

Lam Island appeal was still pending, so whether the notional renewal under the New Territories (Renewable Crown Leases) Ordinance would start the limitation period afresh remained uncertain. As to proprietary estoppel, despite the fact that *Taylor's Fashions* has already purified the doctrine by laying down a broader formulation based on the notion of unconscionability, the judge in *Kung Wong Sau-hin (HC)* still applied the archaic five probanda as if they were binding requirements.

In fact, somewhat unfortunately, such a tendency to revert to the old law seems to be universal. In a recent English case, *Matharu v Matharu*,⁶⁵ the majority of the Court of Appeal also applied the five probanda as the requirements for proprietary estoppel. The majority reasoning has been criticised by many commentators⁶⁶ as a retrograde step in the development of proprietary estoppel, yet such criticisms cannot guard against any further regression. Old habits die hard; it may take a long time for the judges who are used to the five-probanda approach to adapt to the change. So, in the meantime, if other defences such as adverse possession are available, a litigant may be advised to discard proprietary estoppel which should be pleaded only when all other possibilities have been exhausted.

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A Plea for Certainty: Legal and Practical Problems in the Presentation of Non-negotiable Bills of Lading

Fundamental to all maritime transport is the performance of a carrier's obligation to deliver the cargo to the party entitled to its possession at the port of discharge. Traditionally, the carrier has honoured this obligation by ensuring delivery at the port of discharge on presentation of the bill of lading. The unique characteristic of the bill of lading is that delivery of the goods has to be made against surrender of the document. On the one hand, it protects the holder of the bill as it is a basic term of the contract of carriage that the carrier must only deliver the goods against presentation of the bill of lading. On the other hand, such delivery serves to discharge the carrier from further obligations under the contract of carriage.

⁶⁵ (1994) 68 P & CR 93 (CA).

⁶⁶ See eg Welstead [1995] Conv 61 and Battersby (1995) 7 CFLQ 59.

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Straight bills of lading (also known as non-negotiable bills or sea waybills¹) are frequently used in maritime transport, especially in container transport and on short sea routes. In commercial reality, however, many merchants or shippers simply choose to use straight bills of lading indiscriminately, not being fully aware of the legal implications of such bills. In a straight bill of lading, there will be a limited number of parties operating in the transaction, typically a shipper (the party sending the consignment), carrier (the party transporting the goods), and a particular named consignee; this is different from a negotiable bill of lading expressed to be 'to order' without naming a particular consignee. It is generally accepted that a straight bill of lading is not a negotiable document. In other words, the holder of a straight bill of lading cannot transfer title to the goods during transit. In recent years, there have been serious legal and practical problems concerning whether delivery of goods against presentation of straight bills of lading is required. This article intends to examine comparatively the legal status of straight bills of lading in mainland China, the United States of America, and Hong Kong.

Mainland China

The relevant provisions governing straight bills of lading in Chinese law may be found in the Maritime Code of the People's Republic of China (Maritime Code)² and the General Principles of Civil Law of the People's Republic of China (Civil Law).³ These provisions in Chinese law were interpreted in a recent case *MV 'Eagle Comet.'*⁴

¹ Professor Goode stated: 'In English law there is no distinction between a straight bill of lading and a sea waybill, for the straight bill of lading lacks the essential characteristics of transferability and is therefore not a true bill of lading at all' (*Commercial Law* (London: Penguin Books Ltd, 2nd ed 1995), p 903).

² Art 71: A bill of lading is a document which serves as evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

³ Art 106: A citizen or legal person who violates a contract or fails to fulfill other obligations shall assume civil liability.

A citizen or legal person who through his own fault infringes upon State or collective property or upon another person, or who harms another person, shall assume civil liability.

If he is not at fault but the law stipulates that he shall assume civil liability, he shall assume such liability.

Art 117: If State or collective property or the property of another person is seized, it shall be returned. If the property is unable to be returned, monetary compensation of an equivalent value shall be paid.

If State or collective property or the property of another person is damaged, such property shall be restored to its original state or monetary compensation of an equivalent value paid.

Should the victim sustain further serious damage as a result, the infringing person shall also pay compensation for such damage.

