

Delivery of Goods without Original Bills of Lading: A Survey of Recent Law and Practice in China

Qinghui Cai

School of Law, Xiamen University, Xiamen, China
Qhcai74@hotmail.com

Abstract - It is a common practice, in international carriage of goods by sea, for the carrier to deliver the goods without presentation of the original bill of lading. Chinese laws in this area have been vague and resulted in divergent practice among different courts or even different judges with the same court. Based on very recent judicial practice, this paper gives a brief introduction on how to litigate a case on delivery of goods without presentation of original bill of lading before the courts in China.

Index Terms - Bill of Lading, Carrier Shipper.

1. Introduction

In recent years, due to the spread of worldwide financial crisis, international shipping industry has been depressed, with a sharply increasing number of disputes. The number of cases regarding disputes over delivery of goods without presentation of the original bill of lading increased year by year, which accounted for approximately 10% of the total annual caseload in maritime judicial practice in China [1].

The provisions regarding bills of lading in *Maritime Code of PRC (MCC)* are too general to address more detailed issues, which have given rise to difficulties and even controversies in the application of law. It would not be surprising to see similar cases with similar facts are treated in different manners among different maritime courts or higher courts, or even among judges from the same courts, which in turn may give rise to the phenomenon of forum shopping. Such divergency has impeded the development of international commerce and shipping industry, and called for uniform interpretation and application of law.

For the purpose of an uniform interpretation and application of law, the No. 4 Civil Tribunal of the Supreme People's Court (SPC) drafted an Judicial Interpretation entitled *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law during the Trial of Cases about Delivery of Goods Without an Original Bill of Lading (JI I)*, and later another Judicial Interpretation entitled *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases on Forward Agency Disputes Arising from International Carriage of Goods by Sea (JI II)*^a. With the coming into effect of the two judicial interpretations, problems previously unsettled are now settled or to a large extent clarified, judicial practice among different maritime

^a There is no a formal concept of precedent law in China due to its civil law tradition. The decisions of higher courts are of guiding value to the lower courts rather than be binding on them. However, the judicial interpretations issued by the SPC, the highest court in China, has a binding force on all lower courts in their judicial practice. Failing to follow the *JIs* may constitute misuse of law and be a ground on which judgments be reversed or vacated.

courts or upper courts in China has been unified. Based on the abovementioned Judicial Interpretations and very recent court decisions, this paper gives a brief introduction on how to litigate a case on delivery of goods without presentation of original bill of lading in China.

2. Who Is Entitled to Sue

Under Chinese laws, the title to sue or the standing of the plaintiff is a prerequisite question before initiating a lawsuit. In cases on delivery of goods without presentation of original bill of lading, the persons entitled to sue are often the shippers.

Under Chinese laws, there are two types of shippers:

A. The Contractual Shipper

The Contractual Shipper is the person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier.

B. The Actual Shipper

The Actual Shipper is the person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.^b

These two types of shipper are both involved in FOB trade. The contractual shipper is usually expressly stated on the front of the bill of lading, while the actual shipper is usually not indicated in the bill of lading. The original intention of including the actual shipper in the shipper is to entitle the seller under the sales contract under FOB terms, with the legal status of the actual shipper, so that such seller shall have the right to request the carrier to issue the bill of lading and, with such bill of lading, to request for payment for goods from the buyer in the documents transactions of international trade. Although the actual shipper is not indicated in the bill of lading, it only means he or she does not have the right to dispose of or endorse the bill of lading, it is still in the status of the actual shipper entitled by the law and shall still have the right to request the carrier to deliver the goods with an original bill of lading. Once the carrier delivers the goods to the person not holding the original bill of lading, it shall assume liability for delivery of goods without an original bill of lading; and that is also the original legislative intention of including the actual shipper in *MCC* which is to ensure the collection of the payment for goods by the seller of the sales contract in FOB terms.

^b Article 12 of *JI I*, based on Article 42 of *MCC*.

In a very recent case, the Xiamen Maritime Court ruled and later affirmed by the higher court that the holder of the original bill of lading, though not the seller in the FOB transaction, is the contractual shipper and has the right standing to sue.^a

3. Causes of Action

A bill of lading is a document evidencing the contract of carriage of goods by sea, and it is a basic obligation under the contract of carriage of goods by sea that the carrier shall deliver the goods upon the presentation of the original bill of lading. Thus, the carrier's act of delivery of goods without the original bill of lading first constitutes a breach of contract.

