
Shipping & International Trade

Bills of Lading Signed by or on Behalf of the Master – Is it an Owner's Bill or a Charterer's Bill?

Introduction

The identity of the contractual carrier in a bill of lading contract is a matter of importance. It may determine whether the claimant can obtain pre-judgment security through a ship arrest. This is a vital tool in the arsenal of any maritime claimant. In most jurisdictions, only vessels which are owned or demise chartered by the person *in personam* liable for the claim may be arrested. For this reason, a bill of lading issued by shipowners (i.e. an owner's bill) is preferable, as it allows a cargo claimant to arrest the vessel carrying the cargo. Where the bill of lading is held to have been issued by a voyage or time charterer of the vessel (i.e. a charterers' bill), the cargo claimant may face difficulties arresting the carrying vessel, depriving it of pre-judgment security.

It is common in international trade for bills of lading issued to state they are signed by or on behalf of the Master, without expressly stating the identity of the contractual carrier. Under Singapore law, in the absence of any specific statement to the contrary, such bills of lading will generally be treated as having been issued on behalf of the owner (or demise charterer) of the vessel (i.e. an owner's bill). This is also the commonly held understanding of the position under PRC Law.

However, the position under PRC Law may not be as clear as it may first appear. Notably, the Supreme People's Court of the People's Republic of China (the "**PRC Supreme Court**") has previously issued a judgment (2016 Supreme Court Civil Application No 530) (the "**Judgment**") in which it held that a bill of lading issued on behalf of the Master, but which did not otherwise identify the carrier, should be treated as having been issued on behalf of *the time charterers* (and not the owners) of the vessel.

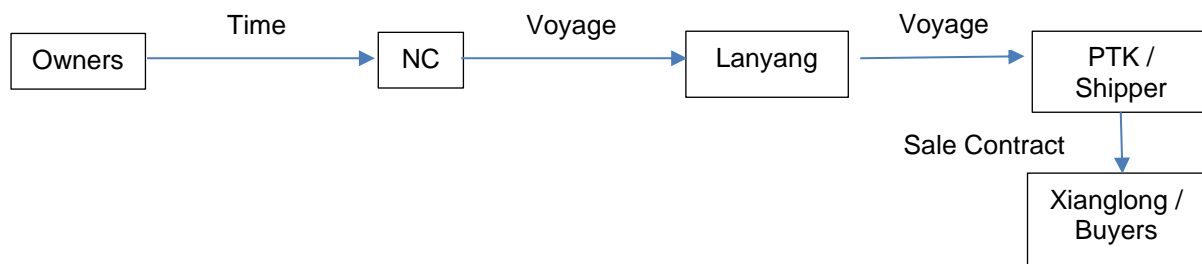
Contribution Note: *This Client Update was written with contributions from Wu Youdan, Associate (Foreign Lawyer), from Shipping & International Trade.*



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Material Facts

The case involved a shipment of nickel ores (the "**Cargo**") on board MV "JIN YUAN" (the "**Vessel**") from Indonesia to Tianjin, China, in 2011. At the material time, the owners of the Vessel, Jinyuan Marine Inc ("**Owners**"), had time chartered the Vessel to NCS Co Ltd ("**NCS**" or "**Time Charterers**"). NCS had sub-voyage chartered the Vessel to Lanyang Co Ltd ("**Lanyang**" or "**Sub-Voyage Charterers**"), which had in turn entered a voyage charter for the Vessel with PT Kresnaintipta ("**PTK**" or "**Shipper**"). PTK were also the sellers of the Cargo to Shandong Xianglong Co Ltd ("**Xianglong**"). The charterparty chain is represented in the diagram below:



On 12 July 2011, the Cargo was loaded on board the Vessel and bills of lading ("**BLs**") were issued on behalf of the Master of the Vessel.

PTK failed to pay freight under the BLs which had been issued in respect of the voyage, and the question for determination by the PRC Supreme Court was whether NCS (as time charterers) were entitled to detain the cargo by exercising a lien as the carrier under the BLs.

Decision of the PRC Supreme Court

The PRC Supreme Court answered the aforesaid question in the affirmative.

In the process, the PRC Supreme Court held that the Time Charterers (NCS) were the contractual carriers under the BLs, applying the following reasoning:

- (a) As a starting point, Article 42.1 of the Maritime Law of the People's Republic of China (the "**Maritime Law**"), defines a "Carrier" as "*the person by whom or in whose name a contract of carriage of goods by sea is concluded with the Shipper*". The difficulty, however, was that the BLs did not expressly identify the party in whose name they were issued.

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- (b) Article 72.2 of the Maritime Law goes on to provide that "[a] bill of lading can be signed by a party authorised by the Carrier, and the bill of lading signed by the Master of the vessel which carries the goods shall be deemed as signed on behalf of the Carrier". However, the PRC Supreme Court held that "the Carrier" referred to under Article 72.2 does not necessarily mean the owner of the vessel. In this respect, the PRC Supreme Court noted that where there is a time charter the charterers are responsible for making decisions as to the commercial employment of the vessel including entering contracts with third parties for individual voyages to be undertaken by the vessel. In contrast, owners' obligations relate to the maintenance and safe navigation by the vessel, and not to signing contracts of carriage.
- (c) The PRC Supreme Court also took the following facts of the case into account in arriving at its decision:
- (i) It was common ground between the Time Charterers and the Owners that the Time Charterers had given instructions to the Master and/or the ship's agent in connection with the issuance of the BLs.
 - (ii) The Time Charterers had asserted that they were entitled to receive freight, a point which the Owners did not deny.
 - (iii) Finally, the Owners indicated that they had done nothing more than to receive hires under the time charter; in particular, the Owners had not participated in making any arrangements in connection with the shipment.