⁴ Guangzhou Maritime Court, No 66 of 1994. There are now ten maritime courts established in the People's Republic of China: Dalian, Tianjin, Qingdao, Shanghai, Guangzhou, Beihai, Wuhan, Xiamen, Haikou, and Ningbo. The view of the Guangzhou Maritime Court or the Guangdong courts does not necessarily represent the whole of mainland China.

The 'Eagle Comet' case: judgment at first instance

By a contract dated 29 July 1993 between the plaintiff in China and X in Singapore, the plaintiff agreed to supply a certain cargo to X. According to the contract, having put the cargo on board for carriage, the plaintiff would fax a copy of the bill of lading to X. Within three days of having received the faxed bill of lading, X would then make payment of the purchase price to the plaintiff by way of telegraphic transfer. Should the plaintiff receive the notice from the bank of the telegraphic transfer of the purchase price, the original bill of lading would then be forwarded to X to enable them to obtain delivery of the cargo. Subsequently, the cargo arrived at the port of Singapore but X did not make any payment. The defendant carrier delivered the cargo to X on 16 September 1993 without production of the original bill of lading, although the defendant carrier had obtained a letter of indemnity from X. The bill of lading was a straight bill of lading naming X as the consignee. The plaintiff instituted proceedings in the Guangzhou Maritime Court against the defendant carrier for delivering the cargo without production of the original bill of lading and claimed damages.

The plaintiff argued that the defendant had neglected their duties and breached their undertaking under the contract of carriage, and also had infringed the rights of the plaintiff as the lawful owner of the cargo. The plaintiff requested the court to render judgment in their favour for the FOB value of the cargo plus economic losses in the total amount of US\$162,928.80 with interest and legal costs. The defendant argued that the fully documented bills of lading signed and issued by the plaintiff were straight bills of lading. The terms and conditions of such straight bills of lading contained a clause paramount which stipulated that US law was the applicable law. The defendant adduced evidence to prove that, in accordance with US law,⁵ the named consignee of a straight bill of lading might take delivery of the cargo without presentation of the original bill of lading. The straight bill of lading was not evidence of ownership. It was not transferable. It was merely a cargo receipt and evidence of the contract of the carriage. Having delivered the cargo to the named consignee under the straight bill of lading, the defendants had fulfilled their obligation of delivery of the cargo and should not be liable for damages for delivery of the cargo without production of the original bill of lading. The Guangzhou Maritime Court rendered judgment against the defendant for the following reasons:

⁵ Carriage of Goods by Sea Act 1936 (COGSA) (Act of 16 April 1936, Chapter 229, 49 Stat 1207-13, 46 US Code Appendix 1300-15) and Pomerene Bills of Lading Act 1916 (Act of 29 August 1916, Chapter 415, 39 Stat 538-45, 49 US Code Appendix 81-124) (hereinafter cited as 'Pomerene Act').

⁶ Although the judge did not mention it in the judgment, Art 269 of the Maritime Code provides that: 'the parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where a party to the contract has not made a choice, the law of the country having the closest connection with the contract shall apply.'

- (a) The parties had the right to choose the applicable law governing the bill of lading.⁶ Therefore, the chosen laws, being the US Carriage of Goods by Sea Act 1936 and the Pomerene Act, were applicable. However, neither statute clearly specified whether a carrier was entitled to deliver the cargo to the consignee without surrendering the straight bill of lading.
- (b) Since the US law was not clear, the court had to apply the PRC Maritime Code. Article 71 of the Maritime Code states that 'a carrier undertakes to deliver the cargo against surrendering of a bill of lading.' Article 71 applied to a bill of lading, providing that the goods were to be delivered to the order of a named person. In other words, even for a straight bill of lading, its production was necessary to obtain delivery of the cargo from the carrier.
- (c) The Chinese court rejected the application of the Singaporean Bills of Lading Act, although the cargo was discharged at the port of Singapore. The commencement date of the Singaporean Bills of Lading Act was 12 November 1993, which was after the date of discharge of the cargo in Singapore. Having no retrospective effect, the Singaporean Bills of Lading Act could not apply to this case.
- (d) The court ordered the defendant to pay only the FOB value of the cargo because the plaintiff produced insufficient evidence to prove the alleged economic losses.

