

Bills of Lading as Documents of Title—Chinese Law and Policy

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Keywords: bill of lading; document of title; property in goods; delivery of goods; doctrine of good faith purchase; freedom of contract; transfer of rights

Abstract

In modern maritime commerce, the bill of lading is usually regarded as a document of title. This is also the case under Chinese law. However, unlike other jurisdictions such as the UK and the US, the exact effects of the bill of lading as a document of title have never been clarified in China due to the silence of Chinese law in this regard. In consequence of that, various explanations on the notion “bill of lading as document of title” have been developed. Unfortunately, none of them is fully compatible with the existing Chinese law and the reality of trade. To understand the notion “bill of lading as document of title” precisely, this article revisits English law and American law from which Chinese law borrows the notion and uncovers that the definition of the notion in national law may be influenced by the following factors: the legislative intent of the national law on the usage of the bill of lading, the freedom of contract in transfer of property rights in goods, and the domestic law on doctrine of good faith purchase. This article then analyses these factors in the context of Chinese law and policy, seeking to find a proper way to clarify the notion “bill of lading as document of title” and localise such a notion to suit Chinese legal and economic background.

Introduction

In contemporary maritime law and practice, the bill of lading¹ is commonly regarded as a document of title which is featured with two functions: firstly, it represents the goods to which it relates; secondly, it enables its holder to claim delivery of goods from the carrier.² These functions are significant to both the cargo interests and the carrier involved in the seaborne cargo trade. On the one hand, the function of document of title enables the cargo interests to dispose the goods through dealing with the bill of lading when the goods are in transit. On the other hand, the function of document of title enables the carrier to discharge the obligation of delivery once the goods are delivered against presentation of the original bill of lading. In this

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¹ The bill of lading mentioned in this article includes the order bill of lading and the bear bill of lading which are usually viewed as transferable or negotiable bills of lading. The straight bill of lading is outside the scope of the article as its legal quality as a document of title is arguable.

² Caslav Pejovic, “Document of Title in Carriage of Goods By Sea: Present Status and Possible Further Directions” (2001) J.B.L. 461, 461.

sense, the functions of the bill of lading as a document of title underpin both the sale of goods and the carriage of goods.

Historically, the usage of the bill of lading as a document of title originated from the custom of merchants and the usage was later recognised and clarified at common law.³ Nowadays, such a usage has been codified in the national law of many seafaring countries so as to prevent the abusive use of such a notion.⁴ However, this is not the case under Chinese law. The current Chinese maritime code (CMC)⁵ does not contain any provision addressing the legal effect of the bill of lading as a document of title, although the bill of lading is often described as a document of title in both Chinese academia and adjudication. It is argued that such a description did not develop naturally from Chinese maritime practice, but rather, transplanted from Anglo-American law.⁶ Given that, debates surrounding the legal nature of such a notion has never been ceased. The interpretations in this regard either focus on what exact “title” the bill of lading represents,⁷ or simply negates the effect of the bill of lading as a document of title in cargo transportation.⁸ None of them is convincing enough to terminate the controversy over the legal nature of the bill of lading as a document of title in Chinese law. Today, the controversy continues, which does not only cause uncertainty to current maritime practice based on the use of tangible bills of lading, but also impedes the transition from the tangible bill to the electronic bill which is expected to achieve functional equivalence to the former.⁹

To bring more certainty to Chinese law and pave the way for the paperless maritime trade, the article attempts to reconstruct the notion of the bill of lading as a document of title under Chinese law. Generally, the article is presented in three main parts. First, the article starts with

³ For recognition of the mercantile usage of the bill of lading as a document of title by the common law court, see *Lickbarrow v Mason* (1794) 5 TR 683 (KB). The legal nature of such a usage was clarified by common law courts in a number of subsequent cases such as *Sanders Bros v Maclean & Co* (1883) 11QB 327 (CA), *Sewell v Burdick (The Zoe)* (1884) 10 AC 74 (HL), and *Barber v Meyerstein* (1870) 4 LR 317 (HL).

⁴ Caslav Pejovic, “Document of Title in Carriage of Goods By Sea: Present Status and Possible Further Directions” (2001) JBL 461, 462.

⁵ 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 came into force as of July 1, 1993.

⁶ 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 Chinese). See also Renjian Wu, “Analysis of the legal nature of the bill of lading as document of title” (2008) 18 *Annual of China Maritime Law* 242, 243 (in Chinese).

⁷ Yu Guo, *The Spirit of Chinese Maritime Law—The theory and practice in China* (2nd edn, peking university press 2005) 166-73 (in Chinese).

⁸ Yuzhuo Si and Beiping Chu, “Discussion on Delivery of Cargo without presentation of Bills of Lading—the nature of Bills of Lading as Documents of Title” (2006) 16 *Annual of China Maritime Law* 1, 5 (in Chinese).

⁹ Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 13.11.

a sketch of the controversy over the notion of the bill of lading as a document of title under Chinese law. Second, since such a notion is borrowed from Anglo-American Law, this article compares and contrasts the approaches in English and American law, particularly highlighting the different priorities of the law in the two jurisdictions. Third, the article examines China's trading policy and law, and argues for the adoption of the American approach to reform Chinese law on the ground that it is in line with national trade policy as well as compatible with domestic legal principles. Based on that, the article demonstrates how such an approach can be fitted into the relevant legislations in China and argues that the approach will not increase the risk of trafficking of the bill of lading.

The Controversy on the legal nature of the bill of lading as a document of title under Chinese law

In early 1990s, the dominant approach in this regard was that the bill of lading represented the ownership of goods and the transfer of the bill would lead to the transfer the ownership of the goods.¹⁰ Such an idea was upheld by Chinese court at that time. For example, in *Xingli Company, Guangao Company v. National Trade Co Ltd (India), Balapool Company (Malaysia), Kupock Company (Malaysia), Narin Company (Malaysia)*,¹¹ the Supreme People's Court (SPC) held that, by virtue of the bill of lading as document of title, the person who had the bill in hand should be regarded as the owner of cargo covered by the bill.¹² From the aforesaid dictum, it appears that the SPC equated the term "document of title" with "document of ownership." Similar argument can also be found in *China Resources Textile Materials Co., Ltd. (H.K.) v Guangdong Zhanjiang Shipping Agency Company and others*.¹³ In this case, Guangzhou Maritime Court held that the claimant was entitled to the ownership of the goods when the goods were discharged at the destination on the ground that the claimant was the party who held the bill of lading as document of title at that time. However, the "ownership approach" has been criticised for deviating from the trading reality in which the cargo interest may free to decide the timing for passing the ownership of goods, whilst also distorting the common law

¹⁰ Wenjun Wang, *The legal basis of the right of suit under the bill of lading* (1st edn, Law Press China 2010) 21-22 (in Chinese).

