lading, would probably be undermined. To avoid an undesirable result, it is submitted that under Chinese law the bill of lading as a document of

⁷⁷ Huixing Liang and Huabin Chen, *Real Right Law* (5th edn, Law Press China, 2014) 389-91, 401-02.

⁷⁸ Property Law 2007, art 243.

⁷⁹ Xin Liu (n3) 142.

title should give its holder more than mere possession of goods.

However, if the bill of lading is simply defined as a document that is able to transfer a proprietary right to its holder, then a conflict with existing judicial practice will arise. For example, in *China Resources Textile Materials Co., Ltd. (H.K.) v Guangdong Zhanjiang Shipping Agency Company, Zhanjiang Textiles Enterprise (Group) Company and Shenzhen Special Economic Zone Import and Export Trade (Group) Company*,⁸⁰ the buyer (endorsee) rejected to pay the value of goods indicated in the L/C, but claimed the delivery of goods by providing the carrier with a LOI when the goods arrived at the destination. After knowing the fact that goods were released without presentation of the original bill of lading, the seller (shipper) negotiated with the buyer, revoked the L/C and reached a new agreement on the term of payment with the buyer. At last, the buyer partially fulfilled the payment. To recover his loss, the seller, who held all original copies of the bill of lading, sued the carrier in tort for releasing the goods to the buyer without presentation of the bill of lading. The seller's claim was dismissed by the Court, on the ground that the legal effect of the bill of lading as a document of title in transferring the property of goods had been ceased at the time when the seller and the buyer agreed to alter the original term of payment in the sale contract. By virtue of accepting the partial payment made by the buyer pursuant to the new agreement, the seller was no longer entitled to the ownership of goods although he have all original bills of lading in possession.⁸¹ Such a verdict implies that the ownership of goods may be passed pursuant to the trading arrangement between the seller and the buyer rather than being passed with the bill of lading only. In addition, it should be noted that the bill of lading does not always vest its holder with ownership of goods even though the bill remains a 'document of title' when it is in the holder's hand. For instance, in *China Construction Bank (Liwan Branch) v Guangdong Lanyue Energy Development Co., Ltd.*,⁸² the court held that the appellant *China*

⁸⁰ [1994] 4 Gazette of the Supreme People's Court 155.

⁸¹ *ibid*, 156.

⁸² In this case, the bank which financed the sale of goods sued the buyer for failure to pay up the value of the goods. As the holder of the bill of lading, the bank claimed the ownership to the goods covered by the bill, and requested the priority to be compensated from the price of disposal of the goods. In the first and second instance of the case, the courts dismissed the bank's claim. Such judgements were overruled in the final instance. By examining the performance of the contract between the buyer and the bank, Supreme People's Court stated despite the bank was not entitled to the ownership of goods, the bank was entitled to the pledge right of the goods as the bank had fulfilled the obligation of financing the cargo transaction in exchange for holding the bill of lading as a security. Accordingly, the Bank was entitled to be compensated in priority from the price of disposal of the goods. Intermediate People's Court of Guangzhou, No.Suizhongfajinminchuzi 158/2013; Higher People's Court of Guangdong Province, No.Yugaofaminerzhongzi 45/2014; Supreme People's Court of the

Construction Bank (Liwan Branch), as the lawful holder of the bill of lading, was not entitled to the ownership of goods.⁸³ The court went on to construe that, as a document of title, the bill of lading in the instant case only vested the bank with the right of pledge to the goods as it was so intended by the bank and the appellee (Guangdong Lanuye Energy Development) in accordance with the contract between them.⁸⁴ From the aforesaid judicial practice, it can be seen that Chinese courts would consider the consent of relevant parties when determining the state of the real right of goods.

As shown from the aforesaid discussion, although the economic implication suggests that it is meaningful to construe the bill of lading as a document of title from the sense of real right law, in the current legal system neither the possession approach nor the property approach is completely compatible with China's real right theory and existing judicial practice regarding the bill of lading as a document of title. Nevertheless, inspired by Anglo-American law, it is submitted that such a conflict might be eased if the American approach and the English approach were to be combined. Such a specific solution is discussed below.

In order to maintain coherence with the existing property law in China, the American approach, which introduces the doctrine of good faith purchase into the law on transfer of property of goods through the bill of lading, could be modelled with a slight alteration. The alteration is that in a future Chinese law the good faith purchaser rule should be extended to cover the acquisition of other types of real rights, for example, the pledge of goods, rather than solely applying to the acquisition of ownership of goods as under FBLA 1994. This means that once the bill of lading is acquired by a person who paid a reasonable consideration, and was at the same time not aware of and would have found it impossible to be aware of any defect in the transferor's entitlement to the goods, then the person should be deemed to have been transferred a certain real right to the goods. It is submitted that such an arrangement is sound according to four aspects. First, such an argument is coherent with the rules covering the transfer of the real right of a moveable property under Property Law 2007 which provides that 'the creation or transfer of the real right of a movable property shall become effective

People's Republic of China, No. Mintizi 126/2015 (*II Law*, 29 January 2016) <<http://www.sea-law.cn/3g/blog-post.asp?id=2236>> accessed on 15 May 2017.

⁸³ *ibid.*

⁸⁴ *ibid.*

upon delivery, except as otherwise prescribed by any law'.⁸⁵ From this rule, it is logical to infer that the real right of goods can be transferred together with the bill of lading as the delivery of a bill of lading is usually viewed as equal to the delivery of goods in commercial practice.⁸⁶ Second, Property Law 2007 provides that the ownership of a real property or movable property can be acquired by the assignee who paid the consideration in good faith even though the assignor was not the person who had entitlement to dispose of the property.⁸⁷ This rule affirms that, as a kind of movable property, the goods and its ownership can be *bona fide* acquired. Likewise, this should also be the case when the goods are disposed of by dealing with the bill of lading in maritime commercial practice. Under such a circumstance, when a good faith purchaser fulfils the obligation of payment for the goods in return for holding the bill of lading, this person should be deemed to have ownership of the goods as if the transaction had been processed by direct dealing with the goods themselves. Third, Property Law 2007 indicates that the bill of lading can be used as a pledge⁸⁸ and that the doctrine of good faith purchase could apply to acquisition of any form of real rights.⁸⁹ Based on that, it is not difficult to conclude, once a person acquired the bill of lading in good faith and paid the value for the purpose of pledge, that his right of pledge to the goods covered by the bill should be protected regardless of any defect in the pledgor's right to the goods. Fourth, as shown from judicial experience, when the timing over the passing of real rights of goods in maritime trade is in question, Chinese courts usually tend to examine the fulfilment of the

⁸⁵ Property Law 2007, art 23. Similar rule can also be found in Contract law 1999, art 133. 'The ownership of a subject matter shall be transferred upon the delivery of the object, except as otherwise stipulated by law or agreed upon by the parties.'

⁸⁶ Si and Li (n75)185.

⁸⁷ Property Law 2007, art 106.

Where a person entitled to dispose a real property or movable property transfers the real property or movable property to an assignee, the owner has the right to recover the real property or movable property. Except it is otherwise prescribed by law, once it is under any of the following circumstances, the assignee shall obtain the ownership of the real property or movable property: (1) The assignee accepted the real property or movable property in good faith; (2) The real property or movable property is transferred at a reasonable price; or (3) The transferred real property or movable property shall have been registered in case registration is required by law, and shall have been delivered to the assignee in case registration is not required.

Where an assignee obtains the ownership of a real property or movable property in accordance with the preceding paragraph, the original owner may ask the person entitled to dispose of the real property or movable property to make compensation for his losses.

Where a party concerned obtains any other real right in good faith, he shall be governed by the preceding two paragraphs by analogy.

⁸⁸ Property Law 2007, art 223. 'The following rights which an obligor or third party has the right to dispose of may be pledged: (3) warehouse receipts and bills of lading.'

⁸⁹ Property Law 2007, art 106. '...where a party concerned obtains any other real right in good faith, he shall be governed by the preceding two paragraphs by analogy.'

obligation of payment and the possession of the bill of lading.⁹⁰ Indeed, in maritime trade, the control and disposal of goods are commonly processed through dealing with the bill of lading. Normally, sellers do not wish to lose their control over goods unless they can secure the payment for the value of the goods. To do so, sellers would usually retain the bill of lading until receipt of payment from the buyer or surrender the bill of lading to the bank in return for being issued payment where the sale of goods are served by L/C. All these facts suggest that once the bill of lading is transferred from the seller to the buyer, it usually means that the seller has received such a payment or is able to secure his payment. In such a situation, there is no reason to deny the buyer's entitlement to the goods if he acquires the bill of lading in good faith for reasonable value; otherwise, the buyer's reliance on holding the bill of lading would become meaningless.

The other alternative to reconcile the conflict between the property approach and the position on transfer of real rights upheld in Chinese judicial practice⁹¹ is the English approach, which provides for a 'presumable and rebuttable' effect in transfer of the property and the constructive possession of goods.⁹² However, one amendment needs to be made in a future maritime law, namely that such a presumable and rebuttable effect should refer to the real rights of the goods acquired by a good faith purchaser. Such a change would result in two effects. First, once the holder who is the good faith purchaser agrees a different time to pass the real rights of the goods covered by the bill with the transferor, such an agreement should prevail over the presumable effect of transferring the real rights together with the bill of lading. Second, the exact type of real rights of goods transferred by the bill of lading is also subject to agreement between the parties involved in the cargo transaction. In this way,

⁹⁰ For example, in *Bank of China, Hunan province branch v. Guangzhou Zhenhua Shipping Co. Ltd, Guangzhou Shipping (Group) Company* [1999], the bill of lading was pledged to the Bank for financing the transaction of goods. Later the goods were released to the receiver without presentation of the bill of lading. The Bank sued the carrier for infringement of its security right to the goods and such a claim was upheld by Guangzhou Maritime Court. According to the rationale given by the Court, one important reason for such a judgement is that the Bank had fulfilled his obligation of issuing payment under the L/C after receiving the bill of lading. The case is cited from Guangzhou Maritime Court (ed), *Annual of Chinese Maritime Trail* (China Communications Press 1999) 340. Similar reasoning can also be found in the case of *China construction bank (Liwang Branch) v. Guangdong Lanyue Energy Development Co., Ltd*, Supreme People's Court of the People's Republic of China, No. Mintizi 126/2015 (*II Law*, 29 January 2016) <<http://www.sea-law.cn/3g/blog-post.asp?id=2236>> accessed on 15 May 2017. According to the rationale given by Supreme People's Court, the bank's pledge right to the goods was upheld as the bank had fulfilled the obligation of financing the cargo transaction in exchange for holding the bill of lading as a security. For more details of the facts of the case, see n82.

⁹¹ As discussed above, Chinese courts would usually consider the parties' intention when examining the time of passing real rights of goods.

⁹² See discussion in 5.2.1 above.

neither the freedom of contract nor the commercial value of the bill of lading as a reliable and tradable document would be undermined.

On balance, in a future Chinese law it will be necessary and feasible for the legal effect of the bill of lading as a document of title to be construed in terms of the real rights of goods. Specifically, such real rights should presumably be transferred with the bill of lading, provided that the bill is transferred to a person in good faith for reasonable value. If this could be done, the commercial value of the bill of lading as a reliable document by which its holder is vested with the exclusive right to deal with the goods would be enhanced. Nevertheless, it has to be admitted that it is not appropriate to incorporate such an operation into a future Chinese maritime law since the bill of lading under CMC 1992 is governed by a contractual framework⁹³ which particularly targets the relationship between the carrier and the cargo interests. It is argued that such a framework should be followed by the future Chinese maritime law.⁹⁴ In this sense, the aforesaid presumable effect on transfer of real rights of goods through the bill of lading may be considered to be addressed when reforming the Property Law rather than the Maritime Law. However, it does not mean that a future maritime law should keep wholly silent on the legal effect of the bill of lading as a document of title. As suggested by the Anglo-American experience and the Rotterdam Rules, another way to construe the bill of lading as a document of title, namely, the presentation rule in delivery of goods, may be worth consideration to clarify the legal nature of the bill of lading as a document of title under a future maritime law.

5.2.4.2 Should the ‘Document of Title’ be construed as ‘Document of Delivery’?

In terms of delivery of goods, English law, American law and the Rotterdam Rules all link

⁹³ Under CMC 1992, the definition and the legal effect of bill of lading are provided under chapter 4 ‘Contract of carriage of goods by sea.’

⁹⁴ In China, a dominating principle of the maritime law reform is that the reform should to a large extent be carried out under the existing framework, for the reason that CMC 1992, especially Chapter 4 ‘Contract of Carriage’, was drafted by reference to the prevailing international conventions (Hague Rules, Hague-Visby Rules and Hamburg Rules) and the custom of merchant that has been established in a long-time maritime practice. So far many rules of the chapters have still coincided with the prevailing international practice. Given that, if the reform fundamentally changes current legal framework, not only the stability of the legal system, but also the commercial practice would be harmed. Therefore, as to the particular issue such as the legal effect of bill of lading as document of title, the reform is better to be carried out under the current framework. See Yu Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author’s translation)]* (2nd edn, Peking University Press 2005) 10; Tingzhong Fu, *Haishangfa, Gainian, Yuanli Yu Zhidu [The Principle of Chinese Maritime Law (author’s translation)]* (1st edn, Law Press China, 2015) 61.

the bill of lading as a document of title with the presentation rule and underline that the delivery of the goods should be made against surrendering at least one original bill of lading.⁹⁵ Notwithstanding, the legal grounds of such a presentation rule are interpreted differently. Under COGSA 1992 and the Rotterdam Rules, delivery of goods against surrendering an original bill of lading can be understood as a contractual obligation, while under FBLA 1994 and UCC, by virtue of introducing the good faith purchaser rule into the law governing negotiation of the bill of lading, the presentation rule is justified in terms of both contract law and property law.⁹⁶

A number of lessons can be drawn from these comparative implications. The first is a new perspective with which to interpret the expression bill of lading as a document of title. As can be seen from English law, American law and the Rotterdam Rules, the main function of such an expression is to describe exclusive control over the goods by virtue of holding the bill of lading. This may also explain why there exists an argument that equates the expression ‘document of title’ to ‘document of property’.⁹⁷ However, as analyzed in 5.2.4.1, such an argument is not fully coherent with the commercial reality and judicial practice in China. As to the function of delivery, CMC 1992 provides that the bill of lading constitutes evidence based on which the carrier undertakes to deliver the goods.⁹⁸ This rule in essence recognizes that the bill of lading may enable its holder to claim delivery from the carrier. Nevertheless, such a provision was rarely invoked to explain the legal nature of the bill of lading as a document of title. Perhaps, this is because the right to claim delivery of goods provided by CMC 1992 is constructed purely on a contractual basis, whose efficiency may be doubted as evidencing the holder’s exclusive control over the goods.⁹⁹ However, such a doubt can be

⁹⁵ See discussion in 5.2.1.1, 5.2.2.2 and 5.2.3 above.

⁹⁶ FBLA 1994, § 80105, § 80110 (a) (2); UCC §7-502 (a) (2) (3) (4).

⁹⁷ Yu Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author’s translation)]* (2nd edn, Peking University Press 2005) 169. The rationale for such an argument can be found in property law, According to Property Law 2007, art 39, ‘The owner of a real property or movable property has the rights to possess, use, seek profits from and dispose of the real property or movable property according to law.’ This rule indicates that the person who is entitled the ownership of goods usually enjoys comprehensive interests to goods which suffice to defeat other person. Therefore, the exclusive control over goods would be well guaranteed if the holder can acquire ownership of goods by holding the bill of lading.

⁹⁸ CMC 1992, art 71.

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 the order of a named person, or to order, or to bearer, constitutes such an undertaking.

⁹⁹ Si and Li (n75) 240.

eased according to the judgement of a recent case discussed below. This case may be viewed as a turning point on construing the legal nature of the bill of lading as a document of title.

In the final instance of *China Construction Bank (Liwan Branch) v Guangdong Lanyue Energy Development Co., Ltd*,¹⁰⁰ the bank to whom the bill of lading was transferred in return for financing the cargo transaction claimed the ownership of goods by virtue of holding the bill of lading as a document of title.¹⁰¹ Although the Supreme People's Court recognized the legal effect of the bill of lading as a document of title when it was in the hands of the bank, the Court held that the bank was not entitled to ownership of the goods merely by holding the bill of lading.¹⁰² As stated by the Court, the expression 'document of title' indicated the potential capacity of the bill of lading on transferring the real right in relation to goods. However, the extent to which the real right of goods could be transferred by the bill should depend on the trading parties' consent.¹⁰³ The Court went on to say that, pursuant to CMC 1992, the holdership of the bill of lading merely gave the holder the right to claim delivery of goods from the carrier.¹⁰⁴ The aforesaid verdict shows that Chinese courts have shifted the standpoint on the legal nature of the bill of lading as a document of title from a purely property law perspective to a perspective focusing on the practical function of the bill of lading in respect of delivery. Viewing such a change together with the Anglo-American experience and the Rotterdam Rules indicates that the Chinese courts are beginning to treat the bill of lading as a document of title in the same way as that in Anglo-American law and the latest international convention. This probably means that such a change should be affirmed in the reform of CMC 1992, which would end the long-running conflict over this point. In addition, as to the aforesaid doubt about the exclusive control of the goods that can be acquired by holding a bill of lading, this would be resolved if a future property law could extend the good faith purchaser rule to cover the transfer of a bill of lading and expressly provide for a presumable consequence of transferring the real right of goods if the bill is acquired by a *bona fide* purchaser for reasonable value.¹⁰⁵ In this way, the bill of lading would

¹⁰⁰ Intermediate People's Court of Guangzhou, No. Suizhongfajinminchuzi 158/2013; Higher People's Court of Guangdong Province, No. Yugaofaminerzhongzi 45/2014; Supreme People's Court of the People's Republic of China, No. Mintizi 126/2015 (*II Law*, 29 January 2016) <<http://www.sea-law.cn/3g/blog-post.asp?id=2236>> accessed on 15 May 2017. For the facts of the case, see n82.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.* This can be seen from art 71, CMC 1992. Text to n98.

¹⁰⁵ See discussion in 5.2.4.1 above.

sufficiently secure the *bona fide* holder's exclusive control over the goods as a contractual right to claim delivery, thus vesting the relevant real right of the goods in him.

To sum up, in the context of Chinese maritime law, the legal quality of the bill of lading as a document of title should be defined as a capability which enables its holder to claim delivery of goods from the carrier, or *vice versa*, a capability which enables the carrier to discharge his obligation of delivery once the delivery is made against surrender of the original bill of lading.¹⁰⁶ Although such a capability is established on a contractual basis under the Maritime Law, it would suffice to protect a *bona fide* holder's interests in the goods provided that the good faith purchaser rule could apply to the procurement of a bill of lading under a future property law. If this could be done, the presentation rule under the future Chinese law would be justified on both a contractual and property basis.

5.3 Termination of the Legal Effect as 'Document of Title' in Carriage of Goods

As discussed in 5.2, when the 'document of title' is employed to describe the bill of lading, in a broad sense it may provide the holder with two distinct but related entitlements: the real rights of goods and the delivery of goods. In maritime trade, the realization of the former usually depends on the implementation of the latter. Therefore, to answer the question as to when the bill of lading ends its legal life as a 'document of title', the timing as to when the bill of lading ceases to enable its holder to enforce the carrier's promise to make actual delivery of goods should be determined.¹⁰⁷ In other words, the question is about when the bill of lading will become 'spent'.¹⁰⁸

¹⁰⁶ A noticeable point is that under a future Chinese maritime law, the carrier would only be discharged the liability for misdelivery in the sense of contractual law as the maritime law only governs the contractual relationship between the carrier and the relevant cargo interests; however, in a broader picture of the law reform suggested by this thesis which includes the reform of good faith purchaser rules under the property law, the carrier would be able to discharge the liability for misdelivery in both contract and tort once he makes the delivery against surrender of the bill of lading. See discussion in 5.2.4.1 above.

¹⁰⁷ Treitel and Reynolds (n38) 363.

¹⁰⁸ *ibid.*

5.3.1 The English Approach

In English common law, the bill of lading is normally regarded as ‘spent’ at the time when the goods covered by the bill are delivered to the person who is entitled to them.¹⁰⁹ Few problems will arise from this point provided that the goods are delivered in pursuance of the presentation rule which requires that the bill of lading is surrendered to the carrier.¹¹⁰ However, a conflict may arise where the goods are delivered against a LOI.¹¹¹ Under such a circumstance, if the bill of lading for some reason is later transferred to a third party who has no knowledge of the fact that the goods have already been delivered at the destination, it is questionable whether such a bill of lading could still enable its holder to claim delivery of goods from the carrier.¹¹² At the first instance of *The Future Express*,¹¹³ 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 authorized to receive delivery’.¹¹⁴ This is because such a result would ‘greatly detract from the value to bankers and other persons who have to rely on them for security and would facilitate fraud’.¹¹⁵ Although such a view may favour the bank or other person who paid the

¹⁰⁹ For example, see *Glynn Mills v The East & West India Dock Co* (1882) 7 AC 591 (HL), 600. Willes J said, ‘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.’

See also *The Delfini* [1988] 2 Lloyd’s Rep 599, 608. Phillips J stated that,

So long as the contract is not discharged, the bill of lading in my view, remains a document of title by endorsement and delivery of which the rights of property in the goods can be transferred... The discharge of the contract referred to by Diplock J occurs, in my view, when the primary obligations of the contract of carriage come to an end, notwithstanding that the carrier may have incurred secondary obligations as a consequence of the breach of those primary obligations. In this case, once the *Delfini* had arrived at [the discharge port], discharged the vast majority of the cargo loaded ... and sailed away, the contract of carriage was discharged by performance. Thereafter any remedy against the defendants lay in a claim for damages for breach.

¹¹⁰ In modern shipping practice, it is common that the bill of lading is issued in a set rather than one original copy. To protect the carrier from suffering competing request of delivery, normally the bill of lading would include a provision, indicating that ‘one being accomplished, the others to stand void.’ Therefore, although a single original bill of lading is required to be surrendered to the carrier in return for the delivery of goods, there is no doubt that the rest copies of the bill would at the same time lose their enforceability in delivery of goods. See John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010)155.

¹¹¹ In practice, the LOI is often employed as a substitute of the original bill of lading by the cargo interest to claim delivery of goods. The primary reason for the LOI practice is that the goods may arrive at the destination earlier than the bill of lading. To avoid demurrage and delay of delivery, the cargo interest who intends to claim delivery may provide a LOI which contemplates to hold the carrier harmless from any liability arising from making delivery without presentation of the original bill of lading. This is particularly the case in the carriage of bulk cargo, such as oil or gas, on the short sea route. See John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 157.

¹¹² Treitel and Reynolds (n38) 363.

¹¹³ [1992] 2 Lloyd’s Rep79 (QB).

¹¹⁴ *ibid*, 99.

¹¹⁵ *ibid*.

price for the security interest by trusting the ostensible value of the bill of lading, its rationality is doubtable as it may be harmful to other innocent parties' lawful interest.¹¹⁶ An example which illustrates such a doubt is given in *Carver on Bills of Lading*.¹¹⁷ Presuming that A, to whose order the goods have been shipped, after obtaining delivery of the goods from the carrier by a LOI, re-sells the goods to B and then pledges the bill to C, C would have priority over B to the goods, provided that C fulfilled the requirement provided by SOGA 1979.¹¹⁸ However, the ground for such a priority is not wholly convincing as B and C are both innocent victims of A's fraud.¹¹⁹ In addition, it appears unnecessary to give C such a priority since COGSA 1992 confers on C cause of action against the carrier even though the bill of lading was no longer a 'document of title', i.e. it had become 'spent' when it came into the possession of C.¹²⁰ Moreover, if the bill of lading remains a 'document of title' after a delivery of goods has been made to a person who is entitled to them, the subsequent commercial transaction of goods may be affected as it would be difficult to predict when the legal effect of the 'document of title' ceased. As a result, the buyer in the subsequent sale may always be worried that his right would be challenged by an unknown person who holds the bill of lading as a document of title.¹²¹ Therefore, in spite of different views, the general position under English law is that the bill of lading at any rate will cease to be a 'document of title' once the cargo covered by the bill is delivered to the person who is entitled to it.

5.3.2 The American Approach

It is submitted that American law adopts a similar approach to English law as to when the bill of lading ceases to perform as a 'document of title'. Such a consequence is implied by the wording of FBLA 1994 which imposes on the carrier the obligation of taking and cancelling the bill of lading. Pursuant to FBLA 1994, if the carrier fails to take and cancel the bill against which the delivery of goods is made, he is liable 'for damages for failure to

¹¹⁶ Treitel and Reynolds (n38) 363.

¹¹⁷ *ibid.*

¹¹⁸ SOGA 1979, s 24.

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

¹¹⁹ Treitel and Reynolds (n38) 363.

¹²⁰ Under such a situation, C is entitled to sue the carrier by virtue of COGSA 1992, s 2(2) and s 5(2).

¹²¹ This is the case shown by the presumed example above.

deliver the goods to a person purchasing the bill for value in good faith whether the purchase was before or after delivery and even when delivery was made to the person entitled to the goods'.¹²² By virtue of such an operation, the person who acquires the bill of lading in good faith for value is vested with a statutory remedy which enables him to sue the carrier for damage or loss as a consequence of the carrier's failure to take and cancel the bill. At this point, the *bona fide* holder of a bill of lading would gain similar protection as under COGSA 1992.¹²³ Therefore, for the same rationales just discussed as to English law,¹²⁴ under American law there appears to be little need to treat the bill of lading as a 'document of title' after the delivery of goods to a person who is entitled them.

5.3.3 The Rotterdam Rules

As discussed in 5.2.3, the legal effect of 'document of title' under the Rotterdam Rules is achieved by highlighting the effect of the bill of lading in delivery of goods. Besides restating the presentation rule, the Rotterdam Rules give attention to the situation where the bill of lading is not able to be presented. As to such a situation, the Rotterdam Rules provide that the carrier may deliver the goods to a person pursuant to the instruction sent by the shipper or the documentary shipper.¹²⁵ For the person who acquires the bill of lading after making such a delivery but pursuant to 'contractual or other arrangements made before such delivery', the Rotterdam Rules confer the 'rights against the carrier under the contract of carriage, other than the right to claim delivery of goods' on the person.¹²⁶ The position therefore is clear –

¹²² FBLA 1994, §80111 (c) .

Except as provided in subsection (d) of this section, if a common carrier delivers goods for which a negotiable bill of lading has been issued without taking and cancelling the bill, the carrier is liable for damages for failure to deliver the goods to a person purchasing the bill for value in good faith whether the purchase was before or after delivery and even when delivery was made to the person entitled to the goods. The carrier also is liable under this paragraph if part of the goods are delivered without taking and cancelling the bill or plainly noting on the bill that a partial delivery was made and generally describing the goods or the remaining goods kept by the carrier.

¹²³ Similar to American law, under English law such a *bona fide* holder is vested with the personal right against the carrier. See COGSA 1992, s 2(2), s5(2). See also Treitel and Reynolds (n38) 364, '...The rights of B (a good faith purchaser) against the carrier under the rules just stated of English or American law are personal rights only.'

¹²⁴ See discussion in 5.3.1 above.

¹²⁵ Rotterdam Rules, 47.2 (b).

The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

¹²⁶ Rotterdam Rules, 47.2 (d).

the holder in the aforesaid situation would acquire the contractual right to sue the carrier for loss or damage rather than the right to require the carrier to make actual delivery of goods. Such a position in general is similar to both English law and American law, which means that under the Rotterdam Rules the legal effect of ‘document of title’ would be terminated once the goods covered by the bill are delivered to the right person.¹²⁷

5.3.4 When will the Bill of Lading Cease to be a Document of Title under the Future Chinese Law?

As indicated in Chapter 3, this issue is left open in current Chinese law and has also received little academic attention.¹²⁸ However, it has arisen in judicial practice. In *Gree Yinshi Ltd (Zhuhai) and Nantong Bank (Zhuhai Branch) v WangFoong Transportation Ltd (HK)*,¹²⁹ the seller (Gree Yinshi) endorsed the bill of lading to Nantong Bank as a pledge for financing the sale contract, despite at that time the goods covered by the bill had been delivered to the buyer against a LOI. Nantong Bank then sent the bill to the buyer’s bank for collecting payment, and the buyer thereafter rejected to pay the price of goods under the L/C. Finally, the bills of lading were sent back to Nantong Bank by the buyer’s bank. Nantong Bank then claimed that as the holder of all original bills of lading, he should be entitled to the right of pledge to the goods. Such a claim was upheld by Higher People’s Court of Guangdong Province, notwithstanding the fact that the goods in question had been delivered against a LOI to the buyer at an earlier time – before the bills of lading were transferred to the bank. The court went on to state that by virtue of acquiring the bill of lading in good faith for value, the bank should have the right of pledge to the goods as the bill of lading would continue to serve as a ‘document of title’ until it was finally surrendered to the carrier.¹³⁰ At first glance,

A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods.

¹²⁷ One thing should be noted is that the ‘right person’ mention herein does not necessarily mean that the person has proprietary right to the goods. It only refers to the person who is designated by the shipper or documentary shipper. Whether such a party is entitled to the proprietary right to the goods depends on the underlying trading arrangement, which is beyond the governance of the Rotterdam Rules. At this point, the Rotterdam Rules may be slightly different with English law and American law, in the latter two jurisdictions the person who is entitled to goods refers to the person who has either constructive possession or property to the goods.

¹²⁸ See discussion in Chapter 3, 3.4.2 above.

¹²⁹ Higher People’s Court of Guangdong Province, No. Yuegaofajingerzhongzi 289/2000 (*Find Law*, 28 December 2009) <<http://china.findlaw.cn/hshs/haishanghetong/tdzj/957.html#p1>> accessed 23 May 2017.

¹³⁰ *ibid.*

such a judgment appears to fairly protect the interest of a *bona fide bank* that paid the value for holding the bill of lading as a security. However, it is submitted there are two defects as to the rationale given by the court.

First, the court construed the legal effect of ‘document of title’ as a capability to convey the real right (pledge) to the goods while at the same time arguing that such a capability would last until the bill of lading was surrendered to the carrier. Were such an argument correct, then this would bring massive uncertainty to the transfer of real rights of goods into the maritime cargo transaction since the cargo interests may have difficulty predicting when the bill of lading would cease to transfer the real rights of the goods even though the goods had been delivered. This would become the case particularly in oil trading where over 90% of cargo is released against LOI rather than the original bill of lading.¹³¹ Under such a situation, the real rights of goods may continue to have an unstable status, which would possibly increase the danger of trading the bill of lading independent of the goods to which the bill is related. Second, the reasoning given by the court appears to lump the right stemming from ‘document of title’ together with the right to claim indemnity for loss or damage. However, as indicated by English law, American law and the Rotterdam Rules, the two rights may exist independently.¹³² Given the aforesaid defects, the view held by the court on the duration of the legal effect of the bill of lading as a ‘document of title’ is not convincing.

It is therefore necessary to develop an answer to the question about when the bill of lading ceases its role as a document of title that is coherent with both the trading reality and the relevant legal concepts. By reviewing Anglo-American law and the Rotterdam Rules, the common position found is that the legal effect of the bill of lading as a ‘document of title’ will be extinguished once the goods are delivered to a person who has the right to receive them. This means that the person who acquires the bill of lading after the delivery of goods, even though it was in good faith with the value paid, is not able to force the carrier to deliver the goods to him. Instead of the primary right to claim delivery from the carrier, the *bona*

¹³¹ Yuzhuo Si, ‘Guanyu Wudan Fanghuo De Lilun Yu Shijian--Jianlun Tidan De Wuquanxing Wenti [Theory and Practice on Delivery of Cargo without Bills of Lading—the nature of Bill of Lading as Document of Title (author’s translation)]’ (2000) 00 Annual of China Maritime Law 18, 19.

¹³² See discussion in 5.3.1 and 5.3.2 above. See also Treitel and Reynolds (n38) 363.

The question whether a spent bill is a document of title and whether the transfer of it vests contractual rights in the transferee remain distinct, so that the exceptions to the general rule that it cannot be used to transfer contractual rights are not directly relevant to its status as document of title.

fide holder acquires a secondary right to claim indemnity from the carrier for loss or damage caused by the unenforceability of the primary right. Such a result is, to some extent, coherent with the view held by the Supreme People's Court on a carrier's breach of duty in the delivery of goods without surrender of the bill of lading. According to the judicial interpretation released by the Supreme People's Court:

Where any loss is caused to the holder of an original bill of lading due to delivery of goods by a carrier without the original B/L, the holder may request the carrier to bear the liability for breach of contract or tort.¹³³

This provision in substance has provided the *bona fide* holder who acquires the bill of lading after the delivery of goods with a remedy to claim loss or damage from the carrier, which means that such a holder does not have to rely on the legal effect of the bill of lading as a document of title to protect himself. On this point, the position of a *bona fide* holder under current Chinese law is similar to that under English law, American law and the Rotterdam Rules. Therefore, it is logical to conclude that, under a future maritime law, the bill of lading will cease to be a 'document of title' once the goods covered by the bill are delivered to a person who has entitlement to the goods. In such an instance, the significance of the bill of lading to a *bona fide* holder does not lie in the right to claim delivery of goods but rather the right to sue the carrier for indemnity.

An additional point needs to be made here. Although the aforesaid conclusion refers to the legal effect of 'document of title' under the framework of maritime law, it may also apply to the legal effect of 'document of title' in the sense of property law. As suggested in 5.2.4.2, to enhance the value of the bill of lading as a trustworthy document in maritime trade, besides the contractual right to claim delivery of goods, the future property law should provide for a presumable effect of transferring the real right of goods if the bill of lading is transferred to a *bona fide* person against payment of value. Such a presumable effect should be extinguished at the same time the bill of lading ceases to be a document of title in the sense of maritime law, namely, when the goods covered by the bill of lading are delivered to a person who is entitled to them. This is because, as the document represents the goods, the legal effect of a bill of lading as a document of title should not be separated from the goods covered as

¹³³ Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading 2009, art 3.

otherwise the risk of trafficking the bill of lading independent of the underlying cargo transaction may arise.

5.4 Conclusion

As shown from the Anglo-American experience, in early maritime trade the expression ‘bill of lading as document of title’ used to be construed in the pure sense of property law.¹³⁴ However, such a position has been altered by the recent development in both common law and statutory law, which underpins the impact of such an expression on the delivery of goods.¹³⁵ This is also the position held by the Rotterdam Rules although the expression ‘bill of lading as document of title’ is not expressly employed.¹³⁶ The aforesaid change reflects a common trend in contemporary maritime legislation and practice in terms of the interpretation of the bill of lading as a document of title. Generally, the interpretation tends to focus more on the function of the bill of lading in the delivery of goods. To maintain consistency with this common trend, such an interpretation should be considered when reforming CMC 1992 to clarify the legal nature of the bill of lading as a document of title. This means that under the framework of a future Chinese maritime law, the bill of lading as a document of title should be construed in terms of its legal effect on the delivery of goods. To highlight such a position, the future law should restate the presentation rule by affirming three points: first, the holder is entitled to claim delivery of goods by surrender of at least one original bill of lading to the carrier; second, the carrier can only discharge his obligation of delivery in the event of making delivery against presentation of an original bill of lading; third, the carrier is entitled to reject delivery if the original bill of lading is not presented.¹³⁷ Also, as under English law,¹³⁸ the presentation rule in the context of Chinese maritime law should be established on a contractual basis. However, in consideration of the conformity with commercial practice regarding transfer of the bill of lading and the coherence with the general rule covering transfer of real rights under Property Law 2007,¹³⁹ it would be better if

¹³⁴ *LickBarrow* (n12), *United States* (n41).

¹³⁵ *Rafaela S* (n24), FBLA 1994, § 80110 (a) (2).

¹³⁶ Rotterdam Rules, art. 47.1 (a) (b).

