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Jiang, Tianyi; Jing, Zhen

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# Shipper's title to sue after the transfer of the bill of lading - a perspective to reform Chinese maritime law

Tianyi Jiang\* and Zhen Jing\*\*

*Cargo interests' title to sue the carrier to recover loss or damage caused by the carrier's default is a crucial issue in carriage of goods by sea. However, the current maritime code in China does not provide explicit guidance on this issue. One significant problem that arises therefrom is whether the shipper who has transferred the bill of lading to the endorsee/consignee is still entitled to sue the carrier. This article critically examines the current rule under the Chinese Maritime Code 1993 and pinpoints the fundamental loophole that gives rise to the aforesaid problem. In addition, based on reviewing various solutions provided by other jurisdictions, this article discusses the possible solution that could be considered when reforming current maritime law in China.*

## I INTRODUCTION

In maritime trade, it is common that one set of bills of lading embeds the contract of carriage into numerous transactions of goods covered by the bill. By transferring the bills of lading, the right under the contract of carriage is passed from one cargo interest to another.<sup>1</sup> In such a situation, cargo interests and carrier may have different concerns if the cargo is damaged or lost during transit. On the one hand, the cargo interests who suffered actual loss or damage may be concerned about losing their title to sue the carrier for indemnity,<sup>2</sup> on the other hand, the carrier may be in fear of assuming multiple claims from more than one cargo claimant.<sup>3</sup> To relieve such

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\*PhD candidate, School of Law, Bangor University

\*\* Senior Lecturer, School of Law, Bangor University

The following abbreviations are used.

COGSA 1992: Carriage of Goods by Sea Act 1992

CMC 1993: Maritime Code of the People's Republic of China 1993

FBLA 1994: United States Federal Bills of Lading Act 1994

GDP: Gross Domestic Product

The Rotterdam Rules: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)

UNCITRAL: United Nations Commission on International Trade Law

<sup>1</sup> In commercial practice, this is common in a string Sale of goods. See Alexander von Ziegler, Alexander Von Ziegler, "Rotterdam Rules and underlining sale contract", CMI year book 2013 PART II - THE WORK OF THE CMI 273, 277

<sup>2</sup> Sometimes the party who suffered an actual loss or damage may not be the party who is entitled to sue the carrier. For example, according to COGSA 1992 s 2(5), the shipper who suffers the loss but is without lawful possession of the bill of lading is not entitled to sue the carrier in contract.

<sup>3</sup> Since the cargo may be re-sold several times during transit, more than one party may be involved before the cargo arrives at its destination. In this instance, it may be difficult for the carrier to identify who is the qualified cargo claimant.

concerns and properly balance the interests between the carrier and the cargo interests, many jurisdictions with strong maritime trading industries, such as the UK and the US, have developed explicit rules to address the issues in respect of cargo interests' title to sue.<sup>4</sup> Recently, these issues have also drawn the attention of the drafters of international conventions governing carriage of goods by sea.<sup>5</sup> A common position upheld by these national and international legislations is that the person to whom the bill of lading is transferred with a lawful reason has the right to sue the carrier in contract. Although this is also the case under the current Chinese Maritime Code<sup>6</sup> (hereinafter referred to as CMC 1993) that has recognized the contract effect of the bill of lading when it is transferred to a third party to the contract of carriage,<sup>7</sup> it does not address what impact the transfer of a bill of lading would have on the shipper who is an original party to the contract of carriage. Under such a circumstance, if the shipper suffers loss or damage as a consequence of the carrier's default, it is questionable whether the shipper is still entitled to bring a contractual action against the carrier. To answer this question, scholars and legal practitioners have to seek solutions from other legislations such as civil law and contract law which often leads to inconsistent conclusions.<sup>8</sup> The best way to thoroughly resolve the problem is to reform the current law and establish explicit guidance to provide for the shipper's title to sue after transferring the bill of lading. To achieve this aim, this article reviews CMC 1993 and attempts to determine the fundamental loophole in the law on this

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<sup>4</sup> In the UK, issues in respect of cargo interests' title to sue are provided by COGSA 1992; and in the US, these issues are covered by FBLA 1994

<sup>5</sup> This can be seen from a series of preparatory documents drafted by UNCITRAL for the Rotterdam Rules, which include United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.21), 8 January 2002; United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work of its eleventh session (A/CN.9/526), 4 April 2003; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP32) 4 September 2003; ; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP56) 8 September 2005; United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work of its eighteenth session (A/CN.9/616), 27 November 2006; United Nations Commission on International Trade, Transport Law : Preparation of a draft convention on the carriage of goods [wholly or partly][by sea] Right of suit and time for suit: document presented for information by the Government of Japan (A/CN.9/WG.III/WP.76)

<sup>6</sup> CMC 1993 was adopted in 1992, and came into force on 1 July 1993.

<sup>7</sup> CMC 1993, s78 paragraph1. For details of the rules, see the discussion in part III

<sup>8</sup> For evidence in this respect, see Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law*, 1<sup>st</sup> edn (Beijing University Press, 2009), 351; Yuzhuo Si, *Maritime Law Monograph*, 2<sup>nd</sup> edn (China Renmin University Press, 2010),100; Wenjun Wang, *legal basis to establish a right of suit relating to bill of lading*, 1<sup>st</sup> edn (Law Press China, 2010), 102; Yu Guo, "Shipper's right of suit against the carrier after assignment of bill of lading" [2010] 6 Annual of China Maritime Law 50, 51

point. In order to do this, some selective solutions provided by both national and international law are examined. By analyzing to what extent these solutions can be used in Chinese law, this article suggests a possible way to provide for the shipper's title to sue under the future Chinese Maritime Law.

## **II CIRCUMSTANCES UNDER WHICH THE SHIPPER MAY SUFFER LOSS OR DAMAGE AFTER THE TRANSFER OF BILL OF LADING**

In cargo claims, normally the claimant should be the party who suffers a substantial loss or damage due to the carrier's breach of duty under the contract of carriage. In the case where bills of lading are involved, this party is usually the consignee or endorsee (the buyer) to whom the bill of lading is transferred in pursuance of the arrangement with respect to the underlying transaction of goods.<sup>9</sup> Such a consequence can be attributed to the usual transfer of risk on or before loading<sup>10</sup> together with the key role of the bill of lading played in payment of goods.<sup>11</sup> However, the trading reality is far more complex and sometimes it may be the shipper (the seller) who sustains the substantial loss or damage even though the bill of lading has been transferred to the consignee or endorsee (the buyer) at that time.

The aforesaid phenomenon may occur when the seller performs the shipper's duty but is not named as the shipper on the bill of lading. For instance, in *Zhejiang Textiles Import & Export Group Ltd. v. Taiwan Uniglory Marine Corporation*,<sup>12</sup> as per the sale contract between the buyer and the seller, the seller arranged the shipment of goods and agreed to name the buyer's agent as the shipper on the bill of lading. When the goods arrived at their destination, the goods were released to the buyer without production of the bill of lading and later the buyer refused to fulfil the obligation of

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<sup>9</sup> Simon Baughen, *Shipping Law*, 4<sup>th</sup> edn (Routledge-Cavendish, 2009), 18

<sup>10</sup> According to Incoterms 2010, as to most prevailing trade terms such as Ex works, FAS, FOB, CFR, CIF, CPT, CIP, the risk of goods is passed before or as from loading.

<sup>11</sup> This role mainly reflects from the document's capacity to "prove (to the buyer) that the sold goods were indeed delivered as requested under the sales contract at loading port." By virtue of such a capacity, the bank would be willing to issue the payment under the Letter of credit when receiving the bill of lading. That is to say, in most situations, the payment of goods under the sale contract will be fulfilled after the seller (shipper) transfers the bill of lading to the buyer (consignee/endorsee). *Supra*, fn.1, 276

<sup>12</sup> (2005) Higher People's Court of Shanghai Municipality, See Xinlong Ying, *Selected maritime cases of Shanghai Maritime Court China*, 1<sup>st</sup> edn (Law Press China, 2011), 87-88

payment under the letter of credit. All documents including the bill of lading were returned to the seller but without the endorsement of the holder who was the buyer's bank. This made it difficult for the seller to sue the carrier even though he sustained a substantial loss caused by the carrier's breach of duty under the contract of carriage.<sup>13</sup> This was because the seller was neither the party who concluded the contract of carriage with the carrier<sup>14</sup> nor the holder of the bill of lading to whom the bill of lading was properly endorsed.