¹¹ (1991) Supreme People's the court of People's Republic of China, 1 Gazette of the Supreme People's Court 47 (in Chinese).

¹² (1991) Supreme People's the court of People's Republic of China, 1 Gazette of the Supreme People's Court 47, 48 (in Chinese).

¹³ (1993) Guangzhou Maritime Court, Gazette of the Supreme People's Court, <http://gongbao.court.gov.cn/Details/47e44f4b507920e109bdb930d8a554.html> [accessed 28 June 2018] (in Chinese).

approach on the bill of lading as document of title at common law.¹⁴ Under the common law, as a document of title the bill of lading represents no more than possession of the good.¹⁵ The transfer of a bill of lading does not necessarily pass the property in goods to its holder, but rather, may become a part of the mechanism to pass such a property.¹⁶

In view of the defect of the “ownership approach”, the “possession approach” was raised in Chinese academia, arguing that the effect of the bill of lading as a document of title should be understood from the sense of “possession”.¹⁷ According to the approach, such an effect lies in the bill’s capacity in proving the possession of goods associated with the bill, and for which the holder is entitled to claim delivery of goods from the carrier.¹⁸ Although such an idea appears to be more alike the original meaning of “bill of lading as document of title” at common law and also compatible with the trading reality that the bill and the property do not necessarily be transferred at the same time, it does not work coherently with the legal nature of the concept “possession” under Chinese law.

The term “possession” is addressed by General Principles of the Civil Law of the People's Republic of China 1986 (Civil Law 1986)¹⁹ and Property Law of the People's Republic of China 2007 (Property Law 2007).²⁰ According to Civil Law 1986, “Property ownership means the owner's rights to lawfully possess, utilize, profit from and dispose of his property.”²¹ Similar provision can be found in Property Law 2007 which provides that “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.”²² Property Law 2007 also states that the debtor or a third party is entitled to transfer the “possession of his movable property” to the creditor as a pledge for debt.²³ All these rules show that the legal nature of “possession” is more

¹⁴ Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 212-13 (in Chinese).

¹⁵ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 132.

¹⁶ *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd’s Rep 252 (CA), 270.

¹⁷ Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 212-14 (in Chinese).

¹⁸ Renjian Wu, “Analysis of the legal nature of the bill of lading as document of title” (2008)18 *Annual of China Maritime Law* 242, 254 (in Chinese).

¹⁹ Civil Law 1986, adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986 and promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986.

²⁰ Property Law 2007, adopted at the Fifth Session of the Tenth National People's Congress of the People's Republic of China on March 16, 2007, and went into effect as of October 1, 2007.

²¹ Civil Law 1986, art 71.

²² Property Law 2007, art 39.

²³ Property Law 2007, art 208.

like a *fait juridique* subject to certain property rights rather than an independent legal right.²⁴ This means that the validity of possession depends on whether such a possession is backed up by a rightful property right.²⁵ Therefore, the idea defining the “title” as a kind of possession may not favour the holders of bills of lading since their rights to the goods may still be in precarious status even though they hold the bills as documents of title. Such a position is underpinned by Article 243 of Property Law 2007, which provides:

In case a real property or movable property is possessed by a possessor, the holder (of real rights of the property)²⁶ 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.

As shown from the article, possession itself does not suffice to secure the possessor’s interest to the property as such a possession may always be challenged by the person who has ownership or other property right such as pledge. In this case, the notion “bill of lading as document of title” would become meaningless. The person to whom the bill is transferred in a string sale would have to enquire into all previous transactions of goods so as to identify the real status of the property rights in goods to which their interests may be subject. Obviously, such a result is not in line with the prevailing usage of the bill of lading in commercial practice.²⁷

Recently, a new proposition called “functional approach” has been raised, arguing that the bill of lading shall be vested with different qualities when it is in different commercial contexts. According to the approach, the legal effect of the bill of lading as a document of title only exists when transacting the goods, whereas at the stage of transportation the transfer of the bill of lading only gives rise to the transfer of the contractual right deriving from the original contract of carriage.²⁸ 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 can

²⁴ Huixing Liang and Huabin Chen, *Real Right Law* (5th edn, Law Press China 2014) 389-91, 401-02 (in Chinese).

²⁵ Huixing Liang and Huabin Chen, *Real Right Law* (5th edn, Law Press China 2014) 401-02 (in Chinese).

²⁶ In Chinese law, the concept “real right” is employed in describing the property rights in a movable or immovable property. According to art 2 of Property Law 2007, the “real right” include ownership, usufructuary right and real rights for security. To keep consistency of this article, the authors use the word “property rights” with the equivalent meaning of “real rights” unless citing the text from Chinese legislation.

²⁷ For instance, when the bill of lading is presented to the bank for issuing the payment under the LC, the bank has no obligation to examine the real status of the performance of the underlying sale contract. See ICC Uniform Customs and Practice for Documentary Credits (UCP 600), art 5 “Banks deal with documents and not with goods, services or performance to which the documents may relate.”

²⁸ Yuzuo Si, *Maritime Law Monograph* (2nd edn, China Renmin University Press 2010) 178-83 (in Chinese).

play rather than clarifying the legal nature of the bill of lading as a document of title. In addition, if the bill of lading does not have any effect as a document of title when serving cargo transportation, then a common practice that the carrier is allowed to discharge his obligation of delivery in contract and conversion once the delivery is made against presentation of the original bill, may hardly be explained. Such a practice has been recognized by the SPC, which states:

Where a carrier issues an original bill of lading in multiple copies, after the carrier delivers the goods to the person who first submits the original bill, if other persons who hold the same original bill request the carrier to bear the civil liability for delivery of goods without the original bill, the people's court shall not uphold such request.²⁹

The aforesaid rule cannot be justified if the bill of lading only carries a contractual right when serving cargo transportation. Moreover, the view dividing the effects of the bill as a document of title according to different commercial context to some extent ignores the potential connection between the transportation of goods and the transaction of goods. This may make the legal functions of the bill become more fragmented and add more complexity to unifying such functions by statutory law.

