May 22, 2012

THE CAUSES AND SOLUTION TO DELIVERY OF GOODS WITHOUT B/L IN CHINA

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ABSTRACT: This paper began with the definition and the types of delivery of goods without B/L. Then to discuss the subjective and objective Causes to the delivery of goods without B/L. and demonstrate the Ways of preventing and remedy to delivery of goods without B/L in China. Finally this paper point out that to legalize the delivery Goods without B/L also is a kind of prospective way to resolve the dilemma of delivery Goods without B/L.

KEYWORDS: Causes and Solution, Delivery of Goods Without B/L

I

INTRODUCTION

Delivery of goods without Bill of lading is a very popular phenomenon in international trade, and it becomes a usual practice for the party as who need change the mode of delivery. It is also a main cause of lawsuit among the marine cases of China. According to the statistics of some scholars in China, The proportion of delivery of goods without B/L is 30% in bulk cargo transportation, up to 50% in container transport, and even 70% in bulk transport of liquid articles, especial in bulk transportation of oil. The cases concerning to delivery without B/L are increasing year by year in the recent 10 years on Chinese admiralty trial. In the recent year the number of cases concerning to delivery without B/L accounting for 5% of the total maritime cases in the Supreme People's Court, as well as at present, China's annual hearing the case of delivery of goods without B/L is equivalent to the sum of other countries around the world.∗Professor Lixin Han


† See Shoujie Liu, Interpretations on Regulations Promulgated by the Supreme People’s Court of P.R.C on Trial of
point out that Delivery of goods without a B/L is a long-existing and hot question, but there is no authoritative conclusion on it till now in China.

This paper began with the definition and the types of delivery of goods without B/L. Then to discuss the subjective and objective Causes to the delivery of goods without B/L, and demonstrate the Ways of preventing and remedy to delivery of goods without B/L in China. Finally this paper point out that to legalize the delivery Goods without B/L also is a kind of prospective way to resolve the dilemma of delivery Goods without B/L.

II

THE DEFINITION AND TYPES OF DELIVERY OF GOODS WITHOUT B/L

A. Definition of delivery of goods without B/L

As for the concept of the delivery of goods without B/L, we can find no explicit definition of it in the laws of most countries and international conventions, except an obligation of delivery against B/L. Meanwhile, in the Maritime Code of the People's Republic of China, ("PRC") such a concept is also unavailable. However, some viewpoints are beginning to emerge during the argument between the theoretical and practical circles of Chinese maritime law. Some scholars based on the literal expression, think it just means to “release the goods without the original B/L”\(^3\), while some others point out it means “the carrier and their agents of goods by sea deliver the goods under the B/L without checking and collecting the original B/L”\(^4\). Someone thinks that it is a typical “mis-delivery”\(^5\), and others consider that it means “after the ship arrives at the port of destination, the carrier, by accepting the consignee’s demand of taking delivery of goods against B/L Copy plus Letter of Guarantee, delivers the goods without the original B/L”\(^6\). Some scholars believe that “it indicates that the carrier issues a certificate of delivery to someone who doesn’t have the original B/L. After the custom clearance and declaration, the non-original B/L holder completely controls, disposes, uses and occupies the goods which are already in a free condition and out of the custom’s supervision and control”\(^7\). Also there is someone who holds that it means “the carriers, actual carriers, their agents and employees can not deliver the goods to the lawful holders of the original B/L because they have delivered the goods without the original B/L”\(^8\). The Provisions of the Supreme People’s Court on certain Issues concerning the Application of law to Trial of Cases of the Delivery of Goods without Production of Original Bills of Lading which promulgated by the Supreme people’s Court of PRC, in its Article 2 stipulates that “delivery of goods without production of original bill of lading means that the carrier, in violating the law or agreement under the contract, delivers the goods without the original B/L and

\(^{3}\) Yuanmin Lin, Philip Yang on Shipping Practice, Dalian; Dalian Maritime University Press, 1995, p. 233.
\(^{6}\) Ting Lei, On the Nature and Legal Liability of Delivery without the Original B/L, China Maritime Trial Annual, 2000, Page123.
damages the rights of the holder of the original B/L. In fact, the definition of carrier including carrier, actual carrier, their agents and employees.”