The shipper may also suffer loss or damage by virtue of the unusual way of applying certain trade terms in commercial practice. For example, the seller (shipper) and the buyer (the consignee/endorsee) may conclude a sale contract on a c.i.f. term<sup>15</sup> except that, unlike a normal c.i.f. contract, the parties agree that the payment of goods should be made pursuant to the quantity of the goods that arrived even though the bill of lading would be transferred to the buyer (consignee/endorsee) before that time. In this instance, if the goods were damaged or lost in transit due to the carrier's default, it is probable that such a loss or damage would be assumed by the seller (shipper) even though the bill of lading had been transferred to the buyer at an earlier stage.<sup>16</sup>

The alteration of the original trading arrangement may also contribute to the assumption of loss or damage by the shipper. It is submitted that such a situation often happens when the goods arrive at the destination in an unsatisfactory condition. Although at that time the risk of goods has usually passed to the buyer (consignee/endorsee to whom the bill of lading is transferred),<sup>17</sup> once the buyer

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<sup>13</sup> The carrier breached the duty to deliver goods against presentation of bill of lading.

<sup>14</sup> In this case, the seller was neither the person who booked the vessel with the carrier, nor the party who was named as the shipper on the bill of lading.

<sup>15</sup> Usually, 'in the absence of special terms, the seller under a c.i.f contract claims payment against presentation of shipping documents.' See Filippo Lorenzon, David Myer Sassoon, Yvonne Baatz, Lynne Skajaa, C. Nicoll, *C.I.F. and F.O.B. Contracts*, 5<sup>th</sup> edn (Sweet & Maxwell, 2012), 52

<sup>16</sup> The presumed situation is addressed in Sir Guenter Treitel and Francis M B Reynolds, *Carver on Bills of Lading*, 3<sup>rd</sup> edn (Sweet & Maxwell, 2011), 280. Under the CIF term, unless otherwise agreed by the trading parties, the payment should be made by the buyer against transfer of the documents which include the bill of lading. In addition, there is also a presumption that the seller (shipper) would reserve the property till the payment is fulfilled. Therefore, in the normal case of a CIF transaction of goods, there is little likelihood that the seller (shipper) would assume loss or damage after the transfer of the bill of lading. See Ewan Mckendrick, *Goode on Commercial Law*, 4<sup>th</sup> edn (Penguin Books, 2010), 1044-1045

<sup>17</sup> According to the Incoterm 2010, for most trade terms except the "D" group terms, the risk of goods passes

discovers the cargo was damaged in transit, instead of accepting the goods as per the original sale contract, the buyer would adopt some commercial measures to mitigate his loss. These measures usually include rejection of goods, acceptance of goods at a discounted price or request for substitution of the lost or damaged goods.<sup>18</sup> Due to the concern of maintaining a business relationship and the expectation of receiving indemnity from the carrier, the seller (shipper) would usually agree with the buyer (consignee/endorsee) to make an arrangement of this kind and thereby assume the actual loss or damage.<sup>19</sup> Such a phenomenon happens quite often in China's export trade.<sup>20</sup>

From the aforesaid discussion, it can be seen that the factors which may trigger the assumption of loss or damage by the shipper after the transfer of the bill of lading are closely related to the arrangement with respect to the commercial transaction of goods. However, it is undeniable that the ultimate reason for such a loss or damage is the carrier's breach of duty under the contract of carriage. In this sense, it seems unfair if the shipper is not entitled to sue the carrier for recovering his loss or damage.

### III CRITICAL REVIEW OF ARTICLE 78 CMC 1993

The CMC 1993 does not provide any explicit guidance on the issue of cargo interests' title to sue. However, Paragraph 1 of Article 78 may shed some light on this point. According to this rule:

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before the goods arriving at the destination.

<sup>18</sup> Yuechuan Jiang, "Cargo interest's title to sue in the carriage of goods by sea" (D.phil Thesis, Dalian Maritime University, 2011),189

<sup>19</sup> For evidence in this respect, see *Hunan Huasheng Industrial & Trading Co. Ltd v. Shandong Yantai International Marine Shipping Co. Ltd and Shandong Yantai International Marine Shipping Co. Ltd, Shanghai Branch* (2007) *Selected maritime cases of Shanghai Maritime Court China*,1<sup>st</sup> edn (Law Press China, 2011) 59-63. In this case, the cargo was discovered as being contaminated when arriving at the destination port. Although the risk of goods should be passed to the buyer at that time as the goods were sold with a CIF term, the seller (shipper) agreed the buyer's (consignee) request of re-delivering the substitute goods, and then assumes the loss or damage caused by the carrier's breach of duty to take proper care of goods in transit. Another significant example is *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company* (2012) Guangdong Province, High court, Civil Judgment, No.104, see Feifei Deng, "Shipper's right to sue in relation to carriage of goods by sea: the approach of Chinese court" [2013] 19 JIML 196, 197

In this case the goods were damaged during discharge. Although at that time both the bill of lading and the risk of goods had been passed to the buyer (endorsee), the seller (shipper) accepted the buyer's (endorsee) rejection of goods and resold the goods to another seller with a discounted price. As a result, the seller (shipper) assumed a substantial loss.

<sup>20</sup> *Supra*, fn.18

The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading.

This rule indicates that the bill of lading is what creates a contractual relationship between the carrier and the holder who is a third party to the contract of carriage. From this rule, it can be inferred that the holder is entitled to sue the carrier in contract once the bill of lading is transferred to him even though the holder is not a contractual party to the original contract of carriage. This is indeed the common position that has been recognized in judicial practice.<sup>21</sup> Notwithstanding, this rule provides no indication about the shipper's title to sue after the transfer of the bill of lading to a third party to the contract of carriage. Therefore, the issue of whether such a shipper is entitled to bring a contractual action against the carrier for claiming loss or damage remains open to debate in both academia and legal practice.

#### **(A) Controversy over whether the shipper is entitled to sue the carrier after the transfer of the bill of lading**

Some scholars argue that the transfer of the bill of lading will at the same time transfer the contract of carriage.<sup>22</sup> This means that once the shipper transfers the bill of lading to the consignee/endorsee, his contractual title to sue vanishes as such rights should be transferred to the holder of the bill of lading. Therefore, the contractual title to sue the carrier should be exclusively vested in the holder of the bill of lading.<sup>23</sup> Such an argument is, to some extent, similar to the arrangement under the UK Carriage of Goods by Sea Act (hereinafter referred to as COGSA 1992) whose purpose it is to

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<sup>21</sup> This position is underlined by the Supreme People's Court of PRC Announces Interpretation on Several Issues of Delivery Without Production of Original Bill of Lading 2009 (adopted on 16 February 2009, entered into force on 5 March 2009), art 3 "Where any loss is caused to the holder of an original B/L due to delivery of goods by a carrier without the original B/L, the holder may request the carrier to bear the liability for breach of contract or tort."

<sup>22</sup> Yuzhuo Si and Zhiwen Li, *Study on the theories of Chinese Maritime Law*, 1st edn (Beijing University Press, 2009), 351

<sup>23</sup> Yuechuan Jiang, "Cargo interest's title to sue in the carriage of goods by sea" (Dphil Thesis, Dalian Maritime University 2011), 129, Yuzhuo Si, *the uniformity of international transport law*, 1<sup>st</sup> edn (Beijing Normal University Publishing Group, 2012), 320, Tingzhong Fu, *The Principle of Chinese Maritime Law*, 1<sup>st</sup> edn (Law Press China, 2015), 44

prevent trafficking of bills of lading.<sup>24</sup> In this sense, this argument may be helpful to mitigate the risk of multiple claims suffered by the carrier.<sup>25</sup> However, it is less favourable to a cargo interest such as a shipper who sustains actual loss or damage after transferring the bill of lading to the consignee/endorsee.

