

LEGAL ISSUES ARISING FROM DELIVERY OF GOODS WITHOUT A BILL OF LADING: CASE STUDY OF SOME ASIAN JURISDICTIONS¹

ČASLAV PEJOVIĆ
Professor of Law,
Kyushu University, Japan

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This article examines the problems related to the delivery of the goods without a bill of lading. It focuses mainly on the problems arising in the Far East, which are compared, in some cases, with similar problems in some Western common law and civil law jurisdictions. Before reviewing the court practice and examining various issues related to the delivery of the goods without a bill of lading, several general questions related to the legal background of this problem are examined. With respect to the practice of delivery of the goods without a bill of lading, various issues are examined, such as whether a carrier can deliver the goods to the owner of the goods without a bill of lading; what is the nature of the carrier's liability for wrongful delivery: tort or contract? Should the carrier deliver against single or a full set of bills of lading? Is the ship's agent liable for delivery without a bill of lading? Should a carrier obey the charterer's orders to deliver the goods without a bill of lading? Can a carrier deliver the goods without production of a straight bill of lading? Should a carrier agree to deliver the goods against the letter of indemnity, and how safe is it to rely on such a document? The main purpose of this article is to try to find an answer to the questions as to why an old problem is still causing so much confusion and how the problems arising in practice can be resolved.

Key words: *delivery of goods, bill of lading, document of title, liability.*

INTRODUCTION

In maritime law, there is a well established rule that the carrier can deliver the goods at the destination only against the production of a bill of lading by the consignee. However, as is often the case, the practice differs from the rules: the

¹ This article is amended and updated version of the article "Delivery of goods without a bill of lading: revival of an old problem in the Far East" published in the *Journal of International Maritime Law* (2003) 448.

carrier often delivers the goods without obtaining a bill of lading.

Delivery of the goods without presentation of the bill of lading is one of the most common problems in the carriage of goods by sea. Recently, the attention of maritime lawyers in some Asian jurisdictions is again focused on this problem.² The problem seems to be particularly widespread in China, especially when the consignee is a state-owned enterprise ('SOE'). The practice of delivery of the goods without production of a bill of lading is causing so many problems in China, that the Chinese Ministry of Foreign Trade and Economic Co-operation (MOFTEC) has issued a special notice warning Chinese companies of this problem³

The courts have acted in various ways in dealing with the problems caused by delivery without a bill of lading. This paper will mainly deal with decisions of the courts in the Far East, which will be compared, in some cases, with the decisions of some common law and civil law jurisdictions.

Before reviewing the court practice, several general questions will be examined. In order to understand the problem of delivery without a bill of lading, it is important first of all to understand why the goods should not be delivered without a bill. Then, with respect to the practice of delivery of the goods without a bill of lading, various issues will be examined, such as whether a carrier can deliver the goods to the owner of the goods without a bill of lading; what is the nature of carrier's liability for wrongful delivery: tort or contract? Should the carrier deliver against single or full set of bills of lading? Is the ship's agent liable for delivery without a bill of lading? Should a carrier obey the charterer's order to deliver the goods without a bill of lading? Can a carrier deliver the goods without production of a straight bill of lading? Should a carrier agree to deliver the goods against the letter of indemnity and how safe is it to rely on such a document?

By examining these issues, we hope to shed a new light on an old problem. The main purpose of this article is to try to find an answer to the questions as to why an old problem is still causing so much confusion and how the problems arising in practice can be resolved.

DELIVERY OF GOODS IN EXCHANGE FOR A BILL OF LADING

The carrier is responsible for proper delivery of the goods entrusted to him to carry. The carrier, by issuing the bill of lading after he has received the goods in

² Delivery of goods without a bill of lading was the central issue at the Annual Conference of the Japanese Maritime Law Association held in Tokyo in October 2002 (attended by the author of this paper).

³ MOFTEC Notice on Circumvention of the Risk of Delivery without Production of a Bill of Lading, 5 December 2000.

his charge, undertakes to deliver the goods to the lawful holder of the bill of lading on production of an original bill of lading. That person can be the consignee named in the bill of lading, or the endorsee or assignee of the person who is authorised by the bill of lading to make an order or assignment of it. If the bill of lading contains a blank endorsement, or is issued to bearer, then the person entitled to receive the goods is simply the holder of the bill of lading. In order for a person to be the lawful holder of the bill of lading, he must have obtained possession of the bill in good faith.

The carrier is not justified in delivering the goods to any person who merely presents a bill of lading, except in the case of bearer bills of lading. In the case of order bills of lading, the carrier is entitled to deliver the goods to the first person who presents a properly endorsed bill of lading, after verifying that there is an uninterrupted chain of endorsements.⁴

As long as the consignee can obtain a bill of lading before the goods arrive, it should be no problem for him to present it before delivery. However, in practice, for various reasons, it often happens that the ship arrives at the port of destination before the consignee obtains the bill of lading. In such situations, waiting for the bill of lading may cause numerous problems to all parties involved. As result of such practical need, the practice of delivering the goods without production of a bill of lading has been developed. This practice, however, may also cause a number of problems.

LEGAL BACKGROUND OF THE RULE

Of the international conventions governing carriage of goods by sea, neither the Hague Rules⁵ nor the Hamburg Rules⁶ have regulated the issue of delivery of the goods by the carrier to the consignee. In the future this may be changed by the Draft Instrument on the Carriage by Sea, which is being prepared by the UNCITRAL

⁴ In a Japanese case, the court held that the carrier to whom an unendorsed bill of lading was presented was justified in delivering the goods to the holder of the bill of lading despite the lack of uninterrupted chain of endorsements when he was aware that the absence of an endorsement was a mere omission oversight (*Orient Power Carstereos Ltd. v. KK Shosen Mitsui, District Court of Tokyo 29 Mai 2001* (2001) Kaijijhou Kenkyukaishi 163, 86). In a Belgian case, the court took a similar view (*Cass. Belgium 6 June 1969* (1969) ETL 710).

⁵ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“The Hague Rules”) and Protocol of Signature, signed in Brussels on 25 August 1924 (entered into force on 2 June 1931).

⁶ United Nations Convention on the Carriage of Goods by Sea (“The Hamburg Rules”), signed in Hamburg on 31 March 1978 (entered into force on 1 November 1992), UN.Doc.A/Conf. 8915.