The definitions above-mentioned can be divided into two categories: narrow and broad sense. Under the narrow sense, it only means that the carrier delivers the goods without the original B/L to someone who has the right to take delivery of the goods. That means the “mis-delivery”, because it refers to someone who doesn’t have the right to take the goods, should be exclude from the definition. In contrast, under the broad sense, just as the name implies, it means delivery without the original B/L, and it should cover the “mis-delivery”. The author is in favor of the broad sense. Therefore, the definition could be that the carrier, actual carrier, their agents and employees, or cargo supervisors, in violating the law or agreement under the contract, delivers the goods without B/L or the original B/L and damages the rights of the holder of the original B/L. And now quite a few scholars also like to give the broad definition.

B. Types of delivery of goods without B/L

Based on the writer’s definition, “Delivery without B/L” could include the following types:

1. delivery against oral or written request but without any guarantee;
2. delivery against Copy B/L;
3. delivery against letter of guarantee issued by good banks, insurance companies, surety companies and creditable corporations;
4. delivery against Copy B/L plus letter of guarantee;
5. delivery against photocopy of the original B/L plus letter of guarantee;
6. delivery without B/L because no B/L has been issued;
7. delivery against B/L which is only reserved for negotiation under L/C;
8. telex release.

III

THE OBJECTIVE CAUSES OF DELIVERY OF GOODS WITHOUT B/L

Generally speaking, the causes of the delivery without B/L can be divided into two types: objective and subjective. The objective causes including the following:

A. Delivery without B/L due to the Dissynchronization of the Circulation between Ships and B/Ls

In the wake of the rapid development of the sailing technology, sailing speed has seen a great growth during international trade and transportation. Sometimes, the ship has already arrived at the destination port while the B/L is still in the bank’s hands. This kind of phenomenon usually occurs in the short-distance ocean transportation, especially in the Sino-Japan and Sino-Korea routes, and delivery against the original B/L often has the result that the goods are undelivered for


a long time. Even in ocean transportation, a ship’s sailing time has tremendously been shortened because of the use of Greyhound and the developed sailing technology. But the circulation of B/L is still in a traditionally complicated and slow way, which obviously can’t meet the modern standards of speed. Under such circumstances, most of the carriers clearly realize that they should insist on delivery against the original B/L, or else they will be confronted with the risk of compensating the huge loss of goods. Although their insistence can prevent them from taking risks, they are losing economic interests which are of more importance, such as the delayed ship’s time schedule, more operation expenses, or even the affect on a subsequent contract. Though there is a “Demurrage Clause” in the contract, it is not always unavailable. So the loss is huge, and so is the consignee. To ensure that the ship’s time schedule is unaffected, by the demand of the consignee for timely delivery, both the carriers and the consignees are searching for a new way of deliver without B/L which actually has deviated from the common course established by the laws and international customs. At the same time, not all the discharging ports are equipped with adequate warehouses and storage yards to accommodate various kinds of goods. Therefore, considering production and sales, the importers often demand a delivery against letter of guarantee and a copy B/L. The carriers, who are completely aware of the risks ahead, sometimes have no choice but accept due to drastic market competition. This phenomenon is more prevalent in container and oil transportation. According to the scholars’ statistics, in the sailing practice, owing to the time difference produced by the fast ship and slow B/L circulation, the carriers often have to deliver goods against letter of guarantee. The proportion of this phenomenon is 15% in liner transport, up to 50% in charter transport, and even 100% in the transport of expensive articles, such as minerals and oil.

B. Delivery without B/L due to Statutory Provisions and Port State Requirements

The statutes of some countries stipulate that the goods imported should first delivered to port or customs, then the port or custom delivers them to the consignee. In such situation, the carriers have to deliver without B/L. This phenomenon is extremely common in some states of middle South America. The carriers have fulfilled their duty of transport after they deliver the goods to customs and get the customs’ confirmation. Late professor Schmitthoff has pointed out that in Venezuela and some other South American countries, the consignees can take delivery of the goods without B/L.

There are similar conditions in the ports of countries such as Sudan, Dominica, and the Philippines. And in some other countries, delivery against letter of guarantee is regarded as a legitimate method. For instance, Article 453 of the Customs Law of Argentina provides that delivery can be made against banks’ letter of guarantee if there is no B/L or such certificate of delivery.