¹³⁷ See discussion in Chapter 5, 5.2.4.2.

¹³⁸ *The Houda* (n28), COGSA 1992 s2 (1).

¹³⁹ Property Law 2007, art 23, art 106.

Property Law 2007 could be reformed in the meantime by incorporating a rule on the *bona fide* acquisition of the bill of lading. Inspired by both English law and American law, such a rule can be constructed as follow: unless contrary consent is proved, the real right of goods should be deemed to be transferred to the holder of the bill of lading if the holder acquired the bill after paying a reasonable price in good faith. In so doing, the commercial value of the bill of lading on vesting its holder with exclusive control over the goods would be enhanced.¹⁴⁰

As to the termination of the legal effect of ‘document of title’, no matter whether it concerns the real right of goods or the contractual right to claim delivery of goods, the right should be extinguished once the goods are delivered to a person who is entitled to the goods, regardless of whether such a delivery is made against an original bill of lading or not. As a remedy for extinguishment of the legal effect of ‘document of title’, the *bona fide* holder of a bill of lading should be entitled to demand compensation from the carrier if there was misdelivery owing to the carrier’s breach of duty.¹⁴¹ With such an arrangement, the transfer of the bill of lading as a document of title would be confined within the transfer backed up by a genuine transaction of the goods. The danger of trafficking of the bill of lading simply as a piece of paper would be eliminated.

In general, a complete definition of ‘bill of lading as document of title’ should include both the real rights of goods and the contractual right to claim delivery of goods. To maintain the commercial value of the bill of lading and harmonize the domestic legislations, a comprehensive legal reform in this respect should be conducted under both maritime law and property law. If this could be done, then it is believed that the legal quality of the bill of lading as a ‘document of title’ would suffice to provide the holder with exclusive control over the goods. However, under the Rotterdam Rules such an exclusive control is expected to be achieved by another concept, the ‘right of control’,¹⁴² whose legal nature is completely different from ‘document of title’. Similar to the quality of ‘document of title’, the ‘right of control’ is provided as a transferable right that can be carried by the bill of lading. Inspired by the new international convention, in Chinese academia there have been growing calls for a future Chinese maritime law to provide the right of control in the same way as under the

¹⁴⁰ See discussion in Chapter 5, 5.2.4.1.

¹⁴¹ See discussion in Chapter 5, 5.3.4.

¹⁴² The right of control is provided by Rotterdam Rules, Chapter 10.

Rotterdam Rules. Whether this is correct is examined in the next chapter.

Chapter Six: Transfer of Right of Control

6.1 Introduction

Historically, the right of control has not been an alien concept to some modes of cargo transportation. However, it was only recently that such a right was introduced into ocean cargo transportation by the Rotterdam Rules. As provided by the Rotterdam Rules, such a right vests the person who holds all original copies of the bill of lading with entitlement to unilaterally vary the agreed delivery of goods.¹ Also, such a right is provided as a contractual right that can be transferred through the bills of lading.² By establishing a systematic legal scheme governing the right of control, the drafters of the Rotterdam Rules expected that it would create greater harmonization not only between the laws governing different modes of cargo transportation but also between cargo transport laws and trade laws across the world.³ Besides this, the right of control is claimed to be essential to make the electronic bill of lading function equivalently to the paper bill.⁴ Informed by the Rotterdam Rules, many Chinese commentators argue that the right of control should be incorporated into a future maritime law in China so as to achieve a better harmonization between the sale of goods and the carriage of goods, whilst also making this future Chinese law adapt to the trend of paperless cargo transportation.⁵ However, there are others who doubt the practical value of the right of

¹ For details in this regard, see 6.2.1 below.

² *ibid.*

³ The intended harmonization can be seen from the following arguments raised by Van Der Ziel who is one of the drafters of the Rotterdam Rules:

Non-maritime transport conventions include specific provisions on this right of control. International maritime law, however, tends to be silent on the right of control... the relationship between the right of control under transport law and rights in the goods under the law of sale or property is that the former may facilitate the latter.

G J van der Ziel, 'Delivery of the goods, rights of the controlling party and transfer of rights,' in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009) 246.

⁴ 'Electronic commerce systems will not work unless clear rules exist to address the right of control... diluting the right of control would be very short-sighted.' 'Issues of Transport Law, Report of the Sixth Meeting' (2001) CMI Ybk 305, 354.

⁵ Zhiwen Li, *Hot issues in the Law of International Carriage of Goods* (1st edn, Law Press-China 2012) 265; See also Tingzhong Fu, 'The comments on some certain issues of the legal system in respect of right of control' (2008) 1 Annual of China Maritime Law 30, 32; Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 379; Zhaofang Li and Zhenkun Ying, 'Tidan Yunshu Yu Huowu Kongzhiquan Wenti [The bill of lading and the Right of Control (author's translation)]', in Xiaonian Li (ed) *Selected Papers on Hot Issues in International Maritime Law* (1st edn, China Legal Publishing House 2008) 53.

control in current bill of lading practice.⁶ In this chapter, a thorough examination of the true value of the right of control is carried out in order to identify whether such a right should be recognized as a statutory right under a future Chinese maritime law and determine a proper way to provide for the substantial matters covered by such a right.

The second section of the chapter focuses on the value of the right of control in traditional maritime practice served by the paper bills of lading in order to determine whether or not the right of control provided by the Rotterdam Rules suffices to achieve greater harmonization as it is supposed to do. To do so, this section first revisits the legal nature of the right of control under the Rotterdam Rules and then examines the analogous concepts ‘right of disposal’ in non-sea carriage and ‘right of stoppage’ in sale of goods, which are the concepts regarded as the sources from where the notion ‘right of control’ originated.⁷ By comparing the right of control with those analogous concepts, a discussion ensues on whether the right of control is necessary to improve current international shipping and trading law. This section subsequently examines the right of control in the context of Chinese law and commercial practice, and notes that the right of control is neither legally reasonable nor commercially reasonable in China.

The third section assesses the effectiveness of the right of control in facilitating the use of the electronic bill of lading. By comparing how such a right works under the Rotterdam Rules with the existing CMI Rules in this respect, as well as the relevant rules for running the electronic bill of lading under the Bolero and the ESS Databridge,⁸ this section points out that such a right may have little practical value to facilitate the use of the electronic bill of lading at the present stage.

⁶ Zengjie Zhu, Huanning Wu, Yongjian Zhang and Yu Guo, *Lutidan Guisze Shiyi [understanding Rotterdam Rules (author’s translation)]* (1st edn, China Commerce and Trade Press 2011) 209; Liang Zhao, ‘Judicial practice and reflection of legislation upon the right of control in the Rotterdam Rules in China’ (2009) 1 Annual of China Maritime Law 16, 16-22.

⁷ Liang Zhao, ‘The right of control in carriage of goods’ [2014] LMCLQ 393, 401; G J van der Ziel, ‘Delivery of the goods, rights of the controlling party and transfer of rights’, in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009) 246.

⁸ The Bolero and the ESS Databridge are the two representative commercial models which provide the solutions for using the electronic bill of lading.

Given the defects of the right of control revealed by the aforesaid two sections, the fourth section attempts to find out what the Chinese law reform needs to include to be successful. Based on the existing solutions provided by Anglo-American law and China's shipping practice, the real focus of Chinese law reform is analyzed, and recommendations are made for its direction.

Finally, based on the aforesaid findings, the fifth section concludes the chapter, pointing to the failure of the right of control provided by the Rotterdam Rules to achieve the expected goals and recommending a solution to improve current Chinese maritime law in this respect.

6.2 Can the Right of Control Improve Current Maritime Trade Based on the Paper Bill of Lading?

The recent concern about the right of control was raised due to the introduction of this concept into ocean cargo transportation by the Rotterdam Rules. Nevertheless, the substantial matters covered by the concept are not alien to the shipping industry and legal professionals. Before the Rotterdam Rules, a number of analogous concepts had been developed in international law on cargo trading and transportation. These concepts share certain similarities and even overlap in some areas although they are defined in various ways and are subject to different fields of law. Given that the construction of the right of control under the Rotterdam Rules to a large extent is inspired by these concepts, a comparative assessment of the right of control and these analogous concepts is conducted below, with the purpose of finding out whether the right of control is truly helpful to improve current international shipping and trading practice. Based on that, a discussion is had on whether the right of control is meaningful to improve current Chinese law and practice.

6.2.1 The Right of Control under the Rotterdam Rules

The Rotterdam Rules is the first international convention that introduced the concept of right of control into sea carriage served by the negotiable transport document,⁹ for example, the

⁹ Under the Rotterdam rules, the rules on right of control does not only apply to the situation where the negotiable transport document is issued, but also cover the situation where the non-negotiable transport document is issued. (Rotterdam Rules, art 51). However, only the former situation is discussed here as the focus

order or bearer bill of lading.¹⁰ Under the Rotterdam Rules, the right of control is defined as ‘the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10’.¹¹ According to Article 50, the right of control covers three matters:

- a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage, b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and (c) The right to replace the consignee by any other person including the controlling party.¹²

Normally, the controlling party with the right of control could be the shipper who concludes the contract of carriage with the carrier; the documentary shipper named on the transport document; the consignee designated by the shipper; or the holder of all negotiable transport documents.¹³ Besides this, the right of control is provided as a right that can be transferred from the controlling party to another party.¹⁴ Under the circumstance where the negotiable transport document is issued, all originals of the negotiable transport document shall be transferred so as to effect the transfer of right of control.¹⁵ Viewing the aforesaid stipulations together, it can be seen that the drafters of the Rotterdam Rules intended to view the right of control as a transferable right deriving from the contract of carriage. However, subparagraph (b) and (c) of Article 50 appears to be incongruous with such an intention since the matters they describe are more like the rights to alter the original contract of carriage rather than the rights under the contract of carriage.¹⁶

As to the effect of the right of control on the carrier, the Rotterdam Rules imposes obligation

of the thesis is on the transfer of rights by the bill of lading. For the ‘Negotiable transport document’, it refers to ‘a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to 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”.’ (Rotterdam Rules, art 1.15). From this definition, it can be seen that the literal meaning of ‘negotiable’ under the Rotterdam Rules only indicates the transferability of the bill of lading. Whether it also has the legal effect of ‘negotiability’ that enables the *bona fide* holder to acquire a better position than its predecessor will depends on the applicable national law.

¹⁰ This can be seen from the aforesaid definition of ‘Negotiable transport document’ in article 1.15 of the Rotterdam Rules.

¹¹ Rotterdam Rules, art 1 (12).

¹² Rotterdam Rules, art 50.1

¹³ Rotterdam Rules, art 51.1 (a); 51.3 (a).

¹⁴ Rotterdam Rules, art 51.1 (b).

¹⁵ Rotterdam Rules, art 51.3 (b).

¹⁶ Liang Zhao, ‘The right of control in carriage of goods’ [2014] LMCLQ 393, 395.

on the carrier to execute the instructions sent by the controlling party provided that the instructions can ‘reasonably be executed’ when they reach the carrier and ‘will not interfere with the normal operations of the carrier’.¹⁷ Such an arrangement shows that the legislators of the Rotterdam Rules intended to stipulate the right of control not only as a contractual entitlement but also as an entitlement that can be unilaterally implemented by the controlling party to vary the agreed contract of carriage.¹⁸ Although the Rotterdam Rules allow the carrier to request security from the controlling party for executing the instruction,¹⁹ such an arrangement simply mirrors prevailing shipping practice and does not change the legal quality of the right of control as a right to unilaterally modify the contract of carriage.²⁰ In addition, it is noteworthy that the provisions with respect to the right of control could be completely abandoned or varied if the parties to the contract of carriage so agreed.²¹

On balance, the construction of the right of control reflects the complex attitudes held by the drafters of the Rotterdam Rules, which are mainly shown by two issues. First, the right of control is defined as a right ‘under’ the contract of carriage. However, the matters covered by such a right in substance go further beyond that. Second, although the Rotterdam Rules tend to highlight the effect of such a right by vesting it with a certain unilateral character, such an arrangement may become toothless as the parties to the contract of carriage are free to opt out of the rules regarding such a unilateral character. In this sense, it is submitted that the legal quality of the right of control under the Rotterdam Rules is a paradox and the prospect of such a right in international shipping practice may not be promising. In spite of enormous controversy, Chapter 10 of the Rotterdam Rules was ultimately kept as it was asserted that such a right would play a positive role in paving the way for paperless trading.²²

¹⁷ Rotterdam Rules, art 52. 1 (b)(c).

¹⁸ G J Van Der Zeil, ‘Chapter 10 of the Rotterdam Rules: Control of Goods in Transit’ (2009) 44 *Texas International Law Journal* 376, 381.

¹⁹ Rotterdam Rules, art 52.3.

²⁰ Alexander Von Ziegler, ‘Rotterdam Rules and underlying sale contract’ (2013) *CMI Ybk* 273, 284.

²¹ Rotterdam Rules, art 56.

²² ‘It (The right of control) should be a strong right... a strong right of control was needed for a pledge to work to protect the bank in an electronic commerce situation in which no paper document had been issued...’ ‘Issues of Transport Law, Report of the fifth meeting’ (2001) *CMI Ybk* 265, 280. See also Michael F. Sturley, ‘Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules’ rights’ in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009) 27.

6.2.2 The Evolution of the Right of Control in International Conventions

In the pre-Rotterdam Rules era, the concepts governing similar matters as the right of control were addressed in the conventions on non-sea cargo carriage. As well as in the transport law, an analogous concept can also be found in the convention on cargo transaction.²³ With the aim of filling the gaps between these existing rules and the rules governing international sea carriage, the drafters of the Rotterdam Rules created the concept of the right of control to provide for the similar matters covered by the existing concepts. Whether the right of control suffices to fulfil such a purpose is examined below through a comparative analysis of the right of control and the analogous concepts.

6.2.2.1 The right of disposal in non-sea carriage

In the non-sea carriage of goods, the concept that bears similar characteristics with the right of control is the right of disposal. Such a concept was first mentioned by the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention).²⁴ According to the Warsaw Convention, the consignor is entitled to:

dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure.²⁵

From the aforesaid rule, it can be seen that the nature of the right of disposal is to vary the agreed contract of carriage. On this point, the extent of the matters involved is wider than that provided by the right of control under the Rotterdam Rules.²⁶ In addition, the Warsaw Convention clearly states that only the consignor is entitled to the right of disposal, which means that the right of disposal is not as transferable as the right of control under the Rotterdam Rules.²⁷ Furthermore, the Warsaw Convention provides that the implementation

²³ The convention on cargo transaction here refers to United Nations Convention on Contracts for the International Sale of Goods 'CISG' (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

²⁴ Convention for the Unification of Certain Rules Relating to International Carriage by Air 'Warsaw Convention' (opened for signature October 12, 1929) 137 LNTS 11.

²⁵ Warsaw Convention, art 12.1.

²⁶ The right of control does not cover the situation 'dispose of the goods by withdrawing them at the airport of departure or destination, or by requiring them to be returned to the aerodrome of departure' as that provided by Article 12.1 of the Warsaw Convention.

²⁷ Rotterdam Rules, art 51.1 (b).

of the right of disposal shall not ‘affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee’.²⁸ This rule underlines the independent nature of the right of disposal under the contract of carriage and the right under the contracts governing the transaction of goods. Such a position is different from the Rotterdam Rules in which the right of control is envisaged to connect the carriage of goods with the transaction of goods.²⁹ As well as these differences, the Warsaw Convention also shares certain similarities with the Rotterdam Rules. For instance, under the Warsaw Convention, the carrier is obliged to carry out the instruction given by the consignor with respect to the disposal of the goods³⁰ provided that the requirements of the Convention are fulfilled.³¹ This is also the case under the Rotterdam Rules which provides that the carrier ‘shall execute the instruction’ if the requirements provided by the Rules are satisfied.³² Also, similar to the Rotterdam Rules,³³ the Warsaw Convention allows the parties to vary the provisions in relation to the right of disposal by expressing such a variation on the consignment note.³⁴ This means that the parties are free to change the original rules on the right of disposal by agreement. Basically, the position on the right of disposal under the Warsaw Convention to a large extent was passed on unchanged to its successor, the Montreal Convention.³⁵

The right of disposal can also be found in the Convention on the Contract for the International Carriage of Goods by Road (CMR).³⁶ Under the CMR, the right of disposal includes the right to require the carrier to ‘stop the goods in transit, to change the place at which delivery is to

²⁸ Warsaw Convention, art 15.1.

²⁹ Ziegler (n20) 277.

³⁰ This can be seen from Article 12.2 of the Warsaw Convention, which provides that ‘if it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.’

³¹ To exercise the right of disposal, the consignor ‘must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.’ See Warsaw Convention, art 12.1.

³² Rotterdam Rules, art 52.1.

³³ Rotterdam Rules, art 54.2.

³⁴ Warsaw Convention, art 15.2.

³⁵ Convention for the Unification of Certain Rules for International Carriage by Air ‘Montreal Convention’ (adopted 28 May 1999) TIAS 13038, 2242 UNTS 350. Although sharing great similarities with the Warsaw Convention in terms of the right of disposal, Montreal Convention has two amendments that are different from the Warsaw Convention. One is about the termination of the right of disposal. Under the Montreal Convention, once the consignee accepts the goods, no matter whether he accepts the waybill or not, the consignor’s right of disposal will be extinguished. See Montreal Convention, art 12.4. Another amendment is about the party to whom the instruction regarding the right of disposal should be given. According to Article 4, such an instruction shall only be addressed to the contracting carrier.

³⁶ Convention on the Contract for the International Carriage of Goods by Road ‘CMR’ (signed 19 May 1956, enter into force 2 July 1961) 399 UNTS 189.

take place or to deliver the goods to a consignee other than the consignee indicated in the consignment note'.³⁷ From this rule, it can be seen that the implementation of the right of disposal to a large extent will result in the variation of the original contract of carriage.³⁸ On this point, the CMR is similar to both the Rotterdam Rules and the conventions governing carriage of goods by air. Regarding the transferability of the right of disposal under the CMR, the CMR provides the right of disposal as a transferable right, although the consignment note in road transportation is not a transferable document like the bill of lading in sea carriage. According to Article 12.2, the right of disposal can be transferred, and only transferred once, from the original controlling party (the sender) to the consignee through handing over the consignment note to the consignee.³⁹ Such a position is different from the Rotterdam Rules and the aforesaid conventions governing carriage of goods by air.⁴⁰ The CMR provides three necessary conditions to exercise the right of disposal. Firstly, the sender or the consignee who wishes to exercise the right of disposal must present the first copy of the consignment on which the relevant instruction to the carrier is indicated and indemnify the carrier for all 'expenses, loss and damage involved in carrying out such instructions'.⁴¹ Secondly, the instructions should be able to be executed at the time when they arrive with the person who is to execute them and should not 'interfere with the normal working of the carriers' undertaking or prejudice the senders or consignees of other consignments'.⁴² Thirdly, the instructions should not cause a division of the consignment.⁴³ Compared to the Rotterdam Rules, the conditions provided by the CMR are more comprehensive as they protect not only carriers' interest but also other traders' interest.⁴⁴ Besides this, a noticeable characteristic of the right of disposal under the CMR is that the parties to the contract of carriage are not

³⁷ CMR, art 12.1.

³⁸ It is submitted that the last two items (change of place of delivery and change of consignee) stipulated by Article 12.1 will probably result in the variation of the agreed contract of carriage, while the first item (stop the goods in transit) may not.

³⁹ CMR, art 12.2 'This right shall cease to exist when the second copy of the consignment note is handed to the consignee or when the consignee exercises his right under article 13, paragraph 1; from that time onwards the carrier shall obey the orders of the consignee.' This means if the consignee to whom the right of disposal is transferred requires the carrier to deliver the goods to another person, that person will not be entitled to instruct the carrier to deliver the goods to other person.

⁴⁰ Under the Rotterdam Rules, the right of control may be transferred multiple times by transferring the bills of lading till one of the original bill is surrendered to the carrier for claiming delivery of goods. (Rotterdam Rules, art 51.3 (b)) Under the Warsaw Convention and the Montreal Convention, the right of disposal is not transferable at all.

⁴¹ CMR, art 12.5 (a).

⁴² CMR, art 12.5 (b).

⁴³ CMR, art 12.5 (c).

⁴⁴ The conditions provided by the Rotterdam Rules only require the execution of the instructions not to 'interfere with the normal operations of the carrier, including its delivery practices.' Rotterdam Rules, article 52.1 (c).

allowed to change or exclude the application of the provisions with respect to the right of disposal by agreement.⁴⁵ Once the sender or consignee fulfils the aforesaid conditions and instructs the carrier to carry out the matters provided by Article 12.1, then the carrier is bound by such an instruction. In this sense, the right of control stipulated by the CMR is in fact the right to unilaterally vary the original contract of carriage while, under the Rotterdam Rules and the conventions governing air carriage, such a unilateral feature may be undermined by virtue of freedom of contract.

In the transportation of goods by rail, the convention which addresses the right of disposal is the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM).⁴⁶ Under the CIM, the right of disposal is described as a right to modify the contract of carriage, which includes the right to discontinue the carriage, to postpone the delivery, to designate a consignee other than the one indicated by the consignment note and to claim delivery at a place other than the destination entered on the consignment note.⁴⁷ Similar to road transportation governed by the CMR, the right of disposal is originally vested in the consignor and can only be transferred once, from the consignor to the consignee, by expressing such an effect on the consignment note.⁴⁸ Once the consignee exercises the right of disposal and designates another party to whom the delivery is to be made, that party will no longer be vested with the right of disposal but rather will only be entitled to claim delivery from the carrier. To exercise the right of disposal under the CIM, the following conditions must be met. First, when exercising the right of disposal the consignor should produce the duplicate of the consignment note on which the modifications are expressed.⁴⁹ Second, the modifications indicated on the consignment note must be ‘possible, lawful and reasonable’ to be carried out, and must not influence the carrier’s normal work nor harm the consignor or consignee’s other consignments.⁵⁰ Third, the consignor or the consignee who intends to exercise the right of disposal must reimburse the carrier with the costs and damages that may arise from executing the modifications.⁵¹ Fourth, the modifications must not have the effect

⁴⁵ Zhao, ‘The right of control in carriage of goods’ (n7) 406.

⁴⁶ Appendix B to the Convention concerning International Carriage by Rail (COTIF) ---Uniform Rules concerning the Contract of International Carriage of goods by Rail ‘CIM’ (Signed in Bern 1980, amended by the Vilnius Protocol of 3 June 1999. entered into force on 1 July 2006) CIT.

⁴⁷ CIM, art 18.1.

⁴⁸ CIM, art 18.2, art 18.3, art18.4.

⁴⁹ CIM, art 19.1.

⁵⁰ CIM, art 19.3.

⁵¹ CIM, art 19.2.

of splitting the consignment.⁵² Basically, these conditions are similar with those provided by the CMR and other conventions mentioned before. Once the aforesaid conditions are fulfilled, the carrier is obliged to carry out the modifications raised by the consignor or consignee. Furthermore, like the CMR, the CIM does not allow the parties to the contract of carriage to freely vary the provisions regarding the right of disposal under the convention, which highlights the unilateral character of the right of disposal. Notwithstanding the foregoing similarities with other transport conventions, the CIM shows a remarkable difference in limiting the carrier's liability. According to Article 19, the carrier can benefit from the limitation of liability provision which indicates that, any compensation payable by the carrier, no matter if it is for the failure of execution of the instruction or for the failure of requiring production of the duplicated consignment note, shall not exceed the amount of the loss of the goods.⁵³ On this point, the carrier may receive better protection under the CIM than other conventions. However, it should be noted that there is no corresponding limitation of liability for the consignor or consignee when they reimburse the carrier with costs or damages arising from carrying out the modifications. In this sense, the interest of the carrier and the cargo interests (consignor and consignee) may not achieve a balance under the CIM.

Like other modes of cargo transportation, the right of disposal has also been provided by the convention governing the carriage of goods by inland waterway, namely, the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI).⁵⁴ According to the CMNI, the right of disposal includes the rights to 'require the carrier to discontinue the carriage of goods, change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document'.⁵⁵ By its nature, such a definition is no different to the rights provided by the aforesaid conventions governing other modes of cargo transportation. Also, the implementation of such a right is very likely to vary the original contract of carriage. One distinctive feature of the CMNI is the documents governed by the convention. In general, two types of shipping documents are provided by the convention – the consignment note and the bill of lading.⁵⁶ The convention expressly

⁵² CIM, art 19.4.

⁵³ CIM, art 19.6, art 19.7.

⁵⁴ Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 'CMNI' (22 June 2001) UN Doc No ECE/TRANS/CMNI/CONF/2/FINAL.

⁵⁵ CMNI, art 14.1.

⁵⁶ CMNI, art 1.6.

indicates that the latter is a document of title⁵⁷ whereas the former is not. As to the party who is entitled with the right of disposal, the CMNI provides that such a right is initially vested in the shipper⁵⁸ and can be transferred by the shipper to the consignee.⁵⁹ To effect such a transfer, the requirements differ between the situation where the consignment note is employed and the situation where the bill of lading is issued. For the former situation, the CMNI requires the shipper to enter the instructions with respect to the right of disposal into the consignment note whereas for the latter situation there is no such requirement.⁶⁰ Such an arrangement to some extent indicates that the legal quality as document of title automatically enables the bill of lading to transfer the right of disposal to its holder, while the consignment note must rely on the mandatory stipulation to validate such a transfer.⁶¹ This also indicates that the right of disposal can be transferred multiple times through the bills of lading until the bills are surrendered to the carrier. Apart from submitting the original transport documents,⁶² the CMNI addresses another two necessary conditions for the shipper or consignee to exercise the right of disposal: one is that the shipper or consignee shall ‘compensate the carrier for all costs and damage incurred in carrying out instructions’;⁶³ another is that the shipper or consignee shall ‘pay all the agreed freight in the event of discharging the goods before arrival at the scheduled place of delivery, unless the contract of carriage provides otherwise’.⁶⁴ These requirements at first glance are not significantly different from those provided by other conventions. However, the CMNI does not state whether the carrier shall execute the instructions sent by the shipper or consignee even though the aforesaid conditions are fulfilled. This to some extent implies that the carrier is free to decide whether to follow the instructions or not. Such an implication is also evidenced by the wording of Article 14.1, which provides that the shipper ‘may’ require the carrier to carry out the relevant

⁵⁷ CMNI, art 13.1.

⁵⁸ CMNI, art 14.1 ‘The shipper shall be authorized to dispose of the goods...’

⁵⁹ CMNI, art 14.2.

The shipper's right of disposal shall cease to exist once the consignee, following the arrival of the goods at the scheduled place of delivery, has requested delivery of the goods and, (a) where carriage is under a consignment note, once the original has been handed over to the consignee; (b) where carriage is under a bill of lading, once the shipper has relinquished all the originals in his possession by handing them over to another person.’ In addition, from this rule, it can be seen that the ‘consignee’ employed here refers to either the consignee indicated on the consignment note or the holder to whom the bill of lading is transferred.

⁶⁰ CMNI, art 14.3. ‘By an appropriate entry in the consignment note, the shipper may, when the consignment note is issued, waive his right of disposal to the consignee.’

⁶¹ Zhao, ‘The right of control in carriage of goods’ (n7) 409.

⁶² CMNI, art 15 (a) (b).

⁶³ CMNI, art 15 (c).

⁶⁴ CMNI, art 15 (d).

instructions.⁶⁵ In this sense, the right of disposal is not a unilateral right to vary the agreed contract of carriage, which is different from all the conventions mentioned above.

6.2.2.2 The right of stoppage in transaction of goods

Under the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG),⁶⁶ the concept of right of stoppage also shares certain resemblance with the right of control.⁶⁷ According to Article 71:

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.⁶⁸

From this rule, it can be seen that the right of stoppage is defense for an unpaid seller to deal with the situation where the buyer fails to pay the price of the goods. Although the rule does not indicate by which means the seller may prevent the handing over of the goods to the buyer, it is submitted that the possible way for the seller to achieve such an effect is through instructing the carrier to redirect the goods.⁶⁹ Such an operation usually lead to the replacement of the person to whom the delivery is made and/or the alteration of the place of delivery.⁷⁰ In this sense, the substantial matters that may be involved under the right of

⁶⁵ CMNI, art 14.1.

The shipper shall be authorized to dispose of the goods; in particular, he may require the carrier to discontinue the carriage of the goods, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document.

⁶⁶ United Nations Convention on Contracts for the International Sale of Goods 'CISG' (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

⁶⁷ Caslav Pejovic, 'Stoppage in Transit and Right of Control: Conflict of Rules?' (2008) 20 Pace International Law Review 132, 147.

⁶⁸ CISG, art 71(1) (2).

⁶⁹ Liangyi Yang and Daming Yang, *Bills of Lading and other Shipping Documents* (2nd edn, Dalian Maritime University Press 2016) 74-75.

⁷⁰ *ibid.*

stoppage are similar to those covered by the right of control under the Rotterdam Rules.⁷¹ Notwithstanding, pursuant to the last sentence of Article 71(2), the right of stoppage merely comes into effect between the seller and the buyer, which means that such a right is not transferable. Once the goods covered by the bills of lading are resold and the bills are transferred to a third party, the seller will no longer be able to exercise the right of stoppage. Such a result is different from the effect of the right of control. Under the Rotterdam Rules, the right of control can be transferred with the bills of lading until one of the original bills is surrendered to the carrier. Besides this, even if the bills of lading are in the hand of seller, it is still not clear to which extent the seller can actually exercise the right of stoppage as Article 71(2) does not impose any obligation on the carrier to execute the seller's instruction to stop the goods. Such an arrangement may be attributed to the fact that the CISG merely governs the trading relationship between the buyer and seller, and has nothing to do with the relationship between the carrier and the seller or the buyer who concludes the contract of carriage with him.⁷² This may be a meaningful way of distinguishing the scope of application of different convention, but its effect is that it makes the right of stoppage lack practical value.⁷³

6.2.3 Observations from Comparisons between the International Conventions

As mentioned before, harmonization is an important theme of the Rotterdam Rules. Such harmonization is not limited to the carrier's liability that has been provided by the previous maritime conventions but also involves some trade-related issues and the issues provided by the rules governing other modes of transportation but which were neglected by the previous conventions on ocean cargo transportation served by the bill of lading. The rules on the right of control under the Rotterdam Rules is an attempt to achieve the aforesaid harmonization since the right of control is envisaged to facilitate the implementation of the right of stoppage under the sale contract, whilst, at the same time, the right of control is constructed by reference to the right of disposal provided by the non-sea carriage conventions so as to build

⁷¹ Under the Rotterdam Rules, the right of control includes the right to give or modify instructions in respect of the goods, the right to change the place of delivery and the right to change the consignee (Rotterdam Rules, art 50.1).

⁷² Pejovic (n67) 137.

⁷³ *ibid.*

up consistency between the conventions governing different modes of cargo transport.⁷⁴ Viewing the aforesaid conventions together, it can be seen that the substantial matters covered by the right of control, the right of disposal and the right of stoppage are roughly the same.⁷⁵ Nevertheless, it is doubtful whether the Rotterdam Rules on the right of control is capable of achieving the expected harmonization of the existing transport law and trade law.

First, except for the CMNI, the conventions covering non-sea carriage provide the right of disposal as a non-transferable right or a right with a very limited transferability since the transport documents used in these modes of transportation are the non-transferable consignment notes. Likewise, the right of stoppage provided by the CISG is a non-transferable right and is only effective between the seller and the buyer. These rules appear to suggest that these types of rights (the right to stop the goods in transit, the right to change the place of delivery and the right to replace the receiver) are, by their nature, not rights that can be freely transferred. It should be noted that even though the CMNI to some extent recognizes that such a kind of rights may be transferred through the bills of lading, it does not impose a corresponding obligation on the carrier to execute the instruction sent by the shipper or consignee. This in fact makes the right of disposal under the CMNI more like an offer which is subject to the acceptance of the carrier rather than an entitlement stipulated by law. In this sense, it is odd that the Rotterdam Rules provide the right of control as a right that can be transferred through the bills of lading, especially under the premise that such a right is a legally recognized entitlement. If one day the Rotterdam Rules do begin to apply, the carrier will probably receive instructions on variation of the agreed carriage sent by a party who is totally alien to him. However, it can be doubted to what extent the carrier would be willing to execute such an instruction, even with the security provided by that party. It should be noted that such a situation does exist in current practice but normally the carrier would act at his discretion as suggested by the CMNI.⁷⁶ Therefore, the transferability of the right of control stipulated by the Rotterdam Rules does not coincide with either the existing conventions or prevailing shipping practice.

⁷⁴ G J Van der Ziel, 'Delivery of the goods, rights of the controlling party and transfer of rights' in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009) 246. Text to n3.

⁷⁵ Basically, the matters covered by those concepts include the stoppage of goods in transit, the change of receiver to whom the goods is to be delivered and the change of place where the delivery is to be made.

⁷⁶ This can be evidenced by COSCO's practice, which is discussed in 6.2.4.2 below.

Second, in terms of the necessary conditions for the carrier's execution of the instructions with respect to the disposal of the goods, most non-sea carriage conventions (except for the CMNI) require that the instructions shall neither harm the carrier's interest nor prejudice other consignments of the shipper/consignor and the consignee. With such a requirement, the right of disposal under these conventions is proposed to be exercised in a way that does not upset the balance of interest between the carrier and the trader. However, this is not the case under the Rotterdam Rules as it keeps silent on preventing the cargo interests, except for the controlling party, from being harmed by implementing the right of control, and merely addresses that the carrier shall execute the controlling party's instruction if the instruction does not interfere with the carrier's normal business operation. Furthermore, since the right of control is conceived as a transferable right attached to the bill of lading, the implementation of the right of control may influence more than one cargo interest if the bill of lading serves a string sale. In this instance, it appears to be irrational that the instruction sent by the controlling party can be carried out without considering the potential impact on other cargo interests in subsequent cargo transactions because any wrongful alteration of the agreed delivery of goods may lead to frustration of the string sales that correlate with each other.⁷⁷ Such a consequence does not conform to the purpose of the Rotterdam Rules, which is to safeguard and facilitate the underlying transaction of goods.⁷⁸ In addition, the Rotterdam Rules provides that the carrier is protected by the limitation of liability provisions for loss or damage to the goods caused by failure to follow the instruction sent by the controlling party. At the same time, it does not allow the controlling party to benefit from the limitation of liability provisions when compensating the carrier for any cost, loss and damage arising from executing the controlling party's instruction. Such an arrangement is similar to that under the CIM, which may upset the balance of interest between the carrier and the controlling party.

Third, apart from the CMNI,⁷⁹ in conventions governing the non-sea carriage of goods the right of disposal is stipulated as a right to unilaterally modify the original contract of carriage. This means that the carrier is obliged to carry out the instruction regarding disposal of goods

⁷⁷ For example, in a string sale of goods, presuming that someone acquires the bills of lading by fraud and then surrenders the bills to the carrier for requiring the carrier to deliver the goods to a party other than the real buyer who has paid for the price, if the carrier executes such an instruction, not only the buyers' interest to the goods, but also the prospective onward sale will be prejudiced.

⁷⁸ Ziegler (n20) 277.