The contrasting argument that the shipper's contractual right to sue the carrier is not extinguished after the transfer of the bill of lading also has a great deal of support.<sup>26</sup> Advocates of such a proposition argue that the bill of lading only evidences the terms of the original contract of carriage. Therefore, the transfer of the bill of lading only transfers the rights and liabilities incorporated in bills of lading rather than transferring the entire contract of carriage. According to such an argument, the bill of lading and the contract of carriage constitute two parallel contracts which respectively govern the relationship between the shipper and the carrier, and the relationship between the holder and the carrier.<sup>27</sup> As a result, both the holder of the bill of lading and the shipper should be entitled to sue the carrier on the basis of their respective contract with the carrier. This view may correctly describe the relationship between the bill of lading and the original contract of carriage. However, it may also create a paradox in explaining why the shipper and the holder of the bill of lading are simultaneously vested with the contractual right to sue the carrier.<sup>28</sup> One may argue that, since the holder's contractual title to sue the carrier has been recognized by current law and judicial practice,<sup>29</sup> the rights incorporated in the bill of lading shall include the title to sue under the original contract of carriage once the bill of lading is issued. Under such a situation, once the bill of lading is out of the possession of the shipper and transferred to another party, the shipper's title to sue under the original contract of

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<sup>24</sup> Yuzhuo Si, *the uniformity of international transport law*, 1<sup>st</sup> edn (Beijing Normal University Publishing Group, 2012), 320-321;

<sup>25</sup> As addressed by the Law Commission, one important aim of the Act is to prevent "trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers." See Law Commission and Scottish Law Commission Law Commission, *Rights of Suit in respect of Carriage of Goods by Sea*: Law Com No.196; Scot Law Com No.130 (1991), para 2.43

<sup>26</sup> Yu Guo, "Shipper's right of sue against the carrier after assignment of bill of lading" [2010] 6 Annual of China Maritime Law 50, 51

<sup>27</sup> Zhiwen Li, *Hot issues in the Law of International Carriage of Goods*, 1<sup>st</sup> edn (Law Press-China, 2012), 290

<sup>28</sup> Yuechuan Jiang, "Cargo interest's title to sue in the carriage of goods by sea" (Dphil Thesis, Dalian Maritime University, 2011), 130

<sup>29</sup> *Ibid*



carriage should vanish since such a right is transferred together with the bill of lading.<sup>30</sup> Therefore, it is hard to explain how the shipper can still rely on the original contract of carriage to assert the contractual title to sue the carrier after transferring the bill of lading to a third party.

As well as being a matter of contention in academia, the controversy can also be found in judicial practice due to the lack of statutory guidance on the question of whether the shipper who sustains substantial loss or damage after the transfer of the bill of lading can sue the carrier. Different judicial decisions have been given to cases with similar facts. For instance, in *Hainan Tonglian Shipping Company v. Minmetals International Nonferrous Metals Trading Company*,<sup>31</sup> although the shipper (seller) was the party who suffered the actual loss after reaching a settlement with the holder (buyer) of the bill of lading based on the sale contracts, the court held that the contractual right to sue the carrier should be vested in the holder rather than the shipper as the bill of lading had been transferred to the holder with due endorsement when the loss had occurred. In contrast, in *Hunan Huasheng Industrial & Trading Co. Ltd v. Shandong Yantai International Marine Shipping Co. Ltd and Shandong Yantai International Marine Shipping Co. Ltd, Shanghai Branch*,<sup>32</sup> the cargo was rejected by the consignee (buyer) due to the contamination that occurred in transit. Later, the cargo was sent back to the shipper (seller) and the shipper agreed to re-deliver substitute cargo to the buyer. The shipper then brought an action against the carrier to claim indemnity for the cargo loss. The court held that the shipper was entitled to sue the carrier on two grounds: first, the shipper was the party who suffered actual loss as a consequence of the carrier's breach of duty; second, as a party to the original contract of carriage, the shipper was always vested with the contractual right to sue the carrier regardless of whether such a right is transferred to a third party.<sup>33</sup> Similar

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<sup>30</sup> *Ibid*

<sup>31</sup> *Hainan Tonglian Shipping Company v. Minmetals International Nonferrous Metals Trading Company* [1996] 6 Gazette of the Supreme People's Court of the People's Republic of China 1999

<sup>32</sup> *Hunan Huasheng Industrial & Trading Co. Ltd v. Shandong Yantai International Marine Shipping Co. Ltd and Shandong Yantai International Marine Shipping Co. Ltd, Shanghai Branch* (2007) *Selected maritime cases of Shanghai Maritime Court China*, 1<sup>st</sup> edn (Law Press China, 2011) 59-63

<sup>33</sup> *Ibid*, 62-63

reasoning can be found in *Dexing Food Industry Co. Ltd v. China Ocean Shipping (Group) Company*<sup>34</sup> and *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company*.<sup>35</sup>

### **(B) The fundamental loophole in current law**

The aforesaid controversy may be directly attributable to the legislative blank in Chinese law. However, it is submitted that the substantial loophole embedded in the current law may amount to more than that.

As mentioned before, the reason why the shipper needs title to sue the carrier is closely connected with the arrangement in respect of the underlying transaction of goods. In fact, such a connection not only influences the shipper's title to sue after the transfer of bills of lading but also affects the evolution of the legal scheme that governs the transfer of a contractual right to sue the carrier by the bill of lading. In early maritime trade, the bill of lading was not invented as a transferable document until the sixteenth century when sale of goods in transit became common practice.<sup>36</sup> Since then, the bill of lading was viewed as a transferable document that can enable its holder to claim delivery of goods from the carrier.<sup>37</sup> Later, with the development of maritime trade, various commercial modes of cargo transaction were introduced into maritime trade by merchants. Under such a situation, more and more parties began to engage in maritime trade. As a result, the transportation of goods has become an issue that not only involves the original parties to the contract of carriage but also influences a broad range of cargo interests such as a bank financing the underlying sales of goods, the sub-buyer to whom the cargo is resold whilst afloat, etc. These parties have usually suffered substantial risk arising from the carriage of goods

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<sup>34</sup> *Dexing Food Industry Co. Ltd v. China Ocean Shipping (Group) Company* (1999) 9 Annual of China maritime trial, 382-383

<sup>35</sup> *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company* (2012) Guangdong Province, High court, Civil Judgment, No.104. Feifei Deng, "Shipper's right to sue in relation to carriage of goods by sea: the approach of Chinese court" (2013) 19 JIML196, 197

<sup>36</sup> Michael D. Bools, *The Bill of Lading, a document of title to goods, an Anglo-American Comparison*, 1<sup>st</sup> edn (LLP, 1997), 4

<sup>37</sup> *Ibid*

but might not be able to sue the carrier to recover their loss or damage as a consequence of the carrier's default.<sup>38</sup> Such a result is mainly attributed to the principle of privity of contract by which a third party to the contract is neither able to impose any contractual obligation nor is entitled to enforce any contractual right.<sup>39</sup> To cope with this problem, many common law approaches<sup>40</sup> and statutory rules<sup>41</sup> have been developed to enable the third party to the contract of carriage to sue the carrier in the contract for indemnity. As a shipping document that is issued by the carrier and then passed from one cargo interest to another, the bill of lading is viewed as a device that can bypass the privity of the contract of carriage and transfer the contractual right to sue to a third party to the contract. Therefore, from the historical perspective, the development of a legal scheme on transfer of rights by the bill of lading cannot be viewed in isolation from the underlying transaction of goods. In this sense, despite the fact that the rules governing cargo interests' title to sue are established under the law covering carriage of goods by sea, the construction of these rules should properly reflect the potential connection with the underlying transaction of cargo.

However, the aforesaid connection cannot be found in Article 78 of CMC 1993, neither from the express wording nor in an implied way. Although the current law recognizes that the contractual relationship between the holder and the carrier is governed by the bill of lading, and such an approach is in line with mercantile custom and most national legislation such as that of the UK and the US,<sup>42</sup> it appears that the legislator simply mechanically borrowed this approach from the foreign experience without taking account of the inherent connection between the cargo interests' title to sue and the underlying transaction of goods. This constitutes the substantial loophole

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<sup>38</sup> Bernard Eder, Howard Bennett, Steven Berry, David Foxton, Christopher Smith, *Scrutton on Charterparties and Bills of Lading*, 22<sup>nd</sup> edn (Sweet & Maxwell Ltd 2011), 40, see also *Thomson v. Dominy* (1845) 14 M&W. 403; *Howard v. Shephard* (1850) 9 C.B. 297

<sup>39</sup> Vernon V. Palmer, *The path to Privity: the History of Third Party Beneficiary Contracts at English Law*, 1<sup>st</sup> edn (The Lawbook Exchange, 1992), 1

<sup>40</sup> These common law approaches include agency, implied contract, assignment, etc. See Simon Baughen, *Shipping Law*, 4<sup>th</sup> edn (Routledge-Cavendish 2009), 35-40

<sup>41</sup> The statutory rules mentioned in this article are COGSA 1992 and FBLA 1994

<sup>42</sup> YuGuo, *The nature of maritime law, Chinese experience and practice*, 2<sup>nd</sup> edn (peking university press, 2005), 163. For details of the UK law and the US law, see discussion below in IV (a) and (b)

in the CMC 1993 which gives rise to the legislative gap should a shipper assuming a substantial loss or damage after the transfer of bill of lading be entitled to sue the carrier.

