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The Provisions Relating to the Identity of the Controlling Party in the Rotterdam Rules and Their Potential Influences on Chinese Cargo Interests

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Introduction

The deficiencies of the Hague Rules and the Hamburg Rules led to their inability to reverse the annoying situation that multiple international and national laws were still competing to govern the carriage of goods by sea in the end of the twentieth century.¹ Additionally, the rapid development of the shipping industry brought about the anxiety that the legal regimes governing the ocean transportation, whether based on the Hague Rules or the Hamburg Rules, might not be perfectly compatible with modern trade practices.² In the 1990s, the Comité Maritime International (CMI) and the UNCITRAL reached a consensus that they were supposed to work together for a modern and widely-accepted regime.³ It was their joint efforts that gave birth to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules.⁴ The Rules were adopted by the U.N. General Assembly on December 11, 2008 and have been open for signature

¹ Michael F. Sturley, Tomotaka Fujita & Gertjan van der Ziel, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (London: Sweet & Maxwell, 2010) at para. 1.047.

² Jernej Sekolec, "Foreword" in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli, eds, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Alphen aan den Rijn: Kluwer Law International, 2010) xxi at xxi. See also Alan E Branch, *Elements of Shipping*, 8th ed. (London: Routledge, 2010) at 76; Niko Wijnolst, Kai Levander & Tor Wergeland, *Shipping Innovation* (Amsterdam: IOS Press, 2009) at 90; Antonis Antapassis, Lia Athanassiou & Erik Rosaeg, *Competition and Regulation in Shipping and Shipping Related Industries* (Leiden: Brill Academic Publishers, 2009) at 46.

³ The seed of the collaboration between the UNCITRAL and the CMI was planted in the former's Electronic Data Interchange Project. In June 1996, a proposal, as part of the project, was discussed in the UNCITRAL. The proposal suggested a review of existing practices and laws related to the international carriage of goods by sea "with a view to establishing the need for uniform rules in the areas where no such rules [had] existed and with a view to achieving greater uniformity of laws than [had] so far been achieved." *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-ninth Session*, UNGAOR, 51st Sess., Supp. No. 17, UN Doc. A/51/17, (1996) at para. 210.

⁴ See Kate Lannan, "Launch of the Rotterdam Rules" (2009) 20 *Annual of China Maritime Law* 1 at 3.

since September 23, 2009.⁵ There are so far 25 signatories to the Rules.⁶ The Rules have been subject to some sharp criticism despite numerous positive comments on them.⁷ As a matter of fact, the future of the Rules is still a blur as there seems to be a long journey to their entry into force.⁸

The right of control is regarded as one of the novelties in the Rotterdam Rules as it was not addressed in the Hague Rules, the Visby Rules or the Hamburg Rules.⁹ It is defined in the Rotterdam Rules as the right of the

⁵ *Resolution Adopted by the General Assembly on 11 December 2008 [on the Report of the Sixth Committee (A/63/438)]*, GA Res. 63/122, UNGAOR, 63d Sess., UN Doc. A/RES/63/122, (2008) at paras. 1-3.

⁶ The 25 signatories include Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea-Bissau, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo and United States of America, online: United Nations Treaty Collection <<https://treaties.un.org>>. Sixteen of them signed the convention at the ceremony for the opening for signature held in Rotterdam. They were Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States. See Michael F Sturley, "Chapter 2 General Principles of Transport Law and the Rotterdam Rules" in Meltem Deniz Güner-Özbek, ed., *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the "Rotterdam Rules"* (Berlin: Springer, 2011) 63 at 65, n. 4.

⁷ For critical comments on the Rotterdam Rules, see generally William Tetley, "Some General Criticisms of the Rotterdam Rules" (2008) 14 *Journal of International Maritime Law* 625. See also Roberto Bergami, "Rotterdam Rules: Volume Contracts, Delivery Terms, Transport Documents and Letters of Credit" (2010) 14 *Vindobona Journal of International Commercial Law & Arbitration* 9 at 31; Felix WH Chan, "In Search of a Global Theory of Maritime Electronic Commerce: China's Position on the Rotterdam Rules" (2009) 40 *J Mar L & Com* 185 at 188. For positive comments on the Rotterdam Rules, see e.g. Sturley, Fujita & van der Ziel, *supra* note 1 at para. 1.019.

⁸ Article 94.1 of the Rotterdam Rules provides that "[t]his Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession." However, only three states have already submitted their instruments of ratification, acceptance, approval or accession. See D Rhidian Thomas, ed, *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Dawlish: Lawtext Publishing, 2009) at 12.

