



## On the Nature of Straight Bill of Lading and Cargo Releasing Where a Straight Bill of Lading Was Issued

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### Abstract

As far as the nature of a straight bill of lading is concerned, a straight bill of lading is a document of title. On the contrary, the SWB does not belong to a document of title. Therefore, releasing the goods with production of straight bills of lading does not make any exceptions. However, the regulations of the applicable law to the contracts of carriage, the stipulations of the bill of lading, and the enforcement of the right of control to cargo of the shipper shall be taking into account as well.

**Keywords:** Straight bill of lading, Document of title, Delivery the cargo against original Bills of lading

Is a straight bill of lading a bill of lading (hereinafter referred to as “B/L”)? If the answer is yes, does a straight bill of lading possess the function of bill of lading that represents the goods? If a straight bill of lading that represents the goods possesses the functions of the bill of lading, what is the relationship between the functions and the carrier’s delivery of the cargo? The maritime law circle has argued these questions for a long time. To clarify some misunderstandings on these questions is the aim of this paper.

### 1. Is a straight bill of lading a bill of lading?

The question that whether a straight bill of lading is a bill of lading always puzzles people. People shall not doubt that a straight bill of lading is a bill of lading since we named the document after a bill of lading. However, a straight bill of lading shall not be negotiated under China Maritime Code (hereinafter referred to as “CMC”), which makes it similar to sea waybill (hereinafter referred to as “SWB”) apparently. Therefore, some scholars take it for granted that a straight bill of lading is not a bill of lading but a SWB. Mr. Scrutton says that a straight bill of lading is a SWB under Bill of Lading Act 1992. Another scholar considers the non-negotiable Bs/L shall include straight Bs/L and SWB in common sense. Where the B/L stated “non-negotiable” on the front page and named the consignee, a straight B/L has no difference with a SWB unless otherwise stipulated on the front page of the B/L. (Chu, 2003.p83) A straight B/L does not possess the characters that a B/L does actually. It is only an alias of a SWB. (Xin, 1995.p48).

On the contrary, Professor William Tetley holds a straight B/L is different from SWB and so categorizes a straight B/L into a document of title. (Chu, 2003.p83) An author points out definitely that a straight B/L is a kind of B/L and still possesses the three functions of a B/L according to the general maritime laws and B/L acts of the countries of the world. (Yang, 1999. P20) It is obvious that the difference between a straight B/L and a SWB is the basic annotation on whether a straight B/L belongs to a B/L or not.

What is the difference between a straight B/L and a SWB on earth, if any? In my opinion, the key to the question lies in whether the roles a straight B/L plays in shipping and trade are the same as a SWB does. If the roles played by a straight B/L and a SWB are alike, it is obvious that the two documents have no difference. Or else, we should say that a straight B/L is different from a SWB. The answer will come to conclusions upon what is the nature thereof and whether the carrier shall release the cargo against the straight B/L issued by him. That is to say, whether a straight B/L is a B/L is to

some extent the questions whether a straight B/L possesses the nature of document of title and whether the carrier shall be liable for releasing the goods without presentation of the original straight B/L where it was issued.

## **2. What is the meaning of a document of title? Is a straight B/L a document of title?**

A B/L is a document of title under English and American laws. However, there are arguments on what a document of title is. Some Chinese scholars translate the “document of title” as a voucher of real right or property right. They hold that the transfer of a B/L means the transfer of ownership of the cargo since a B/L is a voucher on which the carrier’s delivery of goods based. Someone argues that a B/L possesses the same characters as property right does. (Zhou, 2003. p43) Because the cargo represented thereby transfers as the B/L does, some scholars deem the “document of title” shall mean the voucher of ownership. Some others take a B/L as a security of obligatory right. (Li, 2003. P34) In addition, some people translate a “document of title” in very general terms.

In my opinion, we should clarify the fact at first that different state has its different meaning to specific legal term under its unique legislation system. If this basic premise were ignored, we would never gain our ends of legal exchange. It is one of important causes leading to law conflict to endue a legal term pertaining to a same legal element with different meanings in different states.