In addition, the SPC's interpretation on delivery of cargo without presentation of the original bill of lading appears to bring more confusion to define the bill of lading as document of title. According to the interpretation,

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.³⁰

The SPC explained the rationale of this rule is that the delivery of goods without presentation of the original bill of lading does not only result in a breach of the carrier's duty under the contract of carriage, but also constitute an infringement of the holder's property rights in the goods.³¹ This to some extent restates the principle that as a document of title the bill of lading

²⁹ 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 10.

³⁰ 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, art 3.

³¹ Xiaoyan Liu, "Carrier's liability and the consignee's right of suit" (2009) 7 *Gazette of the Supreme People's Court* 23, 23 (in Chinese).

is able to impart certain proprietary interest to its holder rather than merely contractual rights; however, the rule itself do not indicate what exact proprietary interest and in which way such an interest can be acquired by the holder. In this sense, the SPC rule is of little help to clarify the legal nature of the bill of lading as a document of title.

In general, the expression of the bill of lading as a document of title is still lack of certainty under current Chinese law. Since such an expression is said to be transplanted from Anglo-American law, it would be helpful to revisit the English law and the American law so as to draw some inspirations to clarify such an expression in Chinese law.

Revisiting the bill of lading as a document of title under Anglo-American law

The English approach

In early English common law, the bill of lading as a document of title used to be construed in terms of transfer of property in goods;³² however, such a view was rectified in the later common law practice. In *Sanders Bros v Maclean & Co*³³ and *Sewell v Burdick (The Zoe)*,³⁴ the English courts clarified that the general property of the goods was not passed merely by endorsement and delivery of the bill unless the parties had such an intention. Such a principle is still true today.

Compared to the transfer of property, the effect of the bill of lading as a “key to warehouse,” may be more significant to explain the function of the bill as a document of title. Such a function was construed by Lord Hatherley in *Barber v Meyerstein*,³⁵

There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them.³⁶

³² See *Lickbarrow v Mason* (1794) 5 TR 683 (KB). The Court of King’s Bench recognised the mercantile custom that the property of goods would be transferred to the holder by delivery and indorsement of the bill.

³³ (1883) 11 QB 327 (CA).

³⁴ (1881-85) All ER 223, (1884) 10 AC 74 (HL).

³⁵ (1870) 4 LR 317 (HL).

³⁶ *Barber v Meyerstein* (1870) 4 LR 317 (HL), 329-30.

His lordship shows that, to satisfy the mercantile usage of the bill of lading, the possession of the bill should be deemed as a symbolic possession of the goods. Likewise, the delivery of the bill of lading is equal to delivery of goods. In this sense, the practical value of the bill of lading as a document of title in English law lies in its effect in delivery of goods.³⁷ Nowadays, such an effect has been embodied in the presentation rule.³⁸

The landmark case which explains such an effect is *J.I Mac William Co. Inc. v Mediterranean Shipping Co. SA (The Rafaela S)*.³⁹ In this case, the House of Lords held that the straight bill of lading should be regarded as a similar kind of document of title as the order bill and the bearer bill.⁴⁰ Thus, the goods covered by the straight bill should be delivered against presentation of the bill.⁴¹ 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 a proof of right to claim delivery of goods. As summarized by Todd, the presentation rule can lead to the following consequences:

- (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.⁴²

Finally, it is noteworthy that under English law the presentation rule must be strictly adhered, even though merely by virtue of contractual force. This is evidenced in *Kuwait Petroleum Corporation v I & D Oil Carriers Ltd (The Houda)*,⁴³ where Leggatt LJ stated:

... 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.⁴⁴

³⁷ Charles Debattista, *Sale of Goods Carried by Sea* (2nd edn, Bloomsbury Publishing Plc 1998) 29.

³⁸ Paul Todd, *Principles of the carriage of goods by sea* (1st edn, Routledge 2016) 348.

³⁹ [2005] UKHL 11, [2005] 2 WLR 554, [2005] 1 Lloyd's Rep 347.

⁴⁰ *The Rafaela S* [2005] UKHL 11, [20].

⁴¹ *The Rafaela S* [2005] UKHL11, [45].

⁴² Paul Todd, *Principles of the carriage of goods by sea* (1st edn, Routledge 2016) 349.

⁴³ [1994] 2 Lloyd's Rep 541 (CA).

⁴⁴ *The Houda* [1994] 2 Lloyd's Rep 541 (CA) 553.

In other words, under the English law the contractual nexus between the carrier and the holder suffices to justify the presentation rule.

The American Approach

As a country used to share the same jurisdiction with the UK, the US established a similar approach towards the legal effect of the bill of lading as a document of title at common law. This can be seen from *The Bank of Rochester v Jones*⁴⁵ and *Midland National Bank of Kansas City v Missouri, Kansas & Texas R.R.*⁴⁶ In both cases the American courts described the bill of lading as “a key to the warehouse” and acknowledged that its transfer and delivery is equal to the change of possession of the goods themselves. Such an approach was similar to the verdict of the English Court on bills of lading as documents of title in *Barber v Meyerstein*.⁴⁷

Despite the similarity, compared to the English law, the American law is more inclined to view the concept “document of title” in connection with the proprietary interests in goods. For instance, in *United States v Delaware Insurance Co.*,⁴⁸ the Circuit Court stated 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.⁴⁹

Such a statement suggests that the possession of goods represented by the bill of lading should be established on the basis of transferring property of goods together with the bill. This means that the transfer of the bill of lading itself does not suffice to transfer the right of possession of goods, unless the property of goods is transferred along with the bill. For the property in goods, the Court assumed it would be transferred by indorsement of the bill against payment of valuable consideration. Nowadays, such an assumption has been affirmed by statutory law.

In American statutory law, the legal effect of the bill of lading as a document of title are

⁴⁵ 4 Comst 497 (1851).

⁴⁶ 65 Mo. App. 531 (1895).

⁴⁷ (1870) 4 LR 317 (HL) 332 (Lord Hatherley).

⁴⁸ 4 Wash.C.C.418 (1823).