⁹ The Rotterdam Rules consist of eighteen chapters that are respectively entitled "General Provisions", "Scope of Application", "Electronic Transport Records", "Obligations of the Carrier", "Liability of the Carrier for Loss, Damage or Delay", "Additional Provisions Relating to Particular Stages of Carriage", "Obligations of the Shipper to the Carrier", "Transport Documents and Electronic Transport Records",

controlling party under the contract of carriage to give the carrier instructions in respect of the goods.¹⁰ As stated in Article 50 of the Rules, it may be exercised by the controlling party during the entire period of the responsibility of the carrier and it specifically refers to the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage, the right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route, as well as the right to replace the consignee by any other person including the controlling party. However, it is not an innovation of the Rotterdam Rules given the existence of its equivalent in some conventions governing other modes of transport prior to the emergence of the Rules.¹¹ In the report

“Delivery of the Goods”, “Rights of the Controlling Party”, “Transfer of Rights”, “Limits of Liability”, “Time for Suit”, “Jurisdiction”, “Arbitration”, “Validity of Contractual Terms”, “Matters not Governed by This Convention” and “Final Clauses”. See generally Francesco Berlingieri, “General Introduction” in von Ziegler, Schelin & Zunarelli, *supra* note 2, 1 at 3-6. The novelties of the Rules include the door-to-door coverage, the maritime performing party, the right of control, the volume contract, etc. See generally Lannan, *supra* note 4 at 5-9.

¹⁰ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 11 December 2008, 48 I.L.M. 659, arts. 1.12, 1.13 [Rotterdam Rules].

¹¹ See e.g. *Convention on the Contract for the International Carriage of Goods by Road*, 19 May 1956, 399 U.N.T.S. 189, art. 12.1 [CMR]; *Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM) – Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of 9 June 1999*, art. 18.1, online: International Rail Transport Committee <<http://www.cit-rail.org>>; *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 L.N.T.S. 11, 4 U.S.T. 5250, art. 12.1 [Warsaw Convention]. Article 12.1 of the CMR provides that:

The sender has the right to dispose of the goods, in particular by asking the carrier to stop the goods in transit, to change the place at which delivery is to take place or to deliver the goods to a consignee other than the consignee indicated in the consignment note.

Article 18.1 of the CIM provides that:

The consignor shall be entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders. He may in particular ask the carrier

- a) to discontinue the carriage of the goods;
- b) to delay the delivery of the goods;
- c) to deliver the goods to a consignee different from the one entered on the consignment note;
- d) to deliver the goods at a place other than the place of destination entered on the consignment note.

Article 12.1 of the Warsaw Convention provides that:

entitled “Possible Future Work on Transport Law” issued during the UNCITRAL thirty-fourth session in 2001, it was stated that:

During the time the cargo is in the custody of the carrier, the parties interested in the cargo (e.g. the shipper, the holder of any security right and the consignee) may wish to give particular instructions to the carrier for the performance of the contract of carriage. The carrier, in turn, would like to know from whom it is required to take instructions and with whom it could, in case a particular issue arises, negotiate different terms of the contract of carriage and collect additional costs. It is, therefore, thought that the new instrument should contain a rule on the right of control during transit. In doing so, maritime transportation would come into line with most of the transport conventions applicable for other modes of transport that contain specific provisions on the right of control. Of course, the provisions should follow patterns adapted to the particular needs of maritime transport¹².

The identity of the controlling party constitutes an essential part of the scheme regarding the right of control in the Rotterdam Rules. This article is intended for a thorough examination of the provisions concerning the identity of the controlling party in the Rules and their potential influences on Chinese cargo interests.

I. Dissection of Article 51 of the Rotterdam Rules

Article 51 of the Rules is composed of four paragraphs that deal with the identity of the controlling party in different circumstances.

Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

¹² *Possible Future Work on Transport Law*, UNCITRALOR, 34th Sess., UN Doc. A/CN.9/497, (2001) at para. 43, online: United Nations Commission on International Trade Law <<http://www.uncitral.org>>.