Judgment at second instance

The judgment rendered by the Guangzhou Maritime Court may be different from the opinion of other judges and scholars of Chinese maritime law.⁷ In addition, the importance of the clause paramount may have been overlooked.⁸ At first the judge boldly acknowledged that the parties have the right to choose the applicable law governing bills of lading. However, the judge then applied Chinese law against the clause paramount. The defendant appealed against the decision of the Guangzhou Maritime Court to the Higher People's Court of Guangdong Province.⁹ The following judgment was rendered:

⁷ Ren Jianxin (ed), *Lectures on Maritime Law* (Beijing: Beijing People's Court Publishing, 1988), p 59 has the following statements on straight bills of lading: 'since the consignee has been particularly defined, the straight bill of lading becomes a cargo receipt and an evidence of the contract of carriage. As to the shipper, the straight bill of lading is no longer evidence of ownership. The consignor cannot transfer the bill of lading through endorsement except through physical delivery of the goods.'

⁸ *Ibid*, p 67: 'The terms and conditions at the back of the bill of lading are regarded as part of the contract of carriage between the shipper and the carrier ... the study and research of most of the bills of lading of different countries reveal that some shipowners or carriers stipulate that the applicable law of the bills of lading are their national laws, others provide that the applicable law is the international convention.'

⁹ Civil Appeal No 29 of 1996.

- (a) This action was commenced by the plaintiff against the defendant for delivery of cargo without a bill of lading. As a result, the rights of ownership of the cargo were infringed, and therefore the cause of action should be in tort. Because of the tortious action by the defendant, the legal relationships, rights, and obligations between the defendant and the plaintiff were also tortious, and not contractual. Therefore, the action should be governed by the law of tort, not by the contract of carriage of goods by sea. According to Art 146 of the Civil Law, the law governing compensation for a tortious act should be the law of the place of commission of the tort. Hence, concerning a commission of tort, the parties involved did not have the right to choose the applicable law. The defendant alleged that the 1936 Carriage of Goods by Sea Act in the USA should be the applicable law. The court rejected this argument because this was against Chinese law. The place of tort included the place of the commission of the tort and the place where the harmful consequence of the tort occurred. In the present case, the cargo was delivered in Singapore without a bill of lading, so the place of commission of the tort was Singapore. The ownership of the cargo was retained by the plaintiff, and the plaintiff was holding the original bill of lading. Delivery of the cargo without the bill of lading converted the rights of ownership of the cargo. Therefore the damage of the tortious act was suffered by the plaintiff in China. The place of commission of the tort was different from the place where the damage of the tort occurred. According to the Opinions of the Supreme People's Court on the Implementation of the Civil Law, Art 187, if the place of commission of the tort is different from the place of the damage from the tort, the court has the discretion to choose the applicable law. The damage from the tort was suffered by the plaintiff in China, the domicile of the plaintiff was China, and the bill of lading was issued in China. Although the tort was committed in Singapore, China had a closer relationship with this case. Hence, the Guangzhou Maritime Court was not wrong in choosing Chinese law as the applicable law. The defendant alleged that even if US law was not the applicable law, the Singaporean law should govern the present dispute. The court rejected this argument.
- (b) Article 71 of the Maritime Code states that a bill of lading is a document which serves as evidence of the contract of carriage of goods by sea and taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against its surrender. This article did not distinguish a straight bill of lading from an 'order' bill of lading. Logically, no matter whether the bill of lading was straight or otherwise, the carrier still had the obligation to deliver the

cargo against the surrender of the bill of lading only. In the appeal petition, the defendant alleged that 'Chinese law requires that the carrier should deliver the cargo to the consignee named in a straight bill of lading, this is the undertaking given by the carrier under a straight bill of lading, no matter the original bill of lading has been surrendered or not.' The court took the view that this was a misunderstanding of Art 71 of the Maritime Code. In addition, the defendant alleged that, according to international custom, the principle that delivery of cargo should only be made against surrender of a bill of lading was only applicable to transferable bills of lading and not straight bills of lading. The court held that the allegation by the defendant was without evidential support and should be rejected. Furthermore, according to Art 142(3) of the Civil Law, if the Chinese law or the international conventions to which China is a party do not stipulate clearly, then the court could apply international custom. Clear Chinese law, however, should be applied by the court. Concerning delivery of cargo against surrender of a bill of lading, the court considered that the Maritime Code dealt with the position succinctly. Hence, the court should handle this case in accordance with Chinese law, not international custom.