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14 China Maritime Court, the civil judgment (1995) Hu-Hai-Fa-Shang-Chu-Zi No.386
In the 20th century China, in order to solve the severe problem of overstocking and port congestion and lessen the losses due to demurrage, the Leading Group for Port Works under the State Council, the Ministry of Communications and the Ministry of the Foreign Trade and Economic Cooperation (MOFTEC) together in 1983 issued the No.06 Paper, in which a delivery against Copy B/L plus letter of guarantee or other certificate was also allowed, though it claimed that ordinarily the original B/L is required. No.06 Paper actually made delivery without B/L rightful in some situations and it played an important role on out of port congestion. In line with the paper, the port departments of the governments in coastal regions followed a similar practice. For example, Dalian Port Committee issued two papers: the Supplementary Provisions on Take Delivery against Original B/L of Marine Goods Imported, 1986, and the Supplementary Provisions on Take Delivery against Original B/L of Marine Goods Imported, 199015. So we should say delivery without B/L was legitimate at that time. Even under the circumstances in which the goods are delivered against Copy B/L plus letter of guarantee, owing to holding the letter of guarantee, so the carrier still has the right of recourse against the guarantor by the letter of guarantee once happen that the holder of the original B/L claimed for compensation. This was a temporary measure adopted by the government under the planed economic system, and it indeed played a positive role, though it ran against the international custom of delivery against original B/L. In a sense, it is the mixture of business needs and strict abidance by law. However, with the enforcement of the China Maritime Law, delivery against original B/L has been written into the law, so the No.06 Paper has expired, and the rules and regulations of local governments also became null and void. Therefore, delivery without original B/L is illegal at present in China.

Meanwhile, the lack of co-ordination among different departmental laws and regulations is actually a catalyst for the phenomenon of delivery without B/L. For instance, according to Bill of Lading Act or Maritime Law, it’s unlawful to deliver without B/L. But on the contrary, on the basis of the Guarantee Law, the rights of the one who delivers against a letter of guarantee are protected by law. It provides an important legal basis for delivery without B/L.

IV

SUBJECTIVE CAUSES TO DELIVERY OF GOODS WITHOUT B/L

A. Delivery without B/L Caused by the Consignor Party

1. Delivery without B/L due to the consignor’s defective performance of delivery and document surrender.

Carriage of goods by sea is an important part of international sale of goods contract. And the Seller, as a consignor, whose defective performance of document surrender probably can lead to a delay of the documents, with the goods already arrived at the port. For example, under the

payment of documentary L/C, the Bank should strictly examine whether the B/L is consistent with the L/C, and the principle is the “a consistency among the documents and between the B/L and L/C”, which is established by the Uniform Customs and Practice for Documentary Credits. Any imprudence committed by the Seller, as a consignor, will result in the discrepancies. And once the bank finds an inconsistency, it will refuse negotiation or acceptance by claiming that there exists a discrepancy between the B/L and the L/C, and then return the B/L to consignor. This eventually will cause a delay in the circulation of the B/L. Meanwhile, if making shipment does not in line with the date specified by the contract and L/C, possibly, the seller will beg the carrier to sign an ante-dated B/L according to the shipment date of L/C. Having been refused by the carrier, the seller may still hold the full sets of documents while the ship has already arrived at the destination port. When the seller fails in getting the B/L by exchanging the documents, he maybe require the buyer to correct the L/C to settle exchanges. But whatever is the method, either reproducing the documents or rectifying the L/C, it definitely will cause the delay in the circulation of the B/L, and the result is always that the goods have already arrived at the destination port while the B/L is still on its way. In addition, once the quantity, quality, measurement and variety of the goods not meeting the requirements of the contract, the buyer always does not retire the documents on purpose to compel the seller to concede. After the goods have arrived at the destination port, the consignee often demands a delivery against Copy B/L and letter of guarantee. With the aim of fulfilling their duty of transport as soon as possible, the carriers will deliver without B/L after their demands have been met. Also once the consignees, those no reputation, take delivery of the goods, they may deliberately put off payment with various kinds of reasons.

2. The carrier delivers goods without B/L on shipper’s demand.

It usually includes the following situations:

a. the consignee changes the payment method, for instance, which is converted from L/C or D/P to T/T;

b. ahead of ship’s setoff, the carrier delivers goods without B/L under consignor’s order;

c. the consignor orders that the carrier should deliver the goods to consignee, since the payment for goods has been telegraphed to the consignor (the seller) before the buyer receives the goods. Here it is the consignor’s responsibility to send the B/L to the carrier.