What is on earth the meaning of document of title? As a legal term originated from the Common Law Legal System, It is naturally that we shall explore its meaning in the traditions of Common Law Legal System. There is no authentic interpretation for document of title in English common law. However, An English Act to Amend and Consolidate the Factors Acts (the Factors Act, 1889) defines the “document of title” in article 1 which reads “(4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.” That is the legislative interpretation of “document of title” in English statutory law. Of course, the definition includes a warehouse-keeper’s certificate, which though included in the Act of 1825 had been omitted in the Act of 1842, and had been held not to be a document of title. (Gunn v Bolckow, Vaughan & Co. (1875), 10 Ch. App. 491.) However, a B/L is considered a “document of title” all the time. According to Bills of Sale Act of English, the “Documents of title” used in the ordinary course of business as proof of the possession or control of goods or authorizing the possessor of such document to transfer or receive goods, do not require registration as bills of sale. (Bill of Sale Act, 1878, C.31) The English COGSA does not define a B/L. However, it is obvious that a B/L is a “document of title” under Article 1 (b) of the Hague-Visby Rules, which provides that a “Contract of Carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title. Whereas the Hague-Visby Rules was incorporated in English COGSA 1971, therefore, we should say that a B/L is a “document of title” under English legal system and that the “document of title” used in the ordinary course of business is the proof of the possession or control of goods or authorizing the possessor of such document to transfer or receive goods. An analogous provision can be found in Section 7104, the Uniform Commercial Code of the United States that the negotiable document of title includes a warehouse-keeper’s certificate, a B/L, or any other document of title.

Now therefore, I conclude that:

(1). A B/L is a document of title.

(2). A document of title proves that goods are possessed or controlled by whom and proves that the possessor of the same document has been authorized to transfer or receive goods represented thereby. However, there is no indication that the word “title” in the common law legal system is the appropriate word for ownership or real rights in the civil law system. Firstly, it is common knowledge that the concept of real rights derived from the civil law legal system differs from the concept of property right in the common law legal system. Therefore, it is a faulty expression in legal exchange to take a document of title as a voucher of real rights. Secondly, in any case, the possession or control of the goods does not mean the possessor or controller has the property right of the goods. Since an important function a B/L possesses is to prove that the cargo has already been taken over by the carrier and been in charge of the same person stated in a B/L, a B/L is the evidence that proves the cargo is in whose charge, which does not indicate the status of rights to the cargo. It is essential to prove who is in charge of the cargo for sharing the risks and responsibilities among the shipper, the consignee, and the carrier. This is an acceptable theory in both the civil law legal system and the common law legal system. As for the holder of a B/L or the consignee’s right to transfer or receive the cargo is concerned, a B/L is a warranty voucher against which the carrier undertakes to delivery goods to the holder of the B/L or to the named consignee who is authorized to take delivery of goods from the carrier at the port of destination. Nevertheless, the possession of a B/L is in no case equal to having the ownership or other real rights. The possessor’s right to transfer or receive the cargo is empowered by the shipper, which can be concluded in accordance with the provisions that the relationship between the consignee or possessor of the B/L and the carrier with respect to their rights and obligations shall be defined by the clauses thereof provided in Article 78 of China Maritime Code (Note 1), because

in fact it was the shipper and the carrier who made and entered into the contract of carriage evidenced by the B/L and stipulated the rights and obligations of the consignee or the possessor thereof, and that the carrier pays little attentions to the rights and obligations of the consignee usually, consequently the shipper decides his requests to the consignee on his own entirely. Therefore, the clauses of the B/L or the B/L itself do not empower the consignee to transfer or receive goods, but the shipper does indeed. Thirdly, what is called that the possession of the B/L stands for possession of the cargo is groundless as well. Since the holder transfer or receive goods pursuant to the authorization of the shipper, the word "negotiable" means the cargo represented by the bill of lading can be transferred by the possessor thereof. "Negotiable" does not mean the B/L itself is transferable. Since the B/L is the authorizing voucher that authorizes the transferee to transfer the cargo to others or receive the cargo, it shall be passed on to the transferee of the cargo after the resale contract was made by and between the consignee and transferee so that the transferee could receive the cargo. Therefore, the passing of the B/L is a public expression that the former holder of the B/L has the intention to transfer the cargo represented thereby to the latter and is independent of the possession of goods. Or else an absurd conclusion would be drawn due to the carrier's taking charge of the cargo that the carrier is the owner of the cargo in civil law legal system because possession is the instrument of static public expression for ownership. It is obvious that to receive goods is based upon authorization as well. Of course, the authorization grounds on the basic relation set up by the cargo sale contract or other contract with respect to the disposition of the cargo between the shipper and the holder of the B/L or the consignee. Fourthly, in view of the foregoing conclusions we may understand the reason why the B/L may provide the rights and obligations of the third party acting as a consignee or a holder thereof is that the authorization and basic contract relationship entitled the shipper and the carrier to do so. Fifthly, a B/L is not a security of obligatory right because the possessor's right to take delivery of the cargo or transfer the cargo is based upon contract authorization, and that the B/L itself is just a authorization voucher evidencing that the possessor thereof was authorized to dispose the cargo while not a token of right to possess or own the cargo.

