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Hypothetical Problems Treated Under the Rules

A Chinese company "Seller" agrees to sell and a U.S. company "Buyer" agrees to purchase 3940 packages of glyphosate (a kind of herbicide) on FOB terms at a specified price.

Buyer contracted with "Shipowner," a Korean shipping company, for shipment of the cargo.

On 14 January 2012, at the instruction of Buyer (and as required by the sales contract), Seller delivered the cargo in 6 x 20' containers to "Shipowner (Tianjin)," the wholly owned subsidiary of Shipowner, who signed a set of "to order" ocean bills of lading (in three originals) with Shipowner's heading. The bill of lading also indicated Buyer as the "shipper." The consignee was indicated as "to order of Bank A." Other indications on the bill of lading included "CY-CY," the loading port of Tianjing, and the discharging port of Long Beach. Apart from the company seal of Shipowner (Tianjin), the bill of lading also had the signature of the general manager of Shipowner (Tianjin). After the dispute arises, Shipowner affirms that Shipowner (Tianjin) was its authorized agent in Tianjin.

Question 1: Who is the carrier of the subject shipment of cargo? Is it Shipowner, the Korean parent company, or Shipowner (Tianjin), its subsidiary?

Stuart Beare: A carrier is defined in article 1(5) of the Rotterdam Rules as "a person that enters into a contract of carriage with a shipper". It is stated here that the FOB buyer (the U.S. company) contracted with the Korean shipowner for shipment of the cargo. The carrier under the Rotterdam Rules is therefore the Korean shipowner. This definition of "carrier" in the Rotterdam Rules is in substance the same as the definitions in the Hague-Visby Rules and the Hamburg Rules.

Tomotaka Fujita: I wish to add a small comment. Mr. Beare explained very clearly who the carrier is under the Rotterdam Rules. The facts in this hypotetical case seem to contain another question that is outside the scope or the Rules. The question is whether "Shipowner (Tianjin)," the subsidiary, can conclude a contract of carriage on behalf of "Shipowner," the parent company. Shipowner (the parent) affirms that Shipowner (Tianjin) has the necessary authority. But it may not be enough. In some jurisdictions, the agent should explicitly show its capacity as an agent and the identity

of the principal when it is acting on behalf of the principal and such capacity should be expressly stated on a bill of lading. In other jurisdictions, if an agent has authority, whether actual, implied, or apparent, it is sufficient to bind the principal even if the agency relationship or the name of the principal is not stated (known as "undisclosed principal"). This is a typical issue of agency law that is outside the scope of the Rotterdam Rules. It should be governed by applicable national law.

Question 2: If Shipowner (Tianjin) signs a blank bill of lading, who will be identified as carrier? When the registered owner of the carrying vessel is presumed to be the carrier, would it be easier or more difficult for the cargo interests in their claim against the carrier?

Stephen Girvin: Blank bill of lading = bill of lading which bears all the hallmarks of being a bill of lading, but with no obvious carrier name on the face.

So, assuming that the Rotterdam Rules apply to the bill of lading (in accordance with the rules in art. 5(1)), who is the carrier? Establishing this fact is essential if we are to establish whom cargo interests should sue for their cargo claim – and not least because the period of time for suit under the Rules is two years (art. 62(1)), as it also is under the Hamburg Rules (see art. 44). This time bar may be less of an issue than under the Hague and Hague-Visby Rules, where the period is 12 months (see art. III, r 6).

Carrier is defined in the Rules at article 1(5) as "a person that enters into a contract of carriage with a shipper". And article 36(2)(b) says that the contract particulars of a transport document "shall include … the name and address of the carrier". Now, if this information had been provided, as required, then article 37(1) would assist to the extent that it provides that any other information relating to the identity of the carrier in the transport record "shall have no effect" – so this would render ineffective identity of carrier clauses and so-called demise clauses on the reverse (for English law, see Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12; [2003] 1 Lloyd's Rep 571). But this is not the case here.

Therefore, article 37(2) is likely to prove to be of some assistance to the cargo claimant. This provides that when the goods have been loaded on board the named ship there is a presumption that the registered owner of the ship is the carrier. Whether this is Shipowner (holding company) or Shipowner (Tianjin), wholly-owned subsidiary and general manager of Shipowner, is essentially a question of agency (and so not within the Rotterdam Rules). Once, however, the cargo owners have established who the registered owner is (i.e. Shipowner), that entity is the Rotterdam Rules' carrier. So, Shipowner is the carrier.