Working Group on Transport Law: the draft Article 10 includes several provisions on delivery of the goods to the consignee.⁷ At the moment, however, the rule on delivery of the goods against a bill of lading is still based on domestic laws.

The present rule is that, when a bill of lading is issued, the carrier must deliver the goods to the lawful holder of the bill of lading. The right to obtain the goods from the charterer is not based on the contract of carriage, but on the lawful possession of the bill of lading.

The first issue that arises is why the carrier must deliver the goods against the bill of lading? It seems that the reasons for such an obligation on the part of the carrier are sometimes not properly understood. Hence, in order to examine the issues related to the delivery of the goods against production of bill of lading, the reasons for this rule should be examined. And in turn, the nature of the bill of lading as a document of title should be properly understood.⁸

The bill of lading has the character of a document of title, which means that the person in its possession is entitled to receive, hold and dispose of the bill of lading and the goods it represents. By means of a legal fiction, the bill of lading is deemed to represent the goods, so that possession of a bill of lading is equivalent to possession of the goods. The bill of lading enables its lawful holder to use it to obtain physical delivery of the goods at the port of destination, as well as to dispose of them during transit by transferring the bill of lading.

The effect of the transfer of a bill of lading is a result of the special character of the object of sale - goods carried by sea - such that it is impossible to make a physical delivery of the goods to the buyer. The delivery has to be carried out through the carrier as an intermediary, who receives the goods from the shipper (usually the seller) and is bound to deliver it to the consignee (usually the buyer) in exchange for the bill of lading. In fact, the seller performs the delivery of goods by transferring the bill of lading to the buyer, thereby transferring to the buyer the right to demand the delivery of goods from the carrier at the port of destination.

Hence, the rule that the goods must be delivered only against the bill of lading serves to protect against the risk that the goods are delivered to someone who is not entitled to receive them. This rule protects both the carrier and the persons entitled to receive the goods.

⁷ Available at: <http://www.uncitral.org/en-index.htm> (last visited on April 12, 2006).

⁸ See C. Pejovic, "Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions"(2001) JBL 261.

DELIVERY OF THE GOODS TO THE OWNER WITHOUT A BILL OF LADING

Under the contract of carriage, the carrier must deliver the goods to the holder of a properly endorsed bill of lading, regardless of the capacity in which he holds the bill. Failure to do so will make the carrier liable for breach of contract to the lawful holder of the bill.

The carrier will not normally know who the owner of the goods is, nor is he obliged to investigate this matter; his obligation is merely to deliver the goods to the lawful holder of the bill. For the carrier, the rights of the holder of the bill towards the goods are not relevant. This person can be either the seller who kept the bill because the buyer failed to make the payment, the buyer who acquired the bill after payment or an agent for either of these parties. The lawful holder of a bill can even be the bank acting as pledgee. The carrier cannot and should not get involved in examining all these relationships. All the carrier should do is to check with due care whether the person presenting the bill is its lawful holder and deliver the goods to the lawful holder in exchange for the bill of lading. In the words of Leggatt LJ in *The Houda*, ‘delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession’.⁹

In Japan, the courts have adopted a practice that runs counter to the nature of the bill of lading as a document of title. Japanese courts approve the practice of delivery of the goods without a bill of lading so long as the goods are delivered to the owner of the goods; the carrier will be liable only if the goods are delivered to the wrong person.¹⁰ This practice is contrary to the nature of a bill of lading as a document of title because a bill of lading embodies the right to receive the goods from the carrier which may exist independently of the property rights; ownership of the goods is not relevant to the right to receive them from the carrier.

The carrier is not justified in delivering the goods to a cargo unless the bill of lading is produced, even if the carrier knows that he is the owner of the goods. Besides legal reasons, there can be practical reasons for this rule. For example, if the holder of a bill of lading is a freight forwarder, he can have a right of lien on the cargo if the cargo owner fails to pay him the agreed fee and/or costs. In such a case, the carrier will be liable to the freight forwarder for delivery without production of a bill of lading, even if delivery is made to the lawful owner of the goods. This kind of situation may not often arise in practice, but the principle should be clear.

⁹ *Kuwait Petroleum Corp. v. O & D Oil Carriers (The Houda)* [1994] 2 Lloyd’s Rep. 541 at 550 to 552, 556 (English CA). ouda)

¹⁰ *The Supreme Court of Japan 14 June 1930*. Japanese position has not changed since then: T. Tateishi, “Current Japanese Case Law on Carrier’s Liability for Cargo Loss”(2002) JSE Bulletin 4.

CARRIER'S LIABILITY FOR DELIVERY OF GOODS WITHOUT A BILL OF LADING

The carrier must not deliver the goods in any way other than against presentation of an original bill of lading. The carrier who delivers the goods without production of a bill of lading, he does so at his own risk. If the goods are delivered to a person who was not entitled to receive them, the carrier will be liable for breach of contract and for conversion of the goods.¹¹ The carrier who delivered the goods without production of bill of lading has a right of action for the recovery of the goods or their value against the person to whom delivery has been made.¹²

There are some exceptions to the rule that the consignee must present the bill of lading before delivery. The carrier might deliver the goods without production of a bill of lading if it was proved to his reasonable satisfaction both that the person demanding delivery was entitled to possession of the goods and that there was some reasonable explanation of what happened to the bill of lading.¹³ However, carriers should be very cautious with respect to this exception, until it is clarified with greater precision.¹⁴

THE NATURE OF THE CARRIERS LIABILITY: CONTRACT OR TORT?

In some jurisdictions, there is confusion as to the nature of the carrier's liability for wrongful delivery of the goods. For example, in Chinese practice, the carrier's liability for delivery of the goods without a bill of lading was originally treated as tort liability.¹⁵ Later, the courts took a different view on legal basis of liability for wrongful delivery, replacing tort liability with contractual liability.¹⁶ In a Japanese

¹¹ *Barclays Bank Ltd. v. Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep. 81, *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.* [1959] 2 Lloyd's Rep. 114. See also *Mobile Shipping Co. v. Shell Eastern Petroleum Ltd (The Mobile Courage)* [1987] Lloyd's rep. 655.

¹² *Westwood Shipping Lines Inc. v. Geo International Inc. at al.* (24 June 1998) T-359-98 (FCTD).