⁴⁹ *United States v Delaware Insurance Co*, 4 Wash.C.C.418 (1823), 422-23.

provided by FBLA 1994⁵⁰ and Article 7 of UCC (Uniform Commercial Code).⁵¹ The two acts in essence equate “document of title” with “document of property”.⁵² This can be seen from § 7-502 of UCC which indicates that the holder of a negotiable document of title is entitled to acquire “title to the goods” if the bill of lading was “duly negotiated” to the holder. The UCC also requires that the holder to whom the bill is duly 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.”⁵³ Similar requirements can also be found in §80105 (a) (1) of FBLA 1994. Moreover, FBLA 1994 provides that the validity of negotiation of a bill of lading to a *bona fide* purchaser is not affected by any defect in the previous life of the bill of lading.⁵⁴ Such a provision endows the bill of lading with negotiability similar to other negotiable documents such as bill of exchange.⁵⁵

The aforesaid stipulations establish a linkage between the legal effect of the bill of lading as a document of title and the doctrine of good faith purchase.⁵⁶ Accordingly, in American law a *bona fide* purchaser to whom the bill of lading is duly negotiated is entitled to the property rights in the goods.⁵⁷

FBLA 1994 also addresses the function of the bill of lading in 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

⁵⁰ The Federal Bills of Lading Act 1994 (FBLA 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.

⁵¹ The uniform Commercial Code (UCC) was firstly published in 1952. The rules providing for bills of lading as documents of title are in article 7. The rules under this article were revised in 2003.

⁵² Michael D Bools, *The Bill of Lading, a Document of Title to Goods---an Anglo-American Comparison* (1st edn, LLP 1997) 28. “The word property is not used in the UCC and title is therefore used throughout in connection with it.”

⁵³ UCC, § 7-501(5).

⁵⁴ 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.

⁵⁵ Georgios I Zekos, “Negotiable Bills of Lading and their Contractual Role under Greek, United States and English Law” (1998) 40 *Managerial Law* 5, 9.

⁵⁶ Michael D Bools, *The Bill of Lading, a Document of Title to Goods---an Anglo-American Comparison* (1st edn, LLP 1997) 63.

⁵⁷ FBLA 1994, § 80101 (4) “holder means a person having possession of, and a property right in, a bill of lading.”

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.⁵⁸

Subsequently, §80110 (f) provides that the title or a right of a third person 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.⁵⁹ Ostensibly, these provisions are not different from the presentation rule recognized at English common law. However, since FBLA 1994 and UCC introduce the rule of good faith purchase to provide for the legal effect of the bill of lading as a document of title, the rationale for presenting the bill in return for delivery of goods does not only lie in the contract relationship between the holder and the carrier, but also rest on the property of goods that can be transferred through negotiation of the bill of lading. This is evidenced by the following rules.

First, although not expressly addressed, in American law the carrier should normally be discharged the obligation of delivery once the goods are delivered against presentation of an original bill of lading.⁶⁰ However, the carrier may not be allowed to do so if the delivery is not made to a person who is entitled to possession of goods. According to § 80111 (a) (1), under such a circumstance the carrier is liable to the person “having title to or a right to possession of goods.”⁶¹ Second, §80110 (b) (1) provides that subject to § 80111, a carrier may deliver the goods covered by the bill of lading to “a person entitled to their possession.”⁶² Viewing this rule in conjunction with § 80111 (a) (1), it can be inferred that the carrier may be allowed to justify his delivery made to a person entitled to possession of goods but not against presentation of the original bill of lading. Third, in the aforesaid situation, to protect himself from the liability for wrongful delivery, the carrier shall prove that the title to goods or the immediate possession of goods is vested in the person to whom the delivery was made. If the carrier is not able to identify whether the person who claims delivery is entitled to title or possession of goods, § 80110 (d) and (e) allow the carrier to take reasonable time to verify the person’s right or bring the issue before the courts as an interpleader. In light of this, FBLA 1994 underlines the principle that the goods should be delivered to a person who is entitled to them rather than

⁵⁸ FBLA 1994, § 80110 (a) (2).

⁵⁹ FBLA 1994, § 80110 (f).

⁶⁰ Michael D Bools, *The Bill of Lading, a Document of Title to Goods---an Anglo-American Comparison* (1st edn, LLP 1997) 161.

⁶¹ FBLA 1994, § 80111 (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.”

⁶² FBLA 1994, § 80110 (b) (1).

a person who merely has a contractual relationship with the carrier.

Notwithstanding, such a consequence does not impose an additional obligation on a carrier to investigate the performance of the underlying sale contract. Since FBLA 1994 incorporates the doctrine of good faith purchase into the provisions governing the negotiation of the bill of lading, the holder to whom the bill of lading is duly negotiated is usually the person who is entitled to receive the goods. § 80110 (b) (3) also provides that the delivery can be made 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.”⁶³ This means, 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 has been aware of any defect in the person’s entitlement to the goods⁶⁴ or any adverse claim to the goods.⁶⁵ In this sense, under FBLA 1994, the presentation rule provides the carrier with a similar extent 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 depends on its capacity in transferring property of goods. Although at common law there is no necessary link between the transfer of the bill and the transfer of the property, such a link is established by FBLA 1994 through introducing the doctrine of good faith purchase. Since FBLA 1994 also states that the carrier is directly obligated to the person to whom the bill of lading is duly negotiated “under the terms of the bill as if the carrier had issued the bill to that person,”⁶⁶ the presentation rule constructed by FBLA 1994 can be justified in both contractual sense and the sense of property law. As such, the American statutory law is different from the English common law as under the latter the contractual effect of the bill of lading between the carrier and the holder would suffice to justify the presentation rule.

Comparative implications from the Anglo-American Law

As can be seen from the Anglo-American law, what makes the notion “bill of lading as document of title” valuable to shipping practice is its effects in delivery of goods, or in other words, the presentation rule. It enables the holder to claim delivery of goods from the carrier

⁶³ FBLA 1994, § 80110 (b) (3).

⁶⁴ FBLA 1994, § 80111 (a) (3).

⁶⁵ FBLA 1994, § 80110 (a) (d).

⁶⁶ FBLA 1994, § 80105 (a) (2).

by presenting the original bill of lading, and *vice versa*, allows the carrier to discharge the obligation of delivery once the goods are delivered against presentation of the original bill. At this point, a significant difference between the English law and the American law is the legal ground for the presentation rule. In English law, such a ground may either root in a symbolic possession of goods represented by the bill or in contractual nexus between the holder and the carrier.⁶⁷ Whereas in American law, the general position is that the carrier is undertaking to deliver the goods to the person who has title to, or right to possess the goods.⁶⁸ Such a position is reinforced by introducing the doctrine of good faith purchase into the rules governing the negotiation of the bill of lading. In consequence of that, the key element that underpins the presentation rule in American law, at least in statutory law, is the property of goods that can be transferred by negotiation of the bill of lading. It must be admitted that the carrier also bears a contractual obligation to deliver the goods against presentation of the bill of lading;⁶⁹ however, merely the contractual relationship between the carrier and the holder may not suffice to justify the presentation rule in American law. In addition, under the FBLA 1994, the person who acquires the bill of lading by satisfying the requirement of good faith purchase is able to acquire better protection than that under the English law. According to §80104, the title to goods obtained by such a person is free from any defect existed in the previous negotiation of the bill of lading, whereas there is no rule of this nature in English law. In this sense, the person who obtains the bill of lading in good faith for value in American law acquires better legal status than in English law, and the bill of lading in American law can be viewed as a negotiable document which bears more tradability than its English counterpart.