- (c) The plaintiff was the shipper under the bill of lading. He had to establish title to the cargo. The documents and evidence showed that the ownership of the cargo remained with the plaintiff and had not passed to the consignee. First, the bill of lading had not been transferred and, second, because of the delivery of the cargo without the bill of lading, the consignee did not pay the purchase price to the plaintiff. The defendant converted the property rights of the plaintiff. Although the plaintiff failed to notify the defendant promptly not to deliver the cargo to the consignee, the defendant should still be responsible for the loss. After all, it could not be a reason to exempt the defendant from liability for delivery of cargo without the bill of lading. Because of the tortious act committed by the defendant, the plaintiff had a right to claim compensation from the defendant. The appeal was dismissed.

Tort or contract?

The judgment of the Guangdong Higher People's Court may be open to debate in several respects, especially the finding that the cause of action was only tortious and therefore the action should be governed by the law of tort and not by the law of the contract of carriage of goods by sea. The Maritime Code clearly states that a contract of carriage of goods by sea is a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods

contracted for shipment by the shipper from one port to another.¹⁰ Under the Maritime Code, a carrier is defined as the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper; 'shipper' means 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; and that a consignee means the person who is entitled to take delivery of the goods.¹¹ Arguably, whether a consignee is entitled to take delivery of the goods is a matter governed by the contract of carriage of goods by sea. In addition, the Maritime Code stipulates further¹² that the responsibilities of the carrier with regard to goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading until the goods have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerised goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods on board the ship until the time the goods are discharged therefrom. During the period when the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods. Therefore, when an alleged consignee without the production of a bill of lading demands delivery of the cargo from the carrier, the carrier is still in charge of the cargo and their responsibilities should be governed by the contract of carriage. The argument that the action was only tortious and had nothing to do with the contract of carriage may therefore be subject to debate. There is no reason to deny the rights of the parties to the contract of carriage (ie shipper and carrier) to contractually determine the conditions of delivery to the consignee, inter alia, by use of a non-negotiable, straight bill of lading governed by US law. In any event, even though there might have been concurrent liability in tort and contract, the court should not have ignored the Maritime Code and the clause paramount¹³ entirely and simply applied Chinese tort law. In this respect, the practice of the Guangdong Higher People's Court is very different from the practice of the English courts. Authorities such as *The Aliakmon*¹⁴ demonstrate the long-standing reluctance of the English courts to extend the right of recovery in tort for what amounts to pure economic loss. In that case, the steel importers purchased coils of steel, intending to sell on. They were unable to do this before the steel had to be paid for, so it was agreed that they should take delivery, and take the bill of lading 'to the order of' the sellers. The steel was damaged in transit. The House of Lords

¹⁰ Chapter IV, s 1, Basic Principles, Art 41.

¹¹ Ibid, Art 42(1), (3), (4).

¹² Chapter IV, s 2, Carrier's Responsibilities, Art 46.

¹³ Chapter XIV, Application of Law in Relation to Foreign-related Matters, Art 269 of the Maritime Code: '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.'

¹⁴ [1986] 2 Lloyd's Rep 1.

unanimously denied the buyer any remedy in the tort of negligence. In their Lordships' view, there was no lacuna in the law relating to carrier's liability which was required to be filled by extending the range of duty of care in tort. If for some reason the buyer did not have the contractual right under the bill of lading to sue the carrier, the sellers should either exercise this right for their buyers' account or assign such right to them to exercise for themselves. The court found no reason to depart from the principles accepted both in general tort law and in the law of bills of lading.