Thus, I consider that the "document of title" shall be translated into Chinese as "a voucher of possession and warranty" since it has the two functions of receipt and authorizing disposition of goods.

Now comes to the question that whether a straight B/L is a document of title or not. It is obvious that a straight B/L is an evidence of status of goods in the sense that a straight B/L indicates the goods are in charge of the carrier. As to the wording "non-negotiable" stated in the B/L, according to the above-mentioned analysis, in fact it means that the goods represented in the straight B/L are non-negotiable, and so it has nothing with whether the straight B/L itself may be transferred. Though the goods are non-negotiated under a straight B/L, they may be received by and delivered to the named person. Since the document of title just proves the holder thereof is authorized to transfer or receive the cargo according to the above-mentioned English law, and that receiving of the cargo does not go beyond the meanings of functions of the title document, so, a straight B/L still belongs to the document of title due to its function of receiving of the cargo. Someone may ask that people also can receive the cargo where a SWB was issued, then why the SWB is not a document of title. Article 3 (1) of CMI UNIFORM RULES FOR SWBS reads: "The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do." That means the contract of carriage of cargo by sea is not made for the shipper himself but also for the consignee in the respect of receiving of the cargo. That is to say, that the consignee acquires the right to take delivery of the cargo based upon the presumed agency *ad litem*. In contrast with the SWB, the consignee's right is authorized by the shipper where a straight B/L was issued. The object of legal relationship is also different between the case that the straight B/L was issued and that the SWB was issued. In addition, where a SWB was issued, the consignee's right to take delivery of the cargo relies upon the presumed entrustment of an agent, by which the consignee entrust the shipper to hand over the cargo to the carrier for carriage and delivery to him. In the occasion a SWB is used, it happens frequently that who has the ownership of the cargo is definite and the resale of the cargo is rare. Moreover, the consignee is prone to be the buyer of the cargo or the affiliated company of the shipper, therefore the SWB is used to settle the question that the B/L arrives later than the cargo does. It is obvious that the shipper and the consignee have no intention to possess an authorization voucher of transfer or receiving of the cargo. The shipper names the consignee directly and asks the named consignee to take delivery of the cargo basing on his identity.

Therefore, a SWB is not a document of title because it is neither a voucher of taking delivery of the cargo nor an authorization voucher. On the contrary, the straight B/L is a document of title because it is an authorization voucher of taking delivery of the cargo.

It is thus clear that whether a transport document is a document of title depends upon entirely whether the shipper (the seller as often happens) and the consignee (the buyer as often happens) has intention to transfer the cargo in transit or whether the production thereof is required when releasing the cargo. If the answer is yes, the transport document is a title document and vice versa.

### **3. Does the consignee stated in the box of consignee of a straight B/L shall take delivery of the cargo with production of original the B/L**

There are two basic viewpoints with respect to whether the original straight B/L shall be produced when the consignee declared to take delivery of the cargo. One of the viewpoints deems that the straight B/L is non-negotiable and not a document of title, so the consignee may take delivery of the cargo basing on his identity without production of the original B/L. The other viewpoint deems a straight B/L still belongs to a B/L since it possesses the three functions thereof. Therefore, it is natural that the carrier releases the cargo against surrendering the original B/L. In China, subject to Article 71 of Chinese Maritime Code, it is a condition that the carrier releases the cargo against surrendering the original B/L.

Obviously, the first argument is untenable on the condition that a straight B/L belongs to Bs/L. The question is what is the relationship between the attribute of a straight B/L as a title document and releasing the cargo with presentation of the original straight B/L? Most scholars and practices review the question and conclude basing upon whether a straight B/L is a document of title or not. Those who consider that a straight B/L belongs to a document of title draw a conclusion that the carrier shall delivery the cargo with presentation of the original straight B/L where it was issued. Whereas those who hold that a straight B/L does not belong to a document of title draw a conclusion that the carrier may delivery the cargo without presentation of the original straight B/L where it was issued. (Xin, Jan. 15, 2003. Also, see Jonathan Chambers, 2002. P29) In my opinion, with consideration of the original function of a document of title, a B/L is an authorization voucher evidencing the possessor's right to receive the cargo. Therefore, it is necessary to produce the B/L when the possessor declares he want to take delivery of the cargo; otherwise, he is not able to prove that he has the authorization. Now therefore, I conclude that it is the due contents that every original document of title, including but not limited to a straight B/L, shall be presented before the holder to take delivery of the cargo.