B. Delivery without B/L Caused by the Consignee Party

1. Delivery without B/L due to the consignee (also the applicant’s and buyer)’s defective performance under the sales contract.

The application for credit usually provides that the opening bank will deliver the transport documents of the goods only after the applicant has made the payment. So when the buyer is experiencing a financial difficulty or in shortage of money or does not application for the adequate foreign exchange quota timely under the foreign exchange control system, at the same time, the subject matters of the sale contract are also marketable, the buyer often take delivery first in order to seize an opportunity to sell or use the goods, and then with that money the buyer retires the original B/L and gives it to the carrier or forwarders. And sometimes they also demand that the
carrier deliver goods against Copy B/L and letter of guarantee.

2. Delivery without B/L due to the consignee’s (also the buyer’s) non-delivery or rejection of delivery.

During the international sales of goods, the buyers do not take delivery of goods because of the following reasons:

a. the value of the goods has become negative when shipped to the destination port. For instance, the trash, waste, rags and used tires may be produced by transport; the goods may be contaminated or damaged during the transportation. The fees dealing with these kinds of goods probably surpass the goods’ remaining/residual value;

b. The consignees are unwilling to retire the documents from banks since they have not found the next buyer;

c. The buyer refuses to take delivery of goods because the goods’ quality is not in accordance with the contractual specifications;

d. The government may ban the importation of some special commodities when the vessel arrived at the discharging port.

According to the existing international transport customs, the consignee’s behavior is widely acceptable.

3. Delivery without B/L due to consignee’s fraud

With an aim to getting the goods by cheating, the consignees usually use a false B/L to take delivery of goods. Or sometimes, they deliberately refuse to retire the documents and take delivery of goods by an invalid letter of guarantee. And this could make the seller unable to settle the exchanges or the bank to get payment. When both the Non-Vessel Owning Common Carrier B/L and the actual carrier B/L issued two sets of B/L under one batch cargo, the consignees take delivery against B/L which has no effect of document of title, and as a result of which, the legal holder of B/L is unable to take delivery or the shipper can not settle exchanges; when delivery without B/L takes place under a straight B/L, the consignee of the straight B/L may refuse to pay after receiving the goods, and this usually leads to a litigation between the shipper and the carrier.

C. Delivery without B/L due to Contract Alteration by the Consignor (seller) and Consignee (buyer)

When the sales contract is altered, the items recorded on the B/L will be changed accordingly. For instance, provided that the payment term for freight or the form of B/L was altered, the seller would demand the carrier of modifying the B/L or re-issued a new set of B/L. In this circumstance, the carrier would collect the issued B/L, and the arrival of the new B/L will also be delayed.

D. Delivery without B/L due to negligence or fraud Committed by the Carrier, Actual Carrier, Their Agents or Employees and Harbor Operator

In the shipping practice, different countries have their own regulations. So after the vessel
arrives at the discharging port, all the formalities shall be in line with the laws and regulations promulgated by the local government. The carrier, actual carrier, their agents or employees and the harbor operator all have the duty of delivering the goods, while the holder of the B/L, foreign trade agent, actual importer, bank claiming B/L pledge right, and the corporation doing the processing of customer's materials are all the consignees. Sometimes the original B/L may be circulated and transferred several times, so it is difficult for the carrier to spot the real owner of the goods. If delivery of goods is unregulated, only a small amount of negligence will result in a mis-delivery. Once the carrier is perplexed by the trade contract or Copy B/L submitted by the one who claims he is the owner of the goods, a mis-delivery always happens. At the same time, when the ship arrived, usually it is the carrier’s agent to undertake the formalities of delivery. Although not permitted by the carrier, the careless agent and harbor operator often deliver without B/L. And this eventually makes the holder of the original B/L no goods to collect.

In addition, if the carrier is the owner of a phantom ship, he will deliver the goods without B/L to a person who is not entitled to delivery and then vanish together after that, leaving the holder of the original B/L with no goods and severe damages. At present, the fraud cases on delivery without B/L are all of this type, that is, the carrier and consignee collude to cheat the shipper. The consignees are mainly foreign illegal importers, and relying on the FOB term in the trade contract, overseas forwarder’s transportation and House B/L, they deliver goods without B/L unscrupulously and cause severe damages to the exporters. Although the proportion of the fraud cases to the entire cases of delivery without B/L is relatively small, the damages they cause to the regular procedures of international trade are strong enough to ruin the credibility of this delivery method.