United States of America

The issue of whether or not a carrier has an obligation under US maritime law to deliver cargo to a named consignee under a straight bill of lading without surrender of the originals has been summarised as follows:

A carrier which has issued a non-negotiable bill of lading normally discharges its duty by delivering the goods to a named consignee; the consignee need not produce the bill or even be in possession of it; the piece of paper on which the contract of carriage is written is not of importance in itself.¹⁵

Legislation

Under the relevant US law, in particular the Pomerene Act, a 'straight' bill of lading is defined as 'a bill in which it is stated that the goods are consigned or destined to a specified person.'¹⁶ In essence, a straight bill of lading consigns goods to a specified party and is non-negotiable. The Pomerene Act makes it clear that an ocean carrier transporting cargo pursuant to a straight bill of lading is not obliged to ask for the surrender of the original bill of lading prior to delivery of the cargo to the consignee named in the bill: 'a carrier is justified, subject to the provisions of sections 90-92 of this title, in delivering goods to one who is ... (b) the consignee named in a straight bill for the goods.'¹⁷ Very often, the clause paramount on the back of the bill of lading states that the provisions of the US Carriage of Goods by Sea Act 1936 (COGSA)¹⁸ shall apply to disputes arising under the bill of lading. COGSA expressly permits the continuing operation of the Pomerene Act: '[N]othing in this Chapter shall be construed as repealing or limiting the application of any part of [the Pomerene Act].'¹⁹

¹⁵ Gilmore and Black, *The Law of Admiralty* (New York: Foundation Press, 2nd ed 1975), pp 3-4.

¹⁶ 49 USC 82.

¹⁷ 49 USC 89(b).

¹⁸ Note 5 above.

¹⁹ 46 USC 1303.

Case law

In *Chilewich Partners v MV Alligator Fortune*,²⁰ the US Federal Court for the Southern District of New York held that ‘there is no “absolute” duty on the Carriers to take up original bills of lading before delivery where this duty is imposed neither by the terms of the contract of carriage nor by the mutual understanding or agreement of the parties nor by the requirements of the applicable federal law.’ In *Gold Medal Trading Corporation v Atlantic Overseas Corporation*²¹ the New York District Court stated further that ‘a carrier is justified in delivering goods to the consignee named in a straight bill of lading, subject to the provision of [the Pomerene Act].’ In that case, however, prior to the delivery by the carrier to the consignee the shipper had sent the carrier written instructions to deliver the goods to the consignee *only* upon presentation of the original bill of lading. Absent these subsequent instructions, the court agreed that the carrier would have had a right to deliver the cargo to the consignee named in a straight bill of lading without presentation of the original bill. However, the subsequent instructions given by the shipper brought into play another provision of the Pomerene Act and changed the nature of the carrier’s obligation pursuant to 49 USC 90(a).²² The court held that the delivery to the consignee, although authorised by s 89(b),²³ was wrongful because the carrier disregarded a specific request by the shipper pursuant to s 90(a) not to make such delivery.

In fact, the rule is recognised in many jurisdictions in the United States. In *Erskine Williams Lumber Company, Inc v John I Hay & Co, Inc*²⁴ it was held that ‘the Federal Bill of Lading Act heretofore referred to provides that where goods are shipped under a straight bill of lading, delivery may be made to the consignee named in the bill. It was therefore not necessary that the carrier required the surrender of the bills of lading before delivery of the shipments. This rule has been recognised in the State of Louisiana as well as in the Federal Court.’ In *Edelsdone v Schimmel*²⁵ the court said: ‘it is the general rule that a non-negotiable contract of shipment by a common carrier is discharged by delivery to the consignee without the surrender or production of the bill of lading.’ In *St John Brothers Company v Falkson*²⁶ ‘the delivery of the non-negotiable bill of lading by the plaintiff to the defendant and its retention by the latter is not

²⁰ 853 F Supp 744, 753 (SDNY 1994).

²¹ 580 F Supp 610, 612 (SDNY 1984).

²² ‘Liability for delivery to person not entitled thereto: Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property of possession in the goods if he delivered the goods otherwise than as authorised by subdivisions (b) and (c) of 89 of this title; and, if he delivered the goods as authorised by either of said subdivisions, he shall be so liable if prior to such delivery he: (a) has been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery ...’

²³ Note 17 above.

²⁴ 160 SO 650, 652 (Court of Appeal of Louisiana, New Orleans, 15 April 1935).

²⁵ 223 Mass 45, 123 NE 333, 334.