A. When a non-negotiable transport document not indicating that it shall be surrendered in order to obtain delivery of the goods, a non-negotiable electronic transport record, or no transport document or electronic transport record is issued

Paragraph 1 of Article 51 of the Rules is applicable to the cases not referred to in Paragraphs 2, 3 and 4 of the article that respectively deal with the circumstances where a non-negotiable transport document indicating that it shall be surrendered in order to obtain delivery of the goods is issued, a negotiable transport document is issued, and a negotiable electronic transport record is issued. Therefore, it may be inferred that Paragraph 1 applies when a non-negotiable transport document not indicating that it shall be surrendered in order to obtain delivery of the goods,¹³ a non-negotiable electronic transport record, or no transport document or electronic transport record is issued.¹⁴ In such cases, “[t]he shipper is the

¹³ Sea waybill and straight bill of lading should both be regarded as a non-negotiable transport document not indicating that it shall be surrendered in order to obtain delivery of the goods. Professor Charles Debattista said that in the light of the transport documents currently in use, Article 51.1 of the Rotterdam Rules should be understood with reference to “seawaybills and straight bills of lading which either expressly state that their surrender is not necessary for delivery of the goods or are silent as to the need of surrender for delivery”. Yvonne Baatz et al, *The Rotterdam Rules: A Practical Annotation* (London: Informa, 2009) at 155. A similar proposition is held by Professor Gertjan van der Ziel who stated that Article 51.1 of the Rules shall apply to circumstances where a sea waybill was issued. He added that Article 51.2 of the Rules “applies when a bill of lading is made out to a named person. The convention defines such transport document as ‘non-negotiable’. Particularly in civil-law jurisdictions, this type of transport document must be legally distinguished from the sea waybill.” Gertjan van der Ziel, “Chapter 10 of the Rotterdam Rules: Control of Goods in Transit” (2008) 44 *Tex Int’l L.J.* 375 at 380.

¹⁴ Article 51.1 of the Rotterdam Rules is applicable to cases in which no transport document or electronic transport record is issued. They may occur in short-haul shipment or when some e-commerce business models are involved because the electronic data relating to the carriage may not qualify as an electronic transport record as defined in Article 1.18 of the Rules (*ibid.*) In the context of the Rules, “transport document” means a document issued under a contract of carriage by the carrier that (a) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) evidences or contains a contract of carriage. It may be subdivided into negotiable transport document and non-negotiable transport document. The former means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable

controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party.”¹⁵ Furthermore, the right of control may be transferred from the controlling party to another person and the latter becomes the new controlling party when the carrier is notified of the transfer by the transferor.¹⁶ The controlling party, no matter whether he is the shipper, the person designated by the shipper or the transferee, is supposed to properly identify himself when exercising the right of control.¹⁷

to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”; while the latter means a transport document that is not a negotiable transport document. *Rotterdam Rules*, *supra* note 10, arts. 1.14, 1.15, 1.16. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that (a) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) evidences or contains a contract of carriage. It may be subdivided into negotiable electronic transport record and non-negotiable electronic transport record. The former means an electronic transport record (a) that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”, and (b) the use of which meets the requirements of Article 9, Paragraph 1 of the Rotterdam Rules; while the latter means an electronic transport record that is not a negotiable electronic transport record. *Ibid*, arts. 1.18, 1.19, 1.20.

¹⁵ *Ibid*, art. 51.1(a). “Shipper” means a person that enters into a contract of carriage with a carrier. “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record. “Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record. *Ibid*, arts. 1.8, 1.9, 1.11.

¹⁶ Article 51.1(b) of the Rotterdam Rules (*ibid*) provides that:
The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party.

¹⁷ Article 51.1 of the Rotterdam Rules (*ibid*) does not mention the approach that the controlling party may employ to identify himself. The presentation of a transport document or an electronic transport record may be one of the acceptable approaches but is absolutely not the only one. See Baatz et al, *supra* note 13 at 158.

The shipper is presumed to be the controlling party in the circumstances covered by Article 51.1 of the Rules. Such presumption is justifiable on the grounds of the carrier's obligations vis-à-vis the shipper under the contract of carriage.¹⁸ However, the controlling party may be the consignee, the documentary shipper or another person if any of them is designated as the controlling party by the shipper when the contract of carriage is concluded.¹⁹ There is a theory on Article 51.1 of the Rules suggesting that when no negotiable transport document or electronic transport record is issued, only the shipper is entitled to exercise the right of control,²⁰ but it is quite questionable for the following reasons: (a) it is wrong to equate the transferability of a transport document or an electronic transport record with the transferability of the right of control;²¹ (b) there shall be room for the autonomy of will with regard to the determination of the controlling party given the nature of the law governing the carriage of goods by sea as private law;²² and (c) other interests than the shipper and the carrier may be involved in the carriage of goods by sea even if no negotiable transport document or electronic transport record is issued and allowing the shipper to designate another person as the controlling party and recognizing the transferability of the right of control may be beneficial to the realization of the aim of a commercial contract.²³

B. When a non-negotiable transport document indicating that it shall be surrendered in order to obtain delivery of the goods is issued

According to Article 51.2(a) of the Rules, when a non-negotiable transport document indicating that it shall be surrendered in order to

¹⁸ See Xianjiang Wu & Haibo Chen, "Study on the Right of Control" (2003) 14 Annual of China Maritime Law 36 at 44.