It would be open to Shipowner to prove and identify that the carrier is a bareboat charterer, in which case that entity will be presumed to be the carrier. Shipowner may also rebut the presumption if it can identify the carrier and indicate its address.

Assuming that there is a presumption in favour of Shipowner, does this make it easier or more difficult for the cargo interests to make their claim? I do not see this as

necessarily making a material difference to them, save that it may be of assistance in taking steps to enforce their claim. So, assuming the claim is not settled, the cargo claimants can enforce it in rem by issuing a warrant for the arrest of a ship (or a sister-ship). In the case of those countries that have ratified the 1952 Arrest Convention, a claim by the cargo owners is a "maritime claim" (art. 1(1)) and is enforceable in rem against the owners of the ship, i.e. Shipowners (art. 3(1)). (Note that, in the UK, this reference to "owners" is to the registered owners (The Evpo Agnic [1988] 2 Lloyd's Rep 411), but other jurisdictions have not interpreted this "ownership" requirement so narrowly: see The Ohm Mariana ex Peony [1993] SGCA 43; [1993] 2 SLR(R) 113; Kent v SS Maria Luisa (No 2) [2003] FCAFC 93; (2003) 130 FCR 12; Tisand (Pty) Ltd v Owners of the MV Cape Moreton (ex Freya) [2005] FCAFC 68; (2005) 143 FCR 43, among others). In many common law jurisdictions it would be necessary to describe the defendants (see PD 61.3.3 in the UK; O 70, r 2 and Form 159 of the Singapore Rules; Rule 22 and Form 8 of the Australian Admiralty Rules). It is well-established that the issue of a writ (or claim form) in rem is enough to secure the claim of the cargo owners (The Monica S [1968] 2 WLR 431).

Question 3: Suppose there was an express agreement between the parties to the sales contract (*i.e.*, Buyer and Seller) that Seller should be named on the bill of lading as the "shipper," or alternatively that it has been impliedly so agreed (*e.g.*, the ocean bill of lading was one of the documents that Seller was required to tender for payment). If Shipowner was not informed of the arrangement by Buyer and insists on obtaining confirmation by Buyer (because Shipowner was not a party to the sales contract), who should be entitled to request Shipowner to issue the bill of lading? Would it be Seller (who delivered the goods to the carrier) or Buyer (who contracted with the carrier)? And who should be named as "shipper" in the bill of lading? How would this issue be resolved under the Hague-Visby and Hamburg Rules?

Dihuang Song: This is a difficult question, and there have already been disputes under PRC law practice where both the FOB seller and buyer demand the ocean bill of lading. As a matter of PRC law, it says only that at the request of "shipper", carrier shall issue the bill of lading. In other words, issuance of an ocean bill of lading is not a must, unless the shipper so demands. The initial discussion before CMI was that an FOB shipper (if not to be so named in the bill of lading) is entitled to a receipt, whereas the FOB buyer will be entitled to the bill of lading. This was revised later and has been replaced by the current article after various consultation and discussion.
Thus, under the Rotterdam Rules, it is clear that the FOB buyer is entitled to the bill of lading, unless the buyer agrees that the seller shall be a documentary shipper. Whether the agreement can be implied under the Rotterdam Rules is not clear, but it seems that the majority view is that a carrier should not be involved in the interpretation of the sales contract to which it is NOT a party.

Under the Hague or Hague Visby Rules, Art III(3) clearly provides that "After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading". Thus, there is no doubt that the carrier should issue the bill to the "shipper" with whom it has contracted, i.e. the FOB buyer in this case.

The Hamburg Rules may be slightly different, since they also contain a definition of the shipper that includes "actual shipper" or "contractual shipper". I am not entirely sure whether both actual shipper and contractual shipper or only one of them is entitled to demand the bill of lading.

Under the short form of FOB, a buyer may delegate the work to the seller, so that the seller actually contacts/negotiates/concludes the contract of carriage with a carrier, but the seller is entitled to be reimbursed by the buyer for the ocean freight. Suppose that had been the case here and Shipowner was so informed by Buyer. Alternatively, though it was Buyer who concluded the carriage contract with Shipowner according to the sales contract, in the course of the performance of the contract, Shipowner (Tianjin) directly contacted Seller to book shipping space, arrange the loading of the goods into the containers, and plan inland transportation of the containers by trucks to the container yard against the payment of freight.