¹³ *SA Sucre Export v. Northern River Shipping Ltd. (The Sormovskiy)* [1994] 2 Lloyd's Rep. 266.

¹⁴ The court took a different view in *Motis Exports v. Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 121; affirming [1999] 1 Lloyd's Rep.837. The carrier cannot be forced to deliver the goods without a bill of lading. See also *East West Corp. v. DKBS 1912* [2002] 2 Lloyd's Rep. 182, at 205.

¹⁵ For example, *Huarun v. Zhanjiang Vessel Agency* [1993] Gazette of the Supreme Court (6); *The Eagle Comet* [1994] Guangzhou Maritime Court (66).

¹⁶ Great influence in this respect was exercised by the Supreme Court of China decision in *Yuehai v. Cangma*, [1996] Gazette of the Supreme Court (10) (available at: http://www.cemt.org.cn/English/text_typical_4.htm – last visited April 12, 2006). See also *China Overseas Shipping Guangdong Co. v. China Overseas Shipping*

case, the court held that the carrier owed the shipper a contractual duty to deliver the goods to the holder of the bill of lading. Apparently the Court considered that the holder of the bill of lading was a third-party beneficiary.¹⁷

A question that can be posed with respect to the above cases is whether the carrier's liability for wrongful delivery should be based on contract or on tort. Many consider this issue to be merely academic, but in some jurisdictions this issue may also have practical importance, for example if the time bar for claims in tort and contract is different. While in some jurisdictions the plaintiff has the right to choose to sue either in contract or in tort, in some other jurisdictions there is no such freedom; the mere existence of a contract between two parties means that one party cannot sue the other in tort and the only possible legal suit would be for breach of contract.

Traditionally, the law does not recognize concurrent liability in negligence in case of breach of a contractual duty of care unless the tort duty arose independently of the contract.¹⁸ Some recent developments indicate that concurrent liability may be recognized.¹⁹ While in the case of negligently caused physical damage the freedom of choice between tort and contractual liability may be recognized, that would be much more difficult in a case of negligently caused economic loss, as wrongful delivery of the goods would be characterized. Besides, the contracting parties are free to limit the application of the tort liability by expressly so providing in their contract.

Putting aside the issue of concurrent liability, as this issue may be decided differently depending on the national jurisdiction, the focus here will be on determining the legal basis for the claims related to delivery of the goods without the production of a bill of lading. There is no doubt that such delivery has the character of tort, as it represents an illegal act by which the rights of the lawful holder of the bill of lading are infringed. However, as already indicated, the carrier's liability for wrongful delivery is rarely based on tort, as the contractual liability usually prevails.

Even though in legal theory the delivery of goods without a bill of lading is normally treated as a breach of contract, establishing contractual liability is rather complicated. The holder of a bill of lading derives his right to delivery not from the contract of carriage, but from the bill of lading, even though the bill of lading

Guangdong Huangpu Co. (available at: <http://www.ccmt.org.cn/English/writ/judgmentDetail.php?slid=619> – last visited April 12, 2006)

¹⁷ *ICV Trading Company YK v. Shosen Mitsui*, the District Court of Tokyo 12 October, 2000 (2000) Hanrei Taimusu 1051, 306. For a comment in English of this and few other cases related to delivery without a bill of lading see, S. Kozuka, "Recent Developments in Japanese Jurisprudence (2000-2001)" 82002 *Diritto Marittimo* 750, at 758; T. Tateishi, "Current Japanese Case Law on Carrier's Liability for Cargo Loss" (2002) *JSE Bulletin* 45, 1-5.

¹⁸ *Jarvis v. Moy, Davies Smith Vandervell & Co.* [1936] 1 KB, 399, at 405.

¹⁹ *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 (House of Lords).

is issued on the basis of the contract of carriage. When a bill of lading is issued, the right to delivery of the goods is transferred independently from the contract of carriage by the transfer of the bill of lading. The shipper who enters into a contract of carriage with the carrier loses the right to delivery at the moment he transfers the bill of lading to a third person. This right is usually acquired by the consignee on the basis of the contract of sale when the seller transfers to the buyer the bill of lading in exchange for the payment of the price, typically under a letter of credit. But the right to delivery of goods, which is embodied in the bill of lading, is in fact a contractual right against the carrier based on the contract of carriage between the carrier and the shipper and transferred by the shipper to the consignee. So the carrier's liability for wrongful delivery of the goods, in principle, should be based on contract.²⁰

DELIVERY OF GOODS AGAINST ONE ORIGINAL OR A FULL SET OF BILLS OF LADING

The bill of lading is commonly issued in sets of three identical parts, each of them representing an original document. While under a letter of credit the beneficiary must present the full set of bills of lading, there is no such requirement for delivery of the goods to the consignee: the carrier is entitled, in principle, to deliver the goods to the lawful holder of only one original bill of lading.

It may seem strange to state that several originals of a bill of lading are issued, because the concept of an original implies something that exists as a single document. In the case of bills of lading, however, several original bills of lading mean that all these documents represent one bill of lading only. When the consignee receives the goods from the carrier producing one of the original bills of lading, all other originals become void, as is often expressly stated in the bill of lading itself ('one being accomplished others to stand void'). When a carrier delivers the cargo to a lawful holder of a bill of lading he can be sure that he is not responsible to other holders of a bill of lading who might subsequently claim the cargo. While the practice of issuing several bills of lading served the shipper's interests, the rule that the carrier properly performs delivery of the goods to the holder of only one bill of lading was obviously aimed at protecting the carrier.

The situation is different when the shipper or a lawful holder of the bill of lading demands delivery of the goods from the carrier at a port different from the named port of destination. A Chinese case has illustrated the problems that may arise in this

²⁰ Lord Denning in *Sze Hai Tong Bank Ltd. v. Rambler Cycle Ltd.* [1959] AC 576, PC: "The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading... They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them."

kind of situation, if the goods are delivered against only one bill of lading.²¹ In this case, the carrier issued three bills of lading to the shipper. During the course of the voyage, the carrier was instructed by the shipper to change the port of discharge. In this new port, the carrier delivered the goods to the shipper against only one original of the bill of lading. After obtaining the goods, the seller disappeared. Then, the consignee, who was in possession of two remaining original bills of lading, brought a suit against the carrier. The court held that upon delivery of the goods all other bills of lading became void, and the consignee's claim was rejected.