The international practices vary in whether the carrier shall release the cargo with the presentation of the straight B/L. The United States Pomerene Act does not require a straight B/L to be presented for delivery of cargo. The carrier is entitled to deliver to the named consignee although the consignee is required to prove his identity. However, the Pomerene Act required wording like "non-negotiable" shall be stated in the straight B/L. (Note 2) The HK Superior Court held that HK law does not require the production of a straight B/L for delivery of cargo. (Note3) The recent judicial precedents of English indicate that a straight B/L is a document of title. Therefore, the presentation of the straight bill of lading for delivery of the cargo would be necessary even without any express stipulation since the House of Lords ruled it to be a document of title. (Note 4)In Singapore, the carrier shall delivery the cargo to the named consignee against the straight B/L, and shall confirm the consignee's identity as well according to the case of *APL v. Voss Peer*. The Singaporean court of Appeal held that although a straight B/L is made non-negotiable, it does not mean that the parties thereto agreed to abandon the other important nature like the obligation to present the straight B/L for releasing the cargo. It should be further emphasized that to take back the original B/L is the premise for the carrier's delivery of the cargo even a straight B/L was issued. To do otherwise will amount to misdelivery. Holland court held that a straight B/L is a kind of Bs/L that are subject to the Hague rules/Hague-Visby rules and must be presented before the cargo released in "*The Duke of Yare*". So did the Reenes appellate court of France in "*The MSC Magellanes*". The superior court of Malaysia also held the carrier beached the contract because he did not take back the original B/L before the cargo was released, even though he delivered the cargo to the consignee. (Jia, Aug. 3, 2003) The Supreme People's Court Of The People's Republic Of China held that a non-negotiable straight B/L is not a document of title, therefore, the Hague rules is inapplicable to it in "*Guangzhou Feida Electronic Appliances Factory of Wanbao Group v. American President Lines Limited*". However, the court did not make general remarks upon whether the straight B/L shall be presented before the cargo released and simply pointed out the applicable law of that case shall be COGSA 1936 of US. However, in the 13th maritime trial session held in Qingdao, over 50 delegates who come from ten Chinese maritime courts and their higher people's courts participated and got to a common view that the original straight B/L shall be presented before the cargo released regardless the nature thereof and the relationship between such nature and the negotiability of the straight B/L under China Maritime Code. It shows that Chinese judicial circle considers that a straight B/L shall be produced without any exception before the consignee take delivery of the cargo.

According to Article 71 of China Maritime Code, A bill of lading is a document, which serves as an evidence of the contract of carriage of goods by sea and the taking over, or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking. The provision that the goods are to be delivered to the order of a named person constitutes an undertaking indicates that the presentation of the straight B/L is required before the cargo released. A scholar considers the provision shall be interpreted that China Maritime Code deems such a clause in the B/L stating that the goods are to be delivered to the order of a named person is a guarantee clause only. It does not mean that the original straight B/L shall be presented before the cargo released. The scholar observed the lingual meaning of the legal clause obviously, however, he ignored the performance of the undertaking requires the surrendering of the document in order to prove the one who requests the

carrier to deliver the cargo to him has the right so to do. Therefore, only the named consignee represented in the straight B/L produced the straight B/L can the authorized right be proved and can he take delivery of the cargo as well. Although the explicit statement of the named consignee make the carrier know who has the warranted right, that can not guarantee the carrier would not release the goods to the one who has no right to receive the goods. Suppose that a man falsely claims to be the consignee but no production of the original straight B/L, it is very easy happens releasing the goods to the man who has no right so to do. Therefore, the lingual interpretation of law must meet the legislative tenets, otherwise it would be a misconstrued interpretation of the law even though it looks how good to satisfy the requirements of logic and grammar. It is easily to cheat without the requirement of production the straight B/L, therefore, China Maritime Code require the presentation of the straight B/L so as to preventing cargo fraud.