Question 4: Does Seller in either of these scenarios have the right, without the prior consent of Buyer, to request Shipowner to issue a bill of lading naming Seller as the shipper?

Dihuang Song: This is similar to the previous question, and my understanding is that, unfortunately, the FOB seller is not entitled to request the carrier to issue a bill naming itself as the shipper, without prior consent of the Buyer. If it does, the carrier could ignore such a request.

However, my concern is that since the "consent of Buyer" is a matter of domestic law having the jurisdiction over the dispute, it may vary depending on the national law.

Gertjan Van der Ziel: I like to add a few words from the perspective of the carrier. I think that we all agree that from commercial point of view the bill of lading has to be issued to a FOB seller who under the contract of sale (i) has agreed to be paid "cash against documents" and (ii) hasn't actually been paid already (for example, in case of several pre-shipment FOB sales, by another FOB buyer than the one that made the booking, or through set-off)). The only person who is able to advise the carrier whether these two commercial conditions are fulfilled, is the person who made the booking with the carrier, i.e. the shipper (in the legal sense). If the FOB seller made the booking – whether it does so on behalf of the FOB buyer is an internal arrangement between the FOB buyer and the FOB seller, of which a carrier normally isn't aware – there is no problem. In this case, the FOB seller is the legal shipper and, having knowledge of the payment condition, may instruct the carrier to issue the bill of lading to itself. But what about when the FOB buyer made the booking and is the

legal shipper? Let us assume that in such case the FOB seller contacts the carrier and advises the carrier that it agreed "cash against documents," has not been paid yet, and, consequently, commercially needs the bill of lading and, therefore, requires the document to be issued to it. Must the carrier believe it? Must the carrier check the payment conditions of the contract of sale and/or check with the seller's bank whether actually payment has been effected? This seems not realistic. In such case, the FOB buyer is the person who is a party to the contract of sale as well as to the contract of carriage. Therefore, it (normally) has the knowledge of the payment condition and actual payment under the contract of sale and it is under the contract of carriage in the legal position to give the carrier proper instruction to whom the bill of lading should be issued. Thus, in practice, it is the contract of sale that determines the person that commercially should receive the bill of lading from the carrier. The FOB seller should see to it that the contract of sale should oblige the FOB buyer to give the carrier, as the case may be, the proper instruction to which person the carrier should issue the bill of lading. If the FOB buyer, in breach of such (implied or explicit) obligation under the contract of sale, would give the carrier a wrong instruction with the result that the bill of lading does not come in the hands of the unpaid FOB seller, the latter's remedy is under the contract of sale against the FOB buyer. From the perspective of the carrier it is of utmost importance that the legally correct procedures are followed by the FOB seller and FOB buyer, because a carrier might be held liable for the purchase value of the goods if it issues the bill of lading to the wrong person.

Question 5: If Seller, without the consent of Buyer, could *not* be named as the shipper on the shipping documents, would it have any rights against the carrier or any other rights either under the carriage contract or otherwise?

Stuart Beare: A shipper is defined in article 1(8) of the Rotterdam Rules as "a person that enters into a contract of carriage with a carrier". The FOB buyer is accordingly the shipper, and has the rights, obligations and liabilities of the shipper under the Rotterdam Rules.

A shipper is not defined in the Hague-Visby Rules, but is defined in the Hamburg Rules. The first limb of this definition mirrors article 1(8).

Art. 1(9) of the Rotterdam Rules contains a definition of "documentary shipper" as "a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record". This definition is new, but it is similar to the second limb of the definition of "shipper" in the Hamburg Rules.

Here the seller may have accepted to be named as "shipper", but under article 35 the seller is entitled to obtain the transport document only if the shipper (here, the FOB buyer) consents. Absent such consent, the seller will not obtain the transport document on delivery of the goods to the carrier. The seller will not have any rights under the Rotterdam Rules as "holder", nor will the seller be able to exercise rights of control under article 50 unless the shipper designates the seller as the controlling party under article 51.