⁷⁹ The CMNI does not address that the carrier has an obligation to execute the instruction with respect to the right of disposal given by the shipper or the consignee.

sent by the consignor or the consignee. However, the unilateral character of the right of disposal is not stable. Under the Warsaw Convention and the Montreal Convention, if the parties to the contract of carriage agree to exclude or vary the provisions on the right of disposal, the consignor or the consignee will not be able to unilaterally vary the original contract of carriage. Such a position is also adopted by the Rotterdam Rules when providing for the right of control. In contrast, in the CMR and the CIM, the parties to the contract of carriage are not allowed to make any change in the provision covering the right of disposal. Therefore, the unilateral character of the right of disposal is firmly established in the two conventions. As can be seen from these conventions, although the right of disposal has commonly been recognized by the conventions governing non-sea carriage, the extent to which such a right can actually be exercised depends on the exact mode of transportation and the type of transport document employed. Given this, it seems impossible that the right of control provided by a convention governing sea carriage is able to harmonize the existing rules governing different modes of transportation and transport documents. In addition, in cargo transactions where bills of lading are involved, although the CISG confers the right of stoppage on the unpaid seller, in fact such a right can hardly be exercised when the bills of lading have already been transferred to the buyer. In such a situation, the carrier would be more willing to follow the instruction sent by the buyer who holds the original bill of lading so as to avoid the wrongful delivery.⁸⁰ As a result, the right of stoppage is now conceived as an outdated right in modern maritime trade as the seller may have alternative instruments to protect his interest in cargo trading, for example, by employing a L/C as payment method or by retaining the bill of lading until the full payment is received.⁸¹ These alternative instruments are based on the legal quality of the bill of lading as a document of title, which is believed to provide sufficient protection for the unpaid seller.⁸² In this sense, the right of control, which is supposed to facilitate the implementation of the right of stoppage in the trade law, appears to be superfluous. Therefore, whether in the sense of harmonizing the transport law or in the sense of facilitating the underlying transaction of goods, the practical value of the right of control provided by the Rotterdam Rules is not convincing.

⁸⁰ Once the bills of lading are transferred to a third party, normally the carrier will only follow the instruction given by the holder of the bill of lading, since the carrier is obliged to deliver the goods against presentation of at least one original of the bill of lading.

⁸¹ Pejovic (n67)158; see also Yang and Yang (n69) 75.

⁸² UNCTAD 'The Use of Transport Documents in International Trade' (2003) UNCTAD/SDTE/TLB/2003/3, 22.

As shown by the above comparisons, although the right of control was drafted with reference to the analogous rights provided by the existing transportation and trading conventions, there are significant differences between the right of control and those analogous rights. The analogous rights themselves also differ from each other. Such differences in nature are attributed to the specific features of the different modes of transportation and the different contractual nexus governed by each convention. In this sense, it can hardly be believed that the right of control provided by the Rotterdam Rules suffices to harmonize the diversity among the right of disposal, the right of stoppage and the right of control, although they may involve similar matters. Besides this, within the scope of sea carriage, the necessity of providing for the right of control in the situation where the bill of lading is issued is not convincing. As indicated in the conclusion of Chapter 5, normally its legal quality as a document of title would provide its holder with sufficient control over the goods, either in the sense of the law governing carriage of goods or in the sense of law governing underlying transaction of goods. Although the advocates of the right of control argue that providing for the controlling party would be helpful to the carrier in identifying who has the contractual relationship with him when the bills are in circulation,⁸³ such a consideration also seems unnecessary as carriers usually have their own solution to deal with the aforesaid issue. Normally, if a party notifies the carrier to dispose of the goods in a way different from the agreed carriage of goods, the carrier would require that party to surrender all original copies of the bill of lading to verify his identity.⁸⁴ Although this is also the requirement of exercising the right of control under the Rotterdam Rules, it is submitted that in current shipping practice such a requirement is based on the legal quality of the bill of lading as a document of title rather than the so-called right of control. Furthermore, the potential impact of the right of control on the carrier and the cargo interests are not considered to be on an equal footing. This may upset the balance of interest between the parties involved in the maritime trade. Taking all these findings into account, it is submitted that, at the level of international law, there is no need to alter the current bill of lading practice by introducing the right of control since such a right would add little value to the harmonization of the existing international rules on maritime trade.

⁸³‘Issues of Transport Law, Report of the fifth meeting’ (2001) CMI Ybk 265, 275.

⁸⁴ For example of such a practice, see 6.2.4.2 below.

6.2.4 Is the Right of Control Necessary to Improve China's Legal and Commercial Practice?

Although the right of control provided by the Rotterdam Rules may fail to harmonize relevant international rules, its potential impact on national laws remains unknown as it has not yet come into force. As a convention which is believed to represent the latest developments in shipping law, the right of control has created massive concern in both academia and the judiciary in China. As indicated by Chapter 3, the dominant view is that the right of control should be incorporated when reforming CMC 1992.⁸⁵ In this section, such a view is evaluated in relation to China's legal and the commercial environment.

6.2.4.1 Observations in Relation to Legal Aspect

There is no explicit rule which addresses the right of control under CMC 1992. However, a relevant provision can be found in the Contract Law 1999 which provides that:

Prior to carrier's delivery of the cargo to the consignee, the consignor may require the carrier to suspend the carriage, return the cargo, change the destination or deliver the cargo to another consignee, provided that it shall indemnify the carrier for any loss it sustains as a result.⁸⁶

Some similarities with the right of control can be found in this rule. First, by virtue of this rule, the suspension of carriage, return of goods, change of destination and consignee are the matters that are subject to the law governing contract of carriage.⁸⁷ This is also the case with the right of control under the Rotterdam Rules. Second, the change of destination and consignee mentioned by this provision would probably cause the variation of the original contract of carriage. A similar result would also arise when exercising the right of control. Third, similar to the requirement of exercising the right of control, Article 308 requires the consignor to indemnify the carrier for carrying out the instructions in respect of varying the agreed delivery of goods.

⁸⁵ See discussion in Chapter 3, 3.2.1 above.

⁸⁶ Contract Law 1999, art 308.

⁸⁷ This is because of the fact that Article 308 is under the governance of Chapter 17 'Contract of Carriage' in Contract Law 1999.

Notwithstanding the similarities, one significant difference with the right of control is that Article 308 merely addresses that the consignor ‘may’ instruct the carrier to vary the agreed delivery of goods and does not mention whether the carrier shall execute such an instruction. In contrast, under the Rotterdam Rules, the carrier is obliged to carry out the instruction if the conditions stipulated by the Convention are fulfilled. The legislative intention behind Article 308 appears to be to allow the carrier to decide whether to follow the instruction at his discretion. Relevant evidence can also be found in existing judicial practice. In *Mingxing Co., Ltd. v Wanhai Shipping Co., Ltd.*,⁸⁸ the court interpreted Article 308 by comparing it with Article 89 of CMC 1992. The latter clearly indicates that the carrier shall ‘be entitled to’ discharge the goods at a place instead of the original destination if the goods cannot be discharged at that destination due to *force majeure* or any other causes not attributable to the fault of the carrier or the shipper. Noting the difference between the phrase ‘may’ and ‘be entitled to’, the Court stated that under Article 308 of Contract Law 1999 the extent to which the consignors’ request to vary the original carriage can be executed is subject to mutual consent of the consignor and the carrier. In contrast, under Article 91 of CMC 1992 the carrier is entitled to unilaterally vary the place to discharge the goods. Therefore, current Chinese law does not allow the contract of carriage to be unilaterally modified by the cargo interest as the Rotterdam Rules does.

Another difference between Article 308 and the right of control under the Rotterdam Rules is that the consignor’s rights under Article 308 appear to be non-transferable. This is evidenced by the verdict of the Higher People’s Court of Guangdong Province in *Heilongjiang Export and Import Co., Ltd v Brilliant Logistic Group Inc. and others.*⁸⁹ In the final instance of the case, the Court held that the carrier (Brilliant Logistic Group) was legally entitled to deliver the goods to the party which presented the original bill of lading, regardless of the shipper’s instruction to make delivery to another party.⁹⁰ Such a judgment indicates that the implementation of Article 308 should not interfere with the presentation rule in delivery of goods. Furthermore, the Court stated that the ‘consignee’ mentioned by Article

⁸⁸ Shanghai Maritime Court, No. Huhaifashangchuzi 567/2004 <<http://www.110.com/panli/28486.html>> accessed 04 June 2017.

⁸⁹ The Higher People’s court of Guangdong Province, No. Yuegaofaminsizhongzi 75/2002.

⁹⁰ *ibid.*

308 only referred to the consignee named on a non-transferable shipping document such as the straight bill of lading.⁹¹ By its nature, such a statement excludes the applicability of Article 308 to the situation where the transferable bills of lading (order bills or bear bills) are issued, whilst also denying that the rights under Article 308 can be transferred as the right of control under the Rotterdam Rules.

As shown from current legislation and judicial practice in China, it may be more accurate to understand the cargo interests' request to vary the agreed carriage of goods as an offer subject to the carrier's consent rather than a legal right that can be exercised unilaterally. Also, in judicial practice, Chinese courts are reluctant to uphold such a request under the circumstances where the transferable bill of lading is issued and has been transferred to a third party to the original contract of carriage. Given this, the right of control does not appear to fit neatly into China's legal environment.

6.2.4.2 Observations in relation to Commercial Aspect

In China, FOB sales account for a large proportion of China's exporting trade.⁹² CMC 1992 also gives specific protection to the FOB seller. According to Article 42, the FOB seller who actually performs the shipper's duty may acquire the legal status of 'shipper' even though he was not a party that concluded the contract of carriage with the carrier.⁹³ By virtue of such a legal status, the FOB seller is entitled to require the carrier to issue the bills of lading to him and instruct the carrier to deal with the goods as a contracting shipper. However, such a position may be undermined under the Rotterdam Rules. First, the definition of 'shipper' under the Rotterdam Rules only refers to the party 'that enters into a contract of carriage with a carrier',⁹⁴ which means that the FOB seller is not able to acquire the legal status of 'shipper' automatically. To step into the shipper's shoes, the FOB seller has to obtain the shipper's

⁹¹ *ibid.*

⁹² Liying Zhang, *The Influence of the Rotterdam Rules on China's import and export* (1st edn, China University of Political Science and Law Press 2013) 132; See also the statistic issued by World Trade Organization: WTO Database, 'Trade Profile of China' <<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>> accessed 07 June 2017.

⁹³ CMC 1992, art 42.3 (b) "Shipper" means: the person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.'

⁹⁴ Rotterdam Rules, art 1.8.

consent to be named in the transport document as a ‘documentary shipper’.⁹⁵ Second, even though he has been invested with the legal status of ‘documentary shipper’, the FOB seller does not necessarily become the controlling party who is entitled to the right of control.⁹⁶ To exercise the right of control, the FOB seller should obtain the shipper’s permission to designate himself as a controlling party while at the same time procure the bill of lading from the carrier.⁹⁷ Only if all the aforesaid requirements are met does the FOB seller fall into the category of ‘holder’ stipulated by the Rotterdam Rules, thus acquiring the right of control to dispose of the goods. The aforesaid procedures by which the FOB seller can obtain the right to dispose of the goods is far more complicated than under CMC 1992. It is therefore doubtful whether the new scheme would be accepted by Chinese traders. In an investigation on Chinese traders’ attitude to the application of the Rotterdam Rules, 63 percent argued that the provisions with respect to the right of control were more favourable to the buyer than the seller in the FOB sale. They believed that these provisions would undermine FOB sellers’ position in export trade and increase sellers’ risk of not being able to collect payment.⁹⁸

For the carrier, the change of the agreed delivery may result in the modification of the bill of lading or a switch of the bill of lading. In shipping practice, carriers are not always willing to execute the cargo interests’ instruction in this respect. Accordingly, carriers usually set restrictions to such instructions. Evidence for this can be found in the Bill of Lading Manual (the Manual) issued and used by China COSCO Shipping Corporation Limited (COSCO).⁹⁹

⁹⁵ Rotterdam Rules, art 1.9. See also Zengjie Zhu, Huanning Wu, Yongjian Zhang and Yu Guo, *Lutidan Guisze Shiyi [understanding Rotterdam Rules (author’s translation)]* (1st edn, China Commerce and Trade Press 2011) 16.

⁹⁶ Rotterdam Rules, art 51.3 (a). ‘When a negotiable transport document is issued: the shipper or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party.’

⁹⁷ Rotterdam Rules, art 1.10.

Holder means (a) a person that is in possession of a negotiable transport document; and (i) 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; (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof.’ art 35 ‘Unless the shipper and carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper’s position (b) An appropriate negotiable transport document...

⁹⁸ Zhang (n92)132.

⁹⁹ The Bill of lading Manual is a guidance for the employees of COSCO to manage the bill of lading for their clients. Although this is not a legal work, as China’s largest shipping company, COSCO’s commercial mode and the relevant corporate documents are usually viewed as a standard model for other Chinese shipping companies. The author accessed the Manual when doing the internship in COSCO, and acquired the permission for reference of the Manual for this study only.

As to the modification of bills of lading,¹⁰⁰ the Manual indicates that only the shipper is allowed to raise such a request. Such a request would only be considered by COSCO in the event that the shipper surrenders all original copies of the bill of lading, pays the commission charge, and submits written consent issued by the authorized agent if the space was not booked directly from COSCO.¹⁰¹ The Manual goes on to state that the request will not be considered if it is put forward by a holder of the bills of lading who was not party to the original contract of carriage.¹⁰² As to the switch of the bill of lading,¹⁰³ the Manual states that the carrier is not obliged to perform this even though the carrier may agree to do so at his own discretion.¹⁰⁴ Meanwhile, the Manual indicates that any variation on the description of goods and the port of discharge other than the scheduled port is not permitted.¹⁰⁵ In the situation where an order bill of lading is issued, the request to switch the bill of lading may be raised by the shipper, the holder to whom the bill of lading is duly endorsed, or the notify party.¹⁰⁶ When raising such a request, the aforesaid parties shall surrender all original copies of the bill of lading to the carrier and provide the carrier with relevant security.¹⁰⁷ From the aforesaid rules, it can be seen that COSCO is cautious about any modification to the original delivery of goods regardless of whether it constitutes a variation of the contract of carriage. The request that can be raised by the holder in this respect is very limited and is subject to stricter scrutiny by the carrier. More importantly, COSCO highlights that it is under no obligation to accept and execute the foregoing requests. As shown from COSCO's experience, the request to change the original delivery of goods is neither a contractual entitlement that can be exercised unilaterally by the relevant cargo interest nor a right that can be transferred through the bill of lading. Such a position is significantly different from the right of control. As such, the carrier would have an additional obligation imposed upon him in respect of delivery if the Rotterdam Rules were incorporated into Chinese law in the future.

¹⁰⁰ According to the Manual, the modification may involve variation of the following matters: the port of discharge, the shipping mark, the cargo name, the quantity of goods, the package of the goods, and condition with respect to delivery of goods and other clauses related to the carrier's interest. The Manual, 16.

¹⁰¹ The Manual, 16.

¹⁰² *ibid.*

¹⁰³ As indicated by the Manual, the switch bill of lading is usually requested in the event of variation of the original shipper, consignee, notify party, place of issue, port of discharge, port of loading, and other substantial issues in relation to the delivery of goods. Any variation in relation to the description of goods will not be accepted. The Manual, 6.

¹⁰⁴ The Manual, 6.

¹⁰⁵ The Manual, 6-7.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

As shown from the observations above, in China's legal and commercial practice the instructions sent by cargo interests to vary the original arrangement of cargo transportation have never been deemed to be a right that can be transferred through the bill of lading and neither can the variation be enforced unilaterally by those cargo interests. Such a result significantly differs from the right of control provided by the Rotterdam Rules. Besides this, the right of control may prejudice both the Chinese exporters' interest and the carriers' interest, which will damage the balance of interest between the two interest groups. Therefore, similar to the conclusion arrived at in relation to the international conventions, the right of control provided by the Rotterdam Rules would not be a positive way to improve current bill of lading practice under Chinese law.

6.3 Is the Right of Control Necessary to the Application of Electronic Bills of Lading?

The discussion in 6.2 has shown that the right of control may not achieve its expected effect in improving current practice through the paper bill of lading. However, it has been asserted that such a right is helpful to smooth the forthcoming paperless trading in which the electronic bill of lading will be used as a substitute for the paper bill.¹⁰⁸ Whether this is true is examined from both the legal perspective and the practical perspective below.

6.3.1 The Implications of the CMI Rules for the Legal Effect of Electronic Bill of Lading

Nowadays, it is acknowledged that the electronic bill of lading has to fulfil two requirements to be widely accepted by the market. First, the electronic bill must achieve functional equivalence to the paper bill of lading; second, the effect of the electronic bill of lading must be legally recognized.¹⁰⁹ A pilot legislative attempt to fulfil these requirements is the CMI

¹⁰⁸ According to the CMI Yearbook, 'there was broad support for addressing many of the issues raised in chapters 10 (Right of Control) of the draft Outline Instrument, particularly in view of the e-commerce implications of the subject.' 'Issues of Transport Law, Report of Committee A' (2001) CMI Ybk182, 186. One of the drafter Prof. Van Der Ziel also highlighted the importance of the right of control to the e-commerce by arguing that 'electronic commerce systems will not work unless clear rules exist to address the right of control.' He believed that 'diluting the right of control would be very short-sighted.' See 'Issues of Transport Law, Report of the Sixth Meeting' (2001) CMI Ybk 305, 354.

¹⁰⁹ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010)166.

Rules for Electronic Bills of Lading (CMI Rules).¹¹⁰ It should be noted that the term ‘right of control’ is employed by the CMI Rules. Such a right is vested in the holder of an electronic ‘private key’,¹¹¹ which allows the holder to:

- 1) claim delivery of the goods; 2) nominate the consignee or substitute a nominated consignee for any other party, including itself; 3) transfer the Right of Control and Transfer to another party; 4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.¹¹²

It appears that the first paragraph on ‘claim delivery of the goods’ attempts to make the electronic bill of lading achieve the same effect as the bill of lading does as document of title in delivery of goods.¹¹³ For the second paragraph, it is identical to the current practice of transferring the paper bill of lading which aims to change and determine the final receiver of goods.¹¹⁴ The fourth paragraph is similar to the first instance provided by the right of control under the Rotterdam Rules, which allows the holder of paper bills of lading to instruct the carrier to deal with the goods, provided that such instructions do not alter the agreed contract of carriage. Such a phenomenon is not alien to current bill of lading practice.¹¹⁵ As can be seen above, the substantial matters covered by the right of control under the CMI Rules do not go beyond the contractual effect of the traditional paper bill of lading. In addition, the third paragraph indicates that the right of control under the CMI Rules is transferable, which is a restatement of the traditional function of the bill of lading in transferring contractual effect in an electronic environment.

In general, the right of control provided by the CMI Rules merely reflects current practice with respect to the transfer of contractual rights through the paper bill of lading and does not introduce any extraordinary right beyond the original contract of carriage, whereas this is not

¹¹⁰ CMI Rules for Electronic Bills of Lading, adopted by the Comité Maritime International (International Maritime Committee or CMI) in June 1990. The CMI Rules have no mandatory force and only be applicable to the contract of carriage if the parties to the contract intend so. See CMI Rules, art 1.

¹¹¹ CMI Rules, art 2f. “Private Key” means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission.’ Under the CMI Rules, the function of a paper bill of lading is achieved in the electronic environment by using the private key and the receipt message. See Miriam Goldby, ‘The CMI Rules for Electronic Bills of Lading reassessed in the light of current practices’ [2008] LMCLQ 56, 58.

¹¹² CMI Rules, art 7a.

¹¹³ The effect of bill of lading as document of title in delivery of goods is discussed in Chapter 5, 5.2.1.1 and 5.2.3 above.

¹¹⁴ Zhao (n7) 400.

¹¹⁵ *ibid.*

the case as to the right of control provided by the Rotterdam Rules. Under the Rotterdam Rules, such a right to a large extent is provided as a right to unilaterally vary the original contract of carriage rather than a right under the contract of carriage. Given that, although it is said that the Rotterdam Rules was drafted by referencing the CMI Rules, it goes further beyond the scope of the CMI Rules which merely copy the contractual effect of paper bills of lading. In this sense, the right of control provided by the Rotterdam Rules does not coincide with the general principle of making the electronic bill of lading functionally equivalent to its paper counterpart.

6.3.2 The Implications of the Bolero System for the Legal Effect of Electronic Bill of Lading¹¹⁶

In contemporary maritime trade, the most successful business mode for using the electronic bill of lading is the Bolero system, which was designed as a neutral and closed platform which establishes a transferable contract between cargo interest and carrier. The contractual relationship between the parties is stipulated by the Bolero Rulebook.¹¹⁷ By enrolling in the Bolero system, every user is deemed to be bound by the Rulebook¹¹⁸ and agrees to the validity of the electronic message issued under the Bolero system.¹¹⁹ This thereby provides a contractual basis for application of the electronic bill of lading. According to the Rulebook, the electronic bill of lading which is based on the electronic message sent by the carrier (except for the message sent by him as a chartered bill of lading) is the so-called Bolero Bill of Lading (BBL). The BBL shall 'include an acknowledgement by the carrier of the receipt of goods shipped on board a vessel or received for shipment by that carrier; and contain or

¹¹⁶ The Bolero was set up by the Society for Worldwide Interbank Financial Telecommunication (SWIFT) and the Through Transport Mutual Insurance Association (TT Club) in 2000. Under the system, the electronic bill of lading (BBL) can be issued and transferred by the Bolero Core Messaging Platform (BCMP) and the Bolero Title Registry (BTR). How the BBL works under Bolero can be summarized as follow:

The carrier transmits a message to the BCMP requesting the issue of a BBL to the shipper. Once the parties' identities have been verified, the BCMP will issue a BBL to the shipper and a confirming message to the carrier. The shipper's legal title to the cargo is registered in the BTR. When the shipper wants to transfer the BBL to a third party, he must do so by sending a message through the BCMP, which verifies authenticity through the shipper's signature and through BTR records. The system therefore allows the person with constructive possession of goods on board a ship to transfer these rights to other members of the system and updates the BTR records accordingly.

See Miriam Goldby, *Electronic documents in maritime trade: law and practice* (1st edn, Oxford University Press, 2013) 298-99.

¹¹⁷ *ibid.*

¹¹⁸ Bolero Rulebook, 1st edn 1999, Bolero International Ltd, art 2.1.2 (1).

¹¹⁹ Bolero Rulebook, art 2.2.2, 2.2.3.

evidence the terms of the contract of carriage'.¹²⁰ The Rulebook also provides that the BBL should be duly surrendered when claiming delivery of goods.¹²¹ Furthermore, the legal effect of BBL can be transferred through novation.¹²² The aforesaid rules suggest that the BBL is a transferable electronic record that can be deemed as receipt of goods, evidence of contract of carriage and document of title. In this sense, the BBL is able to perform a similar function to the paper bill of lading. On this point, the Bolero Rulebook provides a detailed list of the power vested in the parties to the contract contained in or evidenced by a BBL.¹²³ According to the list, the shipper and the holders (includes the holder to order, the pledgee holder, the bearer holder, the holder and the consignee holder) are entitled to request amendment of the contract of carriage contained in or evidenced by the BBL. A noticeable difference with the Rotterdam Rules is that under the Rulebook such a request is subject to the consent of the carrier. As illustrated by the list, the carrier may either grant amendment or deny amendment,¹²⁴ while under the Rotterdam Rules the carrier is obliged to execute the amendment required by the shipper or the holder, whoever is the controlling party.¹²⁵ This means that the Bolero Rulebook does not provide the request of amendment as an entitlement that can be unilaterally exercised by the relevant cargo interest as under the Rotterdam Rules. Therefore, although the drafter of the Rotterdam Rules asserted that the introduction of the right of control was in line with the operation of Bolero,¹²⁶ in fact the right of control which involves the variation of the contract of carriage has not been recognized in the Bolero system.

6.3.3. The Implications of the ESS-Databridge for the Legal Effect of Electronic Bill of Lading¹²⁷

Recently, another paperless trading mode, the ESS-Databridge, which benefited from the experience of the Bolero system, has gained increasing popularity in both developed nations

¹²⁰ Bolero Rulebook, art 3.1 (1).

¹²¹ Bolero Rulebook, art 3.6 (1).

¹²² Bolero Rulebook, art 3.5.

¹²³ According to the Rulebook, the BBL either contains or evidences the terms of the contract of carriage. See art 3.1 (1) (b). For the full list of the powers mentioned herein, see Bolero Rulebook, article 3.8.

¹²⁴ Bolero Rulebook, art 3.8 (1).

¹²⁵ *ibid.*

¹²⁶ 'Issues of Transport Law, Report of the fifth meeting' (2001) CMI Ybk 265, 277.

¹²⁷ The ESS-Databridge is founded by a company called 'ESS-Databridge Exchange Limited (ESS)' in 2003. The system offers 'Cargo Docs' service which governs all important documents in cargo shipping. The service is running by requiring username, a password, and a token as authentication when logging into the system. With such requirement, any key operation of the electronic documents, for instance, the issuance and transfer of the electronic bill of lading, can be carried out under the system. See Miriam Goldby, *Electronic documents in maritime trade: law and practice* (1st edn, Oxford University Press, 2013) 300-01.

and emerging markets.¹²⁸ Similar to the Bolero system, the ESS-Databridge is designed as a closed system which is open only to its members who signed the Databridge Services and Users Agreement.¹²⁹ An electronic bill of lading issued under the system is deemed a fully functional equivalent to the paper bill of lading with the legal effect of a receipt of goods, evidence of the contract of carriage and document of title.¹³⁰ These effects can be transferred from one cargo interest to another by attornment and novation.¹³¹ More importantly, the ESS-Databridge highlights that the electronic bill of lading can be reviewed and changed under the system.¹³² The operations in this respect can be summarized as ‘return, endorse, produce, amend and convert to the paper format’.¹³³ As to ‘amend’, although the procedure and the extent to which the amendment is allowed remains confidential to ESS,¹³⁴ there is no doubt that the amendment is subject to the ‘consent of the shipper and the carrier’.¹³⁵ This means that the amendment of the electronic bill of lading under the ESS-Databridge, for instance, the amendment of the place of delivery or the person to whom the delivery is to be made, is not considered as a right that can be unilaterally implemented by the cargo interest. Compared to the practice of the traditional paper bill of lading, the position remains unchanged, while it is different to that under the Rotterdam Rules which establishes rules on the right of control to govern the matters regarding such an amendment. As illustrated by an earlier comment on the amendment under the ESS-Databridge, ‘to the extent that the ESS-Databridge copes with such problems, it will merely recreate the paper world, with similar problems.’¹³⁶ This exactly explains the position of ESS-Databridge on the amendment of the electronic bill of lading: since the amendment has never been deemed a unilateral right of the cargo interest, neither should it be in the electronic environment.

On balance, the discussion in 6.3 reveals that the extent of the right of control under the

¹²⁸ Miriam Goldby, *Electronic documents in maritime trade: law and practice* (1st edn, Oxford University Press, 2013) 304.

¹²⁹ Nicolas Gaskell, ‘Bills of Lading in an Electronic Age’ [2010] LMCLQ 233, 261.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Gaskell (n129) 264.

¹³³ Gaskell (n129) 261. For detailed procedure of transfer the electronic bill of lading under the ESS-Databridge, see Nicolas Gaskell, ‘Bills of Lading in an Electronic Age’ [2010] LMCLQ 233, 262, Miriam Goldby, *Electronic documents in maritime trade: law and practice* (1st edn, Oxford University Press, 2013) 303.

¹³⁴ *ibid.*

¹³⁵ Goldby (n128) *Electronic documents in maritime trade: law and practice* (1st edn, Oxford University Press, 2013) 302.

¹³⁶ Gaskell (n129)261. See also Liang Zhao, ‘Control of Goods Carried by Sea and Practice in E-Commerce’ [2013] JBL 585, 597.

Rotterdam Rules is broader than that provided by the current legal and commercial framework for electronic bills of lading. Such an expansion of the latter appears to be unnecessary as the prevailing commercial models for the electronic bill of lading, the Bolero and the ESS-Databridge, show that the legal recognition of the legal effect of the electronic bill of lading only needs to mirror the effect of the paper bill of lading. This means that if the issue remains untouched by the rules on the paper bill of lading, it would be better to keep the *status quo* when envisaging the rules providing for the electronic bill of lading. In this sense, when an electronic bill of lading is issued, the two essential matters covered by the right of control under the Rotterdam Rules, the change of the place of delivery and the change of consignee, should still depend on mutual consent of the carrier and the relevant cargo interest as when a paper bill of lading is issued. As a result, no matter whether in the legislative sense or practical sense, the right of control provided by the Rotterdam Rules is not necessary when ruling the electronic bill of lading.

In China, similar to the international approach, the purpose of ruling the legal effect of the electronic bill of lading is to make the electronic bill achieve the same legal effect as its paper counterpart.¹³⁷ As indicated in 6.2.4.1, the amendment of the contract of carriage contained in or evidenced by the paper bill of lading should not be a right that can be unilaterally enforced by the relevant cargo interest. Such a position should be maintained if paper bills are substituted by their electronic equivalent. In this sense, there is no urgent need to incorporate the Rotterdam Rules on right of control when reforming CMC 1992 to pave the way for the application of electronic bills of lading.

6.4 What Provisions does a Future Chinese Maritime Law need to Provide?

The discussion so far has suggested that the Rotterdam Rules on the right of control are superfluous to bill of lading practice. However, in commercial practice, it is common that the cargo interest instructs the carrier to vary the original arrangements of carriage after the start of the voyage. Under current Chinese law, the only relevant rule in this regard is Article 308

¹³⁷ Yu Guo, *Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—The theory and practice in China (author's translation)]* (2nd edn, Peking University Press 2005) 177.

of the Contract Law 1999, which is drafted in a very loose way. Literally, Article 308 applies to all types of cargo transportation rather than specifically targeting carriage of goods by sea. In other modes of cargo transportation, normally the transport document is not as transferable as the ocean bill of lading.¹³⁸ Therefore, it is not surprising to see Chinese courts construe that Article 308 is only applicable to sea carriage where non-transferable documents, for example, waybills or straight bills of lading, are issued.¹³⁹ For sea carriage where an order or bearer bill of lading is issued, especially when the bills of lading are transferred to a person who is a third party to the contract of carriage, how to deal with the request to change the original arrangement of delivery is outside the scope of the governance of current law. If such a situation were to continue, a similar problem would probably arise when the electronic bill of lading is widely applied in the future. This therefore imposes the task of providing a solution to this on Chinese maritime law reform. There is greater clarity on this point in English and American law so these are reviewed below in order to draw inspiration for the task facing Chinese law.

6.4.1 The Right to Redirect Goods under English Law

English law does not employ the term ‘right of control’ to describe the cargo interests’ instruction to alter the original arrangement on delivery of goods. However, an analogous concept, the ‘right to redirect the goods’ which involves the alteration of the identity of the consignee, can be found in common law practice. Such a right enables the shipper of a bill of lading to redirect the cargo to a person other than the originally designated consignee.¹⁴⁰ A typical example of implementation of such a right is found in *Mitchell v Ede*.¹⁴¹ In this case, the shipper was held to be entitled to endorse the bill of lading to a party other than the original consignee named on the bill of lading. In so doing, the court held that it was the endorsee rather than the original consignee who was entitled to receive the goods. The reasoning given by Lord Denman was as follows:

As between the owner or shipper of the goods and the captain it [the bill of lading] fixes and determines the duty of the latter as to the person to whom it is (at that time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his

¹³⁸ See discussion in 6.2.2 above.

¹³⁹ See discussion in Chapter 5, 5.2.4.1 above.

¹⁴⁰ Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) 20.

¹⁴¹ (1840) 11 Ad & El 888.

purpose, at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it, and may order the delivery to be to some other person, to B instead of A.¹⁴²

This statement clearly indicates that the shipper/owner of the goods is free to change the final receiver of the goods before the delivery of goods or delivery of the bill to the party who was originally named in the bill. Such a principle was affirmed in the later case *Elder Dempster Lines v Zaki Ishag (The Lycano)*.¹⁴³ In this case, the shipper, who was also the seller in the sale contract, was held to be entitled to redirect the goods from the buyer who was named as the consignee on the bill of lading to a bank by endorsement of the bill as a pledge.¹⁴⁴

Besides the general principle above, common law has developed a condition to limit the implementation of the right to redirect goods. This was shown by the extraordinary facts of the case *Mitchell v Ede*.¹⁴⁵ In this case, the shipper owed a debt to the shipowner before arranging the cargo carriage. Notwithstanding, Lord Denman noted that the shipper's intention to load the goods on the shipowner's vessel was not for the purpose of offsetting the debt owed to the shipowner but rather for the normal purpose of cargo transportation.¹⁴⁶ Also, the carrier in this case was held to be the captain rather than the shipowner.¹⁴⁷ Given this, neither the carrier nor the shipowner in this case had interest in delivery of the goods to the original consignee, and thereby they were not entitled to reject the shipper's instruction to deliver the goods to another party.¹⁴⁸ An implication of this is that the redirection of goods might not be allowed were the carrier able to prove that he had interest in delivering the goods to the originally designated consignee. In this sense, the right to redirect goods does not constitute a right that can be unilaterally exercised by the shipper.

At common law, because of the doctrine of privity of contract, the right to redirect is always vested in the shipper and cannot be transferred with the bill of lading to a third party.¹⁴⁹ It is argued that such a position may have been changed after the enactment of COGSA 1992

¹⁴² *ibid* 903.

¹⁴³ [1983] 2 Lloyd's Rep 548 (QB).

¹⁴⁴ *ibid* 550.

¹⁴⁵ (1840) 11 Ad & El 888.

¹⁴⁶ *ibid* 905.

¹⁴⁷ *ibid*. In this case, the shipowner is named as consignee rather than carrier.

¹⁴⁸ *ibid*.

¹⁴⁹ At common law, the consignee is still a third party to the original contract of carriage even though the bills of lading is transferred to him. See Treitel and Reynolds (n140)23.

which allows the holder of a bill of lading to step into the shoes of the shipper.¹⁵⁰ According to COGSA 1992, the holder is entitled to ‘all rights of suit under the contract of carriage as if the holder had been a party to that contract’.¹⁵¹ Although the right to redirect goods is not expressly indicated by the provision, it is argued that the wording here is wide enough to accommodate the right to redirect goods.¹⁵² Consequently, under current English law, the right to redirect goods in theory could be deemed as a transferable right carried by the order or bearer bill of lading.

In general, compared to the right of control under the Rotterdam Rules, the right to redirect goods under English law is less regulated and many details are left to the custom of merchants and freedom of contract.¹⁵³ Notwithstanding, a basic principle for exercising such a right is established under common law and the transferability of such a right is implied by COGSA 1992. Besides this, English law underlines that the carrier’s interest in delivery of goods shall not be prejudiced as otherwise the carrier may reject the redirection of the goods. This in fact denies that the right to redirect goods can be unilaterally exercised by the shipper or the holder of the bill of lading. Such a result secures the balance of interest between the carrier and the cargo interest. More importantly, the right to redirect goods only refers to variation of the person to whom the delivery is to be made although sometimes such a variation may also lead to variation of the place of delivery. However, as to the latter, English law usually shows a restrictive attitude. This is because variation of the place of delivery may easily cause the deviation, which would make the carrier breach his duty under the contract of carriage.¹⁵⁴

¹⁵⁰ COGSA 1992, s 2 (1) (a).

¹⁵¹ *ibid.*

¹⁵² Treitel and Reynolds (n140) 23; see also Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, *The Rotterdam Rules-a practical annotation* (1st edn, Informa 2009) 164.

¹⁵³ For example, in maritime practice, when the shipper or the holder instructs the carrier to redirect the goods to a party other than the consignee named on the bill of lading, they would surrender all original copies of the bill of lading to the carrier and may also request the carrier to switch the bill of lading. Such operations are not provided by law, but rather, a custom of merchants. Also, in which way the switched bill of lading are re-issued is usually subject to the agreement between the carrier and the cargo interest.

¹⁵⁴ Under English law, the carrier’s duty of avoiding deviation had its origins in bailment. At common law, the deviation is only allowed if it is to save life at sea. If Hague Rules or Hague-Visby Rules applies, the deviation may be permitted either for saving life or for saving property or for any other reasonable excuse. Besides that, the deviation may also be allowed if the contract of carriage contains a clause which expressly indicates that the carrier is entitled to do so. Except for the situations above, the deviation is strictly forbidden. See Paul Todd, *Principles of the carriage of goods by sea* (1st edn, Routledge 2016) 71.