The aforesaid differences between English law and American law reflects different purposes contemplated by the two jurisdictions as to the usage of the bill of lading in maritime commerce. In English law, there is no necessary link between the passing of property and the transfer of bills of lading. Although the seller and buyer may agree that the property of goods passes while transferring the bill of lading, the buyer to whom the bill of lading is transferred will not be able to acquire a better title than that held by the seller.⁷⁰ Such a result reflects the dominant position of freedom of contract in English law and the focus of English law on protecting the

⁶⁷ See discussion above in “The English Approach.”

⁶⁸ FBLA 1994, § 80111 (a).

⁶⁹ FBLA 1994, § 80105 (a) (2).

⁷⁰ Sale of Goods Act 1979 (SOGA 1979), section 21(1): “subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”.

true owner's interest in goods. On the contrary, in American law, passing of property in goods is statutorily connected with the negotiation of the bill of lading and the doctrine of good faith purchase. The law acknowledges that the person who obtained the bill of lading in good faith for value is able to acquire a better title than the transferor. Such a result demonstrates that the American law tends to set up limitation on the freedom of contract in transfer of property of goods associated with the bill of lading. It also reflects that the emphasis of American law on providing the bill of lading as a document of title is to facilitate the consecutive transactions of goods.⁷¹ As shown from the Anglo-American experience, the national law-making on the bill of lading as a document of title should be consistent with the extent of freedom of contract in certain jurisdiction; and more importantly, should reflect the priority that domestic legislators considered on the use of the bill of lading.

In addition, the differences between English law and American law may also be attributable to the different stipulations on passing of property in goods. In English law, the doctrine of good faith purchase does not generally apply to the transfer of property in goods.⁷² As a matter of course, this is also the case where the goods are represented and traded through dealing with the bill of lading since the bill is a symbol for the goods. By contrast, under the American law, the sphere where the doctrine applies is much wider than that under the English law. The UCC provides that "a person with voidable title has power to transfer a good title to a good faith purchaser for value."⁷³ The provision subsequently indicates once the goods are delivered to a good faith purchaser the purchaser has the aforesaid power even though illegal incidents such as fraud happened in the transaction and delivery of goods.⁷⁴ These provisions suggest that the doctrine of good faith purchase under American law generally governs the transfer of title to goods. It is thereby logical to apply the doctrine to the situation where the goods are transacted and

⁷¹ The National Conference of Commissioners on Uniform State Laws, UCC Article 7, Document of Title (2003) Summary,

[http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20\(2003\)](http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20(2003)) [accessed 29 June 2018].

⁷² It should be noted that SOGA 1979 contains some exceptional rules which allow the *bona fide* purchase to acquire a better title to the goods than the seller. For example, see s23 "sale under voidable title", s24 "seller in possession after sale" and s 25 "buyer in possession after sale." However, neither rule applies to the occasions where fraud or other illegal issues are involved. By contrast, under the American law the doctrine of *bona fide* purchase may apply to the aforesaid occasions in pursuance of § 80104 (b) of FBLA 1994 and § 2-403 of UCC. Therefore, the scope of application of the doctrine of good faith purchase under English law is relatively limited than that under the American law.

⁷³ UCC, § 2-403 (1).

⁷⁴ UCC, § 2-403 (1) (a)-(d).

symbolically delivered through negotiation of the bill of lading. Such a result has been evidenced by § 80104 (b) of FBLA.

To sum up, the Anglo-American experience has generated several lessons that may be learned by the future Chinese law. First, despite the difference in terms of transfer of property in goods, both English law and American law tend to highlight the function of the bill of lading in delivery of goods when construing the effect of the bill as a document of title. Second, the Anglo-American experience reveals that the national legislation on bills of lading as documents of title may be affected by several factors: the legislative intent on the usage of the bill of lading in maritime commerce; the freedom of contract in transfer of property rights in goods, and the domestic law on the doctrine of good faith purchase. Below, these elements are examined in context of Chinese law and policy so as to reconstruct the notion of the bill of lading as a document of title under Chinese law.

How to understand the bill of lading as a document of title in Chinese law?

Inspired by the Anglo-American experience, this section starts with the investigation on for what purpose the future Chinese law should regulate the use of the bill of lading as a document of title. Next, to which extent the expected value of the bill of lading in commercial practice can work coherently with the existing Chinese law on transfer of property rights in goods is examined. Based on the findings from the aforesaid two aspects, how the notion “bill of lading as document of title” should be defined in Chinese law and in which way could such a notion be fitted into Chinese legal system is proposed. At last, whether such a definition will arise extra risk of trafficking of bills of lading is analysed, aiming to consolidate the proposed definition.

For what purpose should the bill of lading be provided as a document of title under the future Chinese law ?

It is submitted that such a question would be closely related to China’s maritime policy. The reasons are listed as follow. First, in modern business world, states often compete with each other for getting more business and trading opportunities. It is therefore argued that the formation and reform of national law on matters regarding international business and trade shall not be simply market-driven but shall to some degree reflect the national policy in this regard.⁷⁵ Since the bill of lading has long acted as a cornerstone to bolster international sale of goods and carriage of goods, the national law-making on the usage of the bill of lading shall

⁷⁵ 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) 264-65.

embody certain degree of consideration on national trading and shipping policies. Second, as mentioned before, in China the bill of lading is mainly governed by CMC. It is submitted that the policy consideration has already been reflected from CMC which sets out its overall purpose as “promoting the development of maritime transport, economy and trade.”⁷⁶ As noted by some scholars, the legislative purpose of CMC to a large extent can be attributed to China’s “open door” policy in late 1970s.⁷⁷ Since then, China has opened its market to the world, welcoming and encouraging cross-border trade. However, before 1990s the under-developed shipping industry were not able to serve the rapid growth of foreign trade. CMC was issued under such an economic background, aiming to support the development of domestic shipping industry.⁷⁸ Therefore, although CMC only governs the contractual relationship between carriers and cargo interests,⁷⁹ the fundamental purpose behind the existing provisions is to facilitate the underlying cargo trading.