Some scholars consider that a B/L plays different roles in different segments of trade. The function of document of title is non-existent in transport segment. Only when the B/L acts as commercial document or pledge document can the function of the document of title works. (Si, 2000. P18) This is a misunderstanding. In fact, the possession of or control over the goods, for which the document of title stands, means the physical status of the goods is that the goods are in charge of the carrier. It is a basis for ascertaining the custody and protection responsibilities of the carrier. It does not mean the holder of the B/L has property rights or real rights, which was even misunderstood by some west scholars who consider that the possession of the B/L stands for possessing the cargo. That is wrong because the property rights are dealt with by sale contract or other disposition contract and the transfer of ownership as well as other rights are separated from the transfer of documents. Even though in the occasions that commercial documents including Bs/l are required or the document is pledged the nature of Bs/L above-mentioned does not changed. What is pledged or transferred is the authorization voucher instead of the ownership or real rights. People's intention to transfer the goods or pledge the goods constitutes an acceptable arrangement dealt with the rights in the goods and its variation. Whether the holder of B/L can transfer or pledge the goods relies upon whether he has been entitled so to do according to the sale contract or disposition contract. Therefore, a B/L is evidence that the cargo is in charge of the carrier and is an authorization voucher in the transport segment. In contrast with a B/L in the transport segment, a B/L is only an authorization voucher in the trade segment or in the security segment and the holder can take delivery of the cargo thereby to achieve the aim of trade or pledge. Now the conclusion is the title document nature of B/L not disappear both in the trade and transport segments.

Needs to point out is it is wrong that some scholars argue for the straight B/L may transfer between the shipper and the named consignee. (Xu, 2004. P1) The reason is they misunderstood the transfer of a B/L, which means the transfer thereof among the third parties other than the delivery and handover between the shipper and the consignee. The delivery and handover between the shipper and the consignee is to go through the necessary formalities so that the consignee who was authorized could prove his right to transfer or receive the goods. That delivery and handover is not transfer of B/L. Furthermore, the property rights are entirely settled according to the sale contract or contract of cargo disposition made and entered into by and between the shipper and the consignee. The delivery and handover does not resolve the variation of the property rights of the goods. As a result, the viewpoint that takes the delivery and handover between the shipper and the consignee as transfer of B/Li is of no help to illustrate the nature of a B/L as a title document. Mr. Xin Haibao (Jan. 15, 2003) points out that the delivery and handover of a B/L between the shipper and the consignee does not belong to transfer thereof. In addition, to take the delivery and handover of a B/L between the shipper and the consignee as transfer thereof conflicts with Chinese law because Article 79 of China Maritime Code provided that a straight bill of lading is non-negotiable.

Thus, it can be seen that there are no same provisions and practices on whether the straight B/L is required to be presented before the cargo released. Therefore, the key is the choice of applicable law. Needs to clarify herein is whether the applicable law can apply to the specific case or not is subject to the provisions of the applicable law. For example, the Pomerene Bills of Lading Act only applies to the transportation of goods in the United States and from a place in the United States to a place in other country, therefore, where the transportation of goods is unrelated to the ports of the United States, it does not mean that the carrier may release the cargo without presentation of the straight B/L even the Pomerene Bills of Lading Act is the applicable law. Then the case is subject to the provisions on whether the carrier may release the cargo without presentation of the straight B/L, which provided for in the proper law decided according to the conflict rules of the state of the court. In addition, the performance of the right of control over the goods shall be deemed as cancellation of the authorization to the consignee. Therefore, the consignee has no right to transfer or receive the goods any more. However, the straight of B/L still possess the function that evidences the status of the goods.

#### **4. Conclusions**

As far as the nature of a straight B/L is concerned, a straight B/L is different from SWB mostly because the former is evidence proving the goods status and is an authorization document, whereas the latter is not an authorization document. Therefore, whatever provisions the states of the world provided for shall not influence the carrier's obligations to

deliver the goods to the holder of the straight B/L against the surrendering thereof in theory. However, in practice, it shall be subject to the applicable law, the stipulations of the straight B/L, and the enforcement of the shipper's right of control over the goods. There is no relative independency between whether a straight B/L is a document of title and whether it is required to deliver the goods to the consignee against the surrendering thereof. All Bs/L are authorization vouchers for taking delivery of the goods and so it is the premise to surrender original documents to the obligor so that he could perform his obligations. Therefore, as a document of title, it is necessary to produce the straight B/L before releasing the cargo.

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### Notes

Note 1, See Article 78 of China Maritime Code.

Note 2, See the Pomerene Act 1916.

Note 3, See "The Brij". The court held that the essence of a straight B/L is nonnegotiable, so it is unnecessary to present thereof before the cargo released.

Note 4, See the "Rafaela S". Also see the "Happy Ranger". The Obiter Dictum of the "Happy Ranger" indicates that it is inadvisable to hold the view is thoroughly correct in the textbook that because a straight bill cannot be transferred by endorsement and so it is not a document of title and does not need to be produced to receive cargo.