¹⁹ *Rotterdam Rules*, *supra* note 10, art. 51.1(a).

²⁰ See Xianjiang Wu & Haibo Chen, "Review on the Provisions Regarding the Right of Control in the CMI Draft" (2001) 12 Annual of China Maritime Law 371 at 376 [Wu & Chen, "Review"].

²¹ See van der Ziel, *supra* note 13 at 378-379.

²² See Ernest J. Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 10.

²³ See Carl E. McDowell & Helen M. Gibbs, *Ocean Transportation* (Washington D.C.: BeardBooks, 1999) at 12-13; Lachmi Singh, *The Law of Carriage of Goods by Sea* (Totton: Bloomsbury Professional, 2011) at 26.

obtain delivery of the goods is issued, the shipper is the controlling party and may transfer the right of control to the consignee named in the transport document.²⁴

In some earlier draft instruments of the Rules, transport documents had simply been divided into negotiable ones and non-negotiable ones,²⁵ while in the final text of the Rules, non-negotiable transport documents were subdivided into those indicating that they shall be surrendered in order to obtain delivery of the goods and those without such indication.²⁶ Such change arose from the existence of two sorts of transport documents, namely straight bill of lading and sea waybill.²⁷ The former requires the carrier to deliver the goods to a named person.²⁸ The latter is a document that serves as proof that there has been a contract of carriage between the shipper and the carrier and that the carrier has received the goods from the shipper and agreed to deliver them to a named person.²⁹ Neither of them falls within the scope of negotiable transport documents under which the goods shall be “consigned to the order of the shipper, to the order of the consignee, or to bearer.”³⁰ However, there is a noteworthy difference between them, that is, the named consignee under a straight bill of lading needs to surrender the document to obtain delivery of the goods, while the named consignee under a sea waybill does not.³¹ The draftsmen

²⁴ *Rotterdam Rules*, *supra* note 10, art. 51.2(a).

²⁵ See *Preliminary Draft Instrument on the Carriage of Goods by Sea*, UNCITRALOR, 2002, UN Doc. A/CN.9/WG.III/WP.21; *Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]*, UNCITRALOR, 2003, UN Doc A/CN.9/WG.III/WP.32; *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, UNCITRALOR, 2005, UN Doc. A/CN.9/WG.III/WP.56. See also Yuzhuo Si & Lixin Han, eds., *Study on the Rotterdam Rules* (Dalian: Dalian Maritime University Press, 2009) at 326.

²⁶ See *Rotterdam Rules*, *supra* note 10, arts. 46, 51.2.

²⁷ See *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Proposal by the Netherlands on Bills of Lading Consigned to a Named Person*, UNCITRALOR, 2006, UN Doc. A/CN.9/WG.III/WP.68 at para. 2 [Proposal].

²⁸ See Sukhninder Panesar, “Is a Straight Bill of Lading a Document of Title?” (2004) 25 *Bus L. Rev.* 196 at 196-197.

²⁹ See William Tetley, “Waybills: The Modern Contract of Carriage of Goods by Sea” (1983) 14 *J. Mar. L. & Com* 465 at 466-467. See also Tim Howard, “The Carriage of Goods by Sea Act 1992” (1993) 24 *J. Mar. L. & Com.* 181 at 189.

³⁰ See *Rotterdam Rules*, *supra* note 10, art. 1.15. See also Stasia M Williams, “Something Old, Something New: the Bill of Lading in the Days of EDI” (1991) 1 *Transnat’l L. & Contemp. Probs.* 555 at 566.

³¹ Yuzhuo Si, ed., *Maritime Law* (Beijing: Law Press, 2003) at 142.

of the Rules accepted a proposal presented by the Netherlands in 2006 and subdivided non-negotiable transport documents by the presentation rules stated therein.³²

In fact, Article 51.2(a) of the Rules basically reproduced Article 6 of the CMI Uniform Rules for Sea Waybills.³³ Both of them provide that the ship-

³² In the proposal, the Netherlands contended that:

A sea waybill is also a non-negotiable document that normally is consigned to a named person. In order to distinguish the bill of lading consigned to a named person from such sea waybill, and fully in line with its legitimating function, the definition should ... include that the presentation rule must be stated in the document itself. For the reasons outlined above, in the proposals hereunder the bill of lading consigned to a named person is described as “a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods”.