Given the aforesaid analysis, for what purpose the Chinese law on bills of lading should be reformed to a large extent depends on China’s current policy on maritime transport and trade. As to this point, one significant feature of China’s economy over the past three decades is export-driven.⁸⁰ The fast-growing export trade has brought numerous business opportunities to other economic sectors and driven the development of relevant industries such as shipping and import.⁸¹ Nowadays, the significance of export trade to China’s economy still continues with China’s recent “One Belt, One Road” policy. The purpose of the policy is to improve and create new foreign business opportunities with China by linking it with other regions in the world through new trading routes, by road and sea.⁸² Such a policy is expected to “help China export

⁷⁶ CMC, art 1.

⁷⁷ Sharon Li and Colin Ingram, *Maritime Law and Policy in China* (2nd edn, Routledge 2013) 2.

⁷⁸ Tiansheng Li, *The balance of interest between cargo owner and carrier* (1st edn, Law Press China 2012) 308-09 (in Chinese).

⁷⁹ Under CMC, the matters on carriage of goods by sea are governed by Chapter 4 “Contract of carriage of goods by sea.”

⁸⁰ Brendan Coates, Dougal Horton, Lachlan McNamee, “China: prospects for export-driven growth” 4 Economic Roundup Issue (2012), <https://treasury.gov.au/publication/economic-roundup-issue-4-2012/china-prospects-for-export-driven-growth/> [accessed 30 June 2018].

⁸¹ Tiansheng Li, *The balance of interest between cargo owner and carrier* (1st edn, Law Press China 2012) 42-44 (in Chinese). See also Ministry of Commerce of the People’s Republic of China Comprehensive Department, “The reasons for the decline of China’s import” (*Ministry of Commerce of the People’s Republic of China Comprehensive Department*, 5 November 2015), <http://zhhs.mofcom.gov.cn/article/NoCategory/201511/20151101156432.shtml> [accessed 01 August 2018] (in Chinese).

⁸² United Nations Conference on Trade and Development (UNCTAD) “Review of Maritime Transport” (2016) UNCTAD/RMT/2016 (UNCTAD/RMT/2016) 21.

its excess capacity to many developing countries on the principle of mutual benefit.”⁸³ All these indicators show that under current economic background export is still an important stimulus to China’s economy and such a status may continue for a long time. Given that, the trade facilitation, especially the facilitation of export trade, should still be the predominant aim overarching the future Chinese maritime law. Such an aim should be reflected from the regulations on bills of lading.

Then how such a aim will influence the law-making on bills of lading as a document of title? In export merchandise trade, the goods covered by the bill of lading may be re-sold many times at sea before arriving at their destination. Likewise, the bill of lading to which the goods are related will be passed through a number of parties. In this case, the intermediate and the ultimate holders (usually the buyers or the bank financing the sale of goods) of the bill of lading may have little chance to access the true relationship between the parties participating in the previous transactions of goods. For these holders, the only way that they can secure their interests to the goods is to hold the bill of lading as a document of title. If the validity of such a document of title can be defeated by any defect in the previous transactions of goods, the buyers and the bank financing the cargo transactions would always have to investigate how the previous transactions were actually performed so as to ascertain their title to the goods. This will bring extra burden to the foreign buyers and banks who participate in China’s export trade and is not consistent with prevailing international trading practice. In the long run, such a result will not favour the development of China’s export trade. Therefore, from the perspective of national policy, compared to identification of the true owner of goods in certain transaction, the consecutiveness and smooth proceeding of the entire chain of cargo transactions may be the priority that the legislators should consider when defining the bill of lading as a document of title under the future Chinese law. In this sense, the American approach viewing the bill of lading as a document that is able to vest a *bona fide* purchaser with indefeasible title to goods, appears more suitable to be introduced into Chinese law. Whether this is legally feasible is discussed below.

How to achieve such a purpose under Chinese law ?

In terms of policy implication, if the facilitation of consecutive transactions of goods prevails over the protection of individual true owner’s title to goods in China’s maritime commerce,

⁸³ Michael D Swaine, “Chinese Views and Commentary on the One Belt, One Road Initiative” (2015) 47 (6) Hoover Institution (14 July 2015), <http://www.hoover.org/research/chinese-views-and-commentary-one-belt-one-road> [accessed 30 June 2018].

then similar to the American approach, the bill of lading in the future Chinese law should be provided as a negotiable document and its legal nature as a document of title to some extent should be linked with the property rights in goods. As shown from the Anglo-American experience, whether this is legally feasible depends on how Chinese law regulates passing of property rights in goods; or, more specifically, depends on how Chinese law provides the sphere of application of the freedom of contract in transfer of property rights and the doctrine of good faith purchase.

In Chinese law, the general principle of passing property rights in a movable property is established by Contract Law 1999⁸⁴ and re-stated by Property Law 2007. Both of the legislations provide that the property rights shall be passed upon delivery of such a movable property.⁸⁵ Compared to the English law underlining that the property of goods shall be passed when the parties so intend, Chinese law tends to limit the parties' freedom of contract in this regard. Also, from the aforesaid Chinese law, it is logical to infer that the property rights in goods can be transferred together with the bill of lading as in commercial practice the delivery of bills of lading is usually viewed as equivalent to the delivery of the goods covered by the bill.⁸⁶ In addition, Property Law 2007 provides that the ownership of a movable property can be acquired by the assignee who paid the consideration in good faith even though the assignor was not entitled to dispose the property.⁸⁷ This rule affirms that, as a kind of movable property, the goods and their ownership can be *bone fide* acquired. Likewise, this should be the case when the goods are disposed by dealing with the bill of lading. 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 as being transferred to and vested in the ownership of the goods as if the transaction had been carried out by direct dealing with the goods themselves. Such a consequence would not be altered even though there was any defect in the transferor's title to the goods. Moreover, Property Law 2007 recognises that the bill of lading can be used as a pledge.⁸⁸ It also provides that the doctrine of good faith purchase is

⁸⁴ Contract Law of the People's Republic of China 1999 (Contract Law 1999), adopted at the Second Session of the Ninth National People's Congress on March 15, 1999, and came into force on October 1, 1999.

⁸⁵ 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." Property Law 2007, art 23 "the creation or transfer of the real right of a movable property shall become effective upon delivery, except as otherwise prescribed by any law."