This decision is contrary to the practice in most other jurisdictions.²² One of the problems for the court was that the Chinese Maritime Code does not provide clearly for the obligations of the shipper to return all bills of lading in cases when the contract of carriage is not performed as it was originally agreed. Article 90 of the Maritime Code only provides for the shipper's obligation to return a bill of lading to the carrier if the contract is cancelled. So in this case the court lacked clear legal guidance and its decision is rather problematic.

When the shipper demands delivery of the goods at a port different from the port of destination, the carrier is not free to deliver the goods against one bill of lading, but he must require the full set of bills of lading. This is a compulsory obligation of the carrier in most jurisdictions.²³ The full set of bills of lading is required in order to protect the carrier against the risk that at the port of destination a lawful holder of the bill of lading may appear with demand for delivery of the goods. Otherwise, the carrier could become the victim of fraud if the seller would receive the goods against one original bill of lading while other originals would be transferred to the consignee. By the decision of the court in the case above, the victim was the consignee. In some other Chinese cases, however, the courts have taken opposite view.²⁴

²¹ *Hong Kong Co. v. Guangzhou Ocean Shipping Co. & Dalian Foreign Vessel Agency* (quoted in X. Chen, "Chinese Law on Carriage of Goods by Sea under Bills of Lading" (1998) 8 *Current International Trade Law Journal* 89).

²² For example, the Japanese Commercial Code (Article 772) provides that "in places other than the port of loading, the Master may not deliver the goods unless he receives all of the parts of the bill of lading".

²³ The obligation is expressly laid down in section 645(2) of the German Commercial Code, Article 772 of the Japanese Commercial Code, Article 817 of the Korean Commercial Code, and Article 702 of the Taiwanese Maritime Commercial Code.

²⁴ For example, the Shanghai Maritime Court in *Zhongcheng Ningbo Import and Export Co., Ltd. V. Shanghai Asia Pacific International Containership Warehousing and Transport Co.* (quoted in the "Selected Cases of Maritime International Judgments and Comments" (ed. Zhengzhaofang) Shanghai, 2003).

LIABILITY OF THE AGENT FOR WRONGFUL DELIVERY

The rule that goods must not be delivered without production of a bill of lading should also be respected by the ship's agents. The agent is the party who most often delivers the goods under the carrier's instructions. So even if the agent delivers the goods without a bill of lading, the carrier is generally considered liable for the wrongful delivery. For example, in a recent Japanese case,²⁵ the carrier's agent, at the request of the consignee, issued the certificate of loss of the bills of lading. In fact, the bills of lading were not lost but were kept by the collecting bank, and the consignee could not obtain them since he failed to make the payment. The consignee obtained the delivery of the goods by presenting this certificate, without producing bills of lading. The consignee subsequently became insolvent, and the shipper (the unpaid seller) sued the carrier for wrongful delivery. The court held that the agent had been negligent in issuing the certificate of loss without verifying whether the bills of lading were actually lost, and the carrier was held liable for the damages caused by the agent's negligence.

The consignee, however, may decide to sue the agent in tort, instead of suing the carrier under the contract of carriage. In another Japanese case, the ship's agent delivered the goods without production of a bill of lading pursuant to the carrier's instructions.²⁶ After delivery the lawful holder of the bill of lading sued the agent in tort. The court held that the agent was liable in tort because delivery of the goods without production of a bill of lading is an illegal act. The defense of the agent that he was acting under the carrier's instructions was not accepted, since those instructions were relevant to relations between the agent and the carrier, but not to those between the agent and the consignee. This case can serve as a warning that agents should be very cautious if requested by the carrier to deliver goods without a bill of lading. In principle, they should reject such an order, or at least obtain a letter of indemnity from the carrier.

With respect to the letters of indemnity, while they may serve to protect the agent, they may also bring him problems. In another Japanese case, but in a different situation, an agent was held liable under a letter of indemnity.²⁷ In this case, the carrier delivered the goods to the consignee against a letter of indemnity, instead of a bill of lading. The letter of indemnity was jointly signed by the consignee and the forwarding agent. The court held that the agent was liable under such a letter, even though letters of indemnity are usually signed by banks, not by agents.

²⁵ *Orient Power Carstereos Ltd. V. KK Shosen Mitsui, District Court of Tokyo 29 Mai 2001* (2001) Kaijihou Kenkyukaishi 163, 86.

²⁶ *District Court of Osaka 5 April 1988* (1989) Horitsu Jiho, 4, 138.

²⁷ *COSCO v. YK CF Corporation, District Court of Osaka 23 February 1999* (1999) Hanrei Jiho 1736, 158.

DELIVERY OF GOODS WITHOUT BILL OF LADING UNDER CHARTERER'S ORDERS

An interesting question which often arises in practice is whether the Master must obey the time charterer's order to deliver the goods other than against presentation of the bill of lading. Here are several cases from three different jurisdictions that may serve to illustrate the problem.

In a Chinese case,²⁸ the charterer ordered the shipowner to deliver the goods without a bill of lading. The shipper (the seller), not being able to recover the price from the consignee (the buyer), brought a suit against the shipowner as the actual carrier, for delivery of the goods without production of the bill of lading. The Chinese Supreme Court confirmed that the shipowner, as the actual carrier, was an eligible defendant. However, the court held that the actual carrier was not liable for the wrongful delivery as the ship's Master had acted under the charterer's orders.

In a Japanese case,²⁹ the shipowner delivered the goods against a letter of indemnity issued by the consignee, accepting the instruction from the voyage charterer. Problems arose when the consignee went bankrupt without paying the goods to the seller. The seller, who was in possession of the bill of lading, as the buyer did not make the payment, then started proceedings against the shipowner for wrongful delivery of the goods. During the court proceedings, a settlement was reached and the shipowner paid \$620,000 to the seller in exchange for the bill of lading. After payment to the seller, in a subsequent claim against the charterer, the shipowner could not benefit from the letter of indemnity, as it was signed by the consignee only. The Tokyo Maritime Arbitration rejected the shipowner's demand, as the decision whether to deliver the goods without a bill of lading is at the shipowner's discretion. The carrier failed to request the charterer to sign the letter of indemnity, so the charterer could not be held liable for the shipowner's failure to act with due care.