Meanwhile, since a bill of lading is a document based on which the carrier undertakes to deliver the goods against surrendering the same, it usually functions as a document of title in international trade. Thus, if a carrier delivers goods without the original bill of lading, it will infringe the property right to the goods of the holder of the bill of lading, and may constitute a tort. Therefore, the carrier's act of delivery of goods without an original bill of lading may constitute breach of contract and tortious liability concurrently. In accordance with Article 122 of *the Contract Law*, where a breach of contract is concurrent with tortious liability, the aggrieved party shall be entitled to choose to sue for breach of contract or sue in tort.

Article 3 of *JJI* now expressly states that the holder of the original bill of lading may require the carrier to bear the liability for breach of contract or bear the tort liability.^b This article is a reaffirmation of the right to choose conferred by Article 122 of the Contract Law. When choosing to sue for breach of contract or to sue in tort, the aggrieved party may take into accounts the standard of burden of proof, the limitation period, etc, which are different under law of contract or law of tort in China.

It needs to be noted that, for the concurrence of breach of contract and tortious liability under a contract of carriage of goods by sea, Article 58(1) of *MCC* provides that: "The defence and limitation of liability provided for in this Chapter shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the action is founded in contract or in tort."

It can therefore reasonably concluded that the claimant is given the option to choose the cause of action, namely, breach of contract or tort; secondly, whether the claimant chooses the action of breach of contract or the action of tort, the carrier may always refer to the defence provided for under the *MCC*.

^a Case No. (2010) Xia Hai Fa Shang Chu Zi 245, the Xiamen Maritime Court.

^b Article 3 of *JJI* provides that: "Where a carrier causes any loss to the holder of an original bill of lading for delivery of goods without the original bill of lading, the holder of the original bill of lading may require the carrier to bear the liability for breach of contract or bear the tort liability. Where the holder of an original bill of lading requires a carrier to bear the civil liability for delivery of goods without the original bill of lading, the provisions of the Maritime Code shall apply; or if the Maritime Code is silent, the provisions of other laws shall apply."

That is to say, whether the action is brought against the carrier in tort or in breach of contract, the carrier has the same defence and liability, which includes: exemptions, limitation of liability, scope of compensation, limitation of action, etc.

4. Application of Law

In international shipping, the shipper, carrier or consignee are always nonChinese legal persons, with the port of loading, the port of transit or delivery located outside China. Therefore it is quite often that a case on delivery of goods without presentation of original bill of lading would be foreign related. The issue of application of law would then arise from where the private international law rules of China will be applied to determine the laws applicable.

In accordance with relevant private international law principles specified in Article 269 of *MCC* and Article 44 of the *PRC Law on Application of Law to Foreign-related Civil Relationships*, for actions brought in tort against the Carrier of international carriage of goods by sea, the law of the place of tort shall apply. However, in cases where the parties share the same habitual residence, the law of such habitual residence shall apply. Where the parties choose the applicable law by an agreement, the so chosen law shall prevail. On the contrary, for actions brought in breach of contract against the said Carrier, the law chosen by the parties shall apply. If the parties invoke the laws of the same country and no objection has been made regarding the application of the law, it is deemed that the parties have agreed to choose the law of the said country. In a recently decided case on the sale of a yacht between a buyer from mainland China and a seller from Hong Kong, both parties referred to Chinese law and deemed to have chosen Chinese law as applicable law.^c In another case, the bill of lading stated that English law was the applicable law in case of dispute, none of the parties during the trial invoke English law and the court ruled that Chinese law should be applicable.^d In case the applicable law is not chosen, the law the country which is of the most significant relationship with the contract shall apply.