⁸⁶ Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 185 (in Chinese).

⁸⁷ Property Law 2007, art 106.

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."

applicable to the acquisition of any form of property rights.⁸⁹ From such stipulations, it can be inferred that, if the bill of lading is transferred to a *bona fide* purchaser for pledge, the *bona fide* purchaser's right of pledge to the goods covered by the bill should be protected regardless of any defect in the transferor (pledgor)'s right to the goods. Overall, it is submitted that vesting the bill of lading with negotiability and incorporating the doctrine of good faith purchase into the future law governing the transfer of property rights in goods through the bill of lading will not collide with the existing property law and theory in China.

Besides that, as indicated by recent judicial practice, when the transfer of property rights in goods covered by the bill of lading is in question, Chinese courts tend to examine the fulfillment of payment under the contract governing cargo transaction so as to figure out whether the holder's possession of the bill of lading is rightful. For instance, in *Bank of China, Hunan province branch v. Guangzhou Zhenhua Shipping Co. Ltd, Guangzhou Shipping (Group) Company*,⁹⁰ the bill of lading was pledged to the Bank for financing purpose. 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. The court explained that this is because the Bank had fulfilled his obligation of issuing payment under the L/C after receiving the bill of lading.⁹¹ It is submitted that the decision would be similar were the claimant in the aforesaid case a buyer who acquired the bill of lading in good faith for value.⁹² In seaborne cargo trade, the control and disposal of goods are processed through dealing with the bill of lading. Since the sellers usually do not wish to lose their control over goods unless they can secure the payment for the value of the goods, the sellers will usually retain the bill of lading until receipt of payment from the buyer; or, the seller will surrender the bill of lading to the bank in return for being issued payment if the sale of goods are served by L/C. All these facts suggest that in the normal course of business, once the bill of lading is transferred from the seller to the *bona fide* buyer for value, it usually means that the seller has received the payment for the goods or is able to secure such a payment. In this sense, there is no reason to deny a *bona fide* buyer's entitlement to the goods if he

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."

⁹⁰ This case is cited from Guangzhou Maritime Court (eds) *Annual of Chinese Maritime Trail* (1st edn, China Communications Press 1999) 340 (in Chinese).

⁹¹ Guangzhou Maritime Court (eds) *Annual of Chinese Maritime Trail* (1st edn, China Communications Press 1999) 341 (in Chinese).

⁹² If the claimant is the buyer, the only difference is that the claimant may sue the carrier for infringement of his ownership to the goods rather than the security right to the goods.

acquires the bill of lading against payment of consideration; otherwise, the buyer's reliance on possession of the bill of lading would become meaningless.

The discussion above suggests that Chinese law has potential to accommodate the negotiability of the bill of lading and connect such a negotiability with the doctrine of good faith purchase. Therefore, the legal effects of the bill of lading as a document of title may be construed from the angle of transferring property rights in goods. However, in consideration of the trade reality, it is necessary to clarify that the consequence of transferring property rights in goods together with the bill of lading is rebuttable. This means: first, once the buyer who acquired the bill of lading in good faith for value agrees a different time on passing of property rights in goods with the seller, such an agreement should prevail over the presumable effect of transferring the property rights together with the bill of lading; second, the exact type of property rights in goods transferred with the bill of lading should also be subject to the agreement between the parties participating in the cargo transaction. Such an argument to some degree has been recognized in the recent case *China Construction Bank (Liwan Branch) v Guangdong Lanyue Energy Development Co., Ltd.*⁹³ The verdict of the SPC demonstrates that the expression "document of title" merely referred to the potential capacity of the bill of lading in transfer of property rights in goods, and the extent to which the property rights could be transferred by the bill should depend on the trading parties' intention. If such a presumable and rebuttable effect could be affirmed by the future statutory law, neither the freedom of contract nor the commercial value of the bill of lading as a reliable and tradable document would be undermined. Nevertheless, it should be noted that the presumable effect on transfer of property rights in goods through the bill of lading may be more appropriately addressed by the property law rather than the maritime law as the latter only governs the contractual relationship between carriers and the cargo interests.⁹⁴ Does it mean that the future maritime code should keep wholly silent on the notion "bill of lading as document of title"? Inspired by the Anglo-American experience, another way to construe such a notion, namely, through underlining the presentation rule in delivery of goods, may be worth consideration by Chinese law.

⁹³ 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 02 July 2018] (in Chinese).

⁹⁴ Under CMC, the provisions governing the legal effects of the bill of lading can be found in chapter 4 "Contract of carriage of goods by sea."

To what extent should the bill of lading as document of title be provided by Chinese maritime law?

As to the presentation rule, although its legal grounds are slightly different in the English law and the American law, a common implication from the two jurisdictions is that the presentation rule can be interpreted in terms of the contractual effect of the bill of lading.

In fact, CMC has addressed such a contractual effect. According to Article 71, the 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.”⁹⁵ This rule of its nature justifies the presentation rule from the sense of contract. However, such a provision has rarely been invoked to explain the legal nature of the bill of lading as a document of title. Perhaps this is because in commercial practice, the holder of the bill of lading usually expects to acquire an exclusive control over the goods by holding the bill. To fulfil such an exclusive control, the holder should not only be entitled to demand delivery from the carrier but should also be able to defeat any other party who may have interest in the goods. Under such a circumstance, if the legal effect of “document of title” is construed purely on a contractual basis, the efficiency of the bill of lading in evidencing such an exclusive control over the goods may be doubted.⁹⁶ Nevertheless, it is submitted that such a doubt would be relieved, provide that the property law could extend the rules of good faith purchaser to cover the transfer of the bill of lading and address the presumable consequence of transferring property rights in goods when the bill is acquired by a *bona fide* holder for value.⁹⁷ In this way, the bill of lading would sufficiently secure the *bona fide* holder’s exclusive control over the goods as both the contractual right to claim delivery and the property rights in goods would be conferred on him. This thereby provides Chinese maritime law with the possibility to accommodate the notion “bill of lading as document of title” under a contractual framework through restating the presentation rule. More specifically, the notion could be understood as the bill’s capacity which enables its holder to claim delivery of goods from the carrier, or *vice versa*, the capacity which enables the carrier to discharge his obligation of delivery once the delivery is made against surrender of the original bill of lading. In addition, with the support of the property law, the presentation rule under the future Chinese law would be justified on both contract and property ground if the bill of lading is negotiated

⁹⁵ CMC, art 71.