In most jurisdictions, the courts take the position that the shipowner must not deliver the goods other than against presentation of a bill of lading, even if he was instructed by the charterer to make such a delivery.³⁰ Perhaps the most interesting case

²⁸ *Woodtrans Nav. v. Anshan Steel Group*, the Supreme Court of China 19 December 2001.

²⁹ *Tokyo Maritime Arbitration 24 April 1996* (1997) 34 JSE 1.

³⁰ The *Stetin* (1889) 14 PD 142 at 147., *A/S Hansen-Tangens Rederei III v. Team Transport Corporation (The Sagona)* [1984] 1 Lloyd's Rep. 194, *Kuwait Petroleum Corp. v. I & D Oil Carriers (The Houda)* [1994] 2 Lloyd's rep. 541, *Motis Exports v. Dampskibsselskabet AF 1912* [2000] 1 Lloyd's Rep. 121, *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro* [1986] AMC 826 (2d. Cir. 1985), *C-Art Ltd. V. Hong Kong Island Lines America* [1991] AMC 2888 (9th. Cir. 1991), *Glencore Intenational AG v. Owners of the "Cherry"*, Singapore High Court, Kan Ting Chiu J., April 2002 (available at: http://onlinedmc.co.uk/glencore_v_`cherry`.htm - last visited 10 April 2006), R. Cass. Com. 9 July 1991 (1993) DMF 665, Ap. Paris 11 January 1985 (1986) DMF 166 (note by R. Achard), *Trib. Livorno 10 December 1986* (1987) Dir.Mar. 961.

related to this issue is from English case law: *The Houda*.³¹ In this case, the charterer ordered the shipowner to deliver the goods without a bill of lading, against a letter of indemnity countersigned by a bank, but the shipowner declined to accept this order. The court at first instance held that while under a time charter the charterer cannot lawfully order the shipowner or the Master to deliver the cargo to a consignee who is not entitled to possession of the cargo, the charterer is not prevented from ordering delivery of the cargo without production of the bill of lading in circumstances where the charterer is entitled to possession of the cargo or gives an order with the authority of the person entitled to possession of the cargo. The Court of Appeal, however, took a different view and rejected the argument that a time charterer could order a shipowner to deliver the goods without production of an original bill of lading, even to a person who was entitled to possession of the goods.

It is submitted that the opinion of the Court of Appeal is correct. Under a time charter, the charterers are entitled to give orders concerning commercial employment of the ship, but the shipowners are also entitled to refuse to obey any unlawful order, such as delivery of the goods without production of the bill of lading. The shipowner may decide to deliver the goods against a letter of indemnity, of course at his peril, but the charterer can not force him to do so.

The judgment of the court at first instance in *The Houda*, if upheld, could have grave consequences for parties in the carriage of goods by sea as well as in international trade. This judgment runs contrary to the fundamental rule that the goods must not be delivered in any way other than against the bill of lading, and it tried to establish a new rule providing that the carrier must deliver the goods without production of the bill of lading if ordered to do so by the person entitled to possession of the cargo. A conclusion that can be derived from such judgment is that refusing to deliver the goods other than against presentation of the bill of lading may represent a breach of contract.

The claim that such a delivery is lawful if ordered by the person entitled to possession of the cargo runs counter to the notion that the bill of lading is a document of title. It is a well established principle that the carrier is bound to deliver the goods only to a lawful holder of the bill of lading, and he is not bound to investigate who is entitled to possession of the goods. When the consignee is not able to produce the bill of lading, the shipowner as carrier has the option of refusing the charterer's order of delivering the goods without the bill of lading or to deliver the goods in exchange for a letter of indemnity was offered to the shipowner in the present case. However, the above judgment goes much further and implies that the charterers are not obliged to provide a letter of indemnity but are entitled to order the shipowners to deliver the goods to the person actually entitled to the goods.

³¹ *Kuwait Petroleum Corp. v. I & D Oil Carriers (The Houda)* [1994] 2 Lloyd's rep. 541.

The most serious consequence of this judgment would be that the carrier would no longer be justified in refusing to deliver the goods to a party who is not the lawful holder of the bill of lading, or in the case of a non-negotiable bill of lading to a party who is not named in the bill of lading, when such a party is actually entitled to the goods. Such a radical change would endanger the role of the bill of lading as a document of title and discredit its commercial value. Besides, the carrier would be put in an extremely difficult position, because he would be forced to judge whether the person to whom delivery is to be made under the charterer's order is entitled to possession of the goods.

The rule that the goods are to be delivered only to the lawful holder of a bill of lading who must present it prior to delivery is essential to the function that the bill of lading performs as a document of title. If the goods are delivered without production of a bill of lading, there is a risk that the buyer who received the goods before payment is made can later refuse to pay because he has already obtained possession of the goods. Another danger is that the buyer can resell the goods by transferring the bill of lading to a new buyer, so that another party can present the bill of lading and claim the goods from the carrier.

DELIVERY OF THE GOODS IN THE CASE OF STRAIGHT BILLS OF LADING

The straight bill of lading is one of the most misunderstood transport documents in the carriage of goods by sea.³² The source of this misunderstanding lies in the confusion between the straight bill of lading, the bill of lading to a named person, and the waybill. The straight bill of lading has some peculiar features which makes its legal status unclear, It is usually identified with the bill of lading to a named person and it has also been suggested that the straight bill is in effect a waybill.³³

The straight bill of lading is an American invention, as it was first regulated by the American Federal Bills of Lading (Pomerene) Act 1916.³⁴ The practice of using straight bills of lading is now widespread and the use of this document causes problems in other parts of the world. The straight bill of lading has been the focus of

³² See C. Pejovic, *The Straight Bill of Lading: Do we really need it?* (2005) ETL 303.

³³ W. Tetley, *Marine Cargo Claims* (3d. edn. Blais Inc., 1988) at 190 to 191, 950 to 951, 995 to 997. *See also Benjamin's Sale of Goods* (5th. edn. Sweet Maxwell, 1997) para. 18-014, *Carver on Bills of Lading* (14th. edn. Sweet & Maxwell, 2001) para. 6-007.

³⁴ The Pomerene Act was last revised in 1994. The format of the Act is expressed as 49 USCA & 80102. This Act relates to carriage by rail, road, air and water.

recent judgments in several Asian countries with respect to the delivery of the goods. Since there is obviously some confusion as to whether this document should be produced by the consignee, in order properly to understand the nature of the problem of delivery of the goods against a straight bill of lading, the status of this document in both common law and civil law will be examined.