6.4.2 The American Approach

In American law, the issues with respect to variation of the contract of carriage evidenced in or contained by a bill of lading are explicitly addressed by UCC. Under UCC, these issues are summarized as ‘diversion, reconsignment and change of instructions’.¹⁵⁵ The wording here suggests that the scope of variation under UCC is much wider than under English law, while being very close to that under the Rotterdam Rules. On the carrier’s legal status when facing the cargo interests’ requirement to vary the original arrangement of cargo transportation, UCC provides that:

unless the bill of lading otherwise provides, a carrier MAY deliver the cargo to a person or destination other than that stated in the bill or MAY otherwise dispose of the goods, without liability for misdelivery, on instructions from the holder of a negotiable bill¹⁵⁶

From this rule, it can be seen that UCC does not impose any obligation on the carrier to execute the diversion, reconsignment or other instructions about disposal of goods; conversely, this rule underlines that the carrier is free to decide whether to do so. In addition to the holder of a negotiable bill of lading, §7-303 provides a list of parties from whom the carrier may seek the instruction on delivery of goods.¹⁵⁷ It is submitted that such a rule would be particularly helpful to the carrier when the goods are not able to be delivered as per the original arrangement of carriage for reasons not attributable to the carrier’s fault, for instance, if no one claims delivery when the goods arrive at the destination. Under such circumstances, §7-303 gives the carrier an option to discharge the obligation of delivery by delivering the goods to another party and/or discharging the goods at another destination as per the instruction sent from the party provided by the law.¹⁵⁸ In this sense, §7-303 protects carriers’ lawful right in delivery of goods. Such a position is different from right of control under the Rotterdam Rules which obligates the carrier to execute the controlling party’s instruction if the conditions required by the rules are fulfilled.¹⁵⁹ It is also different from English law which requires the carrier to prove his interests in delivering the cargo to the original consignee or

¹⁵⁵ UCC, §7-303.

¹⁵⁶ UCC, §7-303 (a) (1).

¹⁵⁷ UCC, §7-303 (a) (2) (3) (4). These parties include ‘the consignor on a nonnegotiable bill, the consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, the consignee on a nonnegotiable bill if the consignee is entitled as against the consignor to dispose of the goods.’

¹⁵⁸ Zhao, ‘The right of control in carriage of goods’ (n7) 413.

¹⁵⁹ For the right of control under the Rotterdam Rules, see discussion in 6.2.1 above.

otherwise the carrier may not be allowed to reject the instruction of redirection of the goods sent by the shipper or the holder.¹⁶⁰ In sum, the issues regarding ‘diversion, reconsignment and change of instructions’ under American law are subject to the mutual consent of both the cargo interest and the carrier rather than a unilateral decision made by the cargo interest. More importantly, it may be said that §7-303 was drafted from the perspective of protecting the carrier from wrongful delivery rather than the perspective of conferring the right to vary the original contract of carriage on certain cargo interest.

Another noticeable implication of §7-303 is that this rule works coherently with the rules providing for the right of stoppage under UCC.¹⁶¹ According to §2-705(2), an unpaid seller may exercise the right to stop delivering the goods to the buyer before ‘negotiation to the buyer of any negotiable document of title covering the goods’.¹⁶² This rule draws a clear line between the application of trade law on the right of stoppage and the application of shipping law on the diversion, reconsignment or other disposal of goods. As to the right of stoppage, they are only valid between the seller (consignor/shipper)¹⁶³ and the buyer (consignee)¹⁶⁴ before negotiation of the bills of lading. If the carrier follows the seller’s instruction to stop the delivery and/or send the goods back to the seller, the buyer may seek remedy against the seller on the basis of the sale contract.¹⁶⁵ As a result, the interest of each party, either in the sale contract or in the contract of carriage, would be protected. The situation would be slightly different if the bills of lading were negotiated to the buyer. In such instances, the person who is entitled to instruct the carrier to dispose of the goods is the buyer or the sub-buyer. The carrier will be protected by the rules governing ‘diversion, reconsignment or other disposal of goods’ if he follows the instructions sent by the buyer who holds the bill of lading, whereas the seller will no longer be able to benefit from the rules on the right of stoppage though he may claim indemnity from the buyer for reasons based on the sale contract. On balance, the parties under the sale contract and contract of carriage are all able to access the remedy. Such a consequence reflects a consideration on the balance of interest in a comprehensive context

¹⁶⁰ For the right to redirect goods under the English law, see discussion in 6.4.1 above.

¹⁶¹ Zhao (n7) 413.

¹⁶² UCC, §2-705 (2) (d).

¹⁶³ UCC, § 7-102 ‘(4). “Consignor” means a person named in a bill of lading as the person from which the goods have been received for shipment.’ ‘(12) “Shipper” means a person that enters into a contract of transportation with a carrier.’

¹⁶⁴ UCC, § 7-102 ‘(3). “Consignee” means a person named in a bill of lading to which or to whose order the bill promises delivery.’

¹⁶⁵ American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code, 1962 official text, with comments* (Philadelphia, 1963) 503.

which integrates the transaction of goods with the carriage of goods in its entirety. More importantly, such a consideration does not violate the privity of each contract governing the aforesaid two fields. In this way, the practical value of the bill of lading, both in cargo transaction and in delivery of goods, is well preserved under UCC.

Although UCC does not use the concept ‘right of control’ to describe the matters covered by §7-303, the notion of ‘control’ does appear in a series of provisions on the electronic bill of lading. A typical example is §7-106 which recognizes a person’s control of an electronic document of title ‘if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred’.¹⁶⁶ The section subsequently indicates the ways in which the electronic document shall be ‘created, stored, and assigned’ so as to constitute the aforesaid ‘control’.¹⁶⁷

- (1) a single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
- (2) the authoritative copy identifies the person asserting control as: (A) the person to which the document was issued; or (B) if the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;
- (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- (4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.¹⁶⁸

¹⁶⁶ UCC, §7-106 (a).

¹⁶⁷ UCC, §7-106 (b).

¹⁶⁸ *ibid.*

It is argued that the ‘control’ used herein is equal to the status of possession and endorsement of a paper bill of lading.¹⁶⁹ Also, the wording of ‘control’ here highlights the singularity and the exclusivity of the access to the electronic bill of lading.¹⁷⁰ In this sense, the notion of ‘control’ in substance merely replicates the legal effect of the paper bill of lading as document of title in the electronic environment. According to UCC, ‘document of title’ includes:

bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.¹⁷¹

Although the electronic bill of lading is not expressly mentioned, it should be covered by ‘any other document’ stipulated by this provision.¹⁷² In this sense, UCC recognizes the legal effect of the electronic bill of lading as a document of title. Further evidence in this respect can be found in the provision governing the due negotiation of an electronic bill of lading. According to §7-501(b)(2), ‘if the document’s original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated’.¹⁷³ By comparing this provision with §7-501(a)(3) which provides for the due negotiation of a paper bill of lading,¹⁷⁴ it can be observed that the two rules were drafted in a quite similar way and the only difference is that where a negotiable electronic bill of lading is involved, the named person should have ‘control’ of the electronic bill so as to acquire the rights arising from due negotiation, whereas where a paper bill of lading is involved, the bill of lading shall be ‘delivered’ to the named person so as to complete the due negotiation. As defined by UCC, the ‘delivery’ of the document means the ‘voluntary transfer of possession’ of the document.¹⁷⁵ This in essence makes the ‘control’ of a negotiable electronic document of title equivalent to the possession of a paper document of title by ‘delivery’. Likewise, as implied from §7-502, the ‘due negotiation’ of an electronic document

¹⁶⁹ Goldby (128)145.

¹⁷⁰ *ibid* 146.

¹⁷¹ UCC, §1-201 (16).

¹⁷² Goldby (n128) 145.

¹⁷³ UCC, §7-501 (b) (2).

¹⁷⁴ UCC, §7-501(a) (3) ‘If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.’

¹⁷⁵ UCC, §1-201 (15).

of title would achieve the same legal effect as that of the paper document of title.¹⁷⁶

In brief, the notion of ‘control’ employed by UCC is nothing more than the effect of ‘document of title’ of the paper bill of lading. As to the rights to unilaterally vary the original contract of carriage covered by the ‘right of control’ under the Rotterdam Rules, UCC does not have equivalent rules, neither on the paper bill of lading nor on electronic bill of lading.

6.4.3 Which Direction should a Future Chinese Maritime Law Take?

As shown from the aforesaid Anglo-American experience, any change resulting in the variation of the original contract of carriage, such as the change of place of delivery and/or person to whom the delivery is to be made, has not been recognized as a contractual right that can be unilaterally exercised by the cargo interest, regardless of whether the cargo interest is the original party to the contract of carriage or not. Such a result shows respect for the principle of freedom of contract that allows the parties to the contract to freely decide the contractual terms. As a universal principle rooted in contract law, freedom of contract is also deemed a fundamental principle under the Chinese Contract Law 1999.¹⁷⁷ This can be seen from Article 12 which states:

The contents of a contract shall be agreed upon by the parties, and shall generally contain the following clauses: (1) titles or names and domiciles of the parties; (2) subject matter; (3) quantity; (4) quality; (5) price or remuneration; (6) time limit, place and method of performance; (7) liability for breach of contract; and (8) method to settle disputes. The parties may conclude a contract by reference to a model text of each kind of contract.¹⁷⁸

This article clearly indicates that the substantial matters under the contract, for instance, the ‘name of the party’ and the ‘place of performance’, are subject to mutual consent of the

¹⁷⁶ This can be seen from UCC, §7-502. Rights Acquired by Due Negotiation.

(b) Subject to Section 7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if: ... (2) any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion.

¹⁷⁷ Liming Wang and Yegang Wang, *Contract Law* (1st edn, City University of HongKong Press 2016) 18.

¹⁷⁸ Contract Law 1999, art12.

contractual parties. As a general rule applicable to all types of contract, the position established by the Contract Law 1999 should be complied with by parties to a contract of carriage. This means that any variation to the aforesaid matters covered by the contract of carriage should be agreed by both parties to the contract. In addition to the freedom of contract, as indicated by English common law, the variation of the original contract of carriage should also be subject to the principle of privity of contract when the bills of lading, which evidence or contain the contract of carriage, are transferred to a third party to the original contract of carriage.¹⁷⁹ In Chinese law, such a privity to some extent has been loosened under CMC 1992 which recognizes the contractual effect of the bill of lading between the carrier and the holder.¹⁸⁰ By virtue of this rule, the holder is entitled to hold contractual rights against the carrier as if he was a party to the original contract of carriage.¹⁸¹ Notwithstanding, it does not mean that such contractual rights should include the right to unilaterally vary the original contract of carriage as such a right does not vest in the shipper/consignor who concludes the contract of carriage with the carrier, nor should such a right be conferred on the holder.¹⁸² Therefore, similar to Anglo-American law, under a future Chinese maritime law any variation of the original contract of carriage sent from the cargo interest, no matter whether it is from the shipper or from the holder, should not bind the carrier unless agreed by the carrier. In other words, the matters in respect of such variations should still be left to freedom of contract.

Despite all this, it is still necessary to establish new rules in this respect. As mentioned above, the existing law and judicial opinion tend to limit the cargo interests' right to vary the original contract of carriage only to the situation where the non-transferable shipping document is issued.¹⁸³ However, there does exist a practical demand for variation of the agreed delivery in situations where the negotiable bills of lading are issued. For instance, in *Mingxing Co.*,

¹⁷⁹ See discussion in 6.4.1 above.

¹⁸⁰ CMC 1992, art 78 (1) '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'.

¹⁸¹ This can be seen from CMC 1992, art 71:

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 the order of a named person, or to order, or to bearer, constitutes such an undertaking.

¹⁸² In accordance with the article 78 (1) of CMC 1992, it is submitted that an exceptional occasion may happen here if the bill of lading contains an express clause that confers such a right on the holder. However, such an occasion is very rare in practice.

¹⁸³ See discussion in 6.2.4.1 above.

Ltd. v Wanhai Shipping Co., Ltd.,¹⁸⁴ the seller, who held a full set of order bills of lading, required the carrier to ship the goods back to him as the buyer did not fulfil the obligation of payment for the goods. Likewise, in *Heilongjiang Export and Import Co., Ltd v Brilliant Logistic Group Inc. and others*,¹⁸⁵ after issuing a full set of order bills of lading, the shipper (seller) required the carrier to make delivery against surrender of all originals of the bill rather than one original. Later, the shipper instructed the carrier not to make the delivery without the consent of the shipper so as to secure his interest in the sale of the goods. As shown from the extraordinary facts of these cases, although requests for variations of the original contract of carriage are made to the carrier, the ultimate reasons for such variations are usually embedded in the transaction of goods. In current practice, the carrier may freely decide whether to accept such requests. However, the carrier may be sued for wrongful delivery by the original consignee if the carrier chooses to execute the request. Also, if such a request is raised by a person whose identity is unknown to the carrier,¹⁸⁶ it would bring the carrier difficulty in deciding whether to agree on the variation raised by the person. To help the carrier deal with the dilemma, a future maritime law should provide general guidance for the carrier in this respect. In particular, two issues should be addressed by this future law. First, it should indicate from which party the carrier may accept the instruction on disposal of goods, regardless of whether such a disposal constitutes variation of the original contract of carriage or not. Second, it should exempt the carrier from the liability for misdelivery in the event of following the instructions sent by the party stipulated by the law. On this point, what the future Chinese law intends to achieve is very close to the aim of §7-303 of UCC. Therefore, the relevant provisions under a future Chinese maritime law may be drafted by reference to UCC with some slight modifications so as to coincide with China's shipping practice.¹⁸⁷ The proposed article may be drafted in the following way:

Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from the shipper

¹⁸⁴ *Mingxing* (n88).

¹⁸⁵ *Heilongjiang Export and Import* (n89).

¹⁸⁶ This may happen if the request is raised by an intermediate buyer who is the third party to contract of carriage.

¹⁸⁷ As shown from 6.2.4.2, the Bill of Lading Manual of COSCO requires the cargo interest to surrender ALL original copies of the bills of lading when instructing the carrier to change the original arrangement in respect of delivery of goods. At this point, Chinese practice is different from the arrangement under UCC, §7-303, which provides that 'the holder of A negotiable bill' may instruct the carrier to 'deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods...'

or the holder who surrenders all original copies of the bill of lading.

In addition, to encourage the use of electronic bill of lading in China's maritime trade, another legislative attempt should be made so as to legally smooth the transition from the paper bill of lading to its electronic equivalent. As mentioned in Chapter 3, recently China has made great efforts to welcome the use of the electronic bill of lading.¹⁸⁸ However, there is no corresponding support in CMC 1992. As suggested by the CMI Rules, at the current stage the main task of ruling the electronic bills of lading is to recognize the same legal effect of the electronic bill of lading as its paper counterpart in cargo shipping and trading practice, namely, to make the electronic bill become a 'functional equivalent' to the paper bill.¹⁸⁹ On this point, UCC has provided a model that can be studied in the drafting of a future Chinese maritime law. As suggested by UCC, the key to achieve the aforesaid 'functional equivalence' is to ensure the exclusivity and singularity of access to the electronic bill of lading.¹⁹⁰ To achieve such an exclusivity and singularity, the notion of 'control' can be used and construed in a way that is different from the 'right of control' provided by the Rotterdam Rules.¹⁹¹ Based on the experience garnered from the CMI Rules and UCC, it is recommended that a future Chinese maritime law introduce the following provisions that indicate the legal effect of the electronic bill of lading:

a) A person has control of an electronic bill of lading if a system employed for evidencing the transfer of rights in the electronic document reliably establishes that person as the person to whom the electronic document was issued or transferred.

b) A system satisfies subsection (a), and a person is deemed to have control of an electronic bill of lading, if the bill is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the bill exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as: (A) the person to which the bill was issued; or (B) if the authoritative copy indicates that the bill

¹⁸⁸ See discussion in Chapter 3, 3.6.2 above.

¹⁸⁹ See discussion in 6.3.1 above.

¹⁹⁰ See discussion in 6.4.2 above.

¹⁹¹ UCC, §7-106.

has been transferred, the person to which the bill was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

c) A person who satisfies subsection (a) and (b) is vested with all rights against the carrier as if the person is the holder of a paper bill of lading.

In this way, the new rules would replicate the legal effect of the paper bill of lading, whilst at the same time not encouraging conflict with the prevailing commercial models (such as Bolero) that have stipulated the procedures for using the electronic bill of lading in practice.

6.5 Conclusion

The Rotterdam Rules provide the right of control as a right that can be transferred with the bill of lading. Also, such a right can be unilaterally exercised by the cargo interest who holds all original copies of the bill of lading, despite the fact that implementation of such a right would probably result in variation of the original contract of carriage.¹⁹² By introducing such a concept, the drafters of the Rotterdam Rules expected to harmonize the rules governing different modes of cargo transportation,¹⁹³ bridge over the gap between carriage of goods by sea and the transaction of goods,¹⁹⁴ and legally pave the way for the broad application of the electronic bill of lading in future maritime trade.¹⁹⁵ However, such an expectation may be

¹⁹² Rotterdam Rules, art 50.1. 51.3. See discussion in Chapter 6, 6.2.1 above.

¹⁹³ Text to (n3).

¹⁹⁴ *ibid.*

¹⁹⁵ Text to (n4).

frustrated at both the international level and the national level.

In the international conventions governing non-sea carriage, the analogous concept ‘right of disposal’ in some situations is defined as a right that may be unilaterally exercised by the relevant cargo interest.¹⁹⁶ However, it is observed that such a unilateral characteristic only survives in the carriage served by waybill, consignment note and other documents that are not as transferable or negotiable as the bill of lading. Besides this, the conditions for enforcement of such a right differ from one convention to another. This indicates that the legislation on this type of right, whether the right of control or the right of disposal, should respect the specific features of each mode of transportation. Thus, it is unlikely that the right of control provided by a convention mainly targeting the sea carriage is able to harmonize the transport law governing different modes of transportation. In addition, although the right of control was claimed to be helpful to the enforcement of the right of stoppage deriving from the sale contract, the practical value of such an effect is doubted as the right of stoppage has rarely been triggered in modern maritime practice. Normally, an unpaid seller can simply secure his interest to the goods by manipulations based on the legal quality of the bill of lading as document of title. In this sense, it seems pointless to provide for the right of control in shipping law to facilitate an outdated concept in trade law.¹⁹⁷ Furthermore, in the electronic environment, the necessity of introducing the right of control provided by the Rotterdam Rules is not yet wholly convincing.¹⁹⁸ Such a right is defined far beyond that stipulated by the CMI Rules,¹⁹⁹ and neither does it coincide with the rules of prevailing models which govern the running of the electronic bill of lading in commercial practice.²⁰⁰

At the level of national law, the right of control shows little compatible with China’s legal practice, nor is it in line with the interest of Chinese exporters and carriers. The major divergence lies over one question, namely, whether the original contract of carriage could be unilaterally changed by the shipper or the holder of bills of lading. The Contract Law 1999²⁰¹

¹⁹⁶ This is the situations under the CMR and the CIM. In Warsaw Convention, although such a unilateral character can also be seen from the rule (Art 12.1), the convention allows parties to opt out that rule (Art 15.2).

¹⁹⁷ See discussion in Chapter 6, 6.2.3 above.

¹⁹⁸ See discussion in Chapter 6, 6.3 above.

¹⁹⁹ CMI Rules, art 7a.

²⁰⁰ The prevailing models herein refers to the Bolero System and the ESS-Databridge. See discussion in Chapter 6.3.2 and 6.3.3 above.

²⁰¹ Contract Law 1999, art 308. See discussion in Chapter 6, 6.2.4.1 above.

and commercial practice²⁰² in China responds to this in the negative. Similar answers can also be found in English law and American law.²⁰³ This means that the right of control which allows the cargo interest to unilaterally vary the contract of carriage has not yet been recognized as common practice. In addition, as suggested by current practice, normally the ultimate reason for requesting such a variation can be attributed to the performance of the contract governing cargo transactions. Due to the doctrine of privity of contract, in such situations it would be more appropriate for the cargo interest to seek remedy under the sale contract rather than the contract of carriage. Therefore, no matter in terms of modernization of CMC 1992, or in terms of harmonizing the relationship between CMC 1992 and Contract Law 1999, there is no convincing reason to impose an obligation on the carrier to cooperate with the request of variation of the contract of carriage. However, in consideration of the carrier's difficult position when facing such a request and balancing the interest between carrier and cargo interest, it is suggested that a future Chinese maritime law should follow the American approach and provide the carrier with guidelines and a legal shield to deal with such a request.²⁰⁴

Another lesson that can be learned from American law is the interpretation of the notion of 'control', which is different from the Rotterdam Rules. Based on the American approach,²⁰⁵ the notion of 'control' under a future Chinese maritime law should be used to describe the exclusivity and singularity of the access to the electronic bill of lading. In so doing, it is expected that the 'control' of the electronic bill of lading would achieve an equivalent legal consequence as possession of a paper bill of lading.²⁰⁶

In general, the legal scheme of the right of control established by the Rotterdam Rules should not be incorporated by a future Chinese maritime law. The essential rights covered by such a legal scheme, namely, the rights to unilaterally change the original contract of carriage, should in no way be deemed as rights that can be transferred with the bill of lading, no matter whether that is in the paper form or in the electronic form. The provisions that a future law needs to offer is in two parts: one is to exempt the carrier from the liability for misdelivery if

²⁰² See discussion in Chapter 6, 6.2.4.2 above.

²⁰³ See discussion about English approach on 'right to redirect the goods' in 6.4.1 and American approach on 'diversion, reconsignment and change of instructions' (UCC, §7-303) in 6.4.2.

²⁰⁴ See discussion in 6.4.3 above.

²⁰⁵ UCC, §7-106.

²⁰⁶ See discussion in 6.4.3 above.

the carrier disposes of the goods by following the instruction sent by a cargo interest pursuant to the law; the other is to introduce the concept of ‘control’ into the rules governing the electronic bill of lading so as to replicate the exclusivity of the rights that may be acquired by holding a paper bill of lading. As to the scope of such rights under a future Chinese law, it should include the contractual right to sue the carrier discussed in Chapter 4, the contractual right to claim delivery and the real right of goods discussed in Chapter 5.

Chapter Seven: Conclusion and Recommendations

In international maritime practice, there is now a general consensus that the bill of lading is able to vest certain rights in the person who obtains the bill with a lawful reason and for this reason many jurisdictions have developed specific rules in this regard.¹ However, this is not the case under current Chinese law. The Maritime Code (CMC 1992), which should have addressed the issues on the legal effect of the transfer of the bill of lading, merely provides a sketchy rule (Article 78, paragraph 1) on recognition of the bill's contractual effect between the carrier and the holder who is the third party to the original contract of carriage. Although such an arrangement may have been reasonable at the time CMC 1992 was drafted,² it now lags behind current maritime practice.³ The outdated rule has brought enormous controversy to both judicial practice and academia on a number of relevant issues, such as the transfer of title to sue and the transfer of effect as 'document of title'.⁴ In addition, the recent developments under the Rotterdam Rules, which introduces some new features into the legal scheme on transfer of rights through the bill of lading, also challenges the current law in

¹ The selective foreign jurisdictions discussed in this thesis are English law and American law. Besides that, the Rotterdam Rules and its *Travaux préparatoires* (the UNCITRAL Drafts), which firstly bring the transfer of rights issues into the sphere of international convention, are also examined.

² Chapter 3 points out that the current arrangement under CMC 1992 is attributed to the historical and economic background when CMC 1992 was drafted. At that time, China's shipping power was far behind the world average level, which greatly impeded the development of foreign trade. Therefore, from the economic perspective, the foremost aim of CMC 1992 is to promote and facilitate the development of China's shipping industry. This may explain why CMC 1992 focuses on limiting carrier's liability rather than clarifying the rights of the cargo interests. Also, from the legal perspective, the drafters of CMC 1992 widely borrowed the latest foreign rules and international conventions at that time and incorporated them into CMC 1992 so as to accomplish the modernization of maritime law within a short time. Taking these factors into account, it may be concluded that the arrangement under Article 78 was reasonable when CMC 1992 was issued. See discussion in Chapter 3, 3.2.

³ According to the discussion in 3.6.1, now the economic status of China's shipping and trading industry has witnessed massive changes in comparison with the period during which CMC 1992 was drafted. After two decades development, China has owned a powerful merchant fleet, which is competitive in global market. In the meantime, China's merchandise trade, especially the export merchandise trade, is also growing rapidly. It creates the demand for shipping industry and has also become a driving force of the development of other industrial sectors in China. The small and medium private-owned enterprises have taken the largest proportion of China's export traders. Compared to the carrier, especially the liner shipping companies, they are relatively weak to handle with the risk arising from cargo shipping and trading. Even worse, CMC 1992 does not provide explicit guidance for them to exercise their rights and protect their lawful interest. (See discussion in 3.3 and 3.4). In this sense, a future maritime law should concern itself more with the rights and interests of the traders, especially the rights and interests of the export traders, so as to better safeguard and smooth China's export trade.

⁴ For the debates on current rules regarding transfer of rights through the bill of lading under CMC 1992, see Chapter 3, 3.3 and 3.4 above.

China.⁵ In brief, the outstanding problems with respect to the transfer of rights through the bill of lading under current Chinese law can be summarized in two points: the ambiguity about the extent of the rights that can be transferred through the bill of lading, and the uncertainty about the legal manner in which such a transfer is launched.

In order to improve current Chinese law, this thesis has chosen to treat the Anglo-American experience, and the Rotterdam Rules and its *travaux préparatoires*⁶ as advanced models that can be compared to Chinese law. Through this comparative study, this thesis has pinpointed two underlying deficiencies in CMC 1992 which contribute to the aforesaid outstanding problems. One is the failure to mirror the inherent connection between cargo transportation and cargo trading; the other is the disharmony between the rules under maritime law and the rules under other legislations in relation to the transfer of rights issues.⁷ To address the deficiencies and bring more certainty to current law, this thesis has looked at all issues that might be covered by the topic of transfer of rights through the bill of lading, including the right of suit against the carrier, the proprietary right or interest to the goods, and the right of control over the goods during transit. For each individual issue, this thesis has reviewed the approaches provided by English law, American law, and the Rotterdam Rules and its *travaux préparatoires*. After analyzing their coherence and compatibility with China's legal and commercial environment, this thesis has envisaged an integrated shipping and trading scheme that addresses the issues regarding transfer of rights through the bill of lading, with the expectation of achieving a sense of balance across a greater range of interest groups involved in maritime trade, while at the same time reconciling the relationship between the maritime law and other relevant domestic legislations.

⁵ These new features include 'emphasis on assumption of loss or damage in cargo claim' and 'extension of the transferable rights to cover the right of control', which are discussed in Chapter 2, 2.5.4 above.

⁶ The '*travaux préparatoires*' (or the UNCITRAL Drafts) mentioned in this thesis refer to the preparatory documents drafted or released by Working Group III of UNCITRAL for construction of the Rotterdam Rules.

⁷ See Chapter 3, 3.5 above.

7.1 The Significance of this Study

The research question that has dominated this study is how can a systematic and effective legal scheme on transfer of rights through the bill of lading be established in a future Chinese law, with the purpose of solving the outstanding problems in this regard under current Chinese law. Although some problems covered by the research have been explored by existing studies, the thesis is not confined to individual problems but rather seeks to discover the common reason why these problems arise and to develop an overall solution from a brand new perspective. Underpinned by this objective, this thesis makes some original contributions to the reform of current Chinese law as discussed below.

First, by comparison with the historical experience of Anglo-American law and the international conventions, this thesis argued in chapter 3 that the most notable problem in current Chinese law on transfer of rights through the bill of lading relates to the lack of proper consideration about the connection between the carriage of goods and the transaction of goods. As a consequence of this, the balance of interest between the carrier and the cargo interest has been undermined under current law. Even worse, the current rule under CMC 1992 and the interpretation of certain term is not compatible with other legislations in relation to maritime trade such as the Contract Law and the Property Law,⁸ and is inadequate to follow the commercial trend of paperless trading. Given this, the thesis recommends adopting a holistic view to reform the current law on the transfer of rights through the bill of lading, which means that the law reform should be able to harmonize and smooth the shipping and trading practice as a whole.

Second, from a trade holistic perspective, in Chapter 3 this thesis examined the recent status of China's shipping sector and trading sector. By noting the significant shift in economic strength between the two sectors, the driving force of export trade in the development of

⁸ For instance, Article 78 of CMC 1992 is not coherent with article 88 of Contract Law 1999 on the transfer of contractual rights and obligation, nor is it coherent with article 64 of Contract Law 1999 which is about 'stipulation for another.' See discussion in Chapter 3, 3.3.1 above. As to the term 'bill of lading as document of title', the existing interpretations equate the bill of lading either with 'document of property' or with 'document of possession'. The former is not coherent with the commercial reality that the property of goods is not always passed together with the bill of lading, the later may not guarantee the commercial value of the bill of lading as the 'possession' in property law is not a right, but rather, a *fait juridique*. (Property Law 2007, art 243) See discussion in 3.4.1 and 5.2.4.1 above.

seaborne cargo transportation and the significance of export trade to China's economy,⁹ this thesis argues that, in the current and upcoming economic environment, to establish a well-balanced legal scheme on transfer of rights by the bill of lading, the law reform in this respect should pay more attention to exporters' interests. Also, under such a legal scheme the bill of lading should be able to make itself valuable as a way of facilitating export trade in commercial practice as suggested in Chapter 4.¹⁰

Third, in order to achieve harmonization between relevant legislations and secure the commercial value of the bill of lading in both shipping and trading practice, in Chapter 5 this thesis suggested that reform of the law on the legal effect of transferring the bill of lading should not only be carried out under the maritime law but also under the property law so as to demonstrate the presumable effect of transferring the real right of goods by the bill of lading.¹¹

Fourth, with regard to the manner in which the rights could be transferred between the cargo interests, based on the findings of Chapter 4 and 5 this thesis argues that the bill of lading may be negotiated in a similar way to the negotiable instrument. However, except for the contractual right to sue the carrier, the validity of negotiation of the bill of lading should end once the goods are delivered to the person who is entitled to them.¹² In addition, this thesis notes that some rights such as the real right of goods and the contractual right to sue should not be mechanically locked into the bill of lading but rather be conveyed by virtue of some trade-related elements such as the parties' intention in cargo transaction¹³ and the assumption of cargo loss or damage.¹⁴ Such an arrangement is recommended not only for maintaining the fairness of the law but also for paving the way for paperless trading.

⁹ See discussion in Chapter 3, 3.6.1 above.

¹⁰ See discussion in Chapter 4, 4.2.3.2 above.

¹¹ See discussion in Chapter 5, 5.2.4 above.

¹² See discussion in Chapter 5, 5.3 above.

¹³ Transfer of bill of lading to a good faith purchaser will only produce a presumable effect of transferring the real right of goods covered by the bill. If the purchaser and the transferor has otherwise agreed, then the agreement between the purchaser and the transfer shall prevail. See discussion in Chapter 5, 5.2.4.1.

¹⁴ The proof of assumption of loss or damage should be provided as an independent cause of action that enables the shipper who is parted with the lawful possession of the bill of lading to sue the carrier for recovering his loss, provided that the shipper could prove that the holder did not suffer the same loss. See discussion in Chapter 4, 4.3.1 and 4.3.5 above.

Fifth, by examining the possible impact of the right of control on both legal and commercial practice, in Chapter 6 this thesis argued that under a future Chinese law there is no need to incorporate such a right into the legal framework on transfer of rights by the bill of lading since such a right is neither coherent with the existing international conventions and China's law and practice, nor is it consistent with the prevailing commercial practice on electronic bills of lading.¹⁵ In addition, Chapter 6 indicated that the key to make the electronic bill of lading function equivalently to the paper bill is to set out legal rules which guarantee the exclusive and singular access to the electronic bill of lading. Such an exclusivity and singularity of access should be what 'control' of an electronic bill of lading truly refers to.¹⁶

7.2 The Major Findings

This thesis suggests that in a future Chinese law the legal scheme on transfer of rights by the bill of lading should address what the transferable rights are which can be conveyed by the bill of lading and the manner in which such rights should be transferred. The law reform towards the aforesaid two issues should properly reflect the connection between the carriage of goods and commercial transaction of goods, with the purpose of balancing the interest between different stakeholders in cargo shipping and trading practice.

7.2.1 The Underlying Deficiencies in CMC 1992 and the Guidelines to Improve Current Law on Transfer of Rights through the Bill of lading

To identify the underlying defect in current Chinese maritime law, this thesis reviewed how the legal scheme governing transfer of rights through the bill of lading has developed in international maritime practice. The aim of this review was to answer the first sub-question outlined in Chapter 1 which seeks to understand whether there is any common characteristic shared by the national and international approaches on developing the legal scheme governing transfer of rights through the bill of lading.

¹⁵ See discussion in Chapter 6, 6.2.4 and 6.3 above.

¹⁶ See discussion in Chapter 6, 6.4.3 above.

From the analysis in Chapter 2, a few findings emerged. The Anglo-American experience and the recent international convention (the Rotterdam Rules) on the subject were examined as they made a great contribution to the formation of such a legal scheme in today's maritime practice. A significant implication that can be discerned from the historic review is that although the bill of lading is a shipping document issued pursuant to the contract of carriage, the evolution of the legal effect of such a bill, whether in the sense of contract law or in the sense of property law, and the transfer of such effects between cargo interests, to a large extent serves to facilitate the underlying cargo transaction.¹⁷ In addition, as shown from the comparative analysis between the aforesaid national and international law, the way in which the transfer of rights through the bill of lading is regulated depends heavily on the expectation of the commercial value of the bill of lading¹⁸ and/or the perspective from which the relationship between trading and shipping practice is viewed.¹⁹ Notwithstanding the difference in this regard between English law, American law and the Rotterdam Rules, in all of them the legal schemes covering transfer of rights through the bill of lading are established in a way that connects with the underlying transaction of goods, either implicitly or visibly.²⁰ Besides that, the Anglo-American experience and the recent international achievement in this respect demonstrates that the chaos in commercial and judicial practice will not end unless explicit statutory guidance is provided.²¹

This thesis then examined the relevant rule (Article 78, paragraph 1) under CMC 1992 by reference to the aforesaid lessons learnt from Anglo-American law and the Rotterdam Rules. In so doing, the thesis discovered that the two major problems with respect to the transfer of rights through the bill of lading under CMC 1992, namely, the uncertainty about the extent of the rights that can be transferred through the bill of lading and the legal way that such a transfer is governed may both be attributed to the lack of a proper connection with the transaction of goods embedded in Article 78.²² In addition, the reckless copying of foreign and international rules by CMC 1992 causes conflict between the bill of lading practice and

¹⁷ See Chapter 2, 2.6 above.

¹⁸ See discussion in Chapter 2, 2.4 above.

¹⁹ See discussion in Chapter 2, 2.4 and 2.5.2 above.

²⁰ See Chapter 2, 2.6 above.

²¹ *ibid.*

²² See Chapter 3, 3.5 above.

China's civil law heritage.²³ This brings difficulty to completely fitting Article 78 in China's general civil law and commercial law framework.

To address the aforesaid deficiencies and improve current maritime law, this thesis suggests three general guidelines that the law reform should adopt. First, in consideration of the impartible connection between the evolution of legal functions of the bill of lading and the development of cargo trading, the transfer of rights scheme under a future Chinese maritime law should be established through the 'trade holistic perspective'.²⁴ This requires that the future rule should provide for specific issues under a broader context which integrates the carriage of goods with the transaction of goods as a whole rather than focusing on carriage of goods only. In particular, as the power of the trading and shipping industry in China has undergone significant change since the 1990s when CMC 1992 was brought into force, the law reform should pay more attention to the protection of export traders' rightful interest in the procedure of transfer of rights.²⁵

Second, to harmonize the relationship between the future maritime law and other relevant legislations, the law reform should properly localize the experience borrowed from other jurisdictions and international rules.²⁶ This requires that the foreign experiences should be transplanted in a way that is adaptable to China's economic, commercial and legal environment. In this way, the legal scheme on transfer of rights established under the future Chinese maritime law is expected not only to re-balance the interest between the carrier and the trader but also to reduce the incongruity of Chinese maritime law with other domestic legislations related to cargo transit and transaction.