⁹⁶ Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law* (1st edn, Beijing University Press 2009) 240 (in Chinese).

⁹⁷ See discussion above in “How to achieve such a purpose under Chinese law?”.

to a person who acquires the bill in good faith for value. Such a result would be coherent with the SPC's authority on delivery of goods without presentation of the original bill of lading. According to the SPC, in such a situation the holder may choose to sue the carrier either in contract or in tort.⁹⁸

Will the negotiability incur trafficking of bills of lading separating from goods?

If the bill of lading is treated as a negotiable document of title under a future Chinese law, then the person who procures the bill in good faith for value will be entitled to claim delivery of goods and acquire the property rights in goods until the bill is surrendered to and cancelled by the carrier, unless otherwise intended by the transferor and the transferee. In accordance with the doctrine of good faith purchase, the person who holds the bill of lading in good faith for value is entitled to the aforesaid rights even though there is any defect in the transferor's title to the goods. This to some extent means that the rights derived from the bill of lading as a document of title prevails over the rights derived from the goods themselves. Seemingly, the bill of lading would enable its holder, who acts as a good faith purchaser, to claim delivery of goods and assert property rights in goods even though the goods have been delivered to another person who is entitled to them. Were this true, the bill of lading would be traded separating from the goods covered by the bill since in commercial practice the goods are not always delivered against presentation of the original bill.⁹⁹ To avoid trading the bill of lading in such a speculative way, it is necessary to limit the negotiability of the bill within a reasonable extent.

In American law, although the statutory law does not expressly address when such a negotiability is ceased, the law has some implications on this point. First, FBLA 1994 imposes the obligation of taking and cancelling the bill of lading on carriers. If the carrier fails to do so, he 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."¹⁰⁰ This means that the *bona fide* purchaser of the bill is protected by statutory law which enables him to sue the carrier for damage or loss caused by the carrier's failure to take and cancel the bill. Second, FBLA 1994 allows carriers to deliver goods without surrendering the bill of lading, provided that the delivery is made pursuant to a court order which requires "the person claiming the goods gives a surety bond, in

⁹⁸ 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, art 3.

⁹⁹ This would particularly be problematic to oil trading under which delivery of goods against a letter of indemnity rather than the original bill of lading is a common practice.

¹⁰⁰ FBLA 1994, §80111 (c).

an amount approved by the court, to indemnify the carrier or a person injured by delivery against liability under the outstanding original bill.”¹⁰¹ The law subsequently provides that the delivery in accordance with the court order does not exempt the carrier from liability to the *bona fide* purchaser to whom the bill of lading has been negotiated and is negotiated without the notice of the court order.¹⁰² Reading all these rules as a whole, it can be seen that the *bona fide* purchaser is entitled to sue the carrier for indemnity if he acquires the bill of lading after the goods have been delivered to another party without presentation of the original bill. In this case, the *bona fide* purchaser does not necessarily rely on demanding actual delivery of goods to secure his interest to the goods because he can sue the carrier for making delivery without presentation of the original bill of lading. Therefore, under the American law, the negotiability of the bill of lading in transferring indefeasible title to the goods and thereby enabling the *bona fide* purchaser of the bill to take physical possession of the goods will be terminated once the goods covered by the bill are actually delivered.

In Chinese judicial practice, the SPC has taken a similar approach to deal with the situation where the goods are not delivered against the original bill of lading. As mentioned before, in such a situation the SPC allows the holder to sue the carrier for indemnity.¹⁰³ Accordingly, for the same rationale under the American law, vesting the bill of lading with negotiability will not give rise to trafficking of the bill separating from the goods to which the bill is related, provided that the future Chinese law could express that such a negotiability will be ceased at the time when the goods are delivered to a person who is entitled to them.

Concluding Remarks

The Anglo-American law has shown the notion “bill of lading as document of title” is meaningful in both carriage of goods and sale of goods, although the English law and American law demonstrate different priorities when addressing the legal nature of such a notion. The English law secures the true owner’s interest to the goods while the American law tends to favour the consecutive transactions of goods. As such, the American law, which statutorily provides the bill of lading as a negotiable document that is able to secure a *bona fide* purchaser’s property rights in goods and his contractual rights against the carrier, appears more compatible with China’s export-oriented trade policy and the existing law and judicial practice.

¹⁰¹ FBLA 1994, §80114 (a).

¹⁰² FBLA 1994, §80114 (b).

¹⁰³ 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, art 3.

This thereby requires that a complete definition on “bill of lading as document of title” under the future Chinese law should contain two tiers of meaning: one is the effect of the bill of lading in delivery of goods; and the other is the effect of the bill in transferring property rights in goods. As a result, the legal reform should be carried out not only under the maritime law but also under the property law. To do so, when addressing the capacity of the bill of lading in transfer of property rights in goods covered by the bill, the future property law should incorporate the doctrine of good faith purchase to provide for such a capacity and grant the holder who acquires the bill of lading in good faith for value a better position than the transferor in terms of property rights in goods. Also, the future property law should indicate that the legal effect of such a transfer of property rights in goods is presumable and rebuttable since the parties participating in cargo transactions may agree a different timing to pass the property rights. Besides that, the future maritime law should echo the reform of the property law. This can be done by restatement of the presentation rule under the maritime law, underling that the person who obtains the bill of lading in good faith for value is entitled and has the priority to claim delivery of goods. The carrier is only allowed to discharge his obligation of delivery when the goods are delivered against presentation of the original bill, unless the delivery is made pursuant to the law of the place where the port of discharge is located,¹⁰⁴ the court order or judgement.¹⁰⁵ Last but not least, to prevent abusive use of the negotiability of the bill of lading as a ground to trade the bill of lading in a speculative way, the future maritime law and the property law should demonstrate that the *bona fide* holder’s priority in claiming property rights in goods and delivery of goods will be ended once the goods covered by the bill are delivered to another person who is entitled to them. 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 delivered 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 demanding actual delivery of goods. In this way, the transfer of the bill of lading as a document of title would be confined within the transfers backed up by genuine transactions of the goods. The danger of trafficking of the bill of lading simply as a piece of paper would be eliminated.

¹⁰⁴ This can be seen from 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, art 7.

¹⁰⁵ The court proceeding may be needed to deal with the situation where there are competing claims towards the goods. For instance, see FBLA 1994, §80111 (d) “adverse claims”. The judicial procedure may also be invoked in the situation where no one claims delivery of goods at the destination. See art 88 of CMC.