In American law, the straight bill of lading is not considered as a document of title, as it could evidence the title of only one person - the consignee named in the document. This runs contrary to the notion of document of title by which goods could be transferred by endorsement of the document itself. The USCA has remedied a confusion which existed under the original Pomerene Act by making a distinction between negotiable and non-negotiable bills.³⁵ Negotiable bills are in fact the former 'order' bills of lading, while non-negotiable bills are the former 'straight' bills of lading.

The non-negotiable bill is, in fact, a hybrid document which contains elements of both the waybill and the bill of lading to a named person. It is a non-negotiable document, but it can be transferred with effect similar to the transfer of a named bill of lading by assignment in civil law. Under section 80103(b) of the 49 USCA, the endorsement of a non-negotiable bill 'does not give any additional right'. This should be construed in such a way that, unlike a negotiable bill, the transferee of a non-negotiable bill does not acquire any rights that would be additional to those of the transferor. In other words, the transferee 'puts himself in the shoes' of the transferor and has the same rights against the carrier as the transferor had. The fact that the straight bill of lading is transferable and capable of transferring certain rights to the transferee indicates the status of a document of title. In this respect, the non-negotiable bill differs from the waybill, which has none of the features of a document of title, as its transfer does not operate as a transfer of any rights.

With respect to the delivery of goods, under US law the position is clear: the carrier must deliver the goods to the consignee named in a nonnegotiable bill who is not required to present the document to the carrier but only to identify himself.³⁶ This is in accordance with the present text of the 49 USCA. The UCC, however, recognizes the possibility that bills of lading to a named person are negotiable 'where recognized in overseas trade'.³⁷

On the other hand, under English law the situation is not very clear. The crucial issue that is the main source of confusion and problems is whether the carrier should insist on production of a straight bill before he delivers the goods. The English

³⁵ 49 USCA section 80103.

³⁶ 49 U.S.C.A. sect. 80110: *Chilewich Partners v. MV Aligator Fortune* 853 F Supp 744, 753 (SDNY 1994).

³⁷ Uniform Commercial Code s.7-104(1)(b).

Carriage of Goods by Sea Act 1992 failed to clarify this issue, as this Act was aimed at resolving the problems related to rights of suit in respect of carriage of goods by sea. It failed to deal with the issue of whether a straight bill of lading should be produced to obtain delivery of the goods, so the issue remains unresolved. In several cases, the English courts held that the carrier was entitled to deliver the goods to the consignee named in a straight bill without production of the bill.³⁸ But this position was put in doubt by a recent case, *The Happy Ranger*, in which the court took a different view on straight bills. Tuckey LJ, who gave the leading judgment, noted that ‘it would be unwise to assume that the statements in the textbooks are correct.’³⁹ The dominant view in leading textbooks is that under a straight bill of lading the carrier is entitled and bound to deliver the goods without production of the bill.⁴⁰ The latest development is the decision of the Court of Appeal in *The Rafaela S*, in which the court held that a straight bill of lading should be regarded as a bill of lading within the meaning of the Hague Rules and that ‘the practice was that a straight bill of lading, unlike a mere sea waybill, was written on the form of an otherwise classic bill and required production of the bill on delivery, and therefore transfer to a consignee to enable him to obtain delivery.’⁴¹ This decision is a turning point in English law with respect to the status of straight bills of lading. By concluding that the straight bill is a document of title, the court clearly took the view that the carrier must deliver the goods against an original straight bill.

In Asia there are conflicting views relating to the delivery of the goods in case of straight bills of lading. For example, Chinese courts initially considered that production of a bill of lading is required in order to receive the goods from the carrier, even in the case of a straight bill of lading.⁴² Afterwards, the Supreme Court has taken a different view finding a carrier not liable for delivery of the goods without

³⁸ *International Air & Sea cargo GmbH v. Pakistan National Shipping Co (The Chitral)* [2000] 1 Lloyds’ Rep. 529, *East West Corp. v. DKBS 1912 and Utaniko v P&O* [2002] 2 Lloyds’ Rep. 182, *The Rafaela S* [2002] 2 Lloyds’ rep. 403. This is contrary to an older case: *Evans & Reid v. Cornouaille* [1921] Lloyd LR 76, in which the Court held that the master was not entitled to deliver the goods without a bill of lading even to “the consignees named in the bill of lading.”

³⁹ *Parsons Corporation v. C.V. Scheepvaartonderneming (The Happy Ranger)* [2002] EWCA Civ 694.

⁴⁰ *Carver* para. 6-007, *Benjamin* para. 18-059. For a contrary view, see, *Schmitthoff’s Export Trade* (10th ed., Sweet & Maxwell 2001) para.15-038.

⁴¹ *The Rafaela S* [2003] 2 Lloyd’s Rep. 113. The judgment of L.J. Rix was unanimously affirmed by the House of Lords [2005] All ER (16 February 2005).

⁴² *The Shangdong High Court (2002) Yuanchen International Carriage Ltd. V. Hengxing Ltd.*, (cited from <http://www.ccm.org.cn/> last visited: April 12, 2006), *Yuehai v. Cangma, the Supreme People’s Court of China* (1996) Gazette of Supreme Court (10) (also available at: http://www.ccm.org.cn/english/text_typical_4.htm (last visited: April 12, 2006), *The Eagle Comet*, Guangzhou Maritime Court, no. 66 (1994).

production of a straight bill of lading.⁴³ However, in a subsequent case, the Supreme Court held that the carrier must deliver the goods against production of the straight bill.⁴⁴ A similar stance is taken by the courts in Singapore.⁴⁵ However, in Hong Kong the courts have taken the opposite view.⁴⁶

In civil law, bills of lading to a named person have, in principle, the same character as other bills of lading. There is, however, an important difference with respect to the rights of the transferee of the bill of lading to a named person. The rights of the transferee are based on the rights of the transferor (*ex iure cesso*) and not on the bill of lading. On the other hand, the carrier will have the right to invoke against the transferee all rights and exemptions he had against the transferor (*ex persona cedentis*) even if the bill of lading provides differently. For example, when the bill of lading states the freight 'to be paid', if this freight is lower than the freight the shipper and the carrier agreed, the carrier will be entitled to claim against the consignee the freight as agreed with the shipper. Another difference relates to the method of transfer of bills of lading to a named person. The transfer of this bill of lading is effected by a written assignment (*cession*) in accordance with the rules of civil law. These rules are so cumbersome that bills of lading to a named person are actually never transferred in practice.⁴⁷