Third, in order to accommodate the recent trend of paperless trading, the proposed legal scheme on transfer of rights should be compatible with the electronic bill of lading.²⁷

²³ *ibid.*

²⁴ See Chapter 3, 3.6 above.

²⁵ See Chapter 3, 3.6.1 above.

²⁶ See Chapter 3, 3.6.3 above.

²⁷ See Chapter 3, 3.6.2 above.

7.2.2 To What Extent can Rights be Transferred together with the Bill of lading?

Because of the ambiguous and over-simplified wording of Article 78 under CMC 1992, this question is still open to discussion. According to Chinese legal practice and the academic views discussed in Chapter 3, the rights that may be involved include the right to sue the carrier for cargo loss or damage, the rights stemming from the bill of lading as a document of title and the right of control. In Chapters 4, 5 and 6, this thesis examined each right respectively with reference to the Anglo-American experience and the relevant international conventions, and finally drew the following conclusions.

7.2.2.1 Transfer of Right to Sue the carrier

This issue was discussed in Chapter 4. Basically, there is no doubt that the transferable rights conveyed by the bill of lading under the future maritime law should contain the contractual right to sue the carrier as both the current rule (Article 78) and existing judicial practice have clearly so intended. However, in consideration of the impact of the arrangement regarding cargo transaction on the assumption of cargo loss or damage, the contractual right to sue should not be exclusively vested in the holder to whom the bill of lading is transferred.

As indicated in 4.3, other than the holder, the most likely party who may assume a substantial loss or damage is the shipper (usually the exporting seller in the underlying cargo transaction) and this normally occurs under two circumstances: one is that the goods in question are delivered without presentation of the original bill of lading; and the other is the goods in question are rejected by the endorsee/consignee (usually the ultimate buyer in the transactions of goods) for the reason that the goods are damaged as a consequence of the carrier's default.²⁸ By reviewing the relevant judicial practice, this thesis noted that in either situation the cargo loss or damage is ultimately attributable to the carrier's breach of duty although the aforesaid situations often involve a specific trading arrangement.²⁹ Also, the shipper is usually the only party who sustains such a loss or damage.³⁰ Furthermore, under such a

²⁸ See Chapter 4, 4.3.1 above.

²⁹ *ibid.*

³⁰ *ibid.*

situation the shipper may not be able to invoke a tortious action as an alternative remedy.³¹ This is because in accordance with the Chinese Tort Law the shipper must prove that the carrier was at fault to cause the cargo loss or damage. Such a requirement would appear impossible to the shipper as the shipper usually has little opportunity to monitor every detailed action carried out by the carrier and its employee when the goods are in transit. Therefore, to properly balance the interest between the carrier and the cargo interest, this thesis argued that the shipper's contractual right to sue under the aforesaid two situations should be retained irrespective of the transfer of the bill of lading.

To envisage a rule that enables the shipper to bring a contractual action against the carrier under the aforesaid two situations, in Chapter 4 the thesis compared the solutions that have been established in English law, American law and the UNCITRAL Drafts, and observed that the American approach and the UNCITRAL approach, which conditionally treat the assumption of substantial loss or damage as a determinant to allow the shipper to sue the carrier, are more comparable with China's legal and commercial environment than the bailment approach adopted by English law.³² The reasons are set out in two parts. First, the inherent connection between the contractual right to sue the carrier and underlying transaction of goods is built into American law and the UNCITRAL Drafts in a more visible and detectable way since in commercial reality the question of who ultimately assumes the cargo loss or damage caused by the carrier's default is usually subject to the commercial negotiation between the parties that participated in the cargo transactions³³. In this sense, taking the assumption of loss or damage as an independent cause of action for the shipper who suffered loss after the transfer of the bill of lading would effectively address the underlying deficiency of CMC 1992 in the way it lacks a connection with the commercial transaction of goods.³⁴ Second, allowing the shipper to sue after the transfer of the bill of lading would not necessarily upset the balance of interest between the carrier and the cargo interest. As shown from American common law practice and the UNCITRAL Drafts, the assumption of loss or damage as a cause of action would only be upheld by a court³⁵ or

³¹ *ibid.*

³² The shipper's right of suit in bailment was upheld in *East West Corporation v DKBS 1912 A/S* [2003] EWCA Civ 83, [2003] 2 ALL ER 700. This case is discussed in Chapter 4, 4.3.2 above.

³³ See Chapter 4, 4.3.5 above.

³⁴ *ibid.*

³⁵ See Chapter 4, 4.3.3 above.

invoked pursuant to the specific provision³⁶ if the shipper could prove that he was the ONLY party who sustained the claimed loss or damage. With such a condition, there is little likelihood that the carrier would face multiple claims for the same reason even though the action in contract was brought by a party who did not possess the bill of lading or merely possessed the bill but failing to meet the legal requirement of transfer of the bill.³⁷

Based on the aforesaid findings, it is submitted that under the future Chinese maritime law, in addition to the general rule on transfer of contractual rights by the bill of lading, an exceptional provision addressing the shipper's right to sue after the transfer of the bill of lading should also be established. By reference to the American experience and the UNCITRAL Drafts, such a rule could be constructed by highlighting the loss or damage assumed by the shipper. To be specific, if the shipper, in addition to proving his own loss or damage as a consequence of the carrier's breach of duty in carriage of goods, is able to prove that the holder has not suffered the same loss or damage, then the shipper should be allowed to initiate a contractual action against the carrier to recover his loss.³⁸

7.2.2.2 Transfer of Rights Deriving from the Bill of Lading as 'Document of Title'

As noted in Chapter 3, in current Chinese academia and judicial practice the debates on this issue focus on the extent to which the property of goods can be transferred by the bill of lading as a document of title. In Chapter 5, by revisiting the Anglo-American experience where the concept 'document of title' originated, it can be seen that English law and American law have developed their own answers even though they share the same common law heritage. In English law, the explanation of the concept has never gone beyond the notion established at common law which is, as a document of title, the bill of lading vests its holder with the interest in goods no more than the constructive possession of goods;³⁹ whereas under American law, as a document of title, the interest in goods that can be transferred by the bill of lading may extend to the property of goods provided that the holder fulfils the legal requirements of being a good faith purchaser pursuant to FBLA 1994.⁴⁰ By analyzing the

³⁶ See Chapter 4, 4.3.4 above.

³⁷ See Chapter 4, 4.3.5 above.

³⁸ See Chapter 4, 4.4 above.

³⁹ *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd's Rep 252 (CA). See Chapter 5, 5.2.1.1 above.

⁴⁰ FBLA 1994, § 80105 (a) (1). See Chapter 5, 5.2.2.2 above.

compatibility and coherence of the two approaches with the Chinese economic and legal environment, it is submitted that FBLA 1994 may be a better choice as a reference point for Chinese law reform for the following reasons.⁴¹ First, in terms of the economic consideration on facilitating export trade and securing export sellers' interest, it would be helpful if the legal effect of the bill of lading as a document of title could be construed from the sense of property or other real right of goods since the buyer and its bank would only be willing to issue the payment or finance the sale of goods against receiving the bill of lading if they could secure their entitlement to the goods by holding the bill. Second, the concept 'possession' under Chinese law is merely a *fait juridique* rather than a legal right so the bill of lading may not suffice to secure its holder's interest in the goods if the transfer of the bill only vests the holder with possession of goods. Third, in current Chinese law the real right of goods is generally deemed as passed upon delivery and at the same time the doctrine of good faith purchaser has been recognized as a legal reason for acquiring the property or other form of real right of goods (e.g., the pledge).⁴² In light of these reasons, under the future Chinese law it is logical to infer that the person who acquires a bill of lading in good faith for value could be vested with certain real right of goods as in maritime trading practice the delivery of a bill of lading is usually regarded as a symbolic delivery of goods. In this sense, under the future Chinese law the bill of lading as a document of title could be understood as having the capacity to transfer the real right of goods. Accordingly, the bill of lading would remain a reliable document for merchants to smooth the underlying cargo transaction. Notwithstanding, to reconcile the contradiction between the aforesaid capacity of the bill of lading and the traders' freedom of contract in deciding the timing of passing the real right of goods in commercial practice, the English approach which describes the transfer of property in goods through the bill of lading as a presumable effect should be adopted by the Chinese law reform.⁴³ To sum up, under the future Chinese law, once the bill of lading is transferred to a good faith purchaser, such a party presumably acquires the real right of goods covered by the bill unless otherwise intended by the parties to the sale contract.

The thesis has developed an answer to the problematic question about the extent to which the interest in goods can be transferred by the bill of lading in Chinese law and asserted that as a

⁴¹ See Chapter 5, 5.2.4.1 above.

⁴² See Chapter 5, 5.2.4.1 above.

⁴³ See Chapter 5, 5.2.4.1 above.

document of title the bill of lading should have the capacity to transfer the real rights of goods. This thesis also indicates that such a capacity would be better specified by the Property Law than the Maritime Code. This is because the transfer of the real right of goods is a matter that is subject to the former while the latter only governs the relationship under the contract of carriage. However, this does not mean that the concept of document of title is of no value to the legal effect of transferring the bill of lading in the sense of Chinese maritime law.

As indicated in 5.2.4.2, such a value can be built into the future Chinese maritime law by following a common position held by English law, American law and the Rotterdam Rules, which is, the expression ‘bill of lading as document of title’ could be interpreted by underpinning the necessity of a presentation rule in delivery of goods. On the side of the holder, the ‘bill of lading as document of title’ should be understood as a contractual ground to enable the holder to claim delivery from the carrier. On the side of the carrier, the carrier can only discharge his contractual liability for misdelivery in the event of making delivery against presentation of an original bill of lading. If no original bill of lading is presented, the carrier should be entitled to reject the delivery. The rationale for interpreting ‘bill of lading as document of title’ in this way can be attributed to the following factors: first, such an interpretation is coherent with current Chinese maritime law and has been upheld by recent judicial practice.⁴⁴ Second, as shown from the Anglo-American experience and the Rotterdam Rules, the presentation rule can be established on a contractual basis.⁴⁵ Such a result is compatible with Chinese maritime law under which transfer of rights through the bill of lading is governed and will continue to be governed by a contractual framework.⁴⁶ More importantly, in this way the expression ‘bill of lading as document of title’ under the future Chinese maritime law would have the capacity to answer the practical question of what exactly the bill of lading enables its holder to do.⁴⁷ Such a result coincides with the common trend in interpreting such an expression across different jurisdictions and the international convention and would bring more certainty to the rights and obligations of both carrier and cargo interest in delivery of goods.

⁴⁴ See Chapter 5, 5.2.4.2 above.

⁴⁵ See Chapter 5, 5.2.1.1, 5.2.2.2, 5.2.3 above.

⁴⁶ See Chapter 5, 5.2.4.2 above.

⁴⁷ *ibid.*

In sum, under the future Chinese law both the real right of goods and the contractual right to claim delivery of goods could be transferred with the bill of lading as a document of title. This would require legal reform not only of the Maritime Code but also the Property Law.⁴⁸ Only in this way can the commercial value of the bill of lading in maritime trade, which vests its holder with exclusive right to the goods, be secured.⁴⁹ When addressing the transfer of the real rights of goods through the bill of lading, the future Property Law should provide the good faith purchaser rule as a condition for such a transfer, while at the same time indicating that the legal effect of such a transfer is ‘presumable’ as the parties participating in the cargo transactions may have a different arrangement in passing the real rights of goods. Last but not least, to prevent abusive use of ‘document of title’ as a ground for trafficking the bill of lading, the future Maritime Law and Property Law should demonstrate that such an effect would end once the goods covered by the bill are delivered to a person entitled to them.⁵⁰ If the bill of lading is thereafter acquired by a good faith purchaser as a result of the carrier’s breach of duty, for instance, the carrier delivering the goods without presentation of the original bill of lading, the bona fide purchaser should protect his interest by suing the carrier for indemnity rather than claiming actual delivery or any real right of the goods.⁵¹

7.2.2.3 Transfer of Right of Control

As indicated in Chapter 3, some Chinese scholars argue that the right of control should be provided as a transferable right carried by the bill of lading to achieve three aims, which are to harmonize shipping and trading practice, to help the carrier fulfil the obligation of delivery of goods, and to modernize current maritime law to accommodate the use of the electronic bill of lading.⁵² To examine the aforesaid argument, in Chapter 6 this thesis firstly uncovered the legal nature of the right of control under the Rotterdam Rules, which in essence is a right to unilaterally vary the contract of carriage by the relevant cargo interests.⁵³ The thesis then looked at whether such a right is able to achieve the expected harmonization at the level of

⁴⁸ See Chapter 5, 5.2.4 above.

⁴⁹ *ibid.*

⁵⁰ See Chapter 5, 5.3.4 above.

⁵¹ *ibid.*

⁵² See Chapter 3, 3.3.2 above.

⁵³ See Chapter 6, 6.2.1 above.

international law and practice. The findings in 6.2.3 reveals that such a right is of little practical value to harmonize current shipping and trading practice served by the bill of lading.

Based on the aforesaid implication, in 6.2.4 the thesis placed the right of control under the context of current Chinese law and examined whether such a right is compatible with the legal and commercial environment in China. The observation from the legal aspect shows that current Chinese law tends to view the variation of agreed delivery of goods as a matter subject to mutual consent of the relevant cargo interest (cosigner) and the carrier rather than a right that can be unilaterally exercised by the cargo interest.⁵⁴ Besides this, Chinese judicial practice has indicated that the shipper/consignor is entitled to alter the agreed delivery of goods only if such a delivery is served by a non-transferable shipping document, which means that the request to vary the original contract of carriage would not be upheld by Chinese courts once the bill was transferred to the holder.⁵⁵ The analysis from the commercial aspect shows that the stipulations on the right of control may not only undermine the FOB seller's position in exporting trade but also alter the carrier's commercial practice on delivery of goods and impose an extra obligation of execution of cargo interests' instructions on the carrier.⁵⁶ Given the aforesaid findings, this thesis concludes that the right of control envisaged under the Rotterdam Rules would be of little help to improve China's commercial practice regarding delivery of goods when the negotiable bill of lading is issued, nor is it compatible with China's legal practice in this respect. Therefore, there is no reason to alter the current legal and commercial position to provide such a right as a transferable right conveyed by the bill of lading.

This thesis then examined whether the right of control is helpful to achieve the expected modernization of maritime law on the subject of facilitating paperless trading. The findings in 6.3 revealed that such a right is not coherent with the existing international rules on the legal effect of an electronic bill of lading, nor is it coherent with the prevailing commercial systems running electronic bill of lading in practice. Given this, this thesis argues that it is not necessary to introduce the right of control into the future Chinese maritime law to

⁵⁴ See Chapter 6, 6.2.4.1 above

⁵⁵ *ibid.*

⁵⁶ See Chapter 6, 6.2.4.2 above.

facilitate the use of the electronic bill of lading since there is no convincing evidence proving the effectiveness of the right of control in this respect.

Finally, in 6.4 this thesis explored what the Chinese maritime law reform should address with regard to the right of control. First, in order to balance the interest between the carrier and the maritime trader, the future Chinese maritime law should provide the carrier with guidance to deal with the request sent by the cargo interest on variation of the agreed delivery of goods. Such guidance could be established by referencing the American law, which exempts the carrier from liability for misdelivery if the goods are delivered pursuant to an instruction different from the original arrangement of delivery, provided that such an instruction is given by the shipper or the holder who surrenders all original bills of lading.⁵⁷ Second, informed by the CMI Rules and American law, the thesis indicated that the nature of ‘control’ over the electronic bill of lading should refer to the exclusivity and singularity of access to the electronic bill. By virtue of such ‘control’, the holder of an electronic bill of lading would ensure his interest to the goods covered by the bill. In this sense, such ‘control’ would achieve a similar legal effect as a ‘bill of lading as document of title’ in the traditional practice based on the paper bill. Therefore, to legally pave the way for the wide application of electronic bills of lading in maritime trade, the future Chinese maritime law should incorporate rules that define the exclusivity and singularity of such a control.⁵⁸ In this way, the electronic bill would become a functional equivalent of the traditional paper bill of lading.

To sum up, as to the extent of cargo interests’ rights that can be transferred through the bill of lading in the future Chinese law, based on the findings of Chapters 3, 4 and 5 this thesis argues that within the framework of maritime law such rights should refer to the contractual right to sue the carrier and the contractual right to claim delivery of goods; and in a broader meaning, such rights should also include the real rights of the goods which are subject to the governance of the Property Law.

⁵⁷ See Chapter 6, 6.4.3 above.

⁵⁸ *ibid.*

7.2.3 The Legal Manner of Transfer

As indicated in Chapter 3, a significant defect in CMC 1992 is the lack of clarification on the legal manner in which the bill of lading is able to transfer the rights between cargo interests. To clarify this issue, in Chapter 4, the thesis argued that the bill of lading should be treated as a complete and independent contract governing the relationship between the carrier and the party who is not the original party to the contract of carriage.⁵⁹ Subsequently, in combination with the findings of Chapter 5, this thesis argues that the good faith purchaser rule should be introduced into the legal scheme governing the transfer of both the contractual rights and the real rights of goods through the bill of lading.⁶⁰ In addition, this thesis points out that the obligation under the contract of carriage should not be assumed by the holder unless the holder exercises the rights transferred to him.⁶¹ All the aforesaid findings suggest that in the future Chinese law the bill of lading could be transferred in a similar manner to negotiable instrument such as the bill of exchange. This means that in the normal course of business, once the bill of lading is transferred to a party in good faith for value, such a party would be vested with the contractual right to sue the carrier, the contractual right to claim delivery of goods and, presumably, the real rights of the goods, regardless of whether there is any defect in the previous transfer of the bill of lading.⁶² In this sense, the rationale for the transfer of rights through the bill of lading under the future Chinese law could be attributed to a quasi-negotiability of the bill. With such a negotiability, the bill of lading would give its holder sufficient guarantee as to its interest in goods and the right against the carrier. Such a result could fulfil the export traders' expectation about the commercial value of the bill of lading as a document that can be trusted and relied on in shipping and trading practice.

Notwithstanding, to prevent the trafficking of the bill of lading simply as a piece of paper, the future law should set up certain limitations on the negotiability of the bill of lading. As discussed in Chapter 5, this requires that, once the goods are delivered to a party who is entitled to them, the bill of lading should cease its legal effect in transferring the right to claim delivery of goods and the real rights of the goods, even though the bill of lading may for some reason be acquired by a bona fide purchaser after that.⁶³ This means that the bona

⁵⁹ See Chapter 4, 4.2.3.3 above.

⁶⁰ See Chapter 4, 4.2.3.3 and Chapter 5, 5.2.4.1 above.

⁶¹ See Chapter 4, 4.2.3.2 above.

⁶² See Chapter 4, 4.2.3.2, 5.2.4.1, 5.2.4.2 above.

⁶³ See Chapter 5, 5.3.4 above.

fide purchaser's right to the goods should not prevail over the entitlement of the party to whom the goods have been delivered. By virtue of such a limitation, the negotiability of the bill of lading will never be divorced from a lawful transaction of goods covered by the bill. In this sense, under the future Chinese law, the negotiability of the bill of lading will not be equal to that borne by a full negotiable instrument such as bill of exchange.

In addition, in Chapters 4 and 5 this thesis noted that the balance of interest between the carrier and the cargo interest would be undermined if some of the rights discussed herein were strictly locked into the bill of lading. This is not only the case where the real rights of goods is concerned but also where the contractual right to sue is involved. As to the real right of goods, the observation in Chapter 5 suggests that the intention of the parties to the contract governing transaction of goods should prevail over the presumable effect of transfer of real rights of goods through a bona fide purchaser of the bill of lading.⁶⁴ As to the contractual right to sue, the observation in Chapter 4 showed that where the party that sustained a substantial loss or damage is not the holder but rather the shipper who has transferred the bill of lading, the shipper should still be entitled to sue the carrier if he could prove that the holder does not assume the same loss or damage claimed by him.⁶⁵ In general, these observations suggest that the future Chinese maritime law should introduce a more flexible approach towards the legal medium which triggers the transfer of rights between cargo interests. In addition to the bill of lading, some trade related factors, for example, the intention of the parties to the contract governing cargo transaction and the assumption of cargo loss or damage, may also lead to the transfer of certain rights.

To sum up, in the future Chinese law the rationale for the transfer of rights through the bill of lading may be attributed to the legal nature of the bill as a quasi-negotiable instrument, which means that the bill itself is a document that has the ability to confer certain rights to its holder. In this sense, the bill of lading to a large extent could be transferred in the same manner as a negotiable document although such a negotiability should not be divorced from the cargo covered by the bill. Besides this, under the future maritime law the proof of assuming an exclusive and substantial cargo loss or damage should constitute a supplemental rule to the general principle of transfer of contractual right to sue through the bill of lading,

⁶⁴ See Chapter 5, 5.2.4.1 above.

⁶⁵ See Chapter 4, 4.3.5 above.

with the purpose of providing a legal remedy for the shipper who suffered loss caused by the carrier's breach of duty after the bill of lading had been transferred to another party. It is expected that the aforesaid stipulations would not only reconcile the interest between the carrier and the cargo interest but also harmonize shipping and trading practice as a whole.

7.3 A Reformed Legal Framework covering Transfer of Rights through the Bill of Lading

Based on the aforesaid findings, the specific rules concerning the transfer of rights through the bill of lading in the future Chinese law can be envisaged as follows:

With regard to the transfer of contractual rights through the bill of lading, it is recommended that the following rules be added as subparagraphs under Article 78 of CMC 1992.

a) The person who becomes the holder of the bill of lading in good faith for reasonable value shall be transferred to and vest in the right to claim delivery of goods unless the goods covered by the bill have been delivered to the party who is entitled to them.⁶⁶

b) The person who becomes the holder of the bill of lading in good faith for reasonable value shall have the right to sue the carrier transferred to and vested in him; in the event that the shipper suffered loss or damage caused by the carrier's default after the transfer of the bill of lading to the holder, the shipper is entitled to sue the carrier, provided that the shipper is able to prove that the holder does not suffer the same loss or damage assumed by him.⁶⁷

c) Where rights are transferred pursuant to the operation of subparagraph (a) and (b), the validity of the rights acquired by the holder is not affected by the transfer having been a breach of duty by the person making the transfer, or by

⁶⁶ This rule is drafted by referencing FBLA 1994, § 80105 (a) and COGSA 1992, s2 (1).

⁶⁷ This rule is drafted by referencing FBLA 1994, § 80105 (a) and UNCITRAL 'UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (8 September 2005) A/CN.9/WG.III/WP56, art 68 (b).

*the owner of the bill having been deprived of possession by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill is transferred, or a person to whom the bill is subsequently transferred, gives value for the bill in good faith and without notice of the breach of duty, fraud, accident, mistake, duress, loss theft, or conversion.*⁶⁸

*d) Where rights are transferred pursuant to the operation of subparagraph (a) and (b), the transfer shall extinguish any entitlement to those rights which derives from a person having been the shipper or the preceding holder unless otherwise provided by the law.*⁶⁹

*e) The holder that is not the shipper and that does not exercises the rights transferred to him by virtue of subparagraph (a) and (b) does not assume any liability under the contract of carriage solely by reason of being a holder.*⁷⁰

With regard to the transfer of the real right of goods through the bill of lading, it is recommended that the following rules are incorporated into Article 106 of *Chapter IX Special Provisions on the Acquisition of Ownership* under the current Property Law.

The assignee who becomes the holder of the bill of lading or has control of an electronic bill of lading in good faith for reasonable value is entitled to the ownership of the goods covered by the bill, unless the goods covered by the bill have been delivered to another party having entitlement to the goods, or otherwise agreed by the assignee and the assignor.

Accordingly, Article 106 should be revised to read as follows:

⁶⁸ This rule is drafted by referencing FBLA 1994, § 80104 (b). Instead of the word ‘negotiation’ used in the original text, the word ‘transfer’ is employed here. However, according to the formulation of this rule, the ‘transfer’ in nature has an equal meaning of ‘negotiation’ used in the original text under FBLA 1994. The reason for using ‘transfer’ instead of ‘negotiation’ here is to keep consistency of the wording of this rule with other proposed Chinese rules on transfer of rights through the bill of lading and the existing rule in respect of good faith purchaser under Property Law 2007 (Article 106).

⁶⁹ This rule is drafted by referencing COGSA 1992, s2 (5).

⁷⁰ This rule is drafted by referencing COGSA 1992, s3 (1) and Rotterdam Rules, art 58.

Article 106 *Where a person not entitled to dispose of a real property or movable property transfers the real property or movable property to an assignee, the owner has the right to recover the real property or movable property. Except as it is otherwise prescribed by law, once it is under any of the following circumstances, the assignee shall obtain the ownership of the real property or movable property:*

(1) The assignee accepted the real property or moveable property in good faith;

*(2) The real property or movable property is transferred at a reasonable price;
or*

(3) The transferred real property or movable property shall have been registered in case registration is required by law, and shall have been delivered to the assignee in case registration is not required.

The assignee who becomes the holder of the bill of lading or has control of an electronic bill of lading in good faith for reasonable value is entitled to the ownership of the goods covered by the bill, unless the goods covered by the bill have been delivered to another party having entitlement to the goods, or otherwise agreed by the assignee and the assignor.

Where an assignee obtains the ownership of a real property or movable property in accordance with the preceding paragraph, the original owner may ask the person not entitled to dispose of the real property or movable property to make compensation for his losses.

Where a party concerned obtains any other real right in good faith, he shall be governed by the preceding three paragraphs by analogy.

As to the matters in relation to the right of control, the following reforms are suggested to be made under CMC 1992.

First, it is recommended that the following rule is inserted in section 5 *Delivery of Goods* of Chapter 4 *Contract of Carriage of goods by sea*.

*Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill of lading or may otherwise dispose of the goods, without liability for misdelivery, on instructions from the shipper or the holder who surrenders all original copies of the bill of lading.*⁷¹

Second, to prepare for paperless maritime practice, the future Chinese maritime law should legally make the electronic bill of lading achieve functional equivalence to the paper one. To do so, provisions that secure the exclusivity and singularity of the access to the electronic bill of lading should be incorporated as detailed below.

a) A person has control of an electronic bill of lading if a system employed for evidencing the transfer of rights in the electronic document reliably establishes that person as the person to whom the electronic document was issued or transferred.

b) A system satisfies subsection (a), and a person is deemed to have control of an electronic bill of lading, if the bill is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the bill exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as: (A) the person to whom the bill was issued; or (B) if the authoritative copy indicates that the bill has been transferred, the person to whom the bill was most recently transferred;

⁷¹ The rule is drafted by referencing UCC, §7-303.

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

c) A person satisfies subsection (a) and (b), and control the electronic bill of lading in good faith for reasonable value is vested with all rights against the carrier as if the person is the holder of a paper bill of lading.⁷²

7.4 Concluding Thoughts—Limitation and Recommendations for Further Study

With regard to the research method, this thesis adopts an economics related method which tries to view the transfer of rights through the bill of lading from an economics background and find out the economic rationale for the law reform. As to this point, in view of the current economic status of Chinese export traders and the significant role of exporting trade played in China's economy, this thesis argues that one important aim of establishing the legal scheme on transfer of rights through the bill of lading is to smooth export trade and improve the position of Chinese export traders in legal and commercial practice. Accordingly, in this thesis the rules on transfer of rights through the bill of lading are proposed mainly from a perspective of facilitating export trade. The validity of the conclusion in terms of economics

⁷² These rules are borrowed from UCC, §7-106 with slight modification.

would have been stronger if the impact of these rules on China's import trade had also been examined.

In addition, as mentioned in 1.7, the non-transferable/negotiable shipping documents such as the straight bill of lading, the sea waybill and the delivery order have not been considered in this thesis. To complete the legal scheme envisaged by this thesis, future research on transfer of rights is recommended to target the aforesaid non-transferable/negotiable shipping documents and to envisage rules providing for the legal effect of these documents, no matter whether the documents are in paper form or electronic form. To maintain internal consistency of the legal scheme governing negotiable and non-negotiable shipping documents, those elements examined by this thesis, for example, balance of interest between the carrier and the cargo interest, connection between cargo trading and transportation, and facilitation of paperless trading may also be considered when establishing the rules governing the legal effect of the non-negotiable shipping documents.

Bibliography

Primary Source

International Treaties

Appendix B to the Convention concerning International Carriage by Rail (COTIF) --- Uniform Rules concerning the Contract of International Carriage of goods by Rail 'CIM' (1999) CIT

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 'CMNI' (2001) UN Doc No ECE/TRANS/CMNI/CONF/2/FINAL

Convention for the Unification of Certain Rules Relating to International Carriage by Air 'Warsaw Convention' (1929) 137 LNTS 11

Conventions on the Contract for the International Carriage of Goods by Road 'CMR' (1956) 399 UNTS 189

CMI Rules for Electronic Bills of Lading (1990)

Convention for the Unification of Certain Rules for International Carriage by Air 'Montreal Convention' (1999) TIAS 13038, 2242 UNTS 350

UN Convention on Contracts for the International Sale of Goods (CISG 1980) 1489 UNTS 3.

UNGA United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 'The Rotterdam Rules' (adopted 11 December 2008, opened for signature 23 September 2009) (2009) UN Doc A/RES/63/122

ICC Rules

ICC Uniform Customs and Practice for Documentary Credits (UCP 600)

Incoterms Rules 2010

National legislations

China

Contract Law of the People's Republic of China 1999

Civil Procedure Law of the People's Republic of China 2012

General Principles of the Civil Law of the People's Republic of China 1986

Maritime Code of the People's Republic of China 1992

Negotiable Instruments Law of the People's Republic of China 2004

Property Law of the People's Republic of China 2007

Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading 2009

Tort Law of the People's Republic of China 2009

UK

Bills of Lading Act 1855

Bills of Exchange Act 1882

Factors Act 1889

Sales of Goods Act 1979

Carriage of Goods by Sea Act 1992

US

Federal Bills of Lading Act 1994 (49 US Code, Chapter 801)

Federal Rule of Civil Procedure 2014

Uniform Commercial Code

Cases

China

Beijing Wen-yang Imp. & Exp. Co. Ltd. v Shanghai COSCO Shipping Co. Ltd [1999] Higher People's Court of Tianjin Municipality, cited from Wei Wang, *Law and Practice for the Delivery of Goods without Presentation of Original Bills of Lading-A Comparative Study on Relevant Legal Issues of International Carriage of Goods by Sea* (1st edn Law Press, 2010)141

Bank of China, Hunan province branch v. Guangzhou Zhenhua Shipping Co. Ltd, Guangzhou Shipping (Group) Company [1999] Guangzhou Maritime Court (ed), *Annual of Chinese Maritime Trail* (China Communications Press 1999) 340

China Resources Textile Materials Co., Ltd. (H.K.) v. Guangdong Zhanjiang Shipping Agency Company, Zhanjiang Textiles Enterprise (Group) Company and Shenzhen Special Economic Zone Import and Export Trade (Group) Company [1994] 4 Gazette of the Supreme People's Court 155

China Construction Bank (Liwan Branch) v Guangdong Lanyue Energy Development Co., Ltd, Supreme People's Court of the People's Republic of China, Intermediate People's Court of Guangzhou, No. Suizhongfajinminchuzi 158/2013; Higher People's Court of Guangdong Province, No. Yugaofamingerzhongzi 45/2014; Supreme People's Court of the People's Republic of China, No. Mintizi 126/2015 (*II Law*, 29 January 2016) <<http://www.sea-law.cn/3g/blog-post.asp?id=2236>> accessed on 15 May 2017

Gree Yinshi Ltd (Zhuhai) and Nantong Bank (Zhuhai Branch) v WangFoong Transportation Ltd (HK), Higher People's Court of Guangdong Province, No. Yuegaofajingerzhongzi 289/2000 (*Find Law*, 28 December 2009) <<http://china.findlaw.cn/hshs/haishanghetong/tdzj/957.html#p1>> accessed 23 May 2017

Heilongjiang Export and Import Co., Ltd v Brilliant Logistic Group Inc. and others, The Higher People's court of Guangdong Province, No. Yuegaofaminsizhongzi 75/2002

Hainan Tonglian Shipping Company v. Minmetals International Nonferrous Metals Trading Company [1996] Supreme People's the court of People's Republic of China (*China Foreign-Related Commercial and Maritime Trial*, 30 December 2001) <<http://www.ccmf.org.cn/shownews.php?id=102>> accessed 05 May 2017

Mingxing Co., Ltd. v Wanhai Shipping Co., Ltd, Shanghai Maritime Court, No. Huhaifashangchuzi 567/2004 <<http://www.110.com/panli/28486.html>> accessed 04 June 2017

Jinghan (Shenzhen) Trading, Ltd v. Li Tong Logistic, Ltd and A-Sonic Marine (HK) Ltd, Dalian Maritime Court, No. Dahaishangchuzi 385/2006 (*China Foreign-Related Commercial and Maritime Trial*, 9 March 2013) <<http://www.ccmf.org.cn/shownews.php?id=12737>> accessed 23 May 2017

JiaJia import&export trading ltd (Ningbo) v. Mediterranean shipping company, Higher People's Court of Shanghai Municipality, No. Hugaominsihazhongzi 13/2008 (*Pkulaw*) <http://www.pkulaw.cn/case_es/Payz_1970324837830033.html> accessed 23 May 2017

PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company, Higher People's court of Guangdong Province, No. Yuegaofaminsizhongzi 104/2012, cited from Feifei Deng, 'Shipper's right to sue in relation to carriage of goods by sea: the approach of Chinese court' (2013) 19 *JIML* 196

Shenzhen Yingtai Import & Export Ltd v. Huafeng International Logistic (Shanghai) Ltd, Shenzhen Branch, Higher People's Court of Guangdong Province, No. Yuegaofaminsizhongzi 98/2012 (*China Foreign-Related Commercial and Maritime Trial*, 28 November 2014) <<http://www.ccmf.org.cn/shownews.php?id=15185>> 28 May 2017

Xingli Company, Guangao Company v. National Trade Co. Ltd. (India), Balapool Company (Malaysia), Kupock Company (Malaysia), Narin Company (Malaysia) [1991] 1 *Gazette of the Supreme People's Court* 47

Zhejiang Textiles Import & Export Group Ltd. v Taiwan Uniglory Marine Corporation (2005) Higher People's Court of Shanghai Municipality, cited from Xinlong Ying, *Selected maritime cases of Shanghai Maritime Court China* (1st edn, Law Press China, 2011) 87

UK

Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero) [1977] AC 774 (HL)

Aegean Sea Traders Corp v Repsol Petroleo SA (The Aegean Sea) [1998] 2 *Lloyd's Rep* 39 (QB)

Barber v Meyerstein (1870) 4 *LR* 317 (HL)

Brandt v Liverpool Brazil & River Plate SN Co Ltd [1924] 1 *KB* 575 (CA)

Bank of Communications Co Ltd, Hangzhou Branch v. Universal Shipping Group Inc (The Dolphina) [2011] *SGHC* 273

Compania Portoraffi Commerciale S.A. v Ultramar Panama Inc and others (The Captain Gregos No.2) [1990] 2 *Lloyd's Rep* 395 (CA)

Dunlop v Lambert (1839) 6 *Cl & Fin* 600, 7 *ER* 824 (HL)

Elder Dempster Lines v Zaki Ishag (The 'Lycano') [1983] 2 *Lloyd's Rep* 548

Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini) [1988] 2 *Lloyd's Rep* 599, affirmed [1990] 1 *Lloyd's Rep* 252 (CA)

East West Corporation v DKBS 1912 A/S [2003] *EWCA Civ* 83, [2003] 2 *ALL ER* 700

Glynn Mills v The East & West India Dock Co (1882) 7 AC 591 (HL)

Gurney v Behrend (1854) 3 E&B 622

J.I Mac William Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S) [2005] UKHL 11, [2005] 2 WLR 554, [2005] 1 Lloyd's Rep 347

Kum v Wah Tat Bank Ltd [1971] 1 Lloyd's Rep 439 (PC)

LickBarrow v Mason (1794) 5 TR 683 (KB)

Leduc v Ward (1888) 20 QBD 475 (CA)

Mitchell v Ede (1840) 11 Ad& EL 888

New Zealand Shipping Co. v A.M. Satterthwaite & Co. [1975] AC 154 (UKPC)

Partenreederei M/S 'HEIDBERG' and Vega Reederei Friedrich Dauber v. Grosvnor Grain and Feed Co. Ltd., Union Nationale Des Cooperatives Agricoles De Cereales and Assurances Mutuelles Agricoles (The "Heidelberg") [1994] 2 Lloyd's Rep 287 (QB)

Sanders Bros v Maclean & Co (1883) 11 QBD 327 (CA)

Sewell v Burdick (1883) [1881-85] All ER 223, (1884) 10 App Cas 74 (HL)

Standard Chartered Bank v Dorchester LNG Ltd (The Erin Schulte) [2013] EWHC 808 (Comm), [2013] 2 Lloyd's Rep 388, [2014] EWCA civ 1382, [2015] 1 Lloyd's Rep 97

The White Angel (1549) Select Pleas vol.II, 59.