It should be pointed out that the phenomenon of delivery without B/L is a mixture, through combination and interaction, of subjective and objective factors. Objectively, delivery without B/L meets both the owners and charters’ needs, especial when the non-arrival of the original B/L affects the ship’s schedule or the consignee is in an urgent situation to take delivery. Therefore, conditional delivery without B/L can avoid tremendous economic loss. And gradually, in order to fulfill the carrier and consignee’s both needs, they find a balance point between legitimate delivery and against the risks, that is, delivery against letter of guarantee. The method shifts the carriers’ risks, thus the probability for the carrier to compensate is extremely low. Even if claimed by the holder of the B/L, the carrier could also recover the loss through the sponsion. And general speaking, the possibility for the consignee to refuse to pay and retire the documents is fairly small, since creditable consignees will give the B/L back to the carrier in time as long as they receive the original B/L. This objectively makes the participants of delivery without B/L feel safety, thus regarding it as a feasible way though it is illegal.

Look from volitional element, sometimes the carriers clearly understand that to deliver without B/L means to undertake a high risk. However, they have to deliver without B/L either because of the fluke psychology, especially when they count on their experience that they have never been sued, or due to the consideration of economic interests and efficiency. For example, some ocean shipping agencies had asked the concerned Chinese maritime court for advice on the letter of guarantee in the delivery without B/L, with an aim to gaining the court’s understanding and support.
WAYS OF PREVENTING AGAINST DELIVERY OF GOODS WITHOUT B/L

Though delivery without B/L directly endangers the security of international trade and the existing legal system, the number of such cases grows in intensity rather than is eliminated. Objectively, the legal system of B/L can no longer meet the needs of today’s shipping industry, so in the present legal framework, delivering goods without the original B/L is not likely to be brought under control only by legal method. Parties concerned with international trade and shipping should reform the transport documents and actively make up for the disadvantages of B/L legal system. The following ways are suggested to prevent risks in shipping practice:

A. Usage of the Sea Waybill.

The sea waybill is a non-negotiable maritime transport document to ensure that the carrier has received or loaded the goods they are to carry and will give it to the consignee. It came into being in the early 70’s of the 20th century when technology of making ships advanced a lot and the speed of voyage increased greatly.

The sea waybill attracted much attention at the Venice Conference held by Comité Maritime International (CMI) in the year of 1983. The committee agreed that “It should not be encouraged to sign a bill of lading (B/L) when there is no need for a negotiable document” and “an aggregate rule for the sea waybill should be put into practice and its application is encouraged.” Soon after the conference, CMI set up a group to work out the sea waybill regulation. After several years’ effective work, “CMI Uniform Rules for Sea Waybill” (“Rules” for short) was officially passed on the 34th conference held by CMI in Paris in June, 1990. One year after that, it is written into the amended Carriage of Goods by Sea Act 1992 of England, of which Paragraph 3, Article 1 stipulates that sea waybills mentioned in this act include any documents that are not bills of lading but apply to these: (a) receipts including or certifying contracts of shipment by sea; and (b) clarifying to whom the goods will be given according to the contracts.

The sea waybill has legal characteristics as follows: (a) it is an agreement the consignor and carrier already reached, a certificate to the transport contract; (b) it is a receipt from carrier after receiving the goods; (c) the consignor has right of control over the goods and right to choose others to control the goods. “The consignor should be the only party concerned that can instruct the carrier. Only if it is forbidden by the law, the consignor has the right to change the consignee’s name whenever before delivery and after the goods arrive at discharging port”. (d) The sea waybill is not a document of title or security, nor can it be traded or transferred. It cannot function as a guarantee or necessary scrip for picking up goods. These prevent the possible cheating from happening during the trade of B/L, and at the same time simplify the procedure of circulating so that the consignee can pick up goods in time. This in turn accommodates to the fact that documents cannot catch up with the vessels’ higher speed and works out as a solution to the

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17 ibid.
18 see Study of Law on the Bill of lading, Yu Guo, Beijing University Press, 1997-11, p162
20 Still controversial about this. Dongnian Yin and Yu Guo suggest that sea waybill is a document of title. See Law of Transportation by Sea, Yu Guo, Press of People’s Court, 2000
problem of releasing goods without the original B/L.