With respect to delivery of the goods, the general rule is that the person named in the bill as consignee cannot obtain delivery of the goods without production

⁴³ *The Supreme People's Court of China* (2002) Zim Israel Navigation Company Ltd. V. Sun Hing Shipping Co. Ltd. (available at: <http://www.ccmt.org.cn/english/case/show.php?sId=2324> last visited: April 12, 2006)

⁴⁴ *The Supreme People's Court of China* (2004) Qingdao Haishen v. Orient Overseas Container Line (available at: <http://www.ccmt.org.cn/ss/writ/judgementDetail.php?sId=1471> last visited: April 2, 2005).

⁴⁵ *APL v. Peer Voss*, October 8, 2002, the Singapore Court of Appeal. [2002] 3 SLR 176 (available at: http://www.onlinedmc.co.uk/apl_v__voss_peer.htm (last visited: April 2, 2005)). The Court held that "although a straight bill could not be indorsed to transfer constructive possession of the cargo, it did not necessarily follow that the straight bill of lading did not impose contractual term obligating the carrier to require its production to obtain delivery. There had to be clear words present to imply that the parties intended the instrument to be treated in all respects as if it were a sea waybill and that its presentation by the named consignee was not necessary. By issuing the instrument as a bill of lading, the parties must have wished to retain all other features of a bill of lading."

⁴⁶ *The "Brij"*, Hong Kong Admiralty Court 14 July 2000 [2001] 1 Lloyd's Rep. 131. In this case, J. Waung found that the carrier was not liable for delivery of the goods without production of a straight bill of lading.

⁴⁷ For example, under Article 2022 of the Italian Civil Code, the transfer of negotiable documents issued to a named person is effected by entering the name of the transferee on the document and on the registry of the issuer, or by issuance of a new document registered in the name of the new owner and by notation of such an issuance in the registry. However, since a sea carrier cannot be expected to have his own registry of issued bills of lading, Article 464(3) of the Italian Code of Navigation provides for an exemption of the bills of lading to a named person from the general rules applicable to the transfer of documents of title to a named person, specifying that no annotation of the issuance and transfer of nominative bills of lading is required.

of the bill. The carrier is usually obliged to require the surrender of such bills as a condition for the delivery of the goods.⁴⁸ For example, New Dutch Civil Code, 1991 provides in Article 441 that only the lawful holder of a bill of lading has the right to demand delivery of the goods from the carrier under the bill of lading. This applies to bills of lading to a named person equally as to other kinds of bills of lading.⁴⁹ In some civil law jurisdictions, however, the courts sometimes recognize the right to delivery to the person named in the bill of lading without production of the bill.⁵⁰

Obviously in some jurisdictions there is confusion with respect to the obligation of the consignee to produce the straight bill of lading at the port of destination. The problem is that a straight bill and a sea waybill are not yet clearly distinguished. This confusion and the problems it creates can be avoided if, instead of the straight bill, a waybill is issued where there is no need to dispose of the goods in transit. If the straight bill of lading is issued, the safest way for a carrier is to demand production of the bill before the goods are delivered.

With respect to the legal regulation, US law provides a good model based on a distinction between negotiable documents that should be produced on delivery and non-negotiable documents whose production is not required. This distinction between two types of documents is capable of solving the problem of delivery in the case of straight bills. The UNCITRAL Draft Instrument on the Carriage of Goods by Sea provides for a similar distinction: delivery to the consignee if no negotiable transport document has been issued (Draft Article 48) and if a negotiable transport document has been issued (Draft Article 49)⁵¹ The use of the term ‘non-negotiable bill’ instead of ‘straight bill’ may help avoiding the confusion, and the term ‘straight bill’ is likely to disappear in the future.

⁴⁸ *MSC Magelan (The Court of Appeal of Rennes 16 May 2002, unreported)* The French Court in this case held that the straight bill was a document of title and required the carrier to deliver the goods against production of the bill. This decision was quoted by the L.J. Rix in *The Rafaela C* [2003] 2 Lloyd’s Rep. 113.

⁴⁹ *The Duke of Yare* (ARR-RechtB Rotterdam, 10 April 1997). See also, G.J.W. Smallegange, *Special Report on European Maritime Law: Carriers should take care to clause straight bills of lading properly*, Lloyd’s List July 30, 1998, 6.

⁵⁰ *Ap. Firenze March 4, 1987*(1988) Dir.Mar. 1141. This decision has been criticized by, P. Manica, “Polizza di carico nominative e riconsegna della merce” (1988) Dir.Mar. 1141 See also, F. Bonelli, “Responsabilità del vettore per riconsegna dell amerce senza restituzione della polizza di carico” (1978) Dir.Mar. 277. In some other cases, the courts in civil law countries held that presentation of a straight bill is not necessary to obtain the goods: *Ap. Firenze July 22, 1987* (1989) Dir.Mar. 171 (applying American law), *Supreme Court (Spain) February 17, 1997* (1999) Dir.Mar. 949, *Trib. Civitavecchi. February 22, 2001* (2002) Dir.Mar. 1002.

⁵¹ Available at: <http://www.uncitral.org/en-index.htm> (last visited on April 12, 2006).

DELIVERY OF GOODS AGAINST A LETTER OF INDEMNITY

The problem of delivery of goods without a bill of lading is most often resolved in practice by the delivery of goods in exchange for a letter of indemnity instead of a bill of lading. By such a letter of indemnity the consignee undertakes to indemnify the carrier in respect of any liability, loss and damage he may sustain by reason of delivering the goods without production of a bill of lading, as well as to produce and deliver all original bills of lading to the carrier as soon as they arrive. Such a letter is often co-signed by a bank which undertakes the financial obligations and is responsible jointly and severally with the consignee against the carrier.