²⁶ 237 Mass 399, 130 NE 51, 53.

conclusive. Possession of such a bill of lading is not of much significance as to the title of the property ... the carrier rightly could deliver to the consignee and discharge its liability without surrender of such a bill of lading.' In *Utley v Lehigh Valley R Company*²⁷ it was further averred that 'the carrier, on such bill, may deliver on the order of the consignee, and it is under no duty to the latter or the consignor to demand the bill of lading. A carrier is protected in delivering goods to a consignee without the bill of lading; so would it be on his order.'

Hong Kong

Hong Kong received the common law and continues to receive it after sovereignty reverted to China on 1 July 1997. Although judicial decisions in England are unlikely to be binding on local courts in Hong Kong,²⁸ they may well continue to be highly persuasive.

Professor Wilson²⁹ described the commonly adopted business practices of the waybill as follows:

In situations where a negotiable document of title is not required, the presentation problem can be solved by the substitution of a waybill for the normal bill of lading. These documents were first developed for use in land and air transport in which negotiable documents of title were not required since the journeys involved were normally so brief that little opportunity was provided for the consignee to sell the goods in transit. Since negotiation of a waybill is not possible, the obligation of the carrier is to deliver to the named consignee and, provided the latter can identify himself, there is no requirement for presentation of the waybill before he can obtain delivery of the goods. The waybill differs from the bill of lading in that, while it acts as a receipt and provides evidence of the contract of carriage, it lacks the third characteristic in that it does not constitute a negotiable document of title.

Benjamin's *Sale of Goods*³⁰ reads:

Straight or non-negotiable bills are those which make the goods deliverable to a named consignee and either contain no words importing transferability or contain words negating transferability (such as 'not transferable' or, somewhat inaccurately 'not negotiable'). Sea waybills are documents of this kind.

²⁷ 292 PA 251, 141 A 53, 54.

²⁸ See Peter Wesley-Smith, 'The Common Law of England in the SAR' in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993).

²⁹ *Carriage of Goods by Sea* (London: Pitman Publishing, 2nd ed 1993), p 163.

³⁰ London: Sweet & Maxwell, 5th ed 1997, pp 989-90, para 18-014.

Two things follow from the fact that a document of this kind is not transferable by indorsement and delivery. First, the consignee (if in possession of the document) cannot, by purporting to transfer it in this way, impose on the carrier a legal obligation to deliver the goods to another person. Secondly, the shipper cannot oblige the carrier to deliver the goods to a different consignee from the one named merely by indorsing and delivering the bill to that other person; for under a straight bill the carrier is entitled and bound to deliver the goods to the originally named consignee without production of the bill.

For this proposition of law, neither Wilson nor Benjamin cites any authority in support. On the other hand, a different view was expressed by Professor Schmitthoff³¹ whilst again no authority is cited:

In the modern bill of lading a box on the left-hand corner of the bill usually provides: 'consignee (if "order" state notify party).'

If the shipper intends to obtain a negotiable bill he completes this box by inserting 'order' and adding as 'notify party' the name of the consignee.

A shipper who wishes to obtain a bill of lading which is not negotiable does not insert the word 'order' in the appropriate box of the bill but inserts the name of the consignee in the following box.

Logically the function of the bill of lading as a document of title is distinct from its quality as a negotiable instrument. Even a bill of lading which is not made negotiable, operates as a document of title because the consignee named therein can only claim delivery of the goods from the shipowner if able to produce the bill of lading.

Because of such uncertain business practices, carriers have come under increasing pressure to release goods without production of straight bills of lading. Most of the time the carriers do so at their own risk³² and therefore they usually require the consignees taking delivery of the cargo without production of the straight bills of lading to produce letters of indemnity issued by banks. Most Protection and Indemnity (P&I) Clubs do not offer cover against such risk. Indeed, judicial decisions in England indicate that carriers which deliver cargo without presentation of the straight bill of lading do so entirely at their own risk: and that is so even if the person taking the goods is named as the shipper or consignee in the bill.

³¹ *Export Trade: The Law and Practice of International Trade* (London: Sweet & Maxwell, 9th ed 1993), pp 572 and 593.