The mis-delivery of goods can be prevented as long as the carrier is cautious enough about checking the consignee’s identity. This is beneficial for the carrier and reduces the knots and lawsuits between parties concerned. That’s one of the reasons why about 85% of containerized goods are transported in this way in today’s Trans-Atlantic trades. What’s more, in the e-era, sea waybills can be sent as electronic data, which further speeds up the information transfer. To conclude, the sea waybill is of great significance to promote solving the problem of releasing goods without original B/L.

The problem of using a sea waybill is that it protects less of the consignee’s interests, because according to the “Right of Control” in the “Rules”, the consignor is usually allowed to change the consignee at any time before the right of control has been transferred to the consignee. But a possible solution consulting the foreign shipping field can be that banks work as named consignee to get the right of control from the carrier. This can be prescribed in the trading contract or letter of credit.

B. Usage of electronic bill of lading (e-B/L)

E-B/L internetizes and depaperizes B/L, “just like signing and issuing a written B/L.”21 The implementation and trading of transportation contracts are based on an electronic net system. After delivery the consignor, as the holder of the B/L, may orders the carrier with a cryptogram and can transfer the ownership of goods by transferring the cryptogram. Whoever has the cryptogram is the holder of B/L and has right to ask release the goods, name the consignee and transfer its right to another. The operation procedures are: After the vessels are loaded, the vessel owner or the carrier should send an e-B/L with all the contents included in the written B/L to an appointed email address under the consignor’s order. Then, send the consignee a cryptogram that is known only by the two parties themselves. The consignor can exercise the right of control or transfers it in the future with the cryptogram.22

E-B/L has many advantages. First, it is safe and fast, highly reliable and efficient, and can reduce the costs of work handling the bills, avoid situation where bills arrive at the destination port after the vessel. After arriving at the destination port, the carrier examines the code and delivers the goods if the code is correct, and bears no responsibility afterwards. This can prevent cheating from happening. One expert says it is “the savior of releasing goods without the original B/L.”23 Second, it has the function of negotiable B/L. Through the carrier send the new code to the transferee of B/L may transfer the property rights of cargo. The transferee is the holder of new code after each transferring and has the right of control over the goods. The right entrusted is as effective as the written bills. In most cases of releasing goods without the original B/L, the basic contradiction is between slow bills and urgent request from the consignee to deliver the goods. This could be solved as long as the B/L can reach the consignee in time. E-commerce is global and full-time, which liberalize and widen the time and space to deal with the e-B/L. Stored and transferred in the form of data, it reduces the delivery time largely, which perfectly meet the need of present circulation of documents, especially under the way of container transportation.

22 see Bill of Lading and documents of shipment, Philip L.Y. Yang, Press of China University of Politic Science and Law,2001-6, 1 edition, p155
23 ditto, p150 - p156.
Shortening the on-way time from days to seconds, e-B/L will never be late, giving no reason for releasing goods without the original B/L. Also, e-B/L can effectively speed up the dealing process of bills because there is no need to type the content of e-B/L repeatedly. Relying on encrypting technology, the security of the e-B/L can be well assured.

There are also some obstacles of putting e-B/L into practice. First of all, the shipper, the consignor, the consignee, and the banks should cooperate in all aspects and build up a net system, based on which the e-trade can be operated smoothly. Not only a vast computer network should be built to realize cross-regional data exchange, but also affiliated regulations and rules should be improved, for example, the rules for e-letter of credit (e-L/C). Without e-L/C, the e-B/L can not be traded and financed, let alone that the e-B/L is fast, simple and safe. The last thing to mention is that, as the effectiveness of real right entrusted by the traditional written B/L is still controversial, it is more debatable whether a totally different negotiable endorsement of e-B/L may produce effect of real right. After deliver goods without a written certificate, the consignor feels not at ease after all. Information technology is developing fast throughout the world; the use of e-commerce grows in intensity. So we suggested that Governments should attach importance to e-B/L and to bring its advantages into full play. This will finally make up the insufficiency of laws currently in effect and reduce the cases of delivery of goods without the original B/L.

C. *Reinforcement of the supervision and management of shipping agent at discharging port*

Mis-delivery often happens due to the carelessness of shipping agent in charge of affairs after unloading the vessel. It is wise to choose a shipping agent carefully and emphasize the importance of seeing the original B/L before delivery. It is also necessary to warn the shipping agent not to accept any letter of guarantee signed by organization with unknown actual credit.