#### IV SOLUTIONS IN OTHER JURISDICTIONS

As discussed above, the current approach with respect to the title to sue under CMC 1993 is to some extent similar to that found in UK law and US law. However, unlike Chinese law, both UK law and US law reflect the inherent connection with the underlying transaction of goods although the approaches they have adopted are different. This is particularly the case where the shipper's title to sue after the transfer of the bill of lading is involved. The UK and US approaches are examined here in order to consider potential ways to close the legislative loophole and solve the outstanding problem in respect of the shipper's title to sue in the future Chinese Maritime Law. In addition, to ensure that the proposed solution is in line with the latest developments in international law, the recent approach suggested by UNCITRAL is also reviewed.

##### (A) The UK approach

In the UK, most issues in relation to the cargo interests' title to sue are covered by the COGSA 1992. The basic position established under the COGSA 1992 is that the contractual right to sue shall only subsist in one cargo interest.<sup>43</sup> The rationale for such an arrangement can be found in a Law Commission report which asserted that if the shipper was allowed to retain the title to sue after transferring the bill of lading, then all the intermediate holders should have the same right.<sup>44</sup> This may expose the carrier to multiple and unpredictable cargo claims brought by more than one cargo claimant.<sup>45</sup> To avoid such an undesirable result, the COGSA 1992 provides that once the shipper transfers the bill of lading to a third party to the contract of carriage, he

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<sup>43</sup> Rhidian Thomas, "A comparative analysis of the transfer of contractual rights under the English Carriage of Goods by Sea Act 1992 and the Rotterdam Rules" [2011]17 JIML 437, 442

<sup>44</sup> *Supra*, fn. 25(ii)

<sup>45</sup> *Ibid*, (ii) (iii)

will lose the contractual right to sue the carrier.<sup>46</sup> However, it does not mean that the shipper under such a situation has no remedy under the COGSA 1992 since Section 2(4) of COGSA 1992 provides that:

Where, in the case of any document to which this Act applies—(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but (b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.<sup>47</sup>

This rule particularly targets the situation that arises when the party who actually sustains the loss or damage is not the same as the party that lawfully holds the bill of lading. Although Section 2(4) employs a general description of the parties that may suffer from such a problem, it is submitted that this may often be confronted by the shipper as a consequence of the joint action of the carrier's default and the specific arrangement in respect of the cargo transaction.<sup>48</sup> In this sense, although Section 2(4) does not expressly mention the transaction of goods, the construction of the rule reflects the legislator's awareness about the potential connection between the assumption of the cargo loss or damage and the performance of the underlying transaction of goods. By virtue of Section 2(4), the shipper who sustains the substantial loss or damage after the transfer of the bill of lading may rely on the lawful holder to bring a contractual action against the carrier. However, it is questionable the extent to which such an action can be actually established in practice

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<sup>46</sup> This can be seen from COGSA 1992, s2 (1) "Subject to the following provisions of this section, a person who becomes (a) the lawful holder of a bill of lading;" section 2(5) "Where rights are transferred by 'virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives— (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage."

<sup>47</sup> COGSA 1992, s 2(4)

<sup>48</sup> See discussion in Part II

as such an action to a large extent depends on the holder's cooperation.<sup>49</sup> Indeed, in the event that the holder himself does not suffer any loss or damage, the holder may be reluctant to provide such cooperation to initiate an action for the benefit of another party.<sup>50</sup> In this respect, the practical value of Section 2(4) may be diluted.

### **(B) The US approach**

The US legislation does not expressly provide for the issues in respect of the cargo interests' title to sue. However, conclusive guidance on these issues can be found in the Federal Uniform Bills of Lading Act 1994 (hereinafter referred to as FBLA 1994). In accordance with §80105 of FBLA, the negotiation of the bill of lading can make the carrier liable to the person with whom the negotiation was conducted as if the bill of lading were issued to that person.<sup>51</sup> From this rule, it is clear that the person to whom the bill of lading is negotiated is entitled to sue the carrier in contract.<sup>52</sup> However, similar to current Chinese law, this rule does not mention the shipper's legal status after negotiation of the bill of lading. Notwithstanding, a definite answer can be found in judicial practice where it is suggested that the shipper in such a situation usually loses the contractual right to sue the carrier<sup>53</sup> although the consequence may be different if the shipper can prove that he is a 'real party in interest' to the claim.<sup>54</sup>

According to the 'real party in interest' rule under the US law, any action is required to be 'prosecuted in the name of the real party in interest'.<sup>55</sup> In the context of a cargo

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<sup>49</sup> Charles Debattista (ed.), "Cargo Claims and Bills of Lading" in Institute of Maritime Law" *Southampton on Shipping Law* (Informa, 2008), 95.

<sup>50</sup> *Ibid*

<sup>51</sup> FBLA 1994, §80105 (a)(2) "the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person."

<sup>52</sup> William Tetley, *Marine Cargo Claims*, vol, 1, 4<sup>th</sup> edn (Thomson Carswell 2008), 471

<sup>53</sup> See *Farbwerke v. Don Nickey* 589 F.2d. 795 at 797, 1979 AMC 1668 at p.1670 (5 Cir. 1979); *Thyssen Steel v. Palma Armadora* 1984 AMC 1133 (S.D.N.Y 1983), 741 F.2d 1441 (2 Cir.1984); *Cargill, Inc. v. GOLDEN CHARIOT MV*, 31 F.3d 316 (5th Cir. 1994). It should be noted that under US law, the real reason for the extinguishment of shipper's title to sue after the transfer of the bill of lading is the lack of title to goods. Since the seller/shipper's title to the goods usually passes upon their delivery to the carrier at the port of loading, and the bill of lading will surely be negotiated after that timing, the shipper normally loses the title to sue the carrier after negotiation of the bill of lading. See William Tetley, *Marine Cargo Claims*, vol, 1, 4th edn (Thomson Carswell 2008), p. 471-473

<sup>54</sup> *Supra*, fn.52, 475

<sup>55</sup> US Federal Rule of Civil Procedure Rule 2010, s17 (a)

claim, the interest is construed as the ‘actual and substantial interest’ rather than the ‘nominal, formal, or technical interest’ to the subject matter.<sup>56</sup> Basically, the ‘real party in interest’ rule requires the claimant to have certain proprietary interest in goods.<sup>57</sup> Such an interest is usually construed as either the title of cargo<sup>58</sup> or other proprietary rights such as lien or pledge.<sup>59</sup> In addition, once it can be sure that there is no possibility of dual recovery to the claimant,<sup>60</sup> the court may even adopt a broader view to interpret the legal nature of the interest. For instance, in *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al.*,<sup>61</sup> although both the risk and title of goods were passed to the buyer (consignee) at the time the cargo was damaged in transit, the seller (shipper) was held to be a ‘real party in interest’ as he ultimately assumed a substantial loss or damage owing to the price deduction agreement reached between the seller and the buyer.<sup>62</sup> With such an agreement, the only party who sustained the cargo loss was the seller (shipper). In view of such a fact, the court held that the seller (shipper) was entitled to sue the carrier in contract.<sup>63</sup> From this case, it can be seen that the US court tends to view the exclusive assumption of cargo loss or damage as a kind of interest for the claimant who should be the ‘real party in interest’ whilst at the same time conceiving such an assumption of loss or damage as a decisive factor to determine the title to sue of the party who has parted with the title to goods, such as the shipper who sustains loss or damage after negotiation of the bill of lading. Under such a situation, an enquiry into the performance of the underlying cargo transaction is inevitable since this is crucial to examine whether the shipper is the party who ultimately and exclusively assumes the cargo loss or damage.<sup>64</sup> In this sense, the legal requirement of ‘real party in interest’

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<sup>56</sup> *Sumimoto Corp. of America v. M/V Saint Venture*, 683 F.Supp. 1361, 1368 (M.D.Fla.1988)

<sup>57</sup> Tomas J Schoenbaum, *Admiralty and Maritime Law*, 3<sup>rd</sup> edn (West Group, 2001), 535

<sup>58</sup> *Supra*, fn.52, 471-474

<sup>59</sup> *Munson S.S. Line v Rosenthal (The Pan America)* 6 F.Supp.374, 1934 AMC 46 (S.D.N.Y.1933) In this case the consignee, who had a lien or special property to the cargo rather than the title to the cargo, was held to be a qualified claimant.