³² Unless the *CMI Uniform Rules for Sea Waybills* are incorporated in the bill. Rule 7: The carrier shall deliver the goods to the consignee upon production of proper identification. The carrier shall be under no liability for wrong delivery if he can prove that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact that party.

In *Evans & Reid v Cornouaille*³³ the plaintiffs shipped at Cardiff a cargo of coal on board the French steamship *Cornouaille*, under a bill of lading for delivery at Nantes to the plaintiffs' order. The plaintiffs shipped the coal under a contract of sale entered into with the French buyer. The contract provided that the payment of the price became due when documents conforming to the contract were tendered. The documents were subsequently presented to the buyers, but were not taken up. The bill of lading was still in the hands of the plaintiffs, in whom the property in the coal remained. In these circumstances, the defendants' agents at Nantes and the master of the ship delivered the coal to the buyer's agent, namely the Société Union. Justice Hill said,³⁴

The fact that the coal was intended to be delivered to the Société Union did not entitle the master to deliver to anybody without production of the bill of lading. It would not have entitled him to deliver even if the Société Union had been the consignees named in the bill of lading. It is said that the plaintiffs ought to have informed the defendants that the buyers of the coal had not taken up the documents. There is no such duty upon the plaintiffs. The transaction between the buyers and the plaintiffs had nothing to do with the shipowners. The latter were only concerned with the fulfilment of their bill of lading contract, and the plaintiffs were entitled to rely upon this, that the ship would not give delivery of the goods until the bill of lading, with the plaintiffs' endorsement upon it, was presented to the master.

This dictum supports the view taken by Professor Schmitthoff, although it is only obiter as the bill of lading was made out to the plaintiff's order.

In *Thrige v United Shipping Co Ltd*³⁵ Lord Scrutton left the position open. The plaintiff, a Danish manufacturer, sold machinery to an English company. The plaintiff shipped the machinery in vessels belonging to a Danish shipping company which issued the bills of lading naming the English buyer as the consignee. Under the bills of lading the machinery was to be carried from Esbjerg to Harwich and then forwarded to London by rail to be delivered to the consignee upon production of the bills of lading. But upon arrival of the machinery in London the defendants as agents of the shipping company caused the same to be delivered to the consignee without production of the bills of lading. The plaintiff did not receive payment for the machinery from the consignee. The plaintiff successfully obtained judgment against the defendant. The defendant appealed. The appeal was allowed by the Court of Appeal principally on the ground that the defendants as agents of the shipping

³³ (1921) 8 Lloyd LR 76.

³⁴ *Ibid*, p 77.

³⁵ (1924) 18 Lloyd LR 6.

company were under no duty to the plaintiff in respect of the machinery consigned. Lord Scrutton³⁶ averred that 'Neither is there conversion; nor is there any duty owed by the agent to the vendor who has contracted with the shipowner and not with his agent. That renders it unnecessary to decide the question which I personally feel considerable interest in, ie as to whether, when a bill of lading is made out to a consignee and the property passes on shipment, the shipowner who delivers to the named consignee without production of the bill is or is not guilty of any breach of contract. It is not necessary to decide it.'

Judicial development in this proposition of law indicates that the position is indeed still being left open. In the decision of the Privy Council in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*,³⁷ Lord Denning described the position as follows: 'it is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading ...' In *Barclays Bank Ltd v Commissioners of Customs and Excise*,³⁸ Lord Justice Diplock said: 'it is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading (see *The Stettin* (1889) 14 PD 142). Until the bill of lading is produced to him, unless at any rate its absence can be satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession, he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods.' In *The Stettin* a bill of lading was issued making the goods deliverable to 'Mendelsohn or assigns.' Mendelsohn was the agent of the intended purchaser of the goods. The purchaser failed to pay the price and the seller/shipper did not deliver the bill of lading to him. However, the shipowner had delivered the goods to Mendelsohn without his production of the original bill of lading. The carrier was held to be liable to the shipper for the loss. In *Hansson v Hamel*³⁹ Lord Sumner said, 'this is another instance ... of transactions in which, in spite of the insertion of the consignee's name in the bill of lading, the intention to reserve the *jus disponendi* to the seller till the documents are taken up is manifested by the way in which the transaction is carried through with regard to the presentation of the documents.' Therefore, the carrier may be at risk of delivering the cargo to a person who is not entitled to the cargo even though he is the named consignee in the bill of lading, if the title to and property in the goods represented by the straight bill of lading is still retained by the shipper until payment of the purchase price.