The seller may have rights under the contract for the sale and purchase of the glyphosate. The sale and purchase contract could provide for the FOB seller to be named as shipper in the transport document so that the FOB seller has the rights under the Rotterdam Rules of a documentary shipper.

A cargo of glyphosate would be treated and listed as an IMO dangerous cargo only if the water content reached a certain level. There was no evidence that the cargo was in fact a dangerous cargo when it was packed into containers and loaded on board.

No remark on the label of the cargo indicates that it was dangerous, nor on the dock receipt, since Seller itself did not know this particular feature. Hence, no information about the feature was notified to Shipowner. Thus Shipowner, according to the usual customs, stowed the containers on deck without knowledge of the features.

The vessel sailed to the United States on 15 January, and on 25 January heavy weather was encountered en route. The vessel grounded, sea water leaked into the containers, and the cargo was damaged. At the same time, the cargo together with the sea water became corrosive and damaged the container as well as part of the deck and machinery on board.

* Glyphosate = herbicide for the control of grass and weeds.

Question 6: If the carrier or a third party suffered any loss or damage due to Seller's failure to inform Shipowner of the aforesaid features, what would be Seller's liability and burden of proof to discharge the liability under the Hague-Visby, Hamburg, and Rotterdam Rules?

Stephen Girvin: This question asks about Seller's liability for dangerous cargoes in the event of loss by (i) Shipowner or (ii) some third party. In relation to (ii), if a third party suffered loss this would not be material for the purposes of the Hague-Visby, Hamburg, and Rotterdam Rules (though a third party holding endorsed bills of lading might, presumably, sue Seller under the sale contract?). But if Shipowner were sued by a third party under the carriage contract, it might very well be expected to look to its rights of recourse again Seller. A third party would not be a party to the bills of lading, at least in most common law jurisdictions, so its rights might better be protected by suing Seller in tort.

Turning to the position under each of the existing regimes and the Rotterdam Rules, there is a preliminary caveat to note: the wording in each of the Hague-Visby, Hamburg, and Rotterdam Rules is not exactly the same.

Under the Hague (and Hague-Visby) Rules, Art IV, r 6 expressly provides that when "goods of an inflammable, explosive or dangerous nature [are shipped] … [and] the carrier, master or agent of the carrier has not consented [to their shipment] … the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment". As is also the position in

many common law countries (so, "at common law"), the liability of Seller is strict (see Brass v Maitland (1856) 6 E & B 470; 119 ER 940). In other words, the liability of Seller does not depend upon its knowledge or means of knowledge that the goods are dangerous (see The Giannis NK [1998] 1 Lloyd's Rep 337 (HL)). However, it should also be pointed out that if Shipowner were in breach of its obligation to exercise due diligence to provide a seaworthy ship (Art III, r 1), such an indemnity would not be available (see, e.g., The Fiona [1994] 2 Lloyd's Rep 506 (CA)).

The Hamburg Rules produce a similar outcome for Shipowner. Art 13(1) provides that Seller "must mark or label in a suitable manner dangerous goods as dangerous". If it fails to do so, as is the case on these facts, Art 13(2)(a) provides that Seller must inform Shipowner of the dangerous character of the goods and, if necessary, of the precautions to be taken. If Seller fails so to advise the carrier and the carrier does not otherwise have knowledge of their dangerous character, then Seller is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods.

The Hague (and Hague-Visby) Rules and Hamburg Rules do not contain a definition of "… goods of a … dangerous nature" and this has produced broad interpretations of the concept of "dangerous goods" by the courts (see, e.g., The Aconcagua [2010] EWCA Civ 1403; [2011] 1 Lloyd's Rep 683; The Darya Radhe [2009] EWHC 845 (Comm); [2009] 2 Lloyd's Rep 175; The Giannis NK [1998] 1 Lloyd's Rep 337 (HL)).

Although there is no definition in article 1 of the Rotterdam Rules of dangerous goods the chapeau to article 32 provides that such goods must be dangerous "by their nature or character" and, moreover, must be dangerous "to persons, property or the environment". Seller is required, pursuant to article 32(a), to inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered for carriage and must also mark or label dangerous goods in accordance with any law (art. 32(b)).