The proposal was accepted in the Report of Working Group III (Transport Law) on the Work of Its Seventeenth Session. In the report, it was stated that:

After discussion, the Working Group decided that provisions on bills of lading consigned to a named person should be included in the draft convention. It was proposed in paragraph 12 of A/CN.9/WG.III/WP.68 that the bill of lading consigned to a named person should be defined as “a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods”. It was explained that the intention of the proposal was to treat such bills of lading as non-negotiable documents within the ambit of the draft convention, and that the document should carry with it the requirement that it must be shown or surrendered to the carrier when the possessor of the document wanted to exercise any right under the contract of carriage evidenced by the document, or the so-called “presentation rule”. The final necessary element of the definition was thought to be that the “presentation rule” should be stated on the document itself in order to indicate the element of negotiability of the document. It was thought that there was an appropriate combination of elements in the definition to allow it to fit with current commercial practice, in which parties could agree on the requirement of presentation of a non-negotiable document, and that standard form bills of lading consigned to a named person typically contained a statement of the “presentation rule”.

Proposal, supra 27 at paras. 11, 12; *Report of Working Group III (Transport Law) on the Work of Its Seventeenth Session (New York, 3-13 April 2006)*, UNCITRALOR, 2006, UN Doc. A/CN.9/594 at paras. 211-212 [Report].

³³ See *Uniform Rules for Sea Waybills*, art. 6, online: Comité Maritime International <<http://www.comitemaritime.org>> [Uniform Rules]. Article 6 of the Uniform Rules provides that:

(i) Unless the shipper has exercised his option under subrule (ii) below, he shall be the only party entitled to give the carrier instructions in relation to the contract of carriage. Unless prohibited by the applicable law, he shall be entitled to change the name of the consignee at any time up to the consignee claiming delivery of the goods after their arrival at destination, provided he gives the carrier reasonable notice in writing, or by

per shall be the controlling party, unless he opts to transfer the right of control to the consignee.

C. When a negotiable transport document is issued

In such cases, the holder of the negotiable transport document or the holder of all originals of the document, if more than one original is issued, is the controlling party and he may transfer the right of control to another person by transferring the document or all originals.³⁴

There used to be a theory that the owner of the goods in transit shall be the controlling party as the right of control was thought to be essentially analogous to his right to dispose of his property.³⁵ However, it is not always easy to figure out who is the owner of the goods because there is no uniform rules regarding the transfer of ownership universally applicable in all jurisdictions. In France, the ownership is acquired as of right by the buyer with respect to the seller, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered or the price has not yet been paid;³⁶ in Germany, for the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass, but if the acquirer is in

some other means acceptable to the carrier, thereby undertaking to indemnify the carrier against any additional expense caused thereby.

(ii) The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above and the shipper shall cease to have such rights.

³⁴ *Rotterdam Rules*, *supra* note 10, arts. 51.3(a), 51.3(b). They provide that:

When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control.

³⁵ See Li Xiang, "Right of Control of the Goods: Focusing on Chapter 10 of the Rotterdam Rules" (2010) 12 *International Law Review of Wuhan University* 210 at 222; Xu Wu & Yuzhuo Si, "The Legal Characters of the Right of Control of the Goods in the Rotterdam Rules" (2011) 22 *Annual of China Maritime Law* 43 at 45.

³⁶ Art. 1583 C. civ.

possession of the thing, an agreement on the transfer of the ownership suffices;³⁷ in the United Kingdom, where there is a contract for the sale of specific or ascertained goods, the ownership in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case;³⁸ while in the United States, ownership passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods but where delivery is to be made without moving the goods, if the seller is to deliver a document of title, ownership passes at the time when and the place where he delivers such documents or if the goods are at the time of contracting already identified and no documents are to be delivered, ownership passes at the time and place of contracting.³⁹ In the United Nations Convention on Contracts for the International Sale of Goods, that issue is not addressed on purpose.⁴⁰ It is usually difficult for the carrier, independent of the contract of sale, to identify the owner of the goods in transit. In contrast, the holder of the transport document may be identified much more easily.

There has been a lot of debate about the scope of the rights that the holder of a transport document may exercise over the goods covered in that document due to the diverse understandings of the term “document of title” that is often used to describe the nature of transport documents.⁴¹ Although it is not uncontroversial, the definition of “document of title” in the Uniform Commercial Code has been well accepted. “Document of title” is defined in the Code as a document “which in the regular course of business or financing is treated as adequately evidencing that the person in

³⁷ *German Civil Code*, promulgated on 2 January 2002, art. 929.