<sup>60</sup> *Supra*, fn.52, 476

<sup>61</sup> 296 F. Supp 2d 91, 2003 AMC 670 (D.P.R.2003)

<sup>62</sup> *Ibid*, 100

<sup>63</sup> *Ibid*

<sup>64</sup> For example, in the aforesaid cause *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al* 296 F. Supp 2d 91, 2003 AMC 670 (D.P.R.2003), although the cargo was damaged due to the carrier’s default, the direct reason for the shipper (seller)’s assumption of loss was the variation of the sale contract (price reduction) between the shipper (seller) and the consignee (buyer). See also discussion in Part II.

reinforces the connection between the shipper's title to sue and the underlying transaction of goods.

### **(C) The UNCITRAL approach**

At the international law level, the title to sue and its transfer by the bill of lading was first addressed by the UNCITRAL Drafts.<sup>65</sup> Although those rules were finally omitted from the adopted final draft (the Rotterdam Rules) due to significant disagreement between the delegations from different jurisdictions, it does not mean that the UNCITRAL approach itself is without any value. As an approach envisaged to harmonize the law across different jurisdictions, the UNCITRAL approach may be regarded as a hybrid product that deliberately combines the characters of many jurisdictions. In this sense, the UNCITRAL approach may provide a model for the jurisdictions where the issues in respect of title to sue have not been explicitly provided by the national law.<sup>66</sup>

A significant characteristic of the UNCITRAL approach on the cargo interests' title to sue is that it underlines the link between the assumption of loss or damage and the implementation of the contractual right to sue the carrier. This is particularly the case in the situation where the claimant is a party who sustains loss or damage but fails to meet the legal standard as a holder.<sup>67</sup> According to the UNCITRAL Drafts, if a

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<sup>65</sup> The UNCITRAL approach mentioned herein is the approach suggested by a series of UNCITRAL Drafts. For details, see *Supra*, fn. 5

<sup>66</sup> Wenjun Wang, *the legal basis to establish a right of suit relating to bill of lading*, 1st edn (Law Press China, 2010), 181-192; See also Francesco Berlingieri, "Revisiting the Rotterdam Rules" [2010] LMCLQ 583, 639, 'while Article 57 sets out principles that are obvious in a great many jurisdictions, nevertheless it may be of some assistance in those jurisdictions where they are not so obvious and, therefore, may ensure a greater uniformity'. Although the author's original argument only refers to the Article 57 (transfer of rights) under the Rotterdam Rules, it is submitted that such an argument should also apply to the rules under the UNCITRAL Draft, as the Drafts share the same purpose as the Rotterdam Rules.

<sup>67</sup> Under the UNCITRAL approach, the shipper may fall within the definition of the holder. For example, according to art.1.12 of United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.21), "'Holder' means a person that: (a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and (b) either:(i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed.." In view of this rule, if the shipper for some reason re-obtains the bill of lading from the holder, even at this time the bill of lading was not transferred in a proper way, for instance, without the indorsement of the holder, the shipper may still acquire the legal status as holder if he is named as shipper on the bill of lading. Under such a situation, the shipper should be able to sue the carrier in contract as a holder. Nevertheless, the aforesaid rule may not apply to the situation where the shipper performs the obligation as an actual shipper but is not named as the shipper on the bill of lading. For discussion of



person, besides proving his own loss or damage caused by the carrier's breach of duty can also prove that the holder does not suffer the same loss or damage, then that person is permitted to sue the carrier directly even without possession of the bill of lading.<sup>68</sup> As can be seen from this rule, the proof of loss or damage may act as a substitute for possession of the bill of lading to become an independent factor that enables the cargo interest to sue. Although the US courts may arrive at the same conclusion in judicial practice,<sup>69</sup> the UNCITRAL approach is the first legislative attempt to treat the assumption of loss or damage as an independent factor that entitles the cargo interests to sue the carrier. In so doing, the shipper who suffers a substantial loss or damage but fails to fulfil the legal requirement as a holder may acquire a better position than before as the shipper can sue the carrier directly by virtue of an explicit provision rather than relying on an action brought by the holder<sup>70</sup> or an action subject to the judges' discretion.<sup>71</sup> Such a result reflects the legislators' consideration of the cargo interests' title to sue within the entire picture of maritime trade rather than carriage of goods alone since cargo interests' assumption of loss or damage is usually a result of mixed reasons regarding both the cargo transaction and transportation.<sup>72</sup> In this sense, such a consideration highlights the established relationship between the implementation of title to sue the carrier and the underlying transaction of goods. It also shows the drafters' intention to protect the cargo interests' substantial interest

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this type of shipper, see Part II of this article.

<sup>68</sup> United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP.21), 8 January 2002, Article 13.3 "In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage." ; United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP32) 4 September 2003, article 65 "In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is not the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made." United Nations Commission on International Trade Law Draft Instrument on the Carriage of Goods [Wholly or partly][by Sea] (A/CN.9/WG.III/WP56) 8 September 2005, Article 68 (b) "When the claimant is not the holder, must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made."

<sup>69</sup> *Marine Office of America Corp., et al., v. LILAC Marine Corporation, et al* 296 F. Supp 2d 91, 2003 AMC 670 (D.P.R.2003) The verdict of this case shows that such a kind of conclusion would be made if the court can confirm that there is no danger of dual recovery to the claimant. For details, see discussion in Part IV (b) The US approach

<sup>70</sup> This is the case under the UK law. See COGSA 1992, s2(4)

<sup>71</sup> This is the case under the US law, under which the courts need to consider whether the shipper is the "real party in interest."

<sup>72</sup> For discussion of these reasons, see Part II of this article.

rather than mechanically conferring the contractual title to sue on a certain single party such as the holder of the bill of lading.<sup>73</sup>

#### **(D) Comparative notes**

The aforesaid approaches all reflect the legislators' awareness of the established connection between the cargo interests' need for a title to sue the carrier and the underlying transaction of goods, and embed such a connection into legislation through the introduction of a certain interest in relation to goods into the rules covering the issues of title to sue. In the cases where shippers need to sue the carrier after the transfer of the bill of lading, such an interest is usually construed as the assumption of loss or damage due to the breach of duty under the contract of carriage. However, the extent to which assumption of loss or damage can affect the shipper's title to sue after the transfer of the bill of lading differs between these approaches. Under the COGSA 1992, although the phenomenon that the party who sustains an actual loss or damage is not always the lawful holder of the bill of lading is noted by the law, this party, for instance, the shipper who assumes loss or damage after transferring the bill of lading to the endorsee/consignee, is still not vested with an independent cause of action to sue the carrier. In contrast, under the US law and the UNCITRAL Drafts, the shipper may sue the carrier directly by proving the exclusive assumption of loss or damage no matter whether the bill of lading is in his hands or not. It is submitted that the true reasons for such a difference are deeply rooted in the underlying purposes of these legislations related to certain economic considerations.

According to the Law Commission, one prominent aim of the COGSA 1992 is to prevent 'trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers'.<sup>74</sup> With such an aim, the COGSA 1992 shows its priority

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<sup>73</sup> United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work its eleventh session (A/CN.9/526), 4 April 2003, para 152; United Nations Commission on International Trade Law, Report of Working Group III (Transport Law) on the work its eighteenth session (A/CN.9/616), 27 November 2006, para 117. All these documents suggest that the cargo claimant should have "sufficient interest" to the cargo claim.