If it has been determined that foreign law shall apply, the issue of ascertaining and proving foreign law would arise. Under Chinese law, the parties shall bear the burden to prove the contents of foreign law. In case no adequate evidence has been presented to prove the foreign law, the court would then turn to *lex fori*, i.e. Chinese law. For example, the Xiamen Maritime Court once decided that the legal opinion presented by J. Friend Shipping Company Ltd were not sufficient to prove the contents of relevant English law and therefore Chinese law should be applied instead.^e

In cases where Chinese law has been determined by the private international law rules to be the applicable law or, where foreign law can not be ascertained, Chinese law shall apply. Depending on the choice of causes of actions, the application of law differs. For an action brought in breach of

^c Case No. (2012) Xia Hai Fa Shang Chu Zi 53, the Xiamen Maritime Court.

^d Case No. (2010) Xia Hai Fa Shang Chu Zi 245, the Xiamen Maritime Court.

^e Case No. (2010) Xia Hai Fa Shang Chu Zi 353, the Xiamen Maritime Court.

contract of international carriage of goods by sea, *MCC* shall apply.

For a general action brought in tort, the *PRC General Principles of the Civil Law* and the *PRC Tort Liability Law* shall first apply. But the tort by delivering goods without the original bill of lading is a tort occurring during the performance of a contract, which is a type of tort within the frame of the contract, and is different from civil torts in the general sense. In accordance with the principle of *lex specialis derogat legi generali*, the stipulations of *MCC* shall firstly apply to several issues in cases regarding delivery of goods without the original bill of lading, including the scope of compensation for damage, the ascertainment of the carrier's defence of delivery of goods and the ascertainment of the limitation of action.

5. Who is Liable

Probably the most important issue concerned by the shipper is to consider who shall be liable for the delivery of goods without presentation of an original bill of lading.

A. The Carrier

The carrier, by delivery of goods without presentation of an original bill of lading, has breached the contract of carriage of goods by sea or infringe upon the property right to the goods of the holder of the bill of lading. Thus, the carrier is the main party to be liable.

It is commonly understood that a carrier under an order bill of lading or a bearer bill of lading shall deliver the cargo in accordance with the bill of lading, while the opinion towards whether a carrier under a straight bill of lading shall also deliver the goods against surrender of the original bill of lading is not unified in practice and there has even been hot debated. Some argue that in accordance with Article 79 of *MCC*, a straight bill of lading is not negotiable and does not have the function of so-called "document of title", thus, a carrier under a straight bill of lading is not obligated to deliver the goods with the presentation of the original of such bill of lading. Another opinion is that the bill of lading stipulated in Article 71 of the *MCC* includes the straight bill of lading, i.e. a straight bill of lading is also a document based on which the carrier undertakes to deliver the goods against surrendering the same. Article 1 of *J I* clarifies that the original bill of lading thereunder includes the straight bill of lading, the order bill of lading and the bearer bill of lading. That is to say under Chinese law, a carrier under a straight bill of lading shall also deliver the goods with the presentation of the original of such bill of lading.

In a very recent case, the carrier had issued a MT B/L (multimodal transport B/L) and argued that it is not obligated to deliver the cargo upon the presentation of the original bill of lading and should not be liable. The appellate court decided that a multimodal transport B/L involving the carriage of goods by sea is still a bill of lading under Article 71 of *MCC*, a carrier under a multimodal transport B/L involving the

carriage of goods by sea shall also deliver the goods with the presentation of the original of such bill of lading.^a

B. The Forward Agent

A forward agent is in essence an agent under agency law and its activities accrue to the principal. Only in very rare cases would a forward agent be liable for delivery of goods without presentation of an original bill of lading.

These situations include:

1) *The Forward Agent Deemed as the Carrier*: Where a forward agent issues in its own name the bill of lading, seaway bill or other transportation documents, or it issues the bill of lading, seaway bill or other transportation documents in the name of a carrier from whom no authorization has been granted, it may be deemed as the Carrier.^b

2) *The Forward Agent not Exercising Due Diligence*: If the forward agent does not exercise due diligence entering into an international contract of carriage of goods by sea with an NonVessel Operating Common Carrier (NVOCC) which does not meet the filing requirements with government authorities, resulting in the loss of the cargo of shipper, the forward agent shall then be liable.^c

3) *The Forward Agent Jointly Liable with the Carrier*: If the forward agent issues the bill of lading, in the authority of an NVOCC which does not meet the filing requirements with government authorities, the shipper may require the forward agent and the NVOCC to assume joint and several compensation liabilities. The forward agent, after assumption, may turn to the NVOCC for recourse.^d

C. The Person Who Took Delivery of the Goods

In accordance with Article 130 of the *General Principles of the Civil Law*, where the carrier and the person who took delivery of the goods without an original bill of lading caused loss to the holder of the original bill of lading because of the act of delivery of goods without an original bill of lading jointly conducted, the carrier and the said person shall assume joint and several compensation liabilities thereof. The act of delivery of goods without an original bill of lading involves two aspects: the delivery of goods by the carrier and the intentionally illegal taking of delivery by the third party. The two aspects constitute the jointly conducted act of tort. Therefore, the carrier and such third party shall assume joint and several compensation liabilities thereof.