When no notice is given to the carrier, as here (Seller, we are told, did not know that glyphosate might become dangerous if the water content reached a certain level), then (assuming that the carrier does not otherwise have this knowledge) Seller is "liable to the carrier for loss or damage resulting from such failure to inform". This wording is not exactly the same as that under the Hague (and Hague-Visby) and Hamburg Rules and, accordingly (assuming there is a causal connection between the loss suffered by Shipowner and the Sellers' failure to notify Shipowner) Seller will be liable to Shipowner. If Shipowner could (or should) have taken steps to neutralise the dangerous consequences of the carriage of the glyphosate this might interrupt the chain of causation. This does not appear, on the facts, to be the case here and so it is submitted that Seller will be liable to Shipowner under the Rotterdam Rules.

Note that the factual scenario concerns goods that become dangerous and result in actual loss to Shipowner. But when there are goods that may become a danger, Article 15 provides that Shipowner may decline to receive or load such cargoes and may also take reasonable measures, such as unloading, destroying, or rendering the goods harmless if the goods are, or reasonably appear likely to become an actual danger to persons, property, or the environment.

Tomotaka Fujita: Here is an additional remark on the difference between the Hague-Visby or the Hamburg Rules and the Rotterdam Rules. The shipper is liable for loss or damage resulting from a breach of its obligations (article 32(a) and (b)). The wording is slightly different in other Rules. The Hague and Hague-Visby Rules provide that the shipper is liable "for all damages and expenses directly or indirectly arising out of or resulting from such shipment" (article 4(6)) and the Hamburg Rules "for the loss resulting from the shipment of such goods" (article 13(2)(a)). UNCITRAL carefully examined the wording and decided that the current text is more appropriate because it focuses on the causal connection specifically with the shipper's breach. It is accordingly necessary to examine whether the damage could have been avoided if the shipper had observed its article 32 obligations. If the answer is affirmative, then the necessary causation exists and the shipper is liable to that extent. Although I do not know if this leads to a different conclusion under this hypothetical case but I think the different wording on causation under the Rotterdam Rules is worth noting.

After the vessel was refloated, she was towed to a port of refugee for temporary repairs. Due to the improper repairs to the damage caused by the grounding, however, further leaking caused further damage to the cargo.

Question 7: In case that the amount of cargo damage due to the grounding of the vessel has not been appraised and assessed at the port of refuge where the temporary repair work is carried out, and in accordance with relevant provisions stipulated by the Hague-Visby, Hamburg, and Rotterdam Rules, should the carrier be liable for, and how could it bear the responsibility for the cargo damage directly caused by the grounding and the damage arising from the leak of water after the temporary repair? What is the difference in respect of the burden of producing evidence?

Stuart Beare: Here both the damage to the cargo due to the grounding and the subsequent damage due to the improper repairs were caused by seawater ingress from an underwater breach in the integrity of the hull of the ship. In practice, in the absence of a survey report or assessment of the damage at the port of refuge, it would be difficult, if not impossible, to differentiate between the contamination damage to the glyphosate caused by the ingress due to the grounding and the ingress due to the improper repair.

Groundings usually result from negligent navigation and under the Hague-Visby Rules the carrier would seek to rely on the nautical fault exception (art. IV r 2(a)). The burden of proof would be on the carrier. The cargo owner might seek to assert that a defect amounting to unseaworthiness, such as an out-of-date chart or a defect in the ship's steering gear, caused or contributed to the grounding. The burden of proving unseaworthiness would be on the cargo owner. The carrier would then have to prove that it exercised due diligence.

Under the Hamburg Rules, in order to avoid liability the carrier would have to prove that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence [which caused the damage] and its consequences". Here it would be difficult for the carrier to prove that the crew took all such measures to avoid the grounding, and that the repairer took all such measures properly to carry out the repairs.

The nautical fault exception has been excluded from the Rotterdam Rules. The carrier would be able to avoid liability under article 17(2) only if it could prove that the grounding was not attributable to its fault or the fault of the master or crew. This would be difficult. It would also be open to the cargo owner to assert that the damage was probably caused or contributed to by unseaworthiness of the ship under article 17(5)(a). Article 23(6) should assist the cargo owner in obtaining the necessary evidence.