The Future Express [1992] 2 Lloyd's Rep 79 (QB)

US

Clock v. Missouri-Kansas-Texas Railroad Company [1976] 407 F. supp. 448 (E.D)

Cock v Taylor (1811) 13 East 399

Cox v Vermont Cent Co 49 NE 97 (1898)

C. Itoh & Co. (America), Inc.v. M/V Hans Leonhardt, 719 F.supp. 479, 500, 1990 AMC 733 (E.D. La.1989)

Dougal v. Kemble and Another (1826) 3 Bing 383, 13 ECLR 16

Luckenbach SS Co. v. American Mills Co., 24 F.2d 704 (5th Cir. 1928)

Louisville E & St LR v Wilson, 138 U.S. 501 (11 S.Ct. 405, 34 L.Ed. 1023), 21 N.E. 341

Munson S.S. Line v Rosenthal (The Pan America) 6 F.Supp.374, 1934 AMC 46 (S.D.N.Y.1933)

Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al. 296 F. Supp 2d 91 (D.P.R.2003)

Robinson; McLeod & Co v Memphis & Charleston R Co (1881) 9 Fed 129

Shaw v. Merchant's National Bank of St Louis (1879) 25 L.Ed. 892

Sumimoto Corp. of America v. M/V Saint Venture, 683 F.Supp. 1361 (M.D.Fla.1988)

The Mary Ann Guest (1847) 16 Fed. Cas 956 (Fed. Cas. No.9, 197, aff'd No.9, 196)

The Bank of Rochester v Jones (1851) 4 Comst 497

Thyssen Steel v.Palma Armadora 1984 AMC 1133 (S.D.N.Y. 1983), aff'd without opinion, 742 F.2d 1441 (2 Cir. 1984)

The Davenport National Bank v Homeyer (1869) 45 Mo 145

U.S v Central Culf 669 F.2d 243, 1984 AMC 2882 (5 Cir 1983)

United States v Delaware Insurance Co (1823) 4 Wash.C.C.418

West Transmarine Corp. v Charles H. Levitt & Co., Inc., 25 F.2d 275 (2d Cir.1928)

Secondary Source

United Nation Documents

UNCTAD ‘Review of Maritime Transport’ (1992) TD/B/CN.4/27

UNCTAD ‘The Use of Transport Documents in International Trade’ (2003)
UNCTAD/SDTE/TLB/2003/3

UNGA ‘Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Nine Session 51st Session, Supplement No.17’ (1996) UN. Doc A/51/17

UNCITRAL ‘Possible future work on transport law (2001) A/CN.9/497

UNCITRAL ‘UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]’ (8 January 2002) A/CN.9/WG.III/WP21

UNCITRAL ‘Report of Working Group III (Transport Law) on the work of its eleventh session’ (4 April 2003) A/CN.9/526

UNCITRAL ‘UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]’ (4 September 2003) A/CN.9/WG.III/WP32

UNCITRAL ‘UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]’ (8 September 2005) A/CN.9/WG.III/WP56

UNCITRAL ‘Report of Working Group III (Transport Law) on the work of its eighteenth session (27 November 2006) A/CN.9/616

UNCTAD ‘Review of Maritime Transport’ (2016) UNCTAD/RMT/2016
(UNCTAD/RMT/2016)

CMI Yearbooks

‘Issues of Transport Law’ (2000) CMI Ybk 112

‘Issues of Transport Law, Report of Committee A’ (2001) CMI Ybk182

‘Issues of Transport Law, Report of the fifth meeting’ (2001) CMI Ybk 265

‘Issues of Transport Law, Report of the Sixth Meeting’ (2001) CMI Ybk 305

Ziegler A V, ‘Rotterdam Rules and underlying sale contract’ (2013) CMI Ybk 273

Law Commission Reports

American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code, 1962 official text, with comments* (Philadelphia, 1963)

Law Commission and Scottish Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea 1992* (Law Com No.196, Scot Law Com No.130, 1991)

Government Reports

In Chinese

Ministry of Commerce of the People's Republic of China Comprehensive Department, 'Zhongguo Jinkou Dafu Xiajiang De Yuanyin [The reasons for the decline of China's import (author's translation)]' (*Ministry of Commerce of the People's Republic of China Comprehensive Department*, 5 November 2015) <<http://zhs.mofcom.gov.cn/article/Nocategory/201511/20151101156432.shtml>> accessed 07 June 2017

Ministry of Commerce of the People's Republic of China Comprehensive Department, 'Zhongguo Duiwai Maoyi Xingshi Baogao (2016 Nian Qiuji) [The Report of China's Foreign Trade (2016 Autumn) (author's translation)]' (*Ministry of Commerce of the People's Republic of China Comprehensive Department*, 2 November 2016) <<http://zhs.mofcom.gov.cn/table2016//rep01.pdf>> accessed 07 June 2017

Books

In English

Aikens R, Lord R, Bools M, *Bills of Lading* (2nd edn, Informa Law 2016)

Bensa E, *The Early History of Bills of Lading* (1st edn, Caimo & C 1925)

Beaumont B and Yang P, *Chinese Maritime Law and Arbitration* (1st edn, Simmonds & Hill Publishing Ltd 1994)

Bools M D, *The Bill of Lading, a document of title to goods, an Anglo-American Comparison* (1st edn LLP 1997)

Baatz Y, Debattista C, Lorenzon F, Serdy A, Staniland H, *The Rotterdam Rules-a practical annotation* (1st edn, Informa 2009)

Baughen S, *Shipping Law* (6th edn, Routledge-Cavendish 2015)

Corbin A L, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (2nd edn, West Publishing Company, 1963)

Chen J, *Chinese Law: Context and Transformation* (1st edn, Martinus Nijhoff Publishers 2008)

Carr I, *International Trade Law* (5th edn, Cavendish Publishing 2013)

Chow D, *The Legal System of the People's Republic of China in a nutshell* (3rd edn, West Academic Publishing 2015)

Debattista C, *Bills of Lading in Export Trade* (3rd edn, Bloomsbury Professional 2008)

Eder B, Bennett H, Berry S, Foxton D, Smith C, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell Ltd 2011)

Friedmann W, *Legal Theory* (5th edn, Columbia University Press, 1967)

Force B, Yiannopoulos A N, Davies M, Hull H, *Admiralty and Maritime Law* (1st edn Beard Books 2006)

Foster N HD, 'Comparative Commercial Law: Rules or Context?' in Esin Orucu and David Nelken (eds), *Comparative Law-A Handbook* (1st edn, Hart Publishing 2007)

Goldby M, *Electronic documents in maritime trade: law and practice* (1st edn, Oxford University Press, 2013)

Herdegen M, *Principles of International Economic Law* (1st edn, Oxford University Press 2013)

- Jacob G, *Lex Mercatoria: or, The Merchant's Companion* (2nd edn, E. and R. Nutt, and R. Gosling, for B. Motte, J. Clarke, J. Lacy 1729)
- Li S and Ingram C, *Maritime Law and Policy in China* (2nd edn, Routledge 2013)
- Mckendrick E, *Goode on Commercial Law* (14th edn, Penguin Books 2010)
- Morris C and Murphy C, *Getting a PhD in Law* (1st edn, Hart Publishing 2011)
- Malynes G D, *Constuedo, vel Lex Mercatoria, or The Ancient Law-Merchant* (reprint 1997, Adam Islip 1622)
- Mc Conville M and Chui WH, *Research Methods for Law* (1st edn, University of Edinburgh Press Ltd 2007)
- Murray C, Holloway D and Timson-Hunt D, *Export Trade: The law and Practice of International Trade* (11th edn, Sweet & Maxwell 2007)
- Postelthwayt M, *The Universal Dictionary of Trade and Commerce, translated from the French of the Celebrated Monsieur Savory* (2nd edn, John and Paul Knapton 1751-1757)
- Porter B W, *The History and Present Position of the Bill of Lading as Document of Title* (1st edn, CUP 1914)
- Palmer V V, *The path to Privity: the History of Third Party Beneficiary Contracts at English Law* (1st edn, The Lawbook Exchange, Ltd 1992)
- Rogers A, Chuah J, Dockray M, *Cases and Materials on the Carriage of Goods by Sea* (4th edn, Routededge 2016)
- Schoenbaum T J, *Admiralty and Maritime Law* (3rd edn, West Group 2001)
- Seims M, *Comparative Law* (1st edn, Cambridge University Press 2014)
- Todd P, *Contracts for the Carriage of Goods By sea* (1st edn, BSP professional Books 1988)
 —— *Bills of Lading and Bankers' Documentary Credits* (4th edn, Informa 2007)
 —— *Principles of the carriage of goods by sea* (1st edn, Routledge 2016)
- Tetley W, *Marine Cargo Claims, vol.1* (4th edn, Thomson Carswell 2008)
- Treitel GH and Reynolds FMB, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011)
- Wilson J F, *Carriage of Goods by Sea* (7th edn, Pearson 2010)

In Chinese

Fu TZ, *Haishangfa, Gainian, Yuanli Yu Zhidu [The Principle of Chinese Maritime Law (author's translation)]* (1st edn, Law Press China, 2015)

Guo Y, *Tidan Falv Zhidu Yanjiu [Study on the law of bill of lading (author's translation)]* (1st edn, Peking University Press 1997)

——*Haishangfa De Jingshen—Zhongguo De Shijian He Lilun [The Spirit of Chinese Maritime Law—the theory and practice in China (author's translation)]* (2nd edn, Peking University Press 2005)

Guan ZY, *Maritime Legal System from the Perspective of Civil Law* (1st edn, Law Press China 2015)

Hu ZL, Yu SC and Xia BG, *Rotterdam Rules: consequence and countermeasures* (1st edn, Beijing University Press 2014)

Liu X, *Tidan Quanli Yanjiu [Study on bill of lading right (author's translation)]* (1st edn, China Intellectual Property Press 2008)

Li ZW, *Hot issues in the Law of International Carriage of Goods* (1st edn, Law Press-China 2012)

Liang HX and Chen HB, *Real Right Law* (5th edn, Law Press China 2014)

Si YZ and Li ZW, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009)

Si YZ, *Maritime Law Monograph* (2nd edn, China Renmin University Press 2010)

—— *The uniformity of international transport law* (1st edn, Beijing Normal University Publishing Group 2012)

Wang WJ, *Tidan Xiangxia Haiyun Huowu Suopei zhi Qingqiuquan Jichu Yanjiu [legal basis to establish the right of suit under the bill of lading (author's translation)]* (1st edn, Law Press China 2010)

Wang W, *Law and Practice for the Delivery of Goods without presentation of Original Bills of Lading* (1st edn, Law Press 2010)

Wu HN, *Chinese Maritime Law* (1st edn, China University of Political Science and Law Press 1996)

Wang LM and Wang YG, *Contract Law* (1st edn, City University of HongKong Press 2016)

Yang LY and Yang DM, *Bills of Lading and other Shipping Documents* (2nd edn, Dalian Maritime University Press 2016)

Zhang LY, *The Influence of the Rotterdam Rules on China's import and export* (1st edn, China University of Political Science and Law Press 2013)

Zhu ZJ, Wu HN, Zhang YG and Guo Y, *Lutidan Guisze Shiyi [understanding Rotterdam Rules (author's translation)]* (1st edn, China Commerce and Trade Press 2011)

Contribution to Edited Books

In English

Lorenzon F, 'International Trade and Shipping Documents' in Baatz Y (ed), *Maritime Law* (3rd edn, Informa 2014)

Sturley M F, 'Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' rights' in Thomas R (ed), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009)

Van der Ziel G J, 'Delivery of the goods, rights of the controlling party and transfer of rights, in Thomas R (ed),' *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules* (Lawtext Publishing Ltd 2009)

In Chinese

Hai X and Dan S, 'Jiaohuo Tuoyunren Zhi Quanli Baohu [The legal protection towards the shipper who delivers the goods to the carrier (author's translation)]' in Ying XL (ed) *Selected maritime cases of Shanghai Maritime Court China* (1st edn, Law Press China 2011)

Zhu J, 'Qianxi Sifa Shijian Zhong Dui Tuoyunren Suquan De Rending [the Shipper's title to sue in judicial practice (author's translation)]' in Liu NF(ed) *Annual of Chinese Maritime Trail 2008-2009* (Law Press, 2010)

Zheng ZF and Jia ZK, 'Tidan Yunshu Yu Huowu Kongzhiquan Wenti [The bill of lading and the Right of Control (author's translation)]' in Li XN (ed) *Selected Papers on Hot Issues in International Maritime Law* (1st edn, China Legal Publishing House 2008)

Journal Articles

In English

Baughen S, 'Misdelivery and the Boundaries of Contract and Tort' [2003] 4 LMCLQ 413

Berlingieri F, 'Revisiting the Rotterdam Rules' [2010] LMCLQ 583

Chan F W H, 'E-commerce all at sea: China welcomes digital bill of lading under the Electronic Signature Law 2005' [2006] 3 Oklahoma Journal of Law and Technology 31

- Diamond QC A, 'The next sea carriage convention?' [2008] LMCLQ 135
- Deng FF, 'Shipper's right to sue in relation to carriage of goods by sea: the approach of Chinese court' [2013] 19 JIML196
- Ginsburg T, 'Does Law Matter for Economic Development? Evidence From East Asia' [2000] 34 Law & Society Review 829
- Goldby M, 'The CMI Rules for Electronic Bills of Lading reassessed in the light of current practices' [2008] LMCLQ 56
- Gaskell N, 'Bills of Lading in an Electronic Age' [2010] LMCLQ 233
- Henry Hull, 'The Federal Uniform Bills of Lading Act' [1917] 3 The Virginia Law Register, New Series 329
- Kidney D, 'International Legal Theory-Law and the Political Economy of the World' 3 Leiden Journal of International Law [2013] 26
- Luney JR. PR, 'Traditions and Foreign Influences: Systems of Law in China and Japan' [1989] 52 Law and Contemporary Problems 129
- McLaughlin C B, 'The Evolution of the Ocean Bill of Lading' [1926] 35 The Yale Law Journal 548
- Patrick J S G, 'Uniformity of Maritime Law--An International Perspective' [1998-1999] 73 Tulane Law Review 1551
- Pejovic C, 'Document of Title in Carriage of Goods By Sea: Present Status and Possible Further Directions' [2001] JBL 461
 ——— 'Stoppage in Transit and Right of Control: Conflict of Rules?' [2008] 20 Pace International Law Review 129
- Schmitz T, 'The bill of lading as a document of title' [2011] Journal of International Trade Law and Policy 255
- Tetley W, 'Maritime Law as a Mixed Legal System' [1999] 23 Tulane Maritime Law Journal 317
- Todd P, 'The bill of lading and delivery: the common law actions' [2006] LMCLQ 539
 ——— 'Bank as Holder under Carriage of Goods by Sea Act' [2013] LMCLQ 275
- Thomas R, 'A comparative analysis of the transfer of contractual rights under the English Carriage of Goods by Sea Act 1924 and the Rotterdam Rules' [2011] 17 JIML 437
- Van Der Zeil GJ, 'Chapter 10 of the Rotterdam Rules: Control of Goods in Transit' [2009] 44 Texas International Law Journal 376

Zekos G I, 'Negotiable Bills of Lading and their Contractual Role under Greek, United States and English Law [1998] 40 Managerial Law 5

Zhao L, 'Control of Goods Carried by Sea and Practice in E-Commerce' (2013) JBL 585
—— 'The right of control in carriage of goods' [2014] LMCLQ 393

In Chinese

Fu TZ, 'The comments on some legal issues in respect of the right of control' [2008] 1 Annual of China Maritime Law 30

—— 'Analysis of the function of bill of lading as a document of title under the Rotterdam Rules' [2010] 2 Annual of China Maritime Law 19

Guo Y, 'Shipper's right of suit against the carrier after assignment of bill of lading' [2010] 6 Annual of China Maritime Law 50

Hu ZL, 'Lun Haishangfa Xiugai De Biyaoxing [The necessity of reforming Chinese Maritime Law (author's translation)] [2003] 12 Dangdai Faxue [Contemporary Law Review (author's translation)] 142

Hu ZL and Cao C, 'A Reconsideration on the Functions of Bill of Lading as a Document of Title in Chinese Law' [1996] 7 Annual of China Maritime Law 53

Li H, 'Reconsideration on Bill of Lading as Document of Title-And on the Nature of the B/L' [1997] 7 Annual of China Maritime Law 41

Li ZW, 'On the Holder of the Bill of Lading and the Rights, Obligations and Liabilities' [2001] 12 Annual of China Maritime Law 269

Sun WZ, 'On the Amendment of Maritime Law in the Perspective of Microcosm' [2011] 1 International Business Research 58

Si YZ, 'Guanyu Wudan Fanghuo De Lilun Yu Shijian--Jianlun Tidān De Wuquanxing Wenti [Theory and Practice on Delivery of Cargo without Bills of Lading—the nature of Bill of Lading as Document of Title (author's translation)]' (2000) 00 Annual of China Maritime Law 18

Wu RJ, 'Jixi Tidān Wuquan Pingzheng De Gongneng Neihan [Analysis of the legal nature of the bill of lading as document of title (author's translation)]' [2008] 18 Annual of China Maritime Law 242

Zhang YJ, 'Zaiyi Zhongguo Haishangfa Zhi Xiugai [Revisiting the reform of Chinese Maritime Law (author's translation)]' [2001] 1 Maritime Law Review 143

Zeng CS, 'Woguo Waimaoyicundu De Bianhua Qushi Fenxi Jiqi Guoji Bijiao [Comparative analysis of the change of China's dependence on foreign trade (author's translation)]' 3 Beifang Jingji [2008] 5 [North Economics (author's translation)] 45

Zhao L, 'Judicial practice and reflection of legislation upon the right of control in the Rotterdam Rules in China' [2009] 20 Annual of China Maritime Law 16

PhD thesis

In English

Peel S, 'The Development of the Bill of Lading: its future in the maritime industry' (Dphil Thesis, University of Plymouth 2002)

In Chinese

Jiang YC, 'Haishang Huowu Yunshu Zhong Huofang Suquan Rending [Cargo interest's title to sue in the carriage of goods by sea (author's translation)]' (Dphil Thesis, Dalian Maritime University 2011)

Websites and Blogs

China's degree of dependence on foreign trade (2007-2017) (*Stock-ai*) < <https://stock-ai.com/eom-99-cnDDTT.php>> accessed 07 June 2017

China's Shipowner Association, 'Zhongguo Chuandong Xiehui Jizhuangxiang Yunshu Zhuanye Weiyuan hui 2009 Niandu Baogao [2009 Annual Report of China Shipowner's Association, Container Transport Committee (author's translation)]' (*China's Shipowner Association*, 22 August 2016) < <http://www.csoa.cn/doc/410.jsp>> accessed 07 June 2017

Coates B, Horton D, and McNamee L, 'China: prospects for export-driven growth' (2012) 4 *Economic Roundup Issue* < <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Economic-Roundup-Issue-4/HTML/article4>> accessed 07 June 2017

Euro Marine Logistics NV Bill of Lading Terms & Conditions (*EML*) < <http://www.euro-marine.eu/billOfLadingConditions.html>> accessed 09 June 2017

Keely L, 'Uncommon Sense: China's Transition to a Consumer-led Economy-And How Business Can Help' (*Newsire*, 8 April 2015) < <http://www.nielsen.com/us/en/insights/news/2015/uncommon-sense-chinas-transition-to-a-consumer-led-economy-and-how-businesses-can-help.html>> accessed 07 June 2017

Knight J, Quheng D and Shi Li, 'China's Expansion of Higher Education: the Labour Market Consequences of a Supply Shock' (Centre for the Study of African Economies, April 2016) < <https://www.csae.ox.ac.uk/workingpapers/pdfs/csae-wps-2016-04.pdf>> accessed 07 June 2017

Mollmann A, 'Right of control and transfer of rights' (*CEVIA International Seminar on the*

Rotterdam Rules, 30 March 2010)<
http://jura.ku.dk/virksomhedsansvar/nyheder/rotterdam_rules/right_of_control.pdf >
accessed 13 June 2017

‘RBS and Bank of China achieved groundbreaking Bolero deal’ (*Beloro*, 23 August 2013)<
<http://www.bolero.net/about-us/news/18-boleronews/95-rbs-and-bank-of-china-achieved-groundbreaking-bolero-deal>> accessed on 10 June 2017

Shanghai Shipping Exchange, ‘Stable Demand Pushing Market Recovering’ (Chinese Shipping 06 June 2017) <
http://info.chineseshipping.com.cn/eninfo/ENMarketReport/201706/t20170606_1290315.shtml> accessed 07 June 2017.

Swaine M D, ‘Chinese Views and Commentary on the “One Belt, One Road” Initiative’ (2015) 47 (6) Hoover Institution <<http://www.hoover.org/research/chinese-views-and-commentary-one-belt-one-road>> accessed 07 June 2017

Tong XC, ‘The development of shipping industry in China (1949-2010)’ (China Economic History, 31 October 2012) <<http://economy.guoxue.com/?p=7575>> accessed 15 May 2017

UK P&I Club, ‘Legal Briefing on Electronic Bills of Lading’ (*UK P&I Club*, May 2017) <
https://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/2017/Legal_Briefing_e_bill_of_Lading_WEB.pdf> accessed 10 June 2017

World Bank Database, ‘World Development Indicators--Preview of China from 1990-2016’<
<http://databank.worldbank.org/data/reports.aspx?source=2&country=CHN>> accessed 07 June 2017

WTO Database, ‘Trade Profile of China’<
<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>>
accessed 07 June 2017.

Other materials

Alexander von Ziegler, ‘Transfer of rights and transport documents’ (Modern Law for Global Commerce Congress to celebrate the fortieth annual session of UNCITRAL Vienna, 9-12 July 2007)

Bolero Rulebook

COSCO Container Lines Bill of Lading

COSCO Manual of Bills of Lading

Mo JS, ‘Legal Culture and Legal Transplants—Convergence of Civil Law and Common Law Traditions in Chinese Private Law’ (Reports to the XVIIIth International Congress of Comparative Law, Washington, D.C. 2010)

Appendices

Appendix 1

Relevant Articles of China's Laws and provisions in English and Chinese

Maritime Law of the People's Republic of China [Effective]

中华人民共和国海商法 (现行有效)

Issuing authority: Standing Committee of the National People's Congress

发布部门: 全国人大常委会

Date issued: 11-07-1992

发布日期: 1992.11.07

Effective date: 07-01-1993

实施日期: 1993.07.01

Level of Authority: Laws

效力级别: 法律

Area of law: Traffic and Transport, Maritime Litigation

法规类别: 海洋运输, 海事诉讼

CHAPTER I GENERAL PROVISIONS

第一章 总则

Article 1 This Law is enacted with a view to regulating the relations arising from maritime transport and those pertaining to ships, to securing and protecting the legitimate rights and interests of the parties concerned, and to promoting the development of maritime transport, economy and trade.

第一条 【立法目的】为了调整海上运输关系、船舶关系，维护当事人各方的合法权益，促进海上运输和经济贸易的发展，制定本法。

Article 2 "Maritime transport" as referred to in this Law means the carriage of goods and passengers by sea, including the sea-river and river-sea direct transport. The provisions concerning contracts of carriage of goods by sea as contained in Chapter IV of this Law shall not be applicable to the maritime transport of goods between the ports of the People's Republic of China.

第二条 【海上运输界定】本法所称海上运输,是指海上货物运输和海上旅客运输,包括海江之间、江海之间的直达运输。

本法第四章海上货物运输合同的规定,不适用于中华人民共和国港口之间的海上货物运输。

CHAPTER IV CONTRACT OF CARRIAGE OF GOODS BY SEA

第四章 海上货物运输合同

Section 1 Basic Principles

第一节 一般规定

Article 41 A contract of carriage of goods by sea is a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another.

第四十一条 海上货物运输合同,是指承运人收取运费,负责将托运人托运的货物经海路由一港运至另一港的合同。

Article 42 For the purposes of this Chapter:

第四十二条 本章下列用语的含义:

(1) "Carrier" means the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper;

(一) “承运人”是指本人或者委托他人以本人名义与托运人订立海上货物运输合同的人。

(2) "Actual carrier" means the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract;

(二) “实际承运人”，是指接受承运人委托，从事货物运输或者部分运输的人，包括接受转委托从事此项运输的其他人。

(3) "Shipper" means:

(三) “托运人”是指：

a) The person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier;

1、本人或者委托他人以本人名义或者委托他人为本人与承运人订立海上货物运输合同的人；

b) The person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea;

2、本人或者委托他人以本人名义或者委托他人为本人将货物交给与海上货物运输合同有关的承运人的人。

(4) "Consignee" means the person who is entitled to take delivery of the goods;

(四) “收货人”，是指有权提取货物的人。

(5) "Goods" includes live animals and containers, pallets or similar Articles of transport supplied by the shipper for consolidating the goods.

(五) “货物”，包括活动物和由托运人提供的用于集装货物的集装箱、货盘或者类似的装运器具。

Section 4 Transport Documents

第四节 运输单证

Article 71 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 the order of a named person, or to order, or to bearer, constitutes such an undertaking.

第七十一条 【提单定义】提单，是指用以证明海上货物运输合同和货物已经由承运人接收或者装船，以及承运人保证据以交付货物的单证。提单中载明的向记名人交付货物，或者按照指示人的指示交付货物，或者向提单持有人交付货物的条款，构成承运人据以交付货物的保证。

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.

第七十二条 【提单签发】货物由承运人接收或者装船后，应托运人的要求，承运人应当签发提单。提单可以由承运人授权的人签发，提单由载货船船舶的船长签发的，视为代表承运人签发。

Article 73 A bill of lading shall contain the following particulars:

第七十三条 【提单内容】提单内容，包括下列各项：

(1) Description of the goods, mark, number of packages or pieces, weight or quantity, and a statement, if applicable, as to the dangerous nature of the goods;

（一）货物的品名、标志、包数或者件数、重量或者体积，以及运输危险货物时对危险性质的说明；

(2) Name and principal place of business of the carrier;

（二）承运人的名称和主营业所；

(3) Name of the ship;

（三）船舶名称；

(4) Name of the shipper;

（四）托运人的名称；

(5) Name of the consignee;

(五) 收货人的名称;

(6) Port of loading and the date on which the goods were taken over by the carrier at the port of loading;

(六) 装货港和在装货港接收货物的日期;

(7) Port of discharge;

(七) 卸货港;

(8) Place where the goods were taken over and the place where the goods are to be delivered in case of a multimodal transport bill of lading;

(八) 多式联运提单增列接收货物地点和交付货物地点;

(9) Date and place of issue of the bill of lading and the number of originals issued;

(九) 提单的签发日期、地点和份数;

(10) Payment of freight;

(十) 运费的支付;

(11) Signature of the carrier or of a person acting on his behalf. In a bill of lading, the lack of one or more particulars referred to in the preceding paragraph does not affect the function of the bill of lading as such, provided that it nevertheless meets the requirements set forth in Article 71 of this Law.

(十一) 承运人或者其代表的签字。提单缺少前款规定的一项或者几项的, 不影响提单的性质; 但是, 提单应当符合本法第七十一条的规定。

Article 74 If the carrier has issued, on demand of the shipper, a received-for-shipment bill of lading or other similar documents before the goods are loaded on board, the shipper may surrender the same to the carrier as against a shipped bill of lading when the goods have been loaded on board. The carrier may also note on the received-for-shipment bill of lading or other similar documents with the name of the carrying ship and the date of loading, and, when so noted, the received-for-shipment bill of lading or other similar documents shall be deemed to constitute a shipped bill of lading.

第七十四条 【收货待运提单】货物装船前，承运人已经应托运人的要求签发收货待运提单或者其他单证的，货物装船完毕，托运人可以将收货待运提单或者其他单证退还承运人，以换取已装船提单；承运人也可以在收货待运提单上加注承运船舶的船名和装船日期，加注后的收货待运提单视为已装船提单。

Article 75 If the bill of lading contains particulars concerning the description, mark, number of packages or pieces, weight or quantity of the goods with respect to which the carrier or the other person issuing the bill of lading on his behalf has the knowledge or reasonable grounds to suspect that such particulars do not accurately represent the goods actually received, or, where a shipped bill of lading is issued, loaded, or if he has had no reasonable means of checking, the carrier or such other person may make a note in the bill of lading specifying those inaccuracies, the grounds for suspicion or the lack of reasonable means of checking.

第七十五条 【不清洁提单】承运人或者代其签发提单的人，知道或者有合理的根据怀疑提单记载的货物的品名、标志、包数或者件数、重量或者体积与实际接收的货物不符，在签发已装船提单的情况下怀疑与已装船的货物不符，或者没有适当的方法核对提单记载的，可以在提单上批注，说明不符之处、怀疑的根据或者说明无法核对。

Article 76 If the carrier or the other person issuing the bill of lading on his behalf made no note in the bill of lading regarding the apparent order and condition of the goods, the goods shall be deemed to be in apparent goods order and condition.

第七十六条 【清洁提单】承运人或者代其签发提单的人未在提单上批注货物表面状况的，视为货物的表面状况良好。

Article 77 Except for the note made in accordance with the provisions of Article 75 of this Law, 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.

第七十七条 【作为初步证据的提单】除依照本法第七十五条的规定作出保留外，承运人或者代其签发提单的人签发的提单，是承运人已经按照提单所载状况收到货物或者货物已经装船的初步证据；承运人向善意受让提单的包括收货人在内的第三人提出的与提单所载状况不同的证据，不予承认。

Article 78 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.

Neither the consignee nor the holder of the bill of lading shall be liable for the demurrage, dead freight and all other expenses in respect of loading occurred at the loading port unless the bill of lading clearly states that the aforesaid demurrage, dead freight and all other expenses shall be borne by the consignee and the holder of the bill of lading.

第七十八条 【提单效力】承运人同收货人、提单持有人之间的权利、义务关系，依据提单的规定确定。

收货人、提单持有人不承担在装货港发生的滞期费、亏舱费和其他与装货有关的费用，但是提单中明确载明上述费用由收货人、提单持有人承担的除外。

Article 79 The negotiability of a bill of lading shall be governed by the following provisions:

第七十九条 【提单转让】提单的转让，依照下列规定执行：

(1) A straight bill of lading is not negotiable;

（一）记名提单：不得转让；

(2) An order bill of lading may be negotiated with endorsement to order or endorsement in blank;

（二）指示提单：经过记名背书或者空白背书转让；

(3) A bearer bill of lading is negotiable without endorsement.

（三）不记名提单：无需背书，即可转让。

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 that are issued by the carrier shall not be negotiable.

第八十条 【提单以外的单证】 承运人签发提单以外的单证用以证明收到待运货物的，此项单证即为订立海上货物运输合同和承运人接收该单证中所列货物的初步证据。承运人签发的此类单证不得转让。

Section 5 Delivery of Goods

第五节 货物交付

Article 81 Unless notice of loss or damage is given in writing by the consignee the the carrier at the time of delivery of the goods by the carrier to the consignee, such delivery shall be deemed to be prima facie evidence of the delivery of the goods by the carrier as described in the transport documents and of the apparent goods order and condition of such goods. Where the loss of or damage to the goods is not apparent, the provisions of the preceding paragraph shall apply if the consignee has not given the notice in writing within seven consecutive days from the next day of the delivery of the goods, or, in the case of containerized goods, within 15 days from the next day of the delivery thereof. The notice in writing regarding the loss or damage need not be given if the state of the goods has, at the time of delivery, been the subject of a joint survey or inspection by the carrier and the consignee.

第八十一条 【承运人交货】 承运人向收货人交付货物时，收货人未将货物灭失或者损坏的情况书面通知承运人的，此项交付视为承运人已经按照运输单证的记载交付以及货物状况良好的初步证据。货物灭失或者损坏的情况非显而易见的，在货物交付的次日起连续七日内，集装箱货物交付的次日起连续十五日内，收货人未提交书面通知的，适用前款规定。货物交付时，收货人已经会同承运人对货物进行联合检查或者检验的，无需就所查明的灭失或者损坏的情况提交书面通知。

Article 82 The carrier shall not be liable for compensation if no notice on the economic losses resulting from delay in delivery of the goods has been received from the consignee within 60 consecutive days from the next day on which the goods had been delivered by the carrier to the consignee.

第八十二条 【承运人责任免除】 承运人自向收货人交付货物的次日起连续六十日内，未收到收货人就货物因迟延交付造成经济损失而提交的书面通知的，不负赔偿责任。

Article 83 The consignee may, before taking delivery of the goods at the port of destination, and the carrier may, before delivering the goods at the port of destination, request the cargo inspection agency to have the goods inspected. The party requesting such inspection shall bear the cost thereof but is entitled to recover the same from the party causing the damage.

第八十三条 【货物检验】 收货人在目的港提取货物前或者承运人在目的港交付货物前，可以要求检验机构对货物状况进行检验；要求检验的一方应当支付检验费用，但是有权向造成货物损失的责任方追偿。

Article 84 The carrier and the consignee shall mutually provide reasonable facilities for the survey and inspection stipulated in Article 81 and 83 of this Law.

第八十四条 【相互提供便利】 承运人和收货人对本法第八十一条和第八十三条规定的检验，应当相互提供合理的便利条件。

Article 85 Where the goods have been delivered by the actual carrier, the notice in writing given by the consignee to the actual carrier under Article 81 of this Law shall have the same effect as that given to the carrier, and that given to the carrier shall have the same effect as that given to the actual carrier.

第八十五条 【实际承运人交付货物】 货物由实际承运人交付的，收货人依照本法第八十一条的规定向实际承运人提交的书面通知，与向承运人提交书面通知具有同等效力；向承运人提交的书面通知，与向实际承运人提交书面通知具有同等效力。

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.

第八十六条 【无人提取货物的费用和 risk】 在卸货港无人提取货物或者收货人迟延、拒绝提取货物的，船长可以将货物卸在仓库或者其他适当场所，由此产生的费用和 risk 由收货人承担。

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.