6. Limitation Period

As for the limitation period for claims regarding the carriage of goods by sea, *MCC* gives special stipulations different from that for general civil claims:

As for the limitation period, Article 257 of *MCC* stipulates that the limitation period for claims against the carrier with regard to the carriage of goods by sea is one year, counting from the day on which the goods were delivered or

^a Case No. (2013) Min Min Zhong Zi 474, the Fujian High People's Court.

^b Article 4 of *J I*.

^c Article 11 of *J I*.

^d Article 12 of *J I*.

should have been delivered by the carrier. Many people argue that if the holder of the bill of lading brings the action in tort against the carrier, the two-year limitation period in Article 135 of the *General Principles of the Civil Law* shall apply, since Article 235 of the *Maritime Code* shall only apply to actions brought in breach of contract. The carrier's act of delivery of goods without an original bill of lading is a matter regarding carriage of goods by sea. Under the circumstance of concurrence of the causes of action, the action in tort chosen by the holder of the bill of lading is an action in tort due to the performance of the contract of carriage of goods by sea. In accordance with the principle of *lex specialis derogat legi generali*, Article 14 of *JJI* stipulates that whether the holder of the original bill of lading claims against the carrier for compensation in breach of contract or in tort, Article 257 of the *Maritime Code* shall always apply, and the limitation period thereof shall always be one year. The limitation period of claims and its initial day thereof for delivery of goods without an original bill of lading are consistent with that for the claims for compensation for cargo loss, which is from the date when the carrier delivers the goods. The limitation period of claims brought by the holder of the original bill of lading in joint tort against the carrier and the third party is the same as the abovementioned, which shall be counted from the date when the carrier delivers the goods.

As for the interruption of the limitation period of claims, the stipulations in *MCC* are more stringent than that in the *General Principles of the Civil Law*. In accordance with Article 140 of the *General Principles of the Civil Law*, a limitation period of claim shall be interrupted if the lawsuit is brought, or if a party makes the request, or the other party agrees to perform its obligations; as a contrast, in accordance with Article 267 of *MCC* the limitation period of action shall be interrupted only if a suit or an arbitration is brought, or the party agrees to perform its obligations. In comparison, under *MCC*, merely a claim request will not interrupt the limitation

period of action; it only discontinues when the other party agrees to perform its obligations. In accordance with the principle of *lex specialis derogat legi generali* under the circumstance of concurrence of causes of action, Article 15 of *JJI* stipulates that *MCC* shall apply to the interruption of the limitation period of an action for the claims for compensation regarding delivery of goods without an original bill of lading.

7. Conclusion

With the coming into force of the two above-mentioned judicial interpretations, the judicial practice in China regarding cases on delivery of goods without presentation of original bill of lading has largely been unified. Uniform interpretation and application of maritime law is essential to the development of international shipping industry by providing the necessary predictability and a transparent legal framework within which business activities may be carried on. For example, during the first two quarters of 2013, the Xiamen Maritime Court has received much less cases on delivery of goods without presentation of original bill of lading than previous two years. One of the main reasons for such a downward trend of the number of cases is that the shipper, the carrier or the consignee or any other partaker may now choose to reach an out of court solution based on the legal principles and reasons in the two judicial interpretations, rather than submit their dispute to a court, which is not only time consuming but also money consuming. This perhaps best explains to what extent the two judicial interpretations have contributed to the business community.

References

- [1] Y. Wang, "Application of law in the trial of cases about delivery of goods without presentation of original bill of lading - an analysis of provisions of the supreme people's court on several issues concerning the application of law during the trial of cases about delivery of goods without an original bill of lading," unpublished.