It would also be difficult for the carrier to avoid liability for the damage caused by the improper repairs because, prima facie, the carrier would be in breach of the new obligation in article 14 to exercise due diligence to keep the ship seaworthy throughout the voyage. In some jurisdictions the obligation to exercise due diligence under the Hague-Visby Rules is non-delegable, meaning that the carrier cannot escape by proving that it employed a competent independent contractor. In any event, article 18 of the Rotterdam Rules sets out the carrier's liability for the acts or omissions of other persons and provides that the carrier is liable for the breach of its obligations under the Rotterdam Rules caused by their acts or omissions. Article 18(d) is wide and includes among the persons for whose acts or omissions the carrier is liable "any person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request….." The repairer would be such a person, as it undertook at the carrier's request to perform the carrier's obligation under article 14.

The limit of the carrier's package liability under article 59 of the Rotterdam Rules would depend on whether the 3940 packages of glyphosate were enumerated in the transport document, or only the 6 containers.

Question 8: When Buyer refused to pay for the cargo, could Seller exercise a right of stoppage in transit by exercising the right of control? For instance, can Seller request Shipowner to deliver the cargo to another consignee or to return the cargo?

Tomotaka Fujita: In order to answer question 8, it would be useful to begin with the relationship between the right of stoppage in transit and the right of control. The right of stoppage, which is related to the sale of goods, is the right of an unpaid seller that has transferred the ownership of the goods to resume possession of the goods during their transit. In many jurisdictions, the seller retains the right of stoppage in transit after transferring the negotiable transport document to the buyer but before the carrier delivers the goods. Article 71(2) of CISG also provides for the right of stoppage.

The right of control is best understood as a tool that assists the seller in exercising the right of stoppage under the law of contracts. The right of stoppage in transit under a sales contract without retaining the right of control of the goods under the contract of carriage is unlikely to be exercised without having the right of control under the contract of carriage. Even if a person wishes to exercise the right of stoppage, the carrier will not follow the instruction under a sales contract to which it is not a party. The right of control fills this gap.

Therefore, if you ask a question in an abstract manner, i.e., when Buyer refused to pay for the cargo, could Seller exercise a right of stoppage in transit by exercising the right of control, the answer is certainly "yes".

But when we ask whether Seller in this hypothetical case can exercise the right of stoppage in transit through the right of control, the answer depends on specific facts. When a bill of lading is issued, article 51(3) provides it is necessary to have all the originals of the document, if more than one original are issued. The seller needs to obtain the original of the bill of lading. When no bill of lading is issued, the FOB seller who is not the shipper is not a controlling party unless the right is transferred to it. Finally, when the Seller in our hypothetical qualifies as a controlling party, there are further conditions in article 52 for the carrier's executing the instruction from a controlling party.

The bill of lading expressly says "in Witness Whereof, the carrier by its agents have signed three (3) original bills of lading all of this tenor and date, one of which being accomplished, the others to stand void," and also "the goods may be delivered without the surrender of the bill of lading if the proper bill of lading holder cannot be identified with reasonable effort or, if the bill of lading holder can be identified, it declines to claim delivery of the goods."

When the 6 x 20' containers arrived in Long Beach, no holders of the bill of lading appeared, nor did anyone request delivery of the cargo. Shipowner tries to approach the holder, including Bank A and Buyer, but in vain.

Question 9: Can Shipowner approach Seller for instructions? Or in any event, can Seller challenge the attestation in the bill of lading and insist that Shipowner deliver the cargo only against surrender of the original bill of lading?

Gertjan Van der Ziel: The answer to the first question is positive. If the carrier cannot deliver under article 47(1) and the bill of lading includes the above clause, the carrier

has the option to apply either article 48 or article 47(2). If it chooses the latter option, and assuming that the seller is the shipper, the carrier may approach the seller for instructions.

The answer to the second question is negative. In practice, a seller/shipper is often commercially interested in giving the carrier instructions, but it may occur that it is reasonably not able or willing to do so. In such case, article 47(2) is of no avail and if the situation continues that no bill of lading holder shows up in Long Beach, the carrier must regard the goods as undeliverable and has no other option than to apply article 48 (see article 48(1)(b) and(c)). Under article 48, the carrier may "take such action in respect of the goods as circumstances reasonably require" (see article 48(2)). Consequently, the carrier has a wide discretion what to do with the goods, meaning that, when other actions than to follow the seller's 'instructions' are more reasonable under the circumstances, the carrier may ignore the seller's "instructions" or other wishes.