第八十七条 【承运人的留置权】应当向承运人支付的运费、共同海损分摊、滞期费和承运人为货物垫付的必要费用以及应当向承运人支付的其他费用没有付清，又没有提供适当担保的，承运人可以在合理的限度内留置其货物。

Article 88 If the goods under lien in accordance with the provisions of Article 87 of this Law 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 the 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 sale 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 to make the refund and such surplus amount has not been claimed at the end of one full year after the auction sale, it shall go to the State Treasury.

第八十八条 【留置权的行使】承运人根据本法第八十七条规定留置的货物，自船舶抵达卸货港的次日起满六十日无人提取的，承运人可以申请法院裁定拍卖；货物易腐烂变质或者货物的保管费用可能超过其价值的，可以申请提前拍卖。

拍卖所得价款，用于清偿保管、拍卖货物的费用和运费以及应当向承运人支付的其他有关费用；不足的金額，承运人有权向托运人追偿；剩余的金額，退还托运人；无法退还、自拍卖之日起满一年又无人领取的，上缴国库。

Contract Law of the People's Republic of China [Effective]

中华人民共和国合同法 [现行有效]

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Area of law: Contract, E-Commerce

法规类别: 经济合同, 电子商务

Article 64 Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract.

第六十四条 【向第三人履行合同】 当事人约定由债务人向第三人履行债务的，债务人未向第三人履行债务或者履行债务不符合约定，应当向债权人承担违约责任。

Article 82 Upon receipt of the notice of assignment of rights, the obligor may assert against the assignee any defences it has against the assignor.

第八十二条 【债务人的抗辩权】 债务人接到债权转让通知后，债务人对让与人的抗辩，可以向受让人主张。

Article 88 Upon the consent of the other party, one party may transfer its rights together with its obligations under contract to a third party.

第八十八条 【概括转让】当事人一方经对方同意，可以将自己在合同中的权利和义务一并转让给第三人。

Article 107 If a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract such as to continue to perform its obligations, to take remedial measures, or to compensate for losses.

第一百零七条 【违约责任】当事人一方不履行合同义务或者履行合同义务不符合约定的，应当承担继续履行、采取补救措施或者赔偿损失等违约责任。

Article 112 Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement, and the other party still suffers from other damages after the performance of the obligations or adoption of remedial measures, such party shall compensate the other party for such damages.

第一百一十二条 【履行、补救措施后的损失赔偿】当事人一方不履行合同义务或者履行合同义务不符合约定的，在履行义务或者采取补救措施后，对方还有其他损失的，应当赔偿损失。

Article 133 The ownership of a subject matter shall be transferred upon the delivery of the object, except as otherwise stipulated by law or agreed upon by the parties.

第一百三十三条 【标的物所有权转移时间】标的物的所有权自标的物交付时起转移，但法律另有规定或者当事人另有约定的除外。

Article 308 Prior to carrier's delivery of the cargoes to the consignee, the consignor may request the carrier to suspend the carriage, return the cargoes, change the destination or deliver the cargoes to another consignee, but it shall compensate the carrier for any losses thus caused.

第三百零八条 (托运人请求变更的权利) 在承运人将货物交付收货人之前，托运人可以要求承运人中止运输、返还货物、变更到达地或者将货物交给其他收货人，但应当赔偿承运人因此受到的损失。

Article 365 A storage contract is a contract whereby the depository keeps the deposit delivered by the depositor, and eventually returns it thereto.

第三百六十五条 【定义】保管合同是保管人保管寄存人交付的保管物，并返还该物的合同。

Article 381A warehousing contract is a contract whereby the safekeeping party stores the goods delivered by the depositor, and the depositor pays the warehousing fee.

第三百八十一条 【定义】仓储合同是保管人储存存货人交付的仓储物，存货人支付仓储费的合同。

Tort Law of the People's Republic of China [Effective]

中华人民共和国侵权责任法 [现行有效]

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Area of law: Civil Law, E-Commerce

法规类别: 民法, 电子商务

Article 6 One who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.

One who is at fault as construed according to legal provisions and cannot prove otherwise shall be subject to the tort liability.

第六条 行为人因过错侵害他人民事权益，应当承担侵权责任。

根据法律规定推定行为人有过错，行为人不能证明自己没有过错的，应当承担侵权责任。

Property Law of the People's Republic of China [Effective]
中华人民共和国物权法 [现行有效]

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Area of law: Civil Law

法规类别: 民法综合规定与解释, 财产所有权

Article 2 This Law shall apply to the civil relationships generated from the ownership and utilization of properties.

The term 'property' as mentioned in this Law includes real estates (immovable property) and movable property. In case other laws also stipulate certain rights to be the objects of real right, those provisions shall be followed.

The term 'real right' as mentioned in this Law refers to the exclusive right of direct control enjoyed by the holder according to law over a specific property, including ownership, usufructuary right and real rights for security.

第二条 【调整范围】因物的归属和利用而产生的民事关系, 适用本法。

本法所称物, 包括不动产和动产。法律规定权利作为物权客体的, 依照其规定。

本法所称物权, 是指权利人依法对特定的物享有直接支配和排他的权利, 包括所有权、用益物权和担保物权。

Article 23 The creation or transfer of the real right of a movable property shall become effective upon delivery, except it is otherwise prescribed by any law.

第二十三条 【动产物权的设立和转让生效时间】动产物权的设立和转让，自交付时发生效力，但法律另有规定的除外。

Article 39 The owner of a real property or movable property has the rights to possess, use, seek profits from and dispose of the real property or movable property according to law.

第三十九条 【所有权基本内容】所有权人对自己的不动产或者动产，依法享有占有、使用、收益和处分的权利。

Article 106 Where a person untitled to dispose a real property or movable property transfers the real property or movable property to an assignee, the owner has the right to recover the real property or movable property. Except it is otherwise prescribed by law, once it is under any of the following circumstances, the assignee shall obtain the ownership of the real property or movable property:

第一百零六条 【善意取得】无处分权人将不动产或者动产转让给受让人的，所有权人有权追回；除法律另有规定外，符合下列情形的，受让人取得该不动产或者动产的所有权：

(1) The assignee accepted the real property or movable property in good faith;

（一）受让人受让该不动产或者动产时是善意的；

(2) The real property or movable property is transferred at a reasonable price; or

（二）以合理的价格转让；

(3) The transferred real property or movable property shall have been registered in case registration is required by law, and shall have been delivered to the assignee in case registration is not required.

Where an assignee obtains the ownership of a real property or movable property in accordance with the preceding paragraph, the original owner may ask the person untitled to dispose of the real property or movable property to make compensation for his losses.

Where a party concerned obtains any other real right in good faith, he shall be governed by the preceding two paragraphs by analogy.

(三) 转让的不动产或者动产依照法律规定应当登记的已经登记，不需要登记的已经交付给受让人。

受让人依照前款规定取得不动产或者动产的所有权的，原所有权人有权向无处分权人请求赔偿损失。

当事人善意取得其他物权的，参照前两款规定。

Article 223 The following rights which an obligor or third party has the right to dispose of may be pledged:

第二百二十三条 【可以出质的权利范围】 债务人或者第三人有权处分的下列权利可以出质：

(1) Money orders, checks, and cashier's checks;

(一) 汇票、支票、本票；

(2) Securities and deposit receipts;

(二) 债券、存款单；

(3) Warehouse receipts and bills of lading;

(三) 仓单、提单；

(4) Transferable fund units and stock rights;

(四) 可以转让的基金份额、股权；

(5) Exclusive trademark rights, patent rights, copyrights or other property rights in intellectual property that can be transferred;

(五) 可以转让的注册商标专用权、专利权、著作权等知识产权中的财产权；

(6) Account receivables; and

(六) 应收账款；

(7) Other property rights that can be pledged according to any law or administrative regulation.

（七）法律、行政法规规定可以出质的其他财产权利。

Article 243 In case a real property or movable property is possessed by a possessor, the holder may request the return of original object and its fruits, but shall pay necessary expenses to the bone fide possessor for the maintenance of this real property or movable property.

第二百四十三条 【无权占有人的返还义务及善意占有人的必要费用返还请求权】
不动产或者动产被占有人占有的，权利人可以请求返还原物及其孳息，但应当支付善意占有人因维护该不动产或者动产支出的必要费用。

Negotiable Instruments Law of the People's Republic of China (2004 Amendment)
[Effective]
中华人民共和国票据法(2004 修正) [现行有效]

Issuing authority: Standing Committee of the National People's Congress

【发布部门】 全国人大常委会

Date issued: 08-28-2004

【发布日期】 2004.08.28

Effective date: 01-01-1996

【实施日期】 1996.01.01

Level of Authority: Laws

【效力级别】 法律

Area of law: Negotiable Instruments

【法规类别】 票据法规

Article 2 The law applies to all transaction activities in negotiable instruments within the territory of the People's Republic of China.

The negotiable instruments mentioned here include bill of exchange, promissory note and cheque.

第二条 【适用范围】 在中华人民共和国境内的票据活动，适用本法。

本法所称票据，是指汇票、本票和支票。

Article 4 In drafting negotiable instruments, a drawer shall put his/her signature or seal to the instruments according to the legal conditions and bear the liabilities for the negotiable instruments in compliance with the items recorded on them.

In exercising the rights arising out of the negotiable instruments, a holder shall put his/her signature or seal to the negotiable instruments according to the legal procedures and present the instruments.

Other debtors who have put their signatures or seals on the negotiable instruments shall be obliged to perform the obligations arising out of the negotiable instruments.

The term ‘rights arising out of the negotiable instruments’ used in this law refers to the rights of the holder to claim payment according to the amount specified in the negotiable instruments, including the right of claim and the right of recourse.

第四条 【票据行为、票据权利与票据责任】 票据出票人制作票据，应当按照法定条件在票据上签章，并按照所记载的事项承担票据责任。

持票人行使票据权利，应当按照法定程序在票据上签章，并出示票据。

其他票据债务人在票据上签章的，按照票据所记载的事项承担票据责任。

本法所称票据权利，是指持票人向票据债务人请求支付票据金额的权利，包括付款请求权和追索权。

Article 40 For a bill of exchange payable at a fixed date after sight, the holder shall make presentation for acceptance to the payer within one month starting from the date of issuing the bill of exchange.

If a holder has failed to make presentation for acceptance according to the prescribed time limit, that holder shall lose the right of recourse against the prior holder.

第四十条 【见票后定期付款汇票的提示承兑期间及在提示承兑期间未提示承兑的效力】 见票后定期付款的汇票，持票人应当自出票日起一个月内向付款人提示承兑。

汇票未按照规定期限提示承兑的，持票人丧失对其前手的追索权。

Civil Procedure Law of the People's Republic of China (2012 Amendment) [Effective]
中华人民共和国民事诉讼法(2012 修正) [现行有效]

Issuing authority: Standing Committee of the National People's Congress

【发布部门】 全国人大常委会

Date issued: 08-31-2012

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Effective date: 04-09-1991

【实施日期】 1991.04.09

Level of Authority: Laws

【效力级别】 法律

Area of law: Civil Litigation

【法规类别】 民事诉讼法

Article 119 (1) The plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case when bringing an action against the defendant.

第一百一十九条 起诉必须符合下列条件：

（一）原告是与本案有直接利害关系的公民、法人和其他组织。

Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Trial of Cases Involving Delivery of Goods without Original Bills of Lading

最高人民法院关于审理无正本提单交付货物案件适用法律若干问题的规定

(Adopted at the 1463th Session of the Trial Committee of the Supreme People's Court on February 16, 2009)

In order to properly try cases involving delivery of goods without original bills of lading, these Provisions are formulated in accordance with the Maritime Code of the People's Republic of China (hereinafter referred to as the "Maritime Code"), the Contract Law of the People's Republic of China, the General Principles of the Civil Law of the People's Republic of China and other laws.

(2009年2月16日最高人民法院审判委员会第1463次会议通过)

为正确审理无正本提单交付货物案件，根据《中华人民共和国海商法》、《中华人民共和国合同法》、《中华人民共和国民事诉讼法通则》等法律，制定本规定。

Article 1 For the purposes of these Provisions, an original bill of lading shall include straight bill of lading, order bill of lading and open bill of lading.

第一条 本规定所称正本提单包括记名提单、指示提单和不记名提单。

Article 2 Where a carrier, in violation of laws, delivers goods without the original bill of lading (B/L), thus injuring the original B/L holder's rights under the B/L, the original B/L holder may request the carrier to bear the civil liability for the resultant loss.

第二条 承运人违反法律规定,无正本提单交付货物,损害正本提单持有人提单权利的,正本提单持有人可以要求承运人承担由此造成损失的民事责任。

Article 3 Where any loss is caused to the holder of an original B/L due to delivery of goods by a carrier without the original B/L, the holder may request the carrier to bear the liability for breach of contract or tort.

Where the holder requests the carrier to bear the civil liability for delivery of goods without the original B/L, the provisions of the Maritime Code shall apply; in the absence of such provisions, the relevant provisions of other laws shall apply.

第三条 承运人因无正本提单交付货物造成正本提单持有人损失的,正本提单持有人可以要求承运人承担违约责任,或者承担侵权责任。

正本提单持有人要求承运人承担无正本提单交付货物民事责任的,适用海商法规定;海商法没有规定的,适用其他法律规定

Appendix 2 Relevant Articles of the UK law¹

Bills Of Lading Act 1855 (repealed 16.9.1992) 1855 CHAPTER 111 18 and 19 Vict

An Act to amend the Law relating to Bills of Lading. [14th August 1855]

Whereas 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 bonâ 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: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. 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.

Bills of Exchange Act 1882 1882 CHAPTER 61 45 and 46 Vict

Section 90 Good faith.

A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

¹ The text of the UK law is available from < <http://www.legislation.gov.uk/> > accessed 30 April 2017.

Factors Act 1889
1889 CHAPTER 45 52 and 53 Vict

An Act to amend and consolidate the Factors Acts. [26th August 1889]

Preliminary

1 Definitions.

For the purposes of this Act—

(4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Sale of Goods Act 1979²
1979 CHAPTER 54

An Act to consolidate the law relating to the sale of goods. [6th December 1979]

17 Property passes when intended to pass.

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

24 Seller in possession after sale.

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

61 Interpretation.

(1) In this Act, unless the context or subject matter otherwise requires,—

....

‘Document of title to goods’ has the same meaning as it has in the Factors Acts;

‘Factors Acts’ means the Factors Act 1889, the Factors (Scotland) 1890, and any enactment amending or substituted for the same;

(3) 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.

² SOGA 1979 was replaced for consumer contracts from 1 October 2015 by the Consumer Rights Act 2015, but remains the primary legislation underpinning business to business transactions for selling and buying goods.

Carriage of Goods by Sea Act 1992
1992 CHAPTER 50

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]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

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.

5 Interpretation etc.

(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.

Appendix 3 Relevant Articles of the US law³

49 U.S. Code Chapter 801 - BILLS OF LADING (Federal Bills of Lading Act 1994) Amendments

1994—Pub. L. 103–429, § 6 (79), Oct. 31, 1994, 108 Stat. 4388, made technical amendment to chapter heading.

§ 80101. Definitions

In this chapter--

(4) "holder" means a person having possession of, and a property right in, a bill of lading.

§ 80104. Form and requirements for negotiation

(b) Validity not affected.--The validity of a negotiation of a bill of lading is not affected by the negotiation having been a breach of duty by the person making the negotiation, or by the owner of the bill having been deprived of possession by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill is negotiated, or a person to whom the bill is subsequently negotiated, gives value for the bill in good faith and without notice of the breach of duty, fraud, accident, mistake, duress, loss, theft, or conversion.

§ 80105. Title and rights affected by negotiation

(a) Title.--When a negotiable bill of lading is negotiated--

(1) the person to whom it is negotiated acquires the title to the goods that--

(A) the person negotiating the bill had the ability to convey to a purchaser in good faith for value; and

(B) the consignor and consignee had the ability to convey to such a purchaser; and

(2) the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person.

§ 80110. Duty to deliver goods

³ The text of the US law is available from < <https://www.law.cornell.edu/uscode/text> > accessed 30 April 2017.

(a) General rules.--Except to the extent a common carrier establishes an excuse provided by law, the carrier must deliver goods covered by a bill of lading on demand of the consignee named in a non-negotiable bill or the holder of a negotiable bill for the goods when the consignee or holder--

(1) offers in good faith to satisfy the lien of the carrier on the goods;

(2) has possession of the bill and, if a negotiable bill, offers to indorse and give the bill to the carrier; and

(3) agrees to sign, on delivery of the goods, a receipt for delivery if requested by the carrier.

(b) Persons to whom goods may be delivered.--Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to--

(1) a person entitled to their possession;

(2) the consignee named in a non-negotiable bill; or

(3) a person in possession of a negotiable bill if--

(A) the goods are deliverable to the order of that person; or

(B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.

(c) Common carrier claims of title and possession.--A claim by a common carrier that the carrier has title to goods or right to their possession is an excuse for non-delivery of the goods only if the title or right is derived from--

(1) a transfer made by the consignor or consignee after the shipment; or

(2) the carrier's lien.

(d) Adverse claims.--If a person other than the consignee or the person in possession of a bill of lading claims title to or possession of goods and the common carrier knows of the claim, the carrier is not required to deliver the goods to any claimant until the carrier has had a reasonable time to decide the validity of the adverse claim or to bring a civil action to require all claimants to interplead.

(e) Interpleader.--If at least 2 persons claim title to or possession of the goods, the common carrier may--

(1) bring a civil action to interplead all known claimants to the goods; or

(2) require those claimants to interplead as a defense in an action brought against the carrier for no delivery.

(f) Third person claims not a defense.--Except as provided in subsections (b), (d), and (e) of this section, title or a right of a third person is not a defense to an action brought by the consignee of a non-negotiable bill of lading or by the holder of a negotiable bill against the common carrier for failure to deliver the goods on demand unless enforced by legal process.

§ 80111. Liability for delivery of goods

(a) General rules.--A common carrier is liable for damages to a person having title to, or right to possession of, goods when--

(1) the carrier delivers the goods to a person not entitled to their possession unless the delivery is authorized under section 80110(b)(2) or (3) of this title;

(2) the carrier makes a delivery under section 80110(b)(2) or (3) of this title after being requested by or for a person having title to, or right to possession of, the goods not to make the delivery; or

(3) at the time of delivery under section 80110(b)(2) or (3) of this title, the carrier has information it is delivering the goods to a person not entitled to their possession.

(b) Effectiveness of request or information.--A request or information is effective under subsection (a)(2) or (3) of this section only if--

(1) an officer or agent of the carrier, whose actual or apparent authority includes acting on the request or information, has been given the request or information; and

(2) the officer or agent has had time, exercising reasonable diligence, to stop delivery of the goods.

(c) Failure to take and cancel bills.--Except as provided in subsection (d) of this section, if a common carrier delivers goods for which a negotiable bill of lading has been issued without taking and cancelling the bill, the carrier is liable for damages for failure to deliver the goods to a person purchasing the bill for value in good faith whether the purchase was before or after delivery and even when delivery was made to the person entitled to the goods. The carrier also is liable under this paragraph if part of the goods are delivered without taking and

cancelling the bill or plainly noting on the bill that a partial delivery was made and generally describing the goods or the remaining goods kept by the carrier.

(d) Exceptions to liability.--A common carrier is not liable for failure to deliver goods to the consignee or owner of the goods or a holder of the bill if--

- (1) a delivery described in subsection (c) of this section was compelled by legal process;
- (2) the goods have been sold lawfully to satisfy the carrier's lien;
- (3) the goods have not been claimed; or
- (4) the goods are perishable or hazardous.

Uniform Commercial Code (UCC)

ARTICLE 1 - GENERAL PROVISIONS (2001)

PART 2. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 1-201. General Definitions.

(15) 'Delivery', with respect to an instrument, document of title, or chattel paper, means voluntary transfer of possession.

(16) 'Document of title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

ARTICLE 2 - SALES (2002) ›

PART 7. REMEDIES

§ 2-705. Seller's Stoppage of Delivery in Transit or Otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

ARTICLE 7 - DOCUMENTS OF TITLE (2003)

§ 7-106. Control of Electronic Document of Title.

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a), and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the document was issued; or

(B) if the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

§ 7-303. Diversion; Reconsignment; Change of Instructions.

(a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

(1) the holder of a negotiable bill;

(2) the consignor on a non-negotiable bill even if the consignee has given contrary instructions;

(3) the consignee on a non-negotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or

(4) the consignee on a non-negotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) are included in a negotiable bill of lading, a person to which the bill is duly negotiated may hold the bailee according to the original terms.

§ 7-501. Form of Negotiation and Requirements of Due Negotiation.

(a) The following rules apply to a negotiable tangible document of title:

(1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.

(2) If the document's original terms run to bearer, it is negotiated by delivery alone.

(3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.

(4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person as well as delivery.

(5) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.

(b) The following rules apply to a negotiable electronic document of title:

(1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

(c) Indorsement of a non-negotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods.

§ 7-502. Rights Acquired by Due Negotiation.

(a) Subject to Sections 7-205 and 7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

(1) title to the document;

(2) title to the goods;

(3) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and

(4) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this article. In the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery order and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to Section 7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

- (1) the due negotiation or any prior due negotiation constituted a breach of duty;
- (2) any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or
- (3) a previous sale or other transfer of the goods or document has been made to a third person.

Appendix 4 Relevant Articles of the UNCITRAL Drafts and the Rotterdam Rules⁴

UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (8 January 2002) A/CN.9/WG.III/WP21

13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

(i) the shipper,

(ii) the consignee,

(iii) any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,

(iv) any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer.

In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.

13.2 In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. 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.

13.3 In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.

⁴ The text of the UNCITRAL Drafts and the Rotterdam Rules are available from <http://www.uncitral.org/uncitral/uncitral_texts/transport_goods.html> accessed 30 April 2017.

UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea]' (4 September 2003) A/CN.9/WG.III/WP32

Article 65.

In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is not the holder, such claimant must, in addition to its burden of proof 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.

UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (8 September 2005) A/CN.9/WG.III/WP56

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Convention:

(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 transferred and that has exclusive control of that negotiable electronic transport record.

CHAPTER 14. RIGHTS OF SUIT

Article 67. Parties

Variant A

1. Without prejudice to articles 68 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; or

(c) Any person to which the shipper or the consignee has transferred 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.

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.

Article 68. When negotiable transport document or negotiable electronic transport record is issued.

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

(b) When the claimant is not the holder, it must, in addition to 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.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)

Adopted by Resolution (63/122) of General Assembly of United Nations on 11 December 2008, New York

Chapter 1

General provisions

Article 1

Definitions

For the purposes of this Convention:

8. “Shipper” means a person that enters into a contract of carriage with a carrier.
9. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.
10. “Holder” means:
 - (a) A person that is in possession of a negotiable transport document; and (i) 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 (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
 - (b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.
12. “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

Chapter 9

Delivery of the goods

Article 47

Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is,

after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods.

Chapter 10 Rights of the controlling party

Article 50

Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

Article 51

Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary

shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

Article 52

Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

- (a) The person giving such instructions is entitled to exercise the right of control;
- (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
- (c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

Article 56

Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

Chapter 11

Transfer of rights

Article 57

When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

- (a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

Article 58

Liability of holder

1. Without prejudice to article 55, a 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. A 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.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, 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) It transfers its rights pursuant to article 57.

Appendix 5 Relevant Articles of international conventions on other modes of transportation of goods

Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)⁵ Drafted by the International Technical Committee of Legal Experts on Air Questions (Comité International Technique d'Experts Juridiques Aériens, CITEJA), Signed at Warsaw Conference on 12 October 1929

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air consignment note.

⁵ The text of the Warsaw Convention is available from < <http://www.iata.org/Pages/default.aspx> > accessed 30 April 2017.

**Convention for the Unification of Certain Rules for International Carriage by Air
(Montreal Convention)⁶
Adopted by the International Civil Aviation Organization (ICAO) in Montreal on 28
May 1999**

Article 4 Cargo

1. In respect of the carriage of cargo, an air waybill shall be delivered.
2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 12 Right of disposition of cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.
2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.
3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

⁶ The text of the Montreal Convention is available from < <http://www.iata.org/Pages/default.aspx>> accessed 30 April 2017.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

**United Nations Convention on the Contract for the International Carriage of Goods
by
Road (CMR)⁷
Signed in Geneva on 19 May 1956**

Article 12

1. The sender has the right to dispose of the goods, in particular by asking the carrier to stop the goods in transit, to change the place at which delivery is to take place or to deliver the goods to a consignee other than the consignee indicated in the consignment note.

2. This right shall cease to exist when the second copy of the consignment note is handed to the consignee or when the consignee exercises his right under article 13, paragraph 1; from that time onwards the carrier shall obey the orders of the consignee.

5. The exercise of the right of disposal shall be subject to the following conditions:

(a) That the sender or, in the case referred to in paragraph 3 of this article, the consignee who wishes to exercise the right produces the first copy of the consignment note on which the new instructions to the carrier have been entered and indemnifies the carrier against all expenses, loss and damage involved in carrying out such instructions;

(b) That the carrying out of such instructions is possible at the time when the instructions reach the person who is to carry them out and does not either interfere with the normal working of the carriers' undertaking or prejudice the senders or consignees of other consignments;

(c) That the instructions do not result in a division of the consignment.

⁷ The text of the CMR are available from <<https://treaties.un.org/>> accessed 30 April 2017.

**Appendix B to the Convention concerning International Carriage by Rail (COTIF)
--- Uniform Rules Concerning the Contract of International Carriage of Goods by
Rail (CIM)⁸**

Adopted for signature on 3 June 1999

Applicable with effect from 1 July 2006

Article 18 - Right to dispose of the goods

§ 1 The consignor shall be entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders. He may in particular ask the carrier.

- a) to discontinue the carriage of the goods;
- b) to delay the delivery of the goods;
- c) to deliver the goods to a consignee different from the one entered on the consignment note;
- d) to deliver the goods at a place other than the place of destination entered on the consignment note.

§ 2 The consignor's right to modify the contract of carriage shall, notwithstanding that he is in possession of the duplicate of the consignment note, be extinguished in cases where the consignee,

- a) has taken possession of the consignment note;
- b) has accepted the goods;
- c) has asserted his rights in accordance with Article 17 § 3;
- d) is entitled, in accordance with § 3, to give orders; from that time onwards, the carrier shall comply with the orders and instructions of the consignee.

§ 3 The consignee shall have the right to modify the contract of carriage from the time when the consignment note is drawn up, unless the consignor indicates to the contrary on the consignment note.

⁸ The text of the CIM is available from <<http://www.cit-rail.org/en/rail-transport-law/cotif/>> accessed 30 April 2017.

§ 4 The consignee's right to modify the contract of carriage shall be extinguished in cases where he has,

- a) taken possession of the consignment note;
- b) accepted the goods;
- c) asserted his rights in accordance with Article 17 § 3;
- d) given instructions for delivery of the goods to another person in accordance with § 5 and when that person has asserted his rights in accordance with Article 17 § 3.

Article 19 - Exercise of the right to dispose of the goods

§ 1 If the consignor or, in the case referred to in Article 18 § 3, the consignee wishes to modify the contract of carriage by giving subsequent orders, he must produce to the carrier the duplicate of the consignment note on which the modifications have to be entered.

§ 2 The consignor or, in the case referred to in Article 18 § 3, the consignee must compensate the carrier for the costs and the prejudice arising from the carrying out of subsequent modifications.

§ 3 The carrying out of the subsequent modifications must be possible, lawful and reasonable to require at the time when the orders reach the person who is to carry them out, and must in particular neither interfere with the normal working of the carrier's undertaking nor prejudice the consignors or consignees of other consignments.

§ 4 The subsequent modifications must not have the effect of splitting the consignment.

§ 7 If the carrier implements the consignor's subsequent modifications without requiring the production of the duplicate of the consignment note, the carrier shall be liable to the consignee for any loss or damage sustained by him if the duplicate has been passed on to the consignee. Nevertheless, any compensation payable shall not exceed that provided for in case of loss of the goods.

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)⁹
Adopted by the Diplomatic Conference Organized Jointly by CCNR, the Danube Commission and UN/ECE, held in Budapest from 25 September to 3 October 2000.

CHAPTER I

GENERAL PROVISIONS

Article 1 Definitions

6. 'Transport document' means a document which evidences a contract of carriage and the taking over or loading of goods by a carrier, made out in the form of a bill of lading or consignment note or of any other document used in trade.

CHAPTER III

TRANSPORT DOCUMENTS

Article 13 Bill of lading

1. The originals of a bill of lading shall be documents of title issued in the name of the consignee, to order or to bearer.

CHAPTER IV

RIGHT TO DISPOSE OF THE GOODS

Article 14

Holder of the right of disposal

1. The shipper shall be authorized to dispose of the goods; in particular, he may require the carrier to discontinue the carriage of the goods, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document.

2. The shipper's right of disposal shall cease to exist once the consignee, following the arrival of the goods at the scheduled place of delivery, has requested delivery of the goods and,

⁹ The text of the CMNI is available from <<http://www.ccr-zkr.org/>> accessed 30 April 2017.

(a) where carriage is under a consignment note, once the original has been handed over to the consignee;

(b) where carriage is under a bill of lading, once the shipper has relinquished all the originals in his possession by handing them over to another person.

3. By an appropriate entry in the consignment note, the shipper may, when the consignment note is issued, waive his right of disposal to the consignee.

Article 15 Conditions for the exercise of the right of disposal

The shipper or, in the case of article 14, paragraphs 2 and 3, the consignee, must, if he wishes to exercise his right of disposal:

(a) where a bill of lading is used, submit all originals prior to the arrival of the goods at the scheduled place of delivery;

(b) where a transport document other than a bill of lading is used, submit this document, which shall include the new instructions given to the carrier;

(c) compensate the carrier for all costs and damage incurred in carrying out instructions;

(d) pay all the agreed freight in the event of the discharge of the goods before arrival at the scheduled place of delivery, unless the contract of carriage provides otherwise.

Appendix 6 Relevant Articles of international conventions on sale of goods

United Nations Convention on Contracts for the International Sale of Goods (CISG)

Adopted on 11 April 1980, Vienna; entered into force on 1 January 1988

Chapter V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. Anticipatory breach and instalment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Appendix 7 Relevant international rules on the electronic bill of lading

Comité Maritime International (CMI) Rules for Electronic Bills of Lading¹⁰

Adopted in 1990

1. Scope of Application

These Rules shall apply whenever the parties so agree.

2. Definitions

f 'Private Key' means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission.

7. Right of Control and Transfer

a. The Holder is the only party who may, as against the carrier:

(1) claim delivery of the goods;

(2) nominate the consignee or substitute a nominated consignee for any other party, including itself;

(3) transfer the Right of Control and Transfer to another party;

(4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.

b. A transfer of the Right of Control and Transfer shall be effected: (i) by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder, and (ii) confirmation by the carrier of such notification message, whereupon (iii) the carrier shall transmit the information as referred to in article 4 (except for the Private Key) to the proposed new Holder, whereafter (iv) the proposed new Holder shall

¹⁰ The text of the CMI rules for Electronic Bills of Lading is available from <<http://comitemaritime.org>> accessed 30 April 2017.

advise the carrier of its acceptance of the Right of Control and Transfer, whereupon (v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.

c. If the proposed new Holder advises the carrier that it does not accept the Right of Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the proposed transfer of the Right of Control and Transfer shall not take place. The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effects as the transfer of such rights under a paper bill of lading.

Bolero Rulebook
Bolero International Limited, 1st edn, September 1999¹¹

Part 2. General Provisions

2.1. Scope and Application

2.1.2. Applicability

(1) Rulebook. Each User agrees, when enrolling into the Bolero System, to be bound by this Rulebook.

2.2. Messages

2.2.2. Validity and Enforceability

(1) Writing Requirements. Any applicable requirement of law, contract, custom or practice that any transaction, document or communication shall be made or evidenced in writing, signed or sealed shall be satisfied by a Signed Message.

(2) Signature Requirements. The contents of a Message Signed by a User, or a portion drawn from a Signed Message, are binding upon that User to the same extent, and shall have the same effect at law, as if the Message or portion thereof had existed in a manually signed form.

(3) Undertaking not to Challenge Validity. No User shall contest the validity of any transaction, statement or communication made by means of a Signed Message, or a portion drawn from a Signed Message, on the grounds that it was made in electronic form instead of by paper and/or signed or sealed.

2.2.3. Messages as Evidence

(1) Admissibility. Each User agrees that a Signed Message or a portion drawn from a Signed Message will be admissible before any court or tribunal as evidence of the Message or portion thereof.

(2) Primary Evidence. In the event that a written record of any Message is required, a copy produced by a User, which Bolero International has authenticated, shall be accepted by that User and any other User as primary evidence of the Message.

¹¹ The text of Bolero Rulebook is available from <<http://www.bolero.net/>> accessed 30 April 2017.

(3) Authenticated Copies to Prevail. Each User agrees that if there is a discrepancy between the record of any User and the copy authenticated by Bolero International, such authenticated copy shall prevail.

Part 3. Bolero Title Registry

3.1. Creation of a Bolero Bill of Lading

(1) Contents of BBL Text and Identification. Each Carrier agrees that any Message sent by him as a Bolero Bill of Lading other than a Message intended to operate as a Chartered Bill of Lading shall, within the BBL Text:

(a) include an acknowledgement by the Carrier of the receipt of goods shipped on board a vessel or received for shipment by that Carrier; and

(b) contain or evidence the terms of the contract of carriage.

The Message shall be transmitted to the Title Registry.

3.5. Novation of the Contract of Carriage

3.5.1. Occurrence and Effect

The Designation of a new Holder-to-order or a new Consignee Holder after the creation of the Bolero Bill of Lading, other than one who is also the Head Charterer, shall mean that the Carrier, the Shipper, the immediately preceding Holder-to-order, if any, and the new Holder-to-order or Consignee Holder agree to all of the following terms in this section 3.5.1:

(1) New Parties to Contract of Carriage. Upon the acceptance by the new Holder-to-order or Consignee Holder of its Designation as such, or, at the expiry of the 24 hour period allowed for the refusal of the transfer under Rule 3.5.2 (New Holder's Right to Refuse Designation), whichever is the earlier, a contract of carriage shall arise between the Carrier and the new Holder-to-order or Consignee Holder either:

(a) on the terms of the contract of carriage as contained in or evidenced by the BBL Text; or

(b) when the Shipper is a Head Charterer, on the terms set out or incorporated in the BBL Text, as if this had contained or evidenced the original contract of carriage.

(2) Accession to Rights and Liabilities. The new Holder-to-order or Consignee Holder shall be entitled to all the rights and accepts all the liabilities of the contract of carriage as contained in or evidenced by, or deemed to be so contained in or evidenced by, the Bolero Bill of Lading.

(3) Prior Designee's Rights and Liabilities Extinguished. The immediately preceding Holder-to-order's rights and liabilities under its contract of carriage with the Carrier shall immediately cease and be extinguished, unless:

(a) such immediately preceding Holder-to-order is also the Shipper, in which case its rights but not its liabilities under its contract of carriage with the Carrier shall cease and be extinguished; or

(b) such immediately preceding Holder-to-order is the Head Charterer, in which case neither its rights nor its liabilities under its contract of carriage with the Carrier shall cease or be extinguished.

3.5.2. New Holder's Right to Refuse Designation

(1) Refusal. The new Holder-to-order or Consignee Holder may, within 24 hours of having received notification thereof, reject his Designation as new Holder-to-order or Consignee Holder in accordance with Operational Rule 30, in which case all rights and obligations under the contract of carriage between the previous Holder-to-order and the Carrier remain vested in the previous Holder-to-order, or if none, the Shipper, as if no attempt to novate the contract had been made.

(2) Acceptance. If within the 24 hour period and before rejection of his Designation, the Designated Holder-to-order or Consignee Holder represents that it accepts the novation or attempts to exercise any rights to the goods, by taking delivery or commencing proceedings against the Carrier for loss of or damage to the goods or otherwise, it shall be deemed to have accepted its Designation at the time it was made for the purposes of Rule 3.5 (Novation of the Contract of Carriage). Any subsequent refusal given pursuant to paragraph (1) of this Rule 3.5.2 shall be void.