D. *Carrier to keep an original B/L on the vessel*

The shipper can keep one of the three original B/Ls signed routinely on the vessel. If the consignee’s original B/L hasn’t arrived when the vessel reaches the discharging port, the carrier can give its copy to the consignee and then let the consignee give it back. The Common Law of Britain affirmed this way in a lawsuit in 1987, *Mobil Shipping & Transp. Co. v. Shell Eastern Petroleum.*

VI

**REMEDYS TO THE HOULDER OF THE B/L AFTER THE DELIVERY OF GOODS WITHOUT B/L**

A. *Relief channel for the holder of the B/L after the delivery of goods without original B/L*

In China, remedy measures for the holder of the B/L after the delivery of goods without original B/L include:

1. *Self-help remedies.* It means that the holder of the B/L directly claims goods or damages from the actor who deliver the goods without original B/L or the actual consignee;

2. *Arbitration.* The valid agreements of arbitration should be reached between the parties before or after the occurrence of disputes. In the course of arbitration, according to applications of
the party, the arbitrative organ may apply to the maritime court for property saving;

3. Judicial remedy. The holder of original B/L may apply to the maritime court for property saving on or before the litigation. The maritime claims may apply for arresting the ship which belongs to the carrier or actual carrier, ask the carrier or actual carrier provide reliable guarantee, freezing or seizing the assets of the actor who deliver the goods without original B/L.

B. Who may be claimed to by holders of the B/L?

Those whom the holder of the B/L may claim to can be divided as following:

1. The holder of the original B/L claims against carrier for returning the goods or compensating for the damages

According to the transportation contract relationship which proved by the B/L, the holder of the B/L may claim against carrier for returning the goods or compensating for the damages. Under article 71 of China Maritime Law, the carrier should deliver the goods to the holder of original B/L, the provision across the face of B/L generally provides that consignee should take the delivery of goods with the original B/L from the carrier. If the carrier and its agent breach of the transportation contract between the carrier (and its agent) and the lawful holder of the original B/L because they deliver the goods without the original B/L, the holder of the B/L may claim against carrier for returning the goods or compensation for the damages. According to the relevant decisions of Chinese court and stipulation of Article 71 of China Maritime law, the carrier should deliver the cargo to consignee of a straight bill of lading against the original B/L.24

2. The holder of the original B/L claims against carrier’s agent for returning the goods or compensating for the damages

If the holder of original B/L claims against the carrier and its agent as the joint-defendant, generally, the carrier and its agent should be held jointly liable. But the agent should not be held liable for the delivery of goods without original B/L if who delivers goods under carrier’s order. In many cases, the holder of the B/L chooses to claim against the agent alone, not the carrier. It is inconvenienced by bring a lawsuit against carrier when the carrier at abroad (such as in Russia), and the agent is unauthorized to deliver the goods without the original B/L, so the

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24 It should be noted that weather a straight bill of lading should be delivered against the original B/L, is not uniform in the stipulation of Act and the judicial practice of regions. United States Pomerene Act of 1916/1994 stipulates that the carrier have the right to deliver the goods to the straight consignee without the original B/L, just verify their identity. In Hong Kong, China, “The Brij” was also established the principle about the carrier have the right to deliver the goods to the straight consignee without the original B/L, simply verify their identity in 2001. The judgment of “Voss Peer v. APL” has been concluded by the Singapore High Court in 2002 firstly establishes and represents the standpoint of Singapore for straight bill of lading, that is, the carrier must not deliver the cargo except against the production of the original B/L. British House of Lords made the final judgment on “The Rafaela S” in Mar.2005. What the Court did say was that the straight B/L was the B/L too, even if the bill did not contain such a clause, it was still necessary for the named consignee to produce an original of the straight bill on delivery of cargo. The final judgment of “Orient Overseas Container Line Ltd. v. Qingdao Sea Food Co., Ltd.” has concluded by the Supreme People’s court (China) in April 6, 2004, , confirmed the position of Chinese mainland in the issue: the carrier should deliver the goods against the original B/L, even if the bill of question was a straight bill of lading. Clause 1 in the Rules on Several Issues on Hearing of the Dispute Cases of Delivery of Goods without B/L promulgated by the Supreme Court of China on Feb. 2009, reconfirmed that the carrier who issue the straight bill of lading should deliver against the original B/L.
holder of the B/L may choose to prosecute the agent separately. Clearly, there is not a transportation contract between the holder of the original B/L and the carrier’s agent, so in this case, the holder of the original B/L should sue for infringement.