<sup>74</sup> *Supra*, fn.25

in protecting carriers from multiple claims rather than ensuring the cargo interests who sustain substantial loss or damage have title to sue the carrier. This is particularly evidenced by Section 2(4) of COGSA 1992 which denies that the party who has parted with the lawful possession of the bill of lading has an independent right of suit even though this party may actually suffer loss or damage as a consequence of the carrier's breach of duty. Such an arrangement is less favourable to the cargo interest such as the shipper who suffered loss or damage after the bill of lading was transferred. However, in combination with the economic background, such an arrangement may not be surprising as it is consistent with the predominant role that the shipping industry plays in the British economy.<sup>75</sup>

Despite the similar legal tradition, unlike the UK the US is commonly deemed as a trading-dominated nation.<sup>76</sup> Compared to the contribution of the trading industry to US GDP, the significance of the shipping industry appears to be secondary and to a large extent it is reliant on the development of trade sectors, especially export trade.<sup>77</sup> With such an economic background, the US FBLA 1994 aims to smooth and

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<sup>75</sup> In history, the British-owned shipping used to dominate the carriage of goods by sea in worldwide range for ages prior to the World War I. Although such a dominant power gradually declined after the two World Wars, today the shipping industry in the UK is still one of the essential domestic industries where "derived demand" generates. For instance, in 2013 the total gross value added contribution of the shipping industry to UK GDP was estimated to be over one third when the wider multiplier impact on the UK economy was counted. In this sense, the carrier-favored arrangement under COGSA 1992 properly reflects the economic *status quo* of British shipping industry. See [S. G. Sturmev](#), *British shipping and world competition*, 1<sup>st</sup> edn (University of London, Athlone Press, 1962) 12; Oxford Economics, "The economic impact of the UK Maritime Services Sector: Shipping" See the website : [http://www.britishports.org.uk/system/files/documents/shipping\\_the\\_economic\\_impact\\_of\\_the\\_uk\\_maritime\\_services\\_sector.pdf](http://www.britishports.org.uk/system/files/documents/shipping_the_economic_impact_of_the_uk_maritime_services_sector.pdf)

<sup>76</sup> As the third largest nation in the world, the US has a vast territory and various natural resources that allow it naturally to excel in developing manufacturing and agriculture. This can be seen from a number of statistic evidence. For example, according to the IMF (International Monetary Fund) report, in 2012 the US achieved the first industrial production and the third Agriculture output in the world (behind China and India). World Economic Outlook Database, see the website: <http://www.imf.org/external/pubs/ft/weo/2012/01/weodata/index.aspx>; The prosperity of these industries greatly encourages the export trade. According to statistics issued by the WTO (World Trade Organization), in 2013 the US was the world's second biggest merchandise export trader, whereas the UK was ranked eighth (The first is China). WTO Statistic Database, see the website: <http://stat.wto.org/Home/WSDBHome.aspx?Language=>

<sup>77</sup> This can be seen from evidence in many aspects: first, as suggested by the statistic, about 30 percent of GDP growth between 2009 and 2013 can be attributed to the export growth. In 2013, the contribution of export trade to US GDP amounted to 14 percent, which is far more than the shipping industry (around 8 percent). Second, in the US, the law covering carriage of goods by sea is a "cargo preference laws" which requires that the US-flag ships must carry certain amount of home grown or manufactured products. In view of these facts together, it may be concluded that the main purpose of developing shipping industry in the US is to serve the exporting trading. See US Department of Commerce, *The Role of Exports in the United States Economy-An economic report by the US Department of Commerce* (May 13 2014), 2-4; See also The Navy League of the United States, *America's Maritime Industry-A report by the Navy League of the United States*, 6

safeguard the transactions of goods that are served by the bill of lading.<sup>78</sup> This may explain why under the US law the cargo claimant is required to be the ‘real party in interest’ and may be allowed to sue the carrier in contract even though he has parted with both the title to goods and the lawful possession of the bill of lading. Compared to the UK law, the aforesaid arrangements under the US law provide more security to the cargo interests’ substantial interests as they do not necessarily rely on the holder’s assistance to bring a contractual action against the carrier for claiming loss or damage as is the case under the UK law.

The UNCITRAL approach is somewhat similar to that of the US law as it focuses on cargo interests’ substantial interest to the claim and requires the claimants (except the holder) to prove their loss or damage when exercising the title to sue.<sup>79</sup> However, in comparison with the UK law and the US law, the UNCITRAL approach attaches greater importance to the impact of the assumption of loss or damage on cargo interests’ title to sue. According to the UNCITRAL approach, the assumption of loss or damage suffices to enable the cargo interest to sue the carrier in contract if the cargo interest can prove that no one else suffers the same loss or damage.<sup>80</sup> Such an arrangement to a large extent may be attributed to the UNCITRAL’s aim to harmonize maritime practice globally.<sup>81</sup> To achieve such an aim, the UNCITRAL adopted the “Trade Holistic Perspective” when setting out the rules covering carriage of goods by sea.<sup>82</sup> According to the “Trade Holistic Perspective”, the transaction of goods is the *raison d’être* of the shipping industry. Therefore, the law covering carriage of goods by sea should be able to facilitate the underlying cargo trading.<sup>83</sup> This may explain why the UNCITRAL Drafts statutorily recognizes the assumption of cargo loss or

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<sup>78</sup> *Supra*, fn.36, 63 and 200

<sup>79</sup> *Supra*, fn.68

<sup>80</sup> *Ibid*

<sup>81</sup> Alexander Von Ziegler, “*Rotterdam Rules and underlining sale contract*”, CMI year book 2013 PART II - THE WORK OF THE CMI, p.273 at p.276-277

<sup>82</sup> Basically, the “Trade Holistic Perspective” asserts that the carriage of goods should be viewed within the context of underlying trade, which means that the law governing carriage of goods by sea should not be limited to cover the transport issues, but should extend to govern some trade issues that are in relation to the carriage of goods by sea. For more details of the perspective, see Alexander von Ziegler, Alexander Von Ziegler, “*Rotterdam Rules and underlining sale contract*”, CMI year book 2013 PART II - THE WORK OF THE CMI 273, 275

<sup>83</sup> *Ibid*, 277

damage as an alternative cause of action for the cargo interest who sustains loss or damage but at the same time loses the lawful possession of the bill of lading as such an arrangement will make the cargo interest easier to recover his loss or damage that usually arises from the interaction of cargo transaction and transportation. In addition, the UNCITRAL's attempt to separate the implementation of title to sue from the physical possession of the bill of lading to some extent caters to the rising demand for substituting the paper bill of lading with the electronic equivalent. In fact, an important driving force of envisaging the UNCITRAL Drafts and their final product (the Rotterdam Rules) was to facilitate the wide application of electronic bills of lading in maritime trade.<sup>84</sup> In traditional practice based on paper documents, the bill of lading is vested with the function of transferring the title to sue by virtue of the fact that the bill can be physically possessed and presented. Consequently, when there is a lawful transfer of the bill of lading, the title to sue will be exclusively acquired by a singular cargo interest and normally the carrier will not face multiple claims from the same subject matter. However, in the case where an electronic equivalent to the bill of lading is involved, such a kind of exclusivity may not be guaranteed as the electronic equivalent is not able to be physically possessed, presented and endorsed.<sup>85</sup> The current method to overcome such a problem includes the employment of a "digital signature" or "private key" to limit access to the electronic equivalent.<sup>86</sup> However, in the long run, it is unclear to what extent these methods can make the electronic equivalent achieve the exact same function as the bill of lading.<sup>87</sup> Furthermore, the security of the electronic equivalent is also questioned as the unauthorized access may happen in the electronic environment.<sup>88</sup> In view of all these factors, the UNCITRAL approach to divorce the transfer and implementation of contractual title to sue from physical possession of the bill of lading may be regarded as a constructive attempt to

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<sup>84</sup> Michael F. Sturley, "Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules" in Rhidian Thomas (eds), *A New Convention for the Carriage of Goods by Sea-The Rotterdam Rules*, 1<sup>st</sup> edn (Lawtext Publishing Ltd 2009), 27

<sup>85</sup> Caslav Pejovic, "Document of Title in Carriage of Goods By Sea: Present Status and Possible Further Directions" (2001) JBL 461, 493

<sup>86</sup> Torsten Schmitz, "*The bill of lading as a document of title*" (2011) Journal of International Trade Law & Policy 255, 269

<sup>87</sup> *Ibid*, 270

<sup>88</sup> *Ibid*

pave the way to encourage the use of electronic bills of lading. By proving that the claimant is the only party who sustains the loss or damage, the exclusivity of the claimant's contractual title to sue and the carrier's liability arising therefrom would be maintained even in the electronic environment.

To sum up, the UK law, the US law and the latest UNCITRAL Drafts indicate that the impact of cargo interests' substantial interest on their title to sue the carrier is growing. In particular, for the shipper who sustains loss or damage after the transfer of the bill of lading, the US law and the UNCITRAL Drafts even allow the shipper to independently exercise the contractual right to sue the carrier if he is able to prove that no one other than himself suffered such a loss or damage. This suggests that the shippers' interest or in other words in most situations the exporters' interest receives better protection under the US law and the UNCITRAL Drafts than their British counterparts who may only be able to rely on the holder's cooperation to claim indemnity from the carrier. Such a consequence may be attributed to two factors: one is the legislators' orientation on balancing the interest between carrier and trader; the other is the emerging trend of replacing a paper bill of lading with an electronic one.