Assume that Shipowner succeeded in approaching both Bank A and Buyer, but they both denied being the holder of the bill of lading any more. Buyer asserted that it sold the cargo together with the bill on to its sub-purchaser via Bank B.

Question 10: If Buyer gave instruction to Shipowner to deliver the cargo to the sub-purchaser, which is not yet able to produce the bill of lading, is Shipowner obliged to follow that instruction? Can you elaborate on the right of control and the right of following instructions in the absence of the bill of lading? Is Seller's right of stoppage in transit undermined?

Gertjan Van der Ziel: The answer to the first question is negative. Under article 47(2) only the shipper or documentary shipper are entitled to give instructions to the carrier. If this right would have been extended to further sellers/buyers in a chain of sales, the carrier would be involved in the field of contracts of sale, which is beyond its business. Of course, the sub-buyer may provide useful information to the carrier about the possible identity of the bill of lading holder (who may be a subsequent person in the line of sales), but if this further sub-buyer (and possible bill of lading holder) refuses to surrender the bill of lading, the carrier is not allowed to deliver the goods to it under article 47. Like in the answer to the previous question, if this situation continues, the carrier has no option but to regard the goods as undeliverable and it may exercise its wide discretion under article 48. Then, if the carrier considers the information given to it as trustworthy, it cannot be excluded that the most reasonable action that the carrier can do under the circumstances is to deliver the goods (without surrender of the bill of lading) to the person indicated by the sub-buyer against a Letter of Indemnity provided by the sub-buyer and co-signed by a first class bank. I emphasize that such 'delivery' is not a delivery under article 47 (1) or (2), but is a disposal of the goods by the carrier under article 48.

As to the second question it must be realized that it relates here to the situation that the controlling party, i.e. the bill of lading holder, despite that the goods have arrived

at their destination and, therefore, the bill of lading holder is systematically obliged to take delivery or to give the carrier instructions to dispose of the goods otherwise, for some reason or another does not want to do so. In other words, the controlling party does not want to take delivery or exercise its control. Under these circumstances, i.e. in the absence of action by the controlling party, the carrier may seek instructions from the shipper, because the shipper is the carrier's contractual counterpart and, as a matter of principle, responsible that a carrier eventually is able to dispose of the goods. These shipper's instructions are, so to say, the secondary alternative to instructions from the controlling party (bill of lading holder). As soon as the controlling party is willing again to give instructions or to take delivery, the carrier has to follow these instructions (if still possible) and must ignore any instruction from the shipper that is to the contrary. This duty of the carrier to follow up instructions from a controlling party also applies when these instructions are intended for the exercising of the controlling party's right of stoppage.

For the reply to the third question I refer to the answer given by Prof. Fujita to question 8. The right of control is intended to facilitate the exercising of the right of stoppage because a seller, who is the controlling party under the contract of carriage, may instruct the carrier to deliver the goods to itself. (See article 50(1)(c)). A seller, who has parted with the (full set of) bills of lading and still has the right of stoppage under the contract of sale, does not have this easy manner of exercising the right of stoppage. Such seller may still exercise the right of stoppage, but because it is no longer in a position to instruct the carrier, it must, for example, try to obtain a court order for a legal measure that prevents the bill of lading holder to take delivery of the goods and would enable the seller to take repossession of the goods.

So, the right of control is not intended to undermine the right of stoppage but, to the contrary, intended to facilitate the exercising of this right.

Question 11: Would it make any difference if the bill of lading had been a straight bill? Would article 46 increase the transaction risks in the international sale of goods? Does article 46 pave the way for the delivery of cargo without bills of lading (as some cargo interests have observed)?

Gertjan Van der Ziel: All three questions can be answered negatively. Article 46 does not provide for the case of a straight bill of lading to include the notation referred to in the chapeau of article 47(2). This was considered to be unnecessary for this type of transport document. Under a straight bill of lading a carrier always knows the identity of the consignee and can request delivery instructions.