3.5.3. Pledgee Holders

(1) No Novation. There shall be no novation of the contract of carriage between the Carrier and a Pledgee Holder as such.

(2) Pledgee Holder who is also To Order Party. A Pledgee Holder that is also the current To Order Party enforcing its pledge over a Bolero Bill of Lading shall automatically become the Holder-to-order, with the consequence that the contract of carriage is novated in accordance with the provisions of Rule 3.5. (Novation of the Contract of Carriage).

(3) Enforcement by Pledgee Holder who is Not To Order Party. When a Pledgee Holder, who is not the current To Order Party, enforces its pledge over a Bolero Bill of Lading, the current To Order Party, if any, shall be automatically deleted from the Title Registry Record, and the Pledgee Holder shall automatically become the Bearer Holder.

3.5.4. Bearer Holders

(1) No Novation. There shall be no novation of the contract of carriage between the Carrier and a Bearer Holder as such.

(2) Exercise of Rights. A Bearer Holder who wishes either to claim delivery of the goods or commence proceedings against the Carrier for failure to deliver the goods shall first designate itself as Holder-to-order, whereupon it shall become a party to the contract of carriage in accordance with the provisions of Rule 3.5. (Novation of the Contract of Carriage).

3.5.5. Bolero Bill of Lading Terms and Conditions to Apply

For the avoidance of doubt, any User who is or was the Holder, Pledgee Holder, Bearer Holder, Holder-to-order or Consignee Holder of a Bolero Bill of Lading, irrespective of whether such Designation has been rejected, agrees that any claim against the Carrier for loss of or damage to the goods shall be subject to the terms of the contract of carriage as contained in or evidenced by the BBL Text.

3.6. Delivery of the Goods

(1) Persons Entitled to Delivery. Under a contract of carriage in respect of which a Bolero Bill of Lading has been created, delivery of the goods shall only be made by the Carrier to, or to the order of, a Holder-to-order or Consignee Holder which duly Surrenders the Bolero Bill of Lading.

3.8. Powers of Parties to a Bolero Bill of Lading

(1) Table of Powers. The parties to a Bolero Bill of Lading, as defined below, shall be entitled to execute functions in relation to that Bolero Bill of Lading in accordance with the following table:

Functions	Parties						
	Carrier	Shipper and holder	Holder to order	Pledgee Holder	Bearer Holder	Holder	Consignee Holder
Create Bill	Yes	No	No	No	No	No	No
Designate Holder	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Designate to Order	Yes	No	Yes	Yes	Yes	No	No
Blank Endorse	Yes	No	Yes	No	No	No	No
Designate Bearer Holder	Yes	No	Yes	Yes	Yes	No	No
Designate Consignee	Yes	No	Yes	Yes	Yes	No	No
Designate Pledgee Holder	No	Yes	Yes	Yes	Yes	Yes	No
Enforce pledge	No	No	No	Yes	No	No	No
Surrender Bill	No	No	Yes	No	No	No	Yes
Request Amendment	No	Yes	Yes	Yes	Yes	Yes	Yes

Grant Amendment	Yes	No	No	No	No	No	No
Deny Amendment	Yes	No	No	No	No	No	No
Switch to Paper	No	Yes	Yes	Yes	Yes	Yes	Yes

Appendix 8 COSCO Manual of Bills of Lading¹²

第二章 提单签发的规定

Chapter 2 The provisions on the issuance of bills of lading

第三节 提单签发中特殊情况的处理

Section 2 Specific situations regarding the issuance of bills of lading

2 转换提单

2. Switch bill of lading

转换提单是承运人提供给货方的特殊额外服务，承运人并没有签发转换提单的义务。

Switch bill of lading is an extra service to the cargo interest. The carrier is not obliged to issue the switch bill of lading.

如第一套提单的收货人或通知方提出在航线挂靠的范围内更改卸货港时，经中员集运同意，并由货方提供书面保函明确风险和责任划分，货方必须交回第一套提单的全套正本以换取第二套提单。

The carrier may allow the consignee/endorsee or the notify party to change the port of discharge to another scheduled port, provided that the aforesaid parties surrender all original copies of the bill of lading to the carrier, and provide the letter of indemnity which holds the carrier harmless from such a change.

如货方提出对收货人与通知方栏目进行更改，对于记名提单，应由原提单收货人提出，须通过装港代理核实第一套提单的发货人，并收回第一套全套正本提单；对于

¹² The COSCO Manual of Bills of Lading is a guidance for employees of COSCO to manage the bill of lading for their clients. The author accessed the Manual when doing the internship in COSCO in 2013, and acquired the permission for referencing the Manual for this study only. The original text of the Manual is in Chinese, the author translate the rules related to this study into English.

指示提单，一般应由原发货人或经发货人背书的提单持有人或通知方提出，特别是要收回第一套全套已背书提单，同时货方应提供相应的保函。

In the situations where the cargo interest requests to modify the column of consignee and notify party: for the straight bill of lading, such a request should be raised by the consignee named in the original bills of lading. The identity of the consignor named in the original bills of lading should be verified by the agent of the carrier at the port of loading, whilst also, all original copies of the bill of lading should be surrendered to the carrier¹³; for the order bill of lading, generally the request of modification should be raised by the consignor/shipper, the holder to whom the bill of lading is duly endorsed by the consignor/shipper, or the notify party. Accompanying with such a request, all original copies of the bill of lading should be surrendered to the carrier, and the corresponding letter of indemnity should be provided to the carrier.

在转换提单时，转换内容仅限于托运人，收货人，通知方以及装货港和提单签发地；对于货物的表述不可更改。

The switchable items in the original bill of lading are limited to the shipper, the consignee, the notify party, the port of loading and the place where the bill of lading is issue. The original description of goods is not allowed to be changed.

严格禁止签发非班期表上列明挂靠港口的转换提单，因为这样很容易产生欺诈或绕航等方面的索赔。

To avoid cargo claims arising from deviation or fraud, it is strictly forbidden to issue a switch bill of lading which includes a non-scheduled port.

第四章 提单的更改

Chapter 4 the variation of the bill of lading

2 船舶开航后的提单更改

2. The variation of the bill of lading after the start of voyage

¹³ The carrier in this manual refers to COSCO.

托运人在船舶开航后，需要更改已签发的正本提单上的以下内容时，必须提供正式的书面要求并交回已签发的全套正本提单，填写提单更改单，支付改单费，经中远集运或其授权签发提单的代理书面同意后，方可办理。

The shipper may request to vary the original bills of lading after the start of voyage. To do so, the shipper should provide the carrier with an official written request, surrender all original copies of the bill of lading to the carrier, fill in the application form for variation of the bill of lading, and pay up the procedure fee. The variation would be processed only with the written permission issued by the carrier or its agent who issued the original bills of lading.

提单流通过程中的提单持有人提出的更改提单的要求不予接受。

Any variation of the bill of lading requested by the holder to whom the bill of lading is transferred should not be accepted.

Appendix 9 COSCO Container Lines Bill of Lading (amended 24/8/2001)¹⁴

TERMS AND CONDITIONS

1. DEFINITIONS

"Carrier" means COSCO Container Lines Company Limited.

"Merchant" includes the consignor, the shipper, the receiver, the consignee, the owner of the Goods, the lawful holder or endorsee of this Bill of Lading, or any other person having any present or future interest in the Goods or this Bill of Lading, or anyone authorized to act on behalf of any of the foregoing.

"Vessel", where the context so admits, includes the Vessel named in Box 6 of this Bill of Lading or any substitute therefore, and any feeder vessel, lighter or barge used by or on behalf of the Carrier in connection with any seaborne leg of the carriage.

"Sub-contractor" includes owners and operators of vessels (other than the Carrier), stevedores, terminal, warehouse, depot and groupage operators, road and rail transport operators and any independent contractor employed by the Carrier in the performance of the carriage and any sub-sub-contractor thereof. The expression Sub-contractor shall include direct and indirect Sub-contractors and their respective servants, agents or Sub-contractors.

"Goods" means the whole or any part of the cargo received from the Merchant and includes any Container not supplied by or on behalf of the Carrier.

"Package" means each Container which is stuffed and sealed by or on behalf of the Merchant, and not the items packed in such Container if the number of such items is not indicated on the front of this Bill of Lading or is indicated by the terms such as "Said to Contain" or similar expressions.

"Shipping Unit" means any physical unit of cargo not shipped in a package, including machinery, vehicles and boats, except goods shipped in bulk.

"Container" includes any Container, open top, trailer, transportable tank, flat rack, platform, pallet, and any other equipment or device used for or in connection with the transportation of

¹⁴ The text is available from < http://lines.coscoshipping.com/vessel//coscon_tidan_en.pdf > accessed 30 May 2017.

the Goods.

2. CARRIER'S TARIFF

The terms of the Carrier's applicable Tariff and other requirements regarding charges are incorporated into this Bill of Lading. Particular attention is drawn to the terms contained therein, including, but not limited to, free storage time, Container and vehicle demurrage, etc.

Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier or his agents upon request. In case of any inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.

3. SUB-CONTRACTING, INDEMNITY AND CERTAIN DEFENSES, EXEMPTIONS AND

LIMITATIONS

(1) The Carrier shall have the right at any time and on any terms whatsoever to sub-contract the whole or any part of the carriage with any Sub-contractor and/or to substitute any other vessel or means of transport for the Vessel.

(2) The Merchant undertakes that no claim or legal action whatsoever shall be made or brought against any person by whom the carriage is performed or undertaken (including, but not limited to, the Carrier's servants, agents or Sub-contractors), other than the Carrier, which imposes or attempts to impose upon any such person, or any vessel owned or operated by such person, any liability whatsoever in connection with the Goods or the carriage thereof whether or not arising out of negligence on the part of such person. Should any such claim or legal action nevertheless be made or brought, the Merchant undertakes to indemnify the Carrier against all consequences thereof including legal expenses on a full indemnity basis.

Without prejudice to the foregoing, every such person or vessel, including, but not limited to, the Carrier's servants, agents, or Sub-contractors as defined in Clause 1 above, shall have the benefit of every exemption, defense and limitation herein contained applicable to the Carrier, in contract or in tort, as if such provision were expressly contracted for its benefit, and, in entering into this contract, the Carrier, to the extent of such exemptions, defenses and limitations, does so not only on its behalf, but also as an agent and trustee for such person or vessel.

4. CARRIER'S RESPONSIBILITY

(1) Port to Port Shipment If boxes 6, 7 and 8 but not boxes 4,5and 9 are filled in on the front of this Bill of Lading, this Bill of Lading is a Port-to-Port contract. The Carrier shall be responsible for the Goods as Carrier from the time when the Goods are received by the Carrier at the Port of Loading until the time of delivery thereof at the port of discharge to the Merchant or to the Authority as required by local laws or regulations, whichever occurs earlier.

(2) Combined Transport If Box 4, Box 5 and/or Box 9 are filled in on the front of this Bill of Lading and the place(s) or port(s) indicated therein is/are place(s) or port(s) other than that indicated in Box 7 and Box 8 and Freight is paid for combined transport, this Bill of Lading is a combined transport contract. The Carrier undertakes to arrange or procure the pre-carriage and/or on-carriage segments of the combined transport. All claims arising from the combined transport carriage must be filed with the Carrier within 9 months after the delivery of the Goods or the date when the Goods should have been delivered, failing which the Carrier shall be discharged from all liabilities whatsoever in respect of the Goods. If any payment is made by the Carrier to the Merchant in respect of any claim arising from the combined transport carriage, the Carrier shall be automatically subrogated to or given all rights of the Merchant against all others including pre-carrier or on-carrier or Sub-contractor on account of such loss or damage. Nothing herein contained shall be deemed a waiver of any rights that the Carrier may have against a pre-carrier or on-carrier or Sub-contractor for indemnity or otherwise.

5. NOTICE OF CLAIM AND TIME BAR

(1) Unless notice of loss or damage is given in writing to the Carrier's agent at the Port of Discharge or Place of Delivery before or on the date of delivery of the Goods, or if loss or damage is not apparent, within 15 consecutive days thereafter, such delivery shall be prima facie evidence of the delivery of the Goods by the Carrier and/or on-carrier in the order and condition described in this Bill of Lading.

(2) The Carrier, its servants, agents and Sub-contractors shall be discharged from all liabilities whatsoever unless suit is brought within one year after the delivery of the Goods or the date when the Goods should have been delivered.

6. LOSS OR DAMAGE

(1) The terms of this Bill of Lading shall at all times govern all responsibilities of the Carrier in connection with or arising out of the carriage of the Goods not only during the carriage, but also during the period prior to and/or subsequent to the carriage. The exemptions from liability, defenses and limitation of liability provided for herein or otherwise shall apply in any action against the Carrier for loss or damage or delay, howsoever occurring and whether the action be founded in contract or in tort and even if the loss, damage or delay arose as a result of unseaworthiness, negligence or fundamental breach of contract. Save as is otherwise provided herein, the Carrier shall in no circumstances whatsoever and howsoever arising be liable for direct or indirect or consequential loss or damage or loss of profits.

(2) The Carrier does not undertake that the Goods will be transported from or loaded at the place of receipt or loading or will arrive at the place of discharge, destination or transshipment aboard any particular vessel or other conveyance at any particular date or time or to meet any particular market or in time for any particular use. Scheduled or advertised departure and arrival times are only expected times and may be advanced or delayed if the Carrier shall find it necessary, prudent or convenient. The Carrier shall in no circumstances whatsoever and howsoever arising be liable for direct, indirect or consequential loss or damage caused by delay.

(3) If the stage of the combined transport during which loss or damage occurred can be determined, the liability of the Carrier shall be governed by the national law(s) and/or international convention(s) applicable thereto. If the stage of the combined transport during which loss or damage occurred cannot be determined, the Merchant and the Carrier agree that it shall be deemed that the loss or damage occurred aboard the Carrier's Vessel. In either case, clauses 5(2) and 7 shall apply.

7. LIMITATION OF LIABILITY

(1) Except as provided for in Clause 7(2), this Bill of Lading shall be subject to the provisions of the Maritime Code of the People's Republic of China as provided for in Clause 26(1). Neither the Carrier, its servants, agents, Sub-contractors nor the Vessel shall in any event be liable for any loss or damage to the Goods in any amount exceeding the limits per package or unit prescribed by that Code, unless the nature and value of the Goods have been declared by the Merchant before shipment and inserted in this Bill of Lading (Box 10) and the Merchant has paid additional Freight on such declared value.

(2) Where carriage includes carriage to or from or through a port or place in the United States of America, this Bill of Lading shall be subject to the provisions of the United States Carriage of Goods by Sea Act, 1936 (US COGSA) and any amendments thereto, as provided for in Clause 26(2) hereof. In such event, neither the Carriers nor its servants, agents, Subcontractors and/or the Vessel shall in any event be liable for any loss of or damage to the Goods in an amount exceeding the limits per package or unit prescribed by US COGSA, unless the nature and value of the Goods have been declared by the Merchant before shipment and inserted in this Bill of Lading (Box 10) and the Merchant has paid additional Freight on such declared value.

(3) If a legal regime other than the Maritime Code of the People's Republic of China or US COGSA is compulsorily applied to this Bill of Lading, the liability of the Carrier, if any, shall not exceed the limits per Package or Shipping Unit prescribed therein, unless the nature and value of the Goods have been declared by the Merchant and inserted in this Bill of Lading (Box 10) and the Merchant has paid additional Freight on such declared value.

(4) For the purpose of this Clause 7, the declared value shall be the basis for calculating the Carrier's liability, if any, provided that such declared value shall not be conclusive on the Carrier, and further provided that such declared value does not exceed the true value of the Goods at destination. Any partial loss or damage shall be adjusted pro-rata on the basis of such declared value.

8. FIRE

The Carrier shall not be liable for any loss of or damage to the Goods occurring at any time, including that before loading or after discharge by reason of any fire whatsoever, unless such fire is caused by the actual fault of the Carrier.

9. CARRIER'S CONTAINERS

(1) Goods received in break bulk will be stuffed by the Carrier in Containers and the Carrier shall have the right to carry any Containers, whether or not stuffed by the Carrier, on deck or below deck. All such Goods shall participate in General Average.

(2) If Carrier's Containers and equipment are used by the Merchant for pre-carriage or oncarriage or unpacked at the Merchant's premises, the Merchant is responsible for returning the empty Containers, with interiors brushed, clean and free of smell to the point or place

designated by the Carrier, its servants or agents, within the time prescribed in the Tariff and/or required by the Carrier. Should a Container not be returned within the aforesaid time, the Merchant shall be liable for any detention, demurrage, loss or expenses which may arise from such non-return.

(3) The Merchant shall be liable for any loss of or damage to Carrier's Containers and other equipment while in the custody of the Merchant or anyone acting on the Merchant's behalf. The Merchant shall also be liable during such period for any loss of or damage to the property of others or for any injuries or death and the Merchant shall indemnify and hold the Carrier harmless against all damages, including legal expenses, incurred from any and all such claims arising during such periods.

10. MERCHANT-STUFFED CONTAINER

(1) If a Container has not been stuffed by or on behalf of the Carrier, the Carrier shall not be liable for loss of or damage to the Goods and the Merchant shall indemnify the Carrier against any loss, damage, liability or expense incurred by the Carrier if such loss, damage, liability or expense has been caused by:

(a) the manner in which the Container has been filled, packed, loaded or stuffed, or

(b) the unsuitability of the Goods for carriage in the Container, or

(c) the unsuitability or defective condition of the Container, provided that, if the Container had been supplied by or on behalf of the Carrier, this unsuitability or defective condition could have been apparent upon inspection by the Merchant at or prior to the time when the Container was filled, packed, loaded or stuffed.

(2) If a Merchant-stuffed Container is delivered by the Carrier with its seal intact, such delivery shall constitute full and complete performance of the Carrier's obligations hereunder and the Carrier shall not be liable for any loss or shortage of the Goods ascertained at delivery.

(3) The Merchant shall inspect Containers before stuffing them and the use of a Container shall be prima facie evidence of its being suitable and without defect.

11. MERCHANT'S DESCRIPTION

(1) The Merchant's description of the Goods stuffed in a sealed Container by the Merchant, or on his behalf, shall not be binding on the Carrier, and the description declared by the

Merchant on the front of this Bill of Lading is information provided by the Merchant solely for its own use including but not limited to the use of its freight forwarder. It is understood by the Merchant that the Carrier has not verified the contents, weight or measurement of a sealed container, and the Carrier makes no representation as to the contents of a sealed Container, van, crate or box hereunder, nor its weight or measurement, nor the value, quantity, quality, description, condition, marks or number of the contents thereof. The Carrier shall be under no responsibility whatsoever in respect of such description or particulars.

(2) If any particulars of any letter of credit and/or import license and/or sales contract and/or invoice or order number and/or details of any contract to which the Carrier is not a party are shown on the front of this Bill of Lading, such particulars are included solely at the request of the Merchant for its convenience. The Merchant agrees that the inclusion of such particulars shall not be regarded as a declaration of value and shall in no way affect the Carrier's liability under this Bill of Lading. The Merchant acknowledges that, except as provided for in Clause 7 hereof, the value of the Goods is unknown to the Carrier.

12. MERCHANT'S RESPONSIBILITY

(1) The parties defined as "Merchant" in clause 1 hereof shall, where applicable, be jointly and severally liable to the Carrier for the due fulfilment of all obligations undertaken by any of them under this Bill of Lading.

(2) The Merchant warrants to the Carrier that the particulars relating to the Goods as set forth on the front of this Bill of Lading have been checked by the Merchant on receipt of this Bill of Lading and that such particulars, and any particulars furnished by or on behalf of the Merchant, are adequate and correct. The Merchant also warrants that the Goods are lawful Goods and are not contraband.

(3) The Merchant shall indemnify the Carrier against all liabilities, costs, losses, damages, fines, penalties, expenses or other sanctions of a monetary nature arising or resulting from any breach of the warranties in Clause 12(2) hereof or from any other cause in connection with the Goods for which the Carrier is not responsible.

(4) The Merchant shall comply with all regulations or requirements of customs, port and other Authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses or losses (including the full return Freight for the Goods if returned, or if on-carried, the full Freight from the Port of Discharge or the Place of Delivery nominated herein to the amended Port of

Discharge or the amended Place of Delivery) incurred and/or sustained by reason of any failure to so comply, or by reason of any illegal, incorrect or insufficient marking, numbering, or addressing of the Goods, and shall indemnify the Carrier in respect thereof.

13. FREIGHT AND CHARGES

(1) All Freight shall be deemed fully, finally and unconditionally earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event whatsoever.

(2) All Freight and charges shall be paid without any set-off, counter-claim, deduction, or stay of execution before delivery of the Goods.

(3) The Merchant's attention is drawn to the stipulations concerning currency in which the Freight is to be paid, rate of exchange, devaluation and other contingencies concerning the Freight in the applicable Tariff or as agreed otherwise.

(4) If the Merchant's description of the Goods in this Bill of Lading or in any document or certificate furnished to the Carrier by or on behalf of the Merchant shall prove to have been inaccurate, incorrect or misleading in any respect, the Merchant shall pay for the actual damage suffered by the Carrier.

(5) Payment of Freight and charges to any freight forwarder or broker, or anyone other than the Carrier or its authorized agent, shall not be considered payment to the Carrier and shall be made at the Merchant's sole risk.

(6) The parties defined as Merchants in clause 1 hereof shall, where applicable, be jointly and severally liable to the Carrier for payment of all Freight, demurrage, General Average and charges, including, but not limited to, court costs, expenses and reasonable attorney's fees incurred in collecting sums due the Carrier, failing which shall be considered a default by the Merchant in the payment of Freight and charges.

14. INSPECTION OF THE GOODS

The Carrier and/or any person to whom the Carrier has sub-contracted the carriage or any person authorized by the Carrier shall be entitled, but under no obligation, to open any Container or Package at any time and to inspect the Goods. If by order of the Authorities at any place, a container must be opened for inspection, the Carrier shall not be liable for any loss or damage incurred as a result of any opening, unpacking, inspection or repacking. The

Carrier shall be entitled to recover the cost of such opening, unpacking, inspection, and repacking from the Merchant.

15. CARRIAGE AFFECTED BY CONDITION OF THE GOODS

If it appears at anytime that the Goods cannot safely or properly be carried or carried further, either at all or without incurring any additional expense or taking any measure(s) in relation to the Goods or the Container, the Carrier may without notice to the Merchant (but as its agent only) take any measure(s) and/or incur any additional expense to carry or to continue the carriage thereof, and/or dispose of the Goods, and/or abandon the carriage and/or store them ashore or afloat, under cover or in the open, at any place, whichever the Carrier in his absolute discretion considers most appropriate, which abandonment, storage or disposal thereof shall be deemed to constitute due delivery under this Bill of Lading. The Merchant shall indemnify the Carrier against any additional expense so incurred.

16. LIENS

The Carrier shall have a lien on the Goods and any documents relating thereto for Freight, dead Freight, demurrage, detention, and for any expenses incurred by the Carrier for recoopering, repacking, remarking, fumigation or required disposal of faulty Goods, for General Average contributions to whomsoever due, for fines, dues, tolls, land Freight, or commissions paid or advanced by the Carrier on behalf of the Goods, for any sums including salvage payable to the Carrier under this Bill of Lading and for legal expenses incurred because of any attachment or other legal proceedings brought against the Goods by governmental Authorities or any person claiming an interest in the Goods. The Carrier's lien shall survive discharge or delivery of the Goods and the Carrier shall have the right to enforce such lien by public auction or private sale in its discretion. Should the proceeds of sale fail to cover the amount due, including expenses incurred, the Carrier shall be entitled to recover the balance from the Merchant. Should such proceeds exceed the amount due, the balance shall be returned to the Merchant.

17. DECK CARGO, ANIMALS AND PLANTS

Goods (other than Goods stuffed in Containers) that are stated on the front of this Bill of Lading as contracted to be stowed "on deck" and are so carried, and all live animals, including fish and birds, or plants shipped hereunder, shall be carried solely at the risk of the Merchant, and the Carrier shall not be liable for any loss or damage of whatsoever nature arising during

carriage by sea whether or not arising out of negligence on the part of the Carrier. The Carrier shall be bound to prove that he has fulfilled the special requirements of the Merchant with regard to the carriage of the live animals and that under the circumstances of the sea carriage, the loss or damage has occurred due to the special risks inherent therein. The Merchant shall indemnify the Carrier against all or any extra costs incurred for any reason whatsoever in connection with the carriage of such live animals or plants.

18. METHODS AND ROUTES OF CARRIAGE

The Carrier may at any time during the carriage:

- (1) use any means of transport or storage whatsoever;
- (2) transfer the Goods from one conveyance to another including transshipment or carrying the same on another Vessel other than the Vessel named on the front of this Bill of Lading or by any other means of transport whatsoever.

Anything done in accordance with this Clause or any delay arising therefrom shall be deemed to be within the scope of the carriage and shall not be a deviation.

19. MATTERS AFFECTING PERFORMANCE

If at any time the carriage is or is likely in the judgment of the Master to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind, other than the inability of the Goods to be safely or properly carried or carried further, and howsoever arising (even though the circumstances giving rise to such matters as stated above existed at the time this contract was entered into or the Goods were received for shipment), the Carrier (whether or not the carriage is commenced) may, at his sole discretion and without prior notice to the Merchant:

- (1) carry the Goods to the contracted Port of Discharge or Place of Delivery, whichever is applicable, by an alternative route from that indicated in this Bill of Lading or from that which is customary for Goods consigned to that Port of Discharge or Place of Delivery. If the Carrier elects to invoke the terms of this sub-Clause, then, notwithstanding the provisions of Clause 18 hereof, the Carrier shall be entitled to charge such additional Freight as the Carrier may determine, or
- (2) suspend the carriage of the Goods and store them ashore or afloat upon the terms of this Bill of Lading and endeavour to forward them as soon as possible, but the Carrier makes no representation as to the maximum period of suspension. If the Carrier elects to invoke the

terms of this sub-Clause, then the Carrier shall be entitled to the payment of such additional Freight as the Carrier may determine, or

(3) abandon the carriage of the Goods and place the Goods at the Merchant's disposal at any port or place where the Carrier may deem safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall entirely cease. The Carrier shall nevertheless be entitled to full Freight on the Goods received for shipment, and the Merchant shall pay any additional costs of the carriage to, and delivery and storage at such port or place.

Where the Carrier elects to use an alternative route under Clause 19(1) or to suspend the carriage under Clause 19(2), same shall not prejudice its right subsequently to abandon the carriage.

20. DANGEROUS GOODS

At the time of shipment of Dangerous Goods, the Merchant shall, in compliance with the regulations governing the carriage of such Goods, have the same properly packed, distinctly marked and labelled and notify the Carrier in writing of their proper description, nature and the precautions to be taken. In case the Merchant fails to or inaccurately notifies the Carrier, the Carrier may have such Goods landed, destroyed or rendered innocuous when and where circumstances so require, without compensation. The Merchant shall be liable to the Carrier for any loss, damage or expense resulting from such shipment. Notwithstanding the Carrier's knowledge of the nature of the Dangerous Goods and its consent to carry, the Carrier may still have such Goods landed, destroyed or rendered innocuous, without compensation, when they become an actual danger to the Vessel, the crew and other persons on board or to other goods. However, what mentioned in this Clause shall not prejudice the contribution in General Average, if any.

21. SPECIAL, REFRIGERATED OR HEATED CONTAINERS

(1) Unless the Merchant and the Carrier agree in writing before shipment that specially ventilated, refrigerated or heated Containers will be used to ship the Goods and such agreement is noted on the front of this Bill of Lading, and the Merchant gives proper written notice to the Carrier of the nature of the Goods and of the particular temperature range to be maintained and/or special attention required and the Merchant pays the extra Freight charged under the Carrier's Tariff or as agreed, the Goods shall be carried in ordinary unventilated Containers.

(2) In case of a refrigerated Container stuffed by or on behalf of the Merchant, the Merchant undertakes that its thermostatic, ventilating or any other controls have been correctly set by the Merchant and that the temperature of the Goods and the refrigerated Container has been brought to the required temperature level before stuffing and that the Goods have been properly stowed in the Container before the receipt thereof by the Carrier. If these requirements are not fully met, the Carrier shall not be liable for any loss of or damage to the Goods howsoever arising. The Merchant shall be responsible for the operation and maintenance of the Carrier's Container while it is in the Merchant's custody or the custody of anyone acting on the Merchant's behalf.

(3) If a suggested temperature is noted on the front of this Bill of Lading, the Merchant shall deliver the Goods to the Carrier at the noted temperature plus or minus 2°C permitted, and the Carrier shall exercise due diligence to maintain such temperature, plus or minus 2°C while the Goods are in its actual possession.

(4) The Carrier does not warrant that the Container be properly ventilated, refrigerated or heated throughout the carriage, nor shall the Carrier be liable for any loss of or damage to the Goods arising from any latent defects, any total or partial failure or breakdown, or stoppage of the refrigerating machinery, plant, insulation and/or any apparatus of the Container, Vessel, conveyance and any other facilities, provided that the Carrier shall before or at the beginning of the carriage exercise due diligence to maintain the refrigerated Container in an efficient state.

(5) In case of the Merchant's own Container, a set of emergency kit and an operation manual shall be supplied by the Merchant.

22. NOTIFICATION AND DELIVERY

(1) Any mention herein of parties to be notified of the arrival of the Goods is solely for information of the Carrier, and failure to give such notification shall not give rise to any liability on the part of the Carrier or relieve the Merchant of any obligation hereunder.

(2) The Merchant shall take delivery of the Goods within the time provided for in the Carrier's applicable Tariff or as required by the Carrier.

(3) If the Merchant fails to take delivery of the Goods during a reasonable time or whenever in the opinion of the Carrier the Goods are likely to deteriorate, decay, become worthless or

incur charges whether for storage or otherwise in excess of their value, the Carrier may, at its discretion, without prejudice to any rights which he may have against the Merchant, without notice and without any responsibility whatsoever attaching to him, unstuff, sell, destroy or dispose of the Goods at the sole risk and expense of the Merchant, and apply any proceeds of sale in reduction of the sums due to the Carrier from the Merchant. The aforesaid unstuffing shall constitute due delivery hereunder and thereupon all liability whatsoever of the Carrier in respect of the Goods thereof shall cease.

(4) Where the Carrier is obliged to hand over the Goods so carried into the custody of the port, customs or any other Authorities at the Port of Discharge or Place of Delivery and the Goods are delivered by the same to the Merchant without necessity of production of this Bill of Lading by the Merchant as required by the local law, regulation and/or practice, such handover shall constitute due delivery to the Merchant under this Bill of Lading and thereupon the liability of the Carrier in respect of the Goods shall entirely cease.

(5) Refusal by the Merchant to take delivery of the Goods in accordance with the terms of this Clause, notwithstanding its having been notified of the availability of the Goods for delivery, shall constitute an irrevocable waiver by the Merchant to the Carrier of all and any claims whatsoever relating to the Goods or the Carriage. The Merchant shall be liable for any losses, damages, expenses and liabilities incurred and sustained by the Carrier arising from such refusal, including but not limited to, the return of the Goods to their place of origin.

23. GENERAL AVERAGE AND SALVAGE

(1) General Average shall be adjusted at any port or place at the Carrier's option according to the York-Antwerp Rules 1974, as amended in 1990, and any other amendments thereto. The Merchant shall give such cash deposit or other security as the Carrier may deem sufficient to cover the estimated General Average contribution of the Goods before delivery.

(2) In the event of the Master considering that salvage services are needed, the Merchant agrees that the Master shall act on its behalf to procure such services to Goods and that the Carrier may act on its behalf to settle salvage remuneration. The Merchant shall timely and fully provide cash deposit or other security to the salvor without affecting the schedule of the Vessel after the salvage, failing which the Merchant shall be liable for any losses arising therefrom and sustained by the Carrier.

24. BOTH-TO-BLAME COLLISION

The Both-to-blame Collision Clause currently published by the Baltic and International Maritime Conference is deemed to be incorporate into this Bill of Lading.

25. NON-VESSEL-OPERATING COMMON CARRIERS

If this Bill of Lading is accepted by a Merchant acting as a non-vessel-operating common carrier (NVOCC), who has in turn concluded other contracts of carriage with third parties, the NVOCC hereby warrants that the contracts concluded by him in respect of the Goods subject to this Bill of Lading shall incorporate the terms and conditions of this Bill of Lading. The NVOCC further warrants to indemnify the Carrier, its servants, agents and Sub-contractors against all consequences of his failure to do so.

26. LAW AND JURISDICTION

(1) This Bill of Lading is governed by the laws of the People's Republic of China. All disputes arising under or in connection with this Bill of Lading shall be determined by the laws of the People's Republic of China and any action against the Carrier shall be brought before the Shanghai Maritime Court or other maritime courts in the People's Republic of China, as the case may be.

(2) Notwithstanding the provision of Clause 26(1), where carriage includes carriage to or from or through a port or place in the United States of America, this Bill of Lading shall be subject to the provisions of the US COGSA, which shall be deemed to have been incorporated herein and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights, immunities, exceptions or limitations or an increase of any of its liabilities under US COGSA. The provision cited in the COGSA (except as may be otherwise specifically provided herein) shall also govern before loading and after discharging as long as the goods remain in the Carrier's custody of control.

27. VARIATION OF THE CONTRACT

No servant, agent or Sub-contractor of the Carrier shall have the power to waive or vary any terms of this Bill of lading unless such waiver or variation is in writing and is specifically authorized or approved in writing by the Carrier.

28. NEW JASON CLAUSE

In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the Carrier is not responsible by statute, contract or otherwise, the Goods and the Merchant jointly and severally shall contribute with the Carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the Goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving ship belonged to strangers.

The following clauses are applicable only when document used as a Sea Waybill

29. Delivery will be made to the consignee or his authorized representative upon presentation of a delivery receipt or other evidence of identity and authorization satisfactory to the Carrier in his sole and absolute discretion without the need of producing or surrendering a copy of his Sea Waybill.

30. Except as provided in this Sea Waybill, the contract of carriage evidenced by this Sea Waybill is subject to the terms and conditions of the Carrier's current Combined Transport Bill of Lading, a copy of which may be obtained from the Carrier and its agents. The Shipper accepts all said terms and conditions, including but not limited to the per package and other limitations of liability contained therein, on behalf of the Consignee and the Owner of the Goods and warrants that he has authority to do so.

31. The consignee or other receiver of the Goods, by presenting this Sea Waybill and/or requesting delivery of the Goods, undertakes all liabilities of the Shipper under this Sea Waybill and the Carrier's current Combined Transport Bill of Lading, such undertaking being additional and without prejudice to the Shipper's own liability.

32. The shipper agrees and observes the CMI Uniform Rules for Sea Waybill for the purpose of using the Carrier's Sea Waybill in cargo transportation.

33. Upon written request of the Shipper prior to arrival of the carrying vessel at the Port of Discharge or Place of Delivery, whichever applicable, the Carrier will use its best efforts to change the Sea Waybill to the Carrier's Bill of Lading, provided that the Carrier shall in no case be liable for failure timely to effect such changes.

34. The goods are subject to the Carrier's normal credit practices with respect to release of particular Goods, as specified in the Carrier's Tariff and Bill of Lading, including but not limited to, the Carrier's right to a lien against any shipment as security for any unpaid charges due and owing to the carrier by any party to this Sea Waybill, whether related to the Goods described in this sea Waybill or not.

35. Unless instructed to the contrary by the shipper prior to the commencement of carriage and noted accordingly on the face hereof, the Carrier will, subject to the aforesaid terms and conditions, process cargo claims with the Consignee. Claims settlement, if any, shall be a complete discharge of Carrier's liabilities to the Shipper.

(As amended on 24/08/01)