## **V THE POTENTIAL WAY TO REFORM CHINESE MARITIME LAW**

By reviewing the UK law, US law and the UNCITRAL Drafts, it can be seen that the outstanding problem in respect of the shipper's title to sue under current Chinese law can be solved in two ways: either providing that the shipper can rely on the holder's action to claim indemnity from the carrier,<sup>89</sup> or conferring an independent right of suit to such a shipper.<sup>90</sup> Since both of the ways reflect certain economic concerns on balancing relevant stakeholder's interests, and the latter may also show consideration on facilitating electronic maritime trade, these economic concerns should be evaluated in the context of contemporary China in order to find out which way is more appropriate to be adopted in maritime law reform in China. Based on this, whether the

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<sup>89</sup> See discussion in Part IV, (A) the UK approach

<sup>90</sup> See discussion in Part IV, (B) the US approach and (C) The UNCITRAL approach

proposed reform can be accommodated into China's legal environment should also be analyzed so as to maintain the coherence and consistency of the entire legal system in China.

### **(A) Balance the interest between carrier and trader**

It is submitted that the CMC 1993 is more concerned with the carriers' interests. This can be seen from the general principle of the Maritime Code which provides for "the development of maritime transport" as an aim which is listed before the development of trade.<sup>91</sup> Such a priority can also be observed from the construction of Chapter 4 of the Maritime Code which is centred on the issue of the carrier's right and liability in carriage of goods by sea whereas the cargo interests' rights are not properly addressed.<sup>92</sup> Such an arrangement may be meaningful during the period when the CMC 1993 was drafted as at that time the under-developed shipping industry urgently needed legislative support.<sup>93</sup> However, it might no longer be the case in contemporary practice. Through over twenty years of development supported by the government, the shipping industry in China has already established itself as a big player in the international shipping market and is able to serve the needs of cargo delivery that arise from international trade.<sup>94</sup> Also, with the development of marine technology and the ship-building industry, there are now far fewer dangers in shipping than there were twenty years ago.<sup>95</sup> In this sense, the economic rationale for preferential legislative support for the carrier no longer appears to be relevant. On the other hand, during the past decades, China's international trade, particularly export trade, has also undergone rapid growth.<sup>96</sup> Nevertheless, a significant proportion of

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<sup>91</sup> CMC 1993, art 1 "This Code is enacted with a view to regulating the relations arising from maritime transport and those pertaining to ships, to securing and protecting the legitimate rights and interests of the parties concerned, and to promoting the development of maritime transport, economy and trade."

<sup>92</sup> Tiansheng Li, *The balance of interest between cargo owner and carrier*, 1<sup>st</sup> edn (Law Press China 2012), 308

<sup>93</sup> *Ibid*, 308-309

<sup>94</sup> In 2011, China had a merchant fleet whose loading capacity amounted to 12 billion tonnes. This figure is 8% of the total loading capacity of the world's merchants, and ranks it in fourth position globally. Moreover, according to the statistics released by UNCTAD, China's biggest shipping company COSCO has become the world's fifth biggest liner shipping company. See Deloitte, *Deloitte's report on the development of shipping industry in China* (2013), 6

<sup>95</sup> *Supra*, fn. 92, 311

<sup>96</sup> The ratio of China's dependence on import and export trade was only around 10% in the early 1980s. This figure has greatly increased since China joined the WTO, which reached 70% in 2004 and thereafter has held at around 50%-70% annually. In 2013, China's cargo export was ranked as the first in global trade. See Shengcai

China's exporting merchants are still small and medium-sized enterprises that find it difficult to cope with the legal and commercial risks that arise from cargo trading and shipping.<sup>97</sup> As discussed in Part II, these parties usually perform shipper's obligations but in many situations are hardly able to rely on CMC 1993 to safeguard their interests as the current law keeps silent on their title to sue to the carrier.<sup>98</sup> In view of such facts, the future Maritime Law should concern itself more with the export traders' right in carriage of goods by sea so as to re-balance the interest between trader and carrier. This also suggests that, when envisaging the rules that cover the shipper's title to sue after the transfer of the bill of lading, the legislator should ensure that the law facilitates the shipper to recover their loss or damage caused by the breach of duty under the contract of carriage. Such an orientation is quite close to the US law and the UNCITRAL Drafts under which the exclusive assumption of cargo loss or damage may be deemed as an independent cause of action so as to protect certain cargo interests' (for example, the shipper who sustains loss or damage after the transfer of bill of lading) substantial interest and safeguard the smooth performance of the underlying cargo trading.

Although the approach which allows the shipper (export trader) who sustains loss or damage after the transfer of bill of lading to sue the carrier in contract may coincide with the economic *status quo* of China's export trade, to guarantee the fairness of the law, the carrier's interest, or more specifically whether the aforesaid approach would expose the carrier to the risk of multiple claims should be examined. Such a concern may arise on the same ground given by the UK Law Commission and the Scottish Law Commission which rejects the presumption that the shipper is entitled to retain the contractual right to sue the carrier. Pursuant to the Law Commission's argument, if the shipper is allowed to do so, then all intermediate holders would be vested with such a right using the same rationale.<sup>99</sup> This may increase the number of people who

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Zeng, "Analysis on China's reliance on foreign trade" (2008) 19 Journal of north economy 45, 47-50; WTO Statistic Database, see the website: <http://stat.wto.org/Home/WSDBHome.aspx?Language=>

<sup>97</sup> Shengcai Zeng, "Analysis on China's reliance on foreign trade" (2008) 19 Journal of north economy 45, 48

<sup>98</sup> See discussion in Part II

<sup>99</sup> *Supra*, fn.25, (i)



can sue the carrier, which is an undesirable consequence to the carrier.<sup>100</sup> It should be noted that such a consequence may happen under the UK law since the law does not require that the cargo claimant has to be the person who actually sustains loss or damage. Pursuant to COGSA 1992, normally the party is deemed to be vested with a contractual right to sue the carrier once such a party becomes the lawful holder of the bill of lading, regardless of whether or not the loss or damage is actually on his or her side.<sup>101</sup> However, this is not the case in Chinese law. According to the Chinese Contract Law, if a contracting party fails to perform or renders non-conforming performance and the other party has sustained loss or damage therefrom, the breaching party shall pay the damages.<sup>102</sup> This rule tends to indicate that the implementation of the title to sue for claiming indemnity should always be accompanied with the actual assumption of loss or damage.<sup>103</sup> Such an indication is underlined by the Civil Procedure Law which provides that “the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case when bringing an action against the defendant”.<sup>104</sup> In view of the aforesaid rules, the cargo interest’s contractual right to sue the carrier for claiming indemnity would only be upheld by the court if the claimant were able to prove that it was he who sustained the loss or damage for which he intended to get remedy from the carrier.<sup>105</sup> Under such a premise, there is little possibility that the carrier would face the multiple claims for the same loss or damage as the cargo interests would usually negotiate with each other and decide who ultimately assumes such loss or damage before bringing an action to sue the carrier for indemnity.<sup>106</sup> This means that when the dispute is submitted to the court, normally there will only be one party who actually suffers the loss or damage. If such a fact can be proved by the shipper who intends to sue the carrier after the transfer of the bill of lading, there will be no extra risk imposed on the

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<sup>100</sup> *Ibid*

<sup>101</sup> COGSA 1992, s 2 (1), s 2 (4); See also *Pace Shipping Co Ltd of Malta v Churchgate Nigeria Ltd of Nigeria (The ‘Pace’)* [2009] EWHC 1975 (Comm), 1 Lloyd’s Rep. 183, at [30]

<sup>102</sup> Contract law of the People’s Republic of China 1999, article 112

<sup>103</sup> Yuzhuo Si, *The uniformity of international transport law*, 1<sup>st</sup> edn (Beijing Normal University Publishing Group 2012), 327

<sup>104</sup> Civil Procedure Law of the People’s Republic of China 2012, article 108 (1)

<sup>105</sup> Zhiwen Li, *Hot issues in the Law of International Carriage of Goods*, 1st edn (Law Press-China 2012), 303

<sup>106</sup> See discussion in Part II

carrier as other parties, even the holder of the bill of lading, normally lack both the legal standing and the motivation to sue if they do not actually assume loss or damage.

Therefore, from the point of view of balancing the interest between carrier and trader, providing the assumption of the cargo loss or damage as an independent cause of action for the shipper meets both the trader and carrier's expectation on the cargo claims.