Under normal practice a carrier is interested to dispose of the goods when these have arrived at destination. So it will send the known consignee a notice of arrival. And it may be expected that the consignee, having paid for the goods in order to obtain the straight bill of lading, is interested to take delivery of them. If, for one reason or another, the known consignee doesn't do anything, the carrier, because of its interest to dispose of the goods, will try to find the consignee to take delivery. If the

consignee is untraceable, the carrier has no option but to contact the shipper. Usually, the shipper is the seller and has a business relation with the consignee as buyer. So, the shipper may have useful information for the carrier about the whereabouts of the consignee. If also a possible contact with the shipper fails to produce the result that the consignee takes delivery and the carrier remains stuck with the goods at destination, the carrier may apply article 48. Under this article the carrier may take such action in respect of the goods as circumstances may reasonably require. And what is more reasonable under the circumstances than asking the shipper for instructions how to dispose of the goods? In this regard, it should be borne in mind that the shipper is the carrier's contractual counterpart and, as a matter of principle, in this capacity is responsible that the carrier can dispose of the goods, one way or another.

On the basis of the above normal scenario, I fail to see why specifically article 46 would increase transaction risks or pave the way for delivery of cargo without surrender of bills of lading. With a minimum of alertness, as may be expected from international business people, the consignee under a straight bill of lading doesn't run any delivery risk under the Rotterdam Rules. In this connection, I like making two general comments.

First, virtually all commercial functions of a straight bill of lading may be fulfilled by either (i) a sea waybill, particularly now the Rotterdam Rules include express provisions on the right of control under non-negotiable transport documents, or (ii) an ordinary order bill of lading that is endorsed to a named person. If someone, rightfully or wrongfully, mistrusts the straight bill of lading under the Rotterdam Rules, there is alternative documentation available for such person.

Second, it is always possible, also under current law and under any transport document, that a carrier colludes with a shipper or any other person and delivers the goods to another person than the bill of lading holder (or other lawful consignee). In such case, the carrier commits fraud and, by doing so, would spoil its own business. In addition, more generally, trade law is not designed to combat fraud – fraud can always happen, whatever the law – but is (normally) designed to protect the one contract party against insolvency of the other party.

Assume that Seller was named on the bill of lading as shipper. After the cargo arrives at Long Beach, Shipowner — without collecting the original bill of lading — delivers the cargo against a letter of undertaking issued by a bank. The original bill of lading was later returned to Seller, which now wishes to bring a claim against Shipowner. Although the bill of lading contains a jurisdiction clause that stipulates that all disputes arising from or in connection with the bill of lading shall be exclusively submitted to a Korean court in accordance with Korean law, Seller wishes to bring its action in China. Assume that China and the United States are both parties to the Rotterdam Rules.

Question 12: In respect of the loss incurred due to the release of the cargo without the bill of lading, which court could have the jurisdiction over the dispute and which law should be applied?

Tomotaka Fujita: The cargo interest brought an action against the carrier in China.

China is a Contracting State in this hypothesis. But we should note that there are two kinds of contracting states in connection with jurisdiction: those countries that opt in to Chapter 14 of the Convention and those that do not.

If China is a Contracting State opting in to Chapter 14 pursuant to article 74, the Chinese court has jurisdiction under article 66(a)(ii). Courts in the United States, where the place of delivery is situated, have jurisdiction under article 66(a)(iii). Courts in Korea have jurisdiction under article 66(a)(i) and 66(b) if Korea is a contracting state (see the definition of "competent court" in article 1(30)). But in this hypothetical case, the plaintiff has decided to sue in China and it is certainly possible (see the definition of "competent court" in article 1(30)). Please note that the exclusive choice of forum clause for Korean court cannot effectively prevent the law suit in China (unless the specific requirements for a volume contract are satisfied). Which Chinese court has the jurisdiction? You should choose a proper court under Chinese law (which may recognize more than one court). In this case the Rotterdam Rules apply to the dispute because the contract of carriage in our hypothetical case meets the condition in Article 5.

If China is a Contracting State that does not opt into Chapter 14, then the question is decided by Chinese law which is the law of the forum (*lex fori*). I assume the law of the forum governs the procedural issues in most countries. Therefore, the answer depends on what Chinese law says. If Chinese law recognizes the effect of exclusive choice of forum clause on the bill of lading, then the Korean court and only the Korean court has jurisdiction. The Chinese court would refuse to accept the case. The Rotterdam Rules may apply or may not apply depending on whether Korea ratifies the Rotterdam Rules or not. If Chinese law does not recognize the effect of an exclusive choice of forum clause and if it gives jurisdiction to the Chinese court, the Rotterdam Rules apply to this case because the contract of carriage in our hypothetical case meets the condition in Article 5.