³⁶ Ibid, p 9.

³⁷ [1959] 2 Lloyd's Report 114, 120.

³⁸ [1963] 1 Lloyd's Report 81.

³⁹ [1922] 2 AC 36, 43.

The authorities cited and discussed above,⁴⁰ however, are not authorities with direct connection to straight bills of lading. The bills of lading in these cases were either made out 'to order' or 'to the consignee or assigns.' The views expressed by the judges are therefore obiter only. Judicial authority directly on straight bills of lading is lacking both in Hong Kong and in England. The Bills of Lading and Analogous Shipping Documents Ordinance⁴¹ came into force in Hong Kong on 1 March 1994. It states that a sea waybill is not a bill of lading but is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea. It also identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.⁴² A person who becomes (without being an original party to the contract of carriage) the person to whom delivery of goods to which a sea waybill relates is to be made by the carrier in accordance with that contract shall, by virtue of becoming the 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.⁴³ It is submitted that these statutory provisions fail to deal clearly with the issue whether the named consignees in the straight bills of lading can obtain delivery of the goods simply by identifying themselves without presentation of the straight bills of lading.

Recently, this uncertain legal issue was discussed in the High Court of Singapore in *Olivine Electronics Pte Ltd v Seabridge Transport Pte Ltd*.⁴⁴ It is worth noting that the Bills of Lading Act⁴⁵ came into force in Singapore with effect from 12 November 1993. Its provisions are almost identical to those of the UK Carriage of Goods by Sea Act 1992. The plaintiffs agreed to sell a certain cargo to Orient Plus in Russia. Pursuant to this sale, the plaintiffs entered into a contract of carriage of the cargo from Singapore to Vostochny, Russia. The contract of carriage was contained in and evidenced by a straight bill of lading dated 30 March 1994 naming Orient Plus as the consignee. The cargo was delivered by the defendants to Orient Plus in Russia without production of the bill of lading. The plaintiffs had not received payment for the cargo. The plaintiffs commenced proceedings against the defendants and applied for summary judgment. The assistant registrar granted the defendants leave to defend on condition that they furnished a bank guarantee for US\$80,000. Against this order both the plaintiffs and the defendants appealed. The High Court of Singapore dismissed both appeals and affirmed the order of the

⁴⁰ With the exception of *Thrige v United Shipping Co Ltd* (note 35 above).

⁴¹ The provisions of this ordinance are almost identical to those of the UK Carriage of Goods by Sea Act 1992.

⁴² s 3(3). It is identical to s 1(3) of the UK Carriage of Goods by Sea Act 1992.

⁴³ s 4(1). It is identical to s 2(1) of the UK Carriage of Goods by Sea Act 1992.

⁴⁴ [1995] 3 SLR 143.

⁴⁵ It contains provisions which are the same as s 1(3) and s 2(1) of the UK Carriage of Goods by Sea Act 1992.

assistant registrar granting conditional leave to defend. The court held that there was no evidence other than the bare statement in the affidavit of the defendants' export manager that it was the custom and practice of the port of Vostochny for cargo to be delivered without production of the original bills of lading. Justice Goh⁴⁶ said, 'But the law on the duty on the part of the carrier to deliver against production of the original bill of lading in a straight consigned bill of lading is still somewhat open, though the dicta of Hill J in the *Cornouaille* case supports the plaintiffs' claim.' Unfortunately, the matter was not pursued further by the plaintiffs in the High Court of Singapore, presumably because the dispute was subsequently settled out of court.

Conclusion

Under US maritime law, a straight bill of lading requires the carrier to release the cargo to a properly identified, named consignee. Delivery pursuant to a straight bill of lading is not predicated upon the surrender of the originals. In mainland China, however, delivery of the goods has to be made against surrender of the bill of lading. In Hong Kong, the position is uncertain. If the carrier delivers the goods to a person without presentation of the bill of lading, he does so entirely at his own peril.

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⁴⁶ Note 44 above, p 149.

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