3. The consignor’s right as the holder of the original B/L

As the holder of original B/L, the consignor may claim against the carrier under the B/L which serves as an evidence of the transportation contract, and also claim infringement litigation against the carrier’s agent for returning the goods or compensating for the damages, and bring a recourse action against the buyer under the trade contract. The litigation due to the delivery of goods without original B/L is caused by the buyer refusing to make a payment and the letter of credit. When the consignor holds the original B/L, and if the consignor is the seller of the trade contract, the consignor still may claim against the buyer for payment under the payment provision specified by the contract. In China, a lawsuit brought on a trade contract should be under jurisdiction of the local court (not the maritime court).

4. The right of the opening bank as the holder of the original B/L

When the opening bank as the holder of the original B/L, in addition to suing for breach of contract against the carrier and taking infringement litigation against carrier’s agent for returning the goods or compensating for the damages, the opening bank may claim against the applicant for payment for letter of credit under the relationship between the entrusting party (the applicant) and the entrusted party (the opening bank), which arise from the entrustment to issue a letter of credit.

After the delivery of goods without original B/L, the opening bank may accept the letter of credit considering bank credit (if the delivery against guarantee issued by bank), and then bring a recourse action against the applicant for payment for letter of credit under the relationship between the applicant (entrusting party) and the opening bank (entrusted party) which arise from the entrustment to issue a letter of credit.

VII

PERSPECTIVE----LEGALIZATION OF DELIVERY GOODS WITHOUT B/L

“The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea” was adopted by the United Nations General Assembly on 11 December 2008, and Authorizes a ceremony for the opening for signature to had been held on 23 September 2009 in Rotterdam, the Netherlands. So the rules embodied in the Convention be known as the “Rotterdam Rules”. According to the Rotterdam Rules article 45 to 47, the carrier may delivery of goods without B/L on the following condition:

A. When neither a negotiable transport document nor a negotiable electronic transport record has been issued, the carrier may deliver the goods without B/L to the consignee at the time and location agreed in the contract of carriage or which, having regard to the terms of the contract,

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the customs, usages or practices of the trade and the circumstances of the carriage.

B. When a non-negotiable transport document has been issued, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods. The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

C. The parties will allow the delivery of goods without bill of lading in international trades; if they are opt into the following conditions by way of an express statement:

1. The negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record.

2. The goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons that is in possession of a negotiable transport document; and if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods.

3. The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with mentioned above 2 is discharged from its obligation to deliver the goods under the contract of carriage to the holder.

We should note that so far, the Rotterdam Rules have not yet entered into force. There are 24 member states signed the Rotterdam Rules up to July 20, 2011. Only Spain approved the Rotterdam Rules on January 19, 2011. China has not signed and accepted the Rotterdam Rules yet. So the Rotterdam Rules is not applicable to China.

But according to the rule of article 7 to 9 on The Provisions of the Supreme People’s Court on certain Issues concerning the Application of law to Trial of Cases of the Delivery of Goods without Production of Original Bills of Lading, a carrier may delivery of goods without B/L under the following condition:

A. According to the legal provisions of unloading port where be stated in the B/L , the carrier is obligated to deliver the goods to the local authority in charge of customs or port.

26 Supra note 9.
B. The goods have arrived unloading port, no one make customs declaration for them within the time limited by laws, and the goods were collected and sold by the relevant customs legally; or the court render a decision to auction the goods which lien on by the carrier.

C. The consignor of straight B/L require the carrier to suspend shipment, return the goods, change the port of destination or delivers the goods to other consignees.

So this paper holds that to modify our rule of law and legalize the action of delivery Goods without B/L also is a kind of effective path to resolve the dilemma of delivery Goods without B/L.

VIII

CONCLUSION

Owing to delivery of goods without B/L causes by many factors, so the delivery of goods without B/L has assumed diversity. There two workable way to solve the problem of delivery of goods without B/L. First, from a macro point of view, we could amend the regulation and legalize the delivery of goods without B/L under certain condition. Second, from the micro viewpoint, parties may use the sea waybill and electronic bill of lading, reinforcement of the supervision and management of shipping agent at discharging port to prevent delivery of gods without B/L, as well as the holder of original bill of lading may directly claims goods or damages from the actor who deliver the goods without original B/L or the actual consignee; or claim for arbitration, litigation to the actor who deliver the goods without original B/L.