³⁸ *Sale of Goods Act 1979* (UK), c. 54, s. 17 [Act].

³⁹ UCC § 2-401 (2002).

⁴⁰ *United Nations Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 U.N.T.S. 3, art. 4 [CISG]. Article 4 of the CISG provides that:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.

⁴¹ See Wu & Chen, “Review”, *supra* note 20 at 379; Zhengliang Hu & Chong Cao, “Reconsideration of the Function of Bill of Lading as Document of Title” (1996) 7 *Annual of China Maritime Law* 53 at 76.

possession of it is entitled to receive, hold and dispose of the document and the goods it covers.”⁴² Such definition has shed light on the point that the holder of a negotiable transport document is entitled to dispose of the goods covered by that document.⁴³ Thus, it is not surprising that Article 51.3 of the Rotterdam Rules provides that the holder shall be the controlling party when a negotiable transport document is issued.

D. When a negotiable electronic transport record is issued

When a negotiable electronic transport record is issued, the holder is the controlling party and he may transfer the right of control to another person by transferring the negotiable transport record.⁴⁴

In the early shipping age, it was quite difficult for the carrier, because of the poor communication technologies, to know the owner of the goods in his custody if they had been resold once or more before they arrived at the destination.⁴⁵ In order to release the carrier from such predicament, his obligation of delivery was reduced to the delivery of the goods to the person who could surrender the original bill of lading.⁴⁶ At that time, the bill of lading was deemed as the key to the floating warehouse.⁴⁷ In the past few decades, paper-based trade documentation has been subject to criticism as it is expensive, time-consuming, error-prone and vulnerable to fraud.⁴⁸ On the other hand, there has been an increasing volume of empirical research showing that paperless transactions may streamline supply chains and significantly reduce business costs stemming from the management of countless pieces of paper.⁴⁹ In this context, the draftsmen of the Rotterdam Rules

⁴² UCC § 1-201 (2001).

⁴³ See Yu Guo, “Bill of Lading as Document of Title” (1997) 10 *Chinese Legal Science* 69 at 73.

⁴⁴ *Rotterdam Rules*, *supra* note 10, art. 51.4.

⁴⁵ See Stephen Girvin, *Carriage of Goods by Sea* (New York: Oxford University Press, 2007) at para. 1.26.

⁴⁶ See WE Astle, *Legal Developments in Maritime Commerce* (London: Fairplay, 1983) at 61; WP Benneth, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (Cambridge: Cambridge University Press, 1914) at 7.

⁴⁷ *Motis Exports Ltd v Dampskibsselskabet*, [1999] 1 *Lloyd’s Rep* 837 at 842 (QB, UK).

⁴⁸ Chan, *supra* note 7 at 186-187.

⁴⁹ See generally Sandy Chong, “Success in Electronic Commerce Implementation: A Cross-Country Study of Small and Medium-Sized Enterprises” (2008) 21 *Journal of Enterprise Information Management* 468 at 492; David Walters, “New Economy, New

made a praiseworthy attempt to introduce electronic transport record into the new convention.⁵⁰

As a matter of fact, there is no substantive difference between negotiable electronic transport record and negotiable transport document, despite some particular procedures for the use of the former.⁵¹ That is why Article 51.3 and Article 51.4 of the Rules are quite similar.

II. Article 51 of the Rotterdam Rules and Chinese cargo interests

The Chinese government has not yet signed the Rotterdam Rules as there are still disparate voices from both the academia and the shipping industry in China with respect to the Rules.⁵² China is a major trade power in the world,⁵³ so its decision on whether it would accede to the Rules has to be made after much deliberation on their potential influences on

Business Models, New Approaches” (2004) 34 *International Journal of Physical Distribution & Logistics Management* 219 at 220-221; Robert Halhead, “Breaking Down the Barriers to Free Information Exchange” (1995) 8 *Logistics Information Management* 34 at 35-37.

⁵⁰ Article 8 of the Rotterdam Rules (*supra* note 10) provides that:
Subject to the requirements set out in this Convention:

- (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
- (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

⁵¹ Article 9 of the Rotterdam Rules (*ibid*) provides that:

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;
- (b) An assurance that the negotiable electronic transport record retains its integrity;
- (c) The manner in which the holder is able to demonstrate that it is the holder; and
- (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1(a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

⁵² See generally Zhipeng He, “The Rotterdam Rules: the Stand of China” (2011) 22 *Annual of China Maritime Law* 25 at 25-36.