Implications under PRC Law

While the Judgment is not strictly speaking binding precedent under PRC Law, PRC courts are likely in practice to follow the reasoning in a PRC Supreme Court judgment where applicable to the case at hand.

It may be possible to argue that the reasoning in the Judgment is confined only to cases involving the right of cargo detention, as the legal issue in this case was whether the time charterers NCS were entitled to detain the cargo, and the conclusion that NCS were the carriers under the BLs was just one of the reasons to support NCS's right of cargo detention.

However, there seems to be little reason in principle to restrict the application of the Judgment in this fashion. The issue has gained currency in recent academic commentary, which suggests that the Judgment may be of general application to all bill of lading cases. Critically, the Judgment itself does not indicate that the rule only applies to the situation of cargo detention. If this is correct, depending on

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whether a vessel has been time chartered, a cargo claimant seeking recourse under a bill of lading may be deprived of its right to arrest the carrying vessel before the PRC Courts.

The uncertainty in the position under PRC law may be of particular concern to parties who may wish to make misdelivery claims under BLs, including financing banks seeking to secure their lending in respect of cargoes for import into or export from China through a pledge over BLs.

The impact on cargo claims arising due to negligence in navigation and/or carriage of the cargo on board the vessel may be more limited. Pursuant to Articles 61, 62 and 63 of the Maritime Law (read with Article 42.2), the "actual carrier" (i.e. the party who actually ships the cargo with the authorisation of the contractual carrier) remains liable for safe navigation and proper handling of the cargo. In other words, even in the absence of a contractual claim against shipowners under the BLs, cargo claimants in such cases can probably still arrest the carrying vessel by bringing a claim in tort against shipowners as "actual carriers" of the cargo.

Conclusion

To date, our team is not aware of any PRC decision in which the reasoning in the Judgment has been applied. However, we are watching this space closely.

While the uncertainty persists, it may be prudent for cargo interests to take steps to ensure that bills of lading to be presented to them in respect of cargoes for import or export from China should:

- (a) Expressly identify the demise charterer or owner as the contractual carrier (for example, by way of incorporating a demise clause on the front-side of the bill of lading); and
- (b) Contain an express governing law and arbitration clause in favour of a jurisdiction where a bill issued by the Master would typically be viewed as an owners' bill.

With respect to (b), it should be noted that an incorporation clause within a bill of lading, incorporating by reference the terms of an underlying charterparty, is likely to be deemed invalid by PRC Courts. As such, any governing law and arbitration clause should be set out in full on the face of the relevant bills of lading.

For further enquiries, please feel free to contact our team below.

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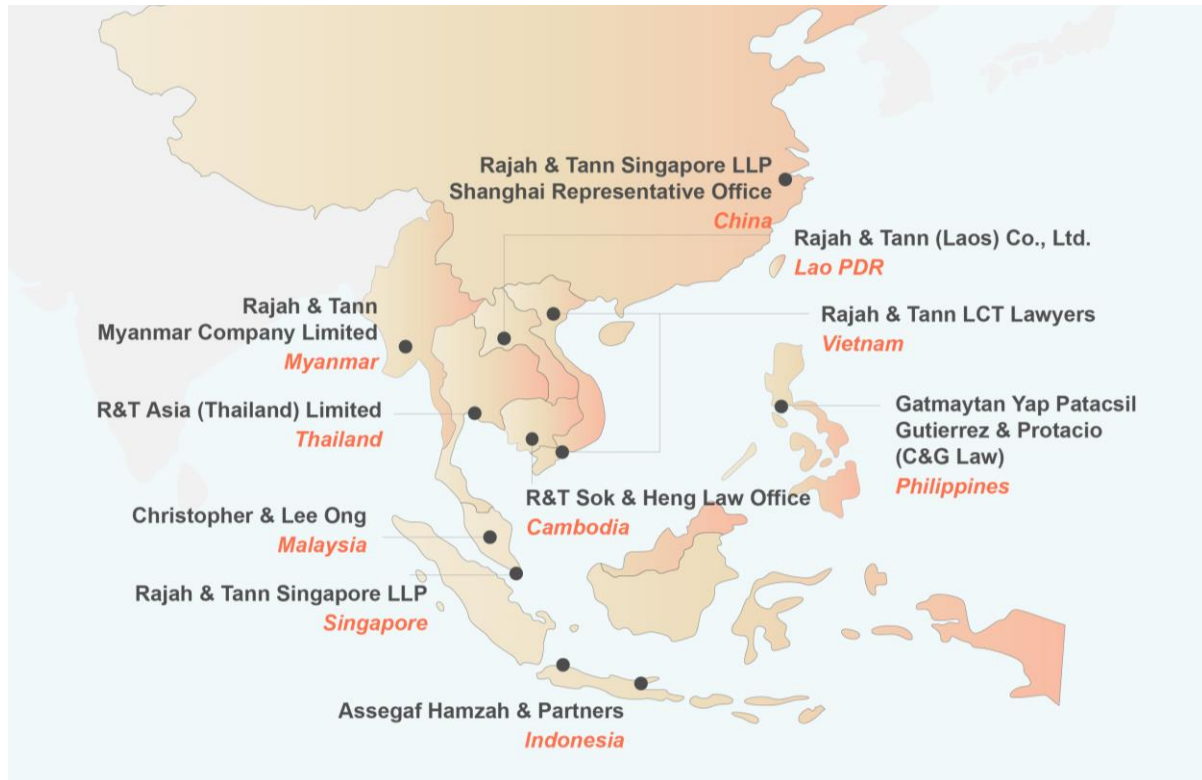
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