### **(B) The impact of e-commerce on maritime trade**

As shown from the analysis of UNCITRAL Drafts, an underlying reason for the UNCITRAL Drafts to treat the assumption of substantial loss or damage as an independent cause of action is to legally pave the way for a wide use of electronic bills of lading in maritime trade. In fact, the trend of replacing the paper bill of lading with the electronic equivalence is also growing in China. This can be seen from a series of efforts that have been made at both the commercial level and the legislative level to bring the electronic bill of lading into maritime practice.<sup>107</sup> Notwithstanding, the CMC 1993, which is the most important statute governing the usage of bills of lading in maritime trade, fails to provide any guidance on the legal effect of electronic bills of lading. It appears that such a legislative blank cannot properly serve the emerging demand for electronic bills of lading in commercial practice and many uncertain legal problems may arise from this.<sup>108</sup> As to the specific problem in respect of the cargo interests' title to sue, since such a right can hardly be transferred and

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<sup>107</sup> For efforts at commercial level, in 2000, one of the major Chinese shipping companies COSCO signed up to the Bolero Association, which is one of most successful platforms for the operation of the electronic bill of lading. Since 2013, Bank of China has established a cooperative relationship with the Royal Bank of Scotland (RBS) to use the Bolero system and has successfully completed its first electronic presentation of documents via the Bolero platform. At the legislative level, the Electronic Signature Law was enacted in 2005. This legislation provides a general legal basis for the use of electronic shipping documents in China.

<sup>108</sup> For example, those outstanding problems include: whether an electronic signature complies with the requirement regarding the signing of a bill of lading provided by CMC 1993; whether an electronic bill of lading is admissible as evidence in courts; how to make the electronic bill of lading achieve functional equivalent to the paper bill of lading, etc. See W.H.Chen, "E-commerce all at sea: China welcomes digital bill of lading under the Electronic Signature Law 2005" (2006) 3 OKLA. J.L. & TECH 31, 41

exercised by virtue of physical handling of the electronic bill of lading,<sup>109</sup> establishing a rule in the future Chinese maritime law that allows the party who sustains substantial loss or damage but is without physical possession of the bill of lading to sue may be deemed as a positive step to support the transition from the traditional paper document based trade to the paperless one.

**(C) The legal standing for the shipper's contractual right to sue after the transfer of a bill of lading under Chinese law**

Although it appears that the approach that allows the shipper to sue after the transfer of the bill of lading is coherent with the *status quo* of China's maritime trade, it is still arguable whether such an approach can be properly accommodated into China's legal environment. It could be argued that the shipper may exercise the title to sue on the basis of the original contract of carriage under which he is usually a contracting party.<sup>110</sup> One may argue that this is the correct way to clarify the origin of the shipper's title to sue but it does not help to explain why the contractual title to sue, which derives from the original contract of carriage, can be vested in two parties (shipper and the holder) at the same time.<sup>111</sup> Despite this, it is submitted that the aforesaid dilemma may only exist at the theoretical level and hardly ever happens in practice. As discussed before, in the context of Chinese law only the party who actually assumes a substantial loss or damage has the incentive and legal standing to claim indemnity from the carrier.<sup>112</sup> By reviewing the occasions where the shipper has sustained an actual loss, it can be observed that the bill of lading usually ceases to govern the legal relationship between the cargo interest and the carrier when the shipper intends to bring an action against the carrier. For example, in *Huasheng Industrial & Trading Co. Ltd v. Shandong Yantai International Marine Shipping Co. Ltd and Shandong Yantai International Marine Shipping Co. Ltd, Shanghai*

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<sup>109</sup> See discussion in Part IV (D) The comparative notes

<sup>110</sup> *Supra*, fn.35, the appeal judge held that "the status of Haze (claimant) as the original shipper under the contract of carriage had not been changed at all. Haze continued to have the right of suit to claim the cargo loss it actually suffered, even after the bill of lading had been transferred."

<sup>111</sup> *Supra*, fn.18, 130

<sup>112</sup> See discussion in Part V (A) Balancing the interest between carrier and trader

*Branch*,<sup>113</sup> when the cargo was in transit the original bills of lading were withdrawn by the carrier in exchange for the Telegraph Release bill of lading.<sup>114</sup> In fact, such a kind of bill of lading merely represents a manner of delivery rather than an electronic equivalent to the paper bill of lading.<sup>115</sup> In this instance, the only contract governing the relationship between the cargo interest and the carrier was the original contract of carriage. Therefore, as a party to the contract, the shipper should without any doubt have the contractual right to sue the carrier. Likewise, in another case, *PICC Property and Casualty Company Limited of China Shenzhen Branch v China Progress international Forwarding Company*,<sup>116</sup> instead of taking delivery of the cargo, the buyer (endorsee) asked the carrier to return the bill and sent it back to the seller (shipper) without proper endorsement. It can hardly be believed that in this situation the bill of lading was still able to carry any contractual right since the lifecycle of the bill of lading should have been ended at the earlier time when it was surrendered to the carrier in return for the delivery order. As a consequence, the relationship between the carrier and the shipper should be governed by the original contract of carriage rather than the spent bill of lading. The aforesaid cases reveal that there is little possibility for the shipper and the holder of the bill of lading to compete with each other to exercise the contractual right to sue the carrier. Normally, the shipper would intend to initiate such a contractual action only when the bill of lading ceases to give any right to the holder. As a consequence, it does not seem necessary to lock the contractual title to sue with the bill of lading under the circumstance where the cargo claimant is the shipper who sustains a substantial loss or damage after the transfer of the bill of lading.

## VI CONCLUSION

The issue of who is entitled to exercise the title to sue is closely connected with the arrangement regarding cargo transactions between cargo interests. This is particularly

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<sup>113</sup> (2007) Selected maritime cases of Shanghai Maritime Court China, 1<sup>st</sup> edn (Law Press China, 2011), 59

<sup>114</sup> *Ibid*, 60

<sup>115</sup> Wei Wang, *Law and Practice for the Delivery of Goods without presentation of Original Bills of Lading*, 1<sup>st</sup> edn (Law Press, 2010), 145-146

<sup>116</sup> *Supra*, fn.35

the case in the situation where the shipper, who has transferred the bill of lading to the consignee/endorsee but actually sustained a substantial loss or damage, intends to sue the carrier. Legislations governing this issue often indicate different economic concerns. In the UK law, the shipper who has parted with lawful possession of the bill of lading has to rely on the holder's action to claim indemnity from the carrier. The aim here is to prevent the carrier from suffering multiple claims as a consequence of the trafficking of bills of lading. In contrast, in the US law, to protect traders' substantial interest the shipper who sustains actual loss or damage may be allowed to bring a suit against the carrier in his own name although to what extent such a consequence can be achieved to a large extent depends on judges' discretion. The UNCITRAL Drafts resemble US law in this way but statutorily recognizes that the exclusive assumption of cargo loss or damage may enable the party who has parted with lawful possession of the bill of lading to sue the carrier. Such a legislative product can be attributed to the "Trade Holistic Perspective" and the aim of facilitating e-commerce held by the legislators. This goes even further than the US law. By comparing these approaches and analyzing their compatibility with China's economic and legal environment, it may be concluded that the future Chinese Maritime Law should solve the problem in respect of shipper's title to sue by learning from the experience of the US law and the UNCITRAL Drafts. This means that the assumption of actual loss or damage should be expressly provided as an independent cause of action for the shipper and other parties who assume an actual and substantial loss or damage but have parted with lawful possession of the bill of lading. In addition, to prevent the carrier from suffering multiple actions brought by more than one claimant, the future Chinese Maritime Law should set out certain conditions to limit the occasion where the cargo interest can invoke the assumption of loss or damage as an independent cause of action. The condition can be envisaged by reference to the UNCITRAL approach which requires the claimant to prove that he is the only party who suffers the loss or damage for which the action is brought. To be specific, the future rules may be constructed in the following way:

- a) The party who intends to sue the carrier for loss or damage caused by the carrier's breach of duty under the contract of carriage should prove that he is the party who suffered the loss or damage mentioned herein.
- b) In the event that a negotiable transport document or negotiable electronic equivalent is issued and the claimant is the person without being the holder, such a claimant must, in addition to its burden of proof that it suffered a substantial loss or damage that is relevant to a breach of the contract of carriage it must prove that the holder did not suffer such loss or damage.

In this way, the problem in respect of the shipper's title to sue after the transfer of the bill of lading is viewed in a broader context that combines the carriage of goods with the underlying transaction of goods. The legal connector which links the two realms is the assumption of loss or damage. It is believed that such an arrangement will not only close the loophole in the current law but will also exert a positive impact on China's shipping and trading practice in the long run.