⁵³ See generally Nicholas R. Lardy, *China in the World Economy* (Washington, D.C.: Institute for International Economics, 1994) at 11-16.

Chinese cargo interests. The rest of this article is contributed to a detailed evaluation of the impacts that Article 51 of the Rules may have on Chinese cargo interests.

A. Positive influences

1. Clarification of the party entitled to exercise the right of control

It is not uncommon that cargo interests need to give the carrier some instructions with regard to the goods in transit under certain circumstances, but there are no provisions on who is entitled to give such instructions in the Hague, Visby and Hamburg Rules. The absence of such provisions has, on the one hand, made it difficult for cargo interests to react effectively to circumstances necessitating changes to the contract of carriage and, on the other, increased the carrier's difficulty in identifying the party whose instructions he is supposed to follow.⁵⁴ Article 51 of the Rotterdam Rules has well filled in this gap by prescribing who has the right of control in different cases.

2. Secure operation of the right of control

The stoppage in transit has been established in numerous domestic laws, such as the U.K. Sale of Goods Act,⁵⁵ the U.S. Uniform Commercial Code,⁵⁶

⁵⁴ Changsheng Hu, "On Certain Issues Concerning the Right of Control in the Rotterdam Rules" (2011) 22 *Annual of China Maritime Law* 11 at 13. See also Faqiang Yuan & Zhiyao Ma, "The Research on the Right of Control in the Marine Transport" (2009) 11 *Journal of Southwest University of Political Science & Law* 90 at 92-93.

⁵⁵ Section 44 of the Act (*supra* note 38) provides that:
Subject to this Act, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

⁵⁶ Section 2-705 of the UCC (*supra* note 39) provides that:
(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.
(2) As against such buyer the seller may stop delivery until
(a) receipt of the goods by the buyer; or
(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the

and the Contract Law of China,⁵⁷ as well as in some international commercial treaties, like the United Nations Convention on Contracts for the International Sale of Goods.⁵⁸ However, the problem is that the stoppage in transit prescribed in the context of the trade law is not fully binding on the carrier, who has not entered into independent of the contract between the seller and the buyer, but who is a party to the contract of carriage under which he is obliged to deliver the goods to the named consignee or the holder of the document of title.⁵⁹ That problem has been noted by the

bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

⁵⁷ See *Contract Law of the People's Republic of China*, promulgated on 15 March 1999, art 308. Article 308 of the Contract Law provides that:

Before the delivery of goods to the consignee by the carrier, the shipper may request the carrier to suspend the carriage, return the goods, alter the destination or deliver the goods to another consignee. The shipper shall compensate the carrier for losses thus caused.

⁵⁸ Article 71 of the CISG (*supra* note 40) provides that:

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

⁵⁹ See Caslav Pejovic, "Stoppage in Transit and Right of Control: Conflict of Rules?" (2008) 20 *Pace Int'l L. Rev.* 129 at 140.

draftsmen of the U.N. Convention on Contracts for the International Sale of Goods. Article 71.2 of the Convention explicitly limits its operation to “the rights in the goods as between the buyer and the seller”, as the Convention is written in a seller-buyer context and should not be interpreted to interfere in other spheres that it is not meant to cover.⁶⁰ That article merely confirms that the seller is not in breach of the contract of sale, should he prevent the carrier from handing over the goods to the buyer at the destination under the circumstances described therein. The carrier, however, is not bound to comply with the seller’s instructions. Indeed, when the buyer holds a document entitling him to obtain the goods, the carrier may be precluded from withholding them by his obligations under the contract of carriage.⁶¹ Article 51 of the Rotterdam Rules, along with the other provisions in Chapter 10, actually reconfirms in the context of the transport law the stoppage in transit that has been contained for a long time in the law governing the sale of goods.⁶² It is foreseeable that the mechanism would work better in the context of the Rotterdam Rules where the carrier’s obligation to follow the instructions given by the prescribed controlling party and his liability for loss of or damage to the goods or for delay in delivery resulting from his failure to comply with such instructions have been explicitly stipulated.⁶³

⁶⁰ See Alexander von Ziegler, “The Right of Suspension and Stoppage in Transit (and Notification Thereof)” (2005) 25 *J.L. & Com.* 353 at 363.

⁶¹ See *ibid* at 366-367. See also AG Guest et al. *Benjamin’s Sale of Goods*, 7th ed. (London: Sweet & Maxwell, 2006) at 1369. John O. Honnold argued that the rules on the stoppage in transit contained in Article 71.2 of the CISG were not so feeble even though their scope was limited to the rights between the seller and the buyer. He added, to support this argument, that although the Convention did not state that the carrier must deliver the goods to the seller, it did state that the seller might stop the delivery of the goods to the buyer holding a document entitling him to obtain them. See John O Honnold & Harry M Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 5th ed. (Alphen aan den Rijn: Kluwer Law International, 2015) at 431.

⁶² Chapter 10 of the Rotterdam Rules contains seven articles. They are respectively entitled “exercise and extent of right of control”, “identity of the controlling party and transfer of the right of control”, “carrier’s execution of instructions”, “deemed delivery”, “variations to the contract of carriage”, “providing additional information, instructions or documents to carrier” and “variation by agreement”. See generally *Rotterdam Rules*, *supra* note 10, arts. 50-56.

⁶³ Article 52.1 of the Rotterdam Rules (*ibid*) provides that:
Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

3. Protection against risks arising from the issuance of straight bills of lading

There are still debates on whether the delivery of goods without production of original bill of lading is allowed when a straight bill of lading has been issued. In the United States Code, the carrier is obliged, when a non-negotiable bill of lading has been issued, to deliver the goods to the consignee named therein,⁶⁴ unless he has been requested by a person having title to, or right to possession of, the goods not to make the delivery or he has been aware that the goods are being delivered to a person not entitled to their possession.⁶⁵ Nonetheless, the Code does not contain any provision regarding the presentation rule for the delivery of goods when a straight

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- (a) The person giving such instructions is entitled to exercise the right of control;
 - (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
 - (c) The instructions will not interfere with the normal operation of the carrier, including its delivery practices.

Article 52.4 of the Rotterdam Rules (*ibid*) provides that:

The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

⁶⁴ 49 U.S.C. § 80110(b) (1994). Section 80110(b), entitled "Persons to Whom Goods May Be Delivered", provides that:

Subject to section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to –

- (1) a person entitled to their possession;
- (2) the consignee named in a nonnegotiable bill; or
- (3) a person in possession of a negotiable bill if –
 - (A) the goods are deliverable to the order of that person; or
 - (B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.

⁶⁵ Section 80111(a) (*ibid*) provides that:

A common carrier is liable for damages to a person having title to, or right to possession of, goods when –

- (1) the carrier delivers the goods to a person not entitled to their possession unless the delivery is authorized under section 80110(b)(2) or (3) of this title;
- (2) the carrier makes a delivery under section 80110(b)(2) or (3) of this title after being requested by or for a person having title to, or right to possession of, the goods not to make the delivery; or
- (3) at the time of delivery under section 80110(b)(2) or (3) of this title, the carrier has information it is delivering the goods to a person not entitled to their possession.

bill of lading has been issued.⁶⁶ In *Glory Products Co Ltd v CAVN (The Brij)*, it was stated that the carrier under a straight bill of lading might deliver the goods to the named consignee who did not surrender the bill of lading.⁶⁷ However, the aforementioned idea was not followed in some subsequent influential cases, such as *Voss v APL Co Pte Ltd* where the judges contended that the goods were deliverable only if the original bill of lading was surrendered even though the bill of lading in question was a straight bill of lading,⁶⁸ as well as *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* where the production of straight bill of lading was thought to be a prerequisite for the obtention of goods even if no such presentation rules were included in the bill of lading.⁶⁹ According to the latest rule in China relating to the delivery of goods in the carriage of goods by sea, goods shall be delivered upon the presentation of original bill of lading, no matter whether it is a straight bill of lading, an order bill of lading or a bearer bill of lading.⁷⁰ Sellers may be left at a disadvantage as a result of the non-uniform norms concerning the delivery of goods when a straight bill of lading has been issued. They would take disproportionate risks if goods may be delivered to buyers failing to appropriately perform their obligations under the contract of sale and holding no documents of title.⁷¹ When a non-negotiable transport document is issued, shippers get the status of controlling party pursuant to Article 51 of the Rotterdam

⁶⁶ Stephen Girvin, “Bills of Lading and Straight Bills of Lading: Principles and Practice” (2006) *J. Bus. L.* 86 at 110.

⁶⁷ *Glory Products Co Ltd v CAVN (The Brij)*, [2001] 1 *Lloyd’s Rep* 431 at 435 (Sup. Ct. HK).

⁶⁸ *Voss v APL Co Pte Ltd*, [2002] 2 *Lloyd’s Rep* 707 at 710 (CA Sing).

⁶⁹