The carrier must be aware that the delivery of goods without production of the bill of lading represents a serious breach of contract which could deprive him of the benefit of limitation of liability. Therefore, in order to protect his interests the carrier should demand a letter of indemnity to cover the whole amount of the damage suffered as a consequence of the delay in delivering the bill of lading, including legal and other expenses that the carrier could be liable for. Letters of indemnity can be very expensive and the consignee might be spared this cost if the carrier accepts his personal indemnity. Some charterparties expressly provide that the shipowner is to deliver the goods without production of a bill of lading against a personal indemnity. Whether a carrier would accept such indemnity is, however, very uncertain and depends on the consignee's financial standing and reputation. Also, as has been shown above, letters of indemnity may sometimes be useless and even bring some problems.⁵²

In practice, the charterparties often require the Master to deliver the goods against a letter of indemnity. The issue that may arise is whether the carrier is bound by such a contractual clause; can he refuse to deliver the goods against an indemnity? It is submitted that this kind of clause serves merely to protect the carrier against the consequences of delivery of the goods without presentation of the bill.⁵³ The carrier cannot be bound by a clause that imposes an unlawful obligation on him, such as to deliver against an indemnity. The letter of indemnity issued by the consignee has a different character from the letter of indemnity issued by the shipper in exchange for a clean bill of lading. Even though shippers may often issue fraudulent letters of indemnity, when the carrier is aware that the description of goods is not accurate, the letters of indemnity issued by the consignee normally do not have such a character and are usually considered valid.⁵⁴

⁵² *COSCO v. YK CF Corporation*, District Court of Osaka 23 February 1999 (1999) Hanrei Jiho 1736, 158.

⁵³ *Kuwait Petroleum Corp. v. I & D Oil Carriers (The Houda)* [1994] 2 Lloyd's rep. 541.

⁵⁴ Y. Lucas, "La lettre de garantie por defect de connaissance" (1987) DMF 346, W. Tetley, "Contre-lettres

From an economic point of view, letters of indemnity are justified because they serve a useful commercial purpose. Letters of indemnity are issued in the case of the late arrival of a bill of lading in order to offer protection to the carrier if he delivers the goods without a bill of lading; when the bills of lading actually come into the possession of the consignee, under the terms of a letter of indemnity they are to be delivered to the carrier. It is usually provided in the letter that when all original bills of lading are delivered to the carrier the liability of the consignee and of the bank under the letter is to cease. The carrier must take care that all originals are returned to him, because otherwise he can be responsible to another holder of the bill of lading holder.

CONCLUSION

While this article has focused mainly on the Far East, the relevant principles are universal and are equally applicable in any national jurisdiction. Despite the well established rule that the goods must be delivered only against the bill of lading, the shocking truth, at least for the lawyers, is that there is a widespread practice of delivery of goods without production of a bill of lading. If you ask the Masters about it, many of them will confirm that they do often deliver goods without a bill of lading, especially in the case of time charters of tankers. In the same way as you may pass through red lights many times without any consequences, the Master may deliver goods many times without a bill of lading. But once you are caught the consequences can be severe.

From a practical point of view, delivery without production of a bill of lading is justified under certain conditions, but from a legal point of view this represents a serious breach of contract by the carrier. Admittedly the rule that the consignee must present a bill of lading prior to delivery is outmoded and can cause many problems in practice, but this is still a valid rule and must be respected. Until this rule is changed, the courts must treat delivery of goods without presentation of a bill of lading as a breach of contract. Courts must apply the law as it is; their right of interpretation does not amount to power of modification. *Dura lex sed lex*.

In practice, various means are used to remedy the problem of delivery of goods without production of the bill of lading. Most often, letters of indemnity are given instead of bills of lading. But, as noted above, these letters can be very expensive. Another way of avoiding this problem is the use of non-negotiable sea waybills,

d'indemnité et lettres de garantie" (1988) DMF 275; *Sze Hai Tong Bank Ltd. V. Rambler Cycle Co. Ltd.* [1959] 2 Lloyd's Rep. 114 Cass. France 24 November 1982 (1983) DMF 472. Contrary, R. Rodière, *Traité Général de Droit Maritime – Affretements et Transports* (Dalloz 1968) Vol. II 551.

since their presentation is not required before delivery. However they can be used only in a limited number of cases when the goods are not to be sold during the course of the voyage. The introduction of electronic bills of lading, followed by the necessary legal adjustments, will hopefully solve this problem. Until this happens, this problem will continue to arise.

The purpose of this article may soon become obsolete, once paper transport documents are replaced by electronic ones. But there is a long way to go before this happens. The issues dealt with here will be relevant as long as the problems arise. It is hoped the analysis of the problem and the views expressed in this article will help practitioners and lawyers better to understand the problem, so that confusion can be avoided and better solutions found.

Sažetak:

PRAVNI PROBLEMI U SLUČAJU PREDAJE ROBE BEZ TERETNICE: PRAKSA NEKIH AZIJSKIH JURISDIKCIJA

Ovaj se članak bavi ispitivanjem pravnih problema koji se javljaju u slučaju predaje tereta bez predočenja teretnice. Glavna pažnja usmjerena je na neka azijska prava, s poredbenim prikazom pristupa istim problemima u nekim od kontinentalnih i anglosaksonske jurisdikcije na Zapadu. Prije analize sudske prakse, u uvodnom dijelu članak se bavi nekim teorijskim pitanjima u odnosu na problem predaje tereta bez teretnice. U odnosu na sam problem predaje tereta bez teretnice, obrađeno je više pitanja, kao što su: Može li prijevoznik predati teret vlasniku tereta koji nije u posjedu teretnice? Koja je osnova odgovornosti prijevoznika za predaju tereta bez teretnice: ugovorna ili izvanugovorna odgovornost? Treba li prijevoznik predati teret imatelju jedne teretnice, ili je potrebno predočiti sve primjerke teretnice? Je li agent brodar odgovoran za predaju ako izvrši predaju tereta bez teretnice? Treba li prijevoznik postupiti prema nalogu naručitelja prijevoza da preda teret bez teretnice? Treba li prijevoznik zahtijevati predočenje teretnice na ime? Može li prijevoznik predati teret u zamjenu za garanciju primatelja? Cilj ovoga članka je pokušaj pronalaženja odgovora na pitanje zašto jedan tako stari problem, kao što je predaja tereta bez teretnice, još uvijek izaziva tolike probleme u praksi, te kako ti problemi mogu biti rješavani.

Ključne riječi: predaja tereta, teretnica, vrijednosni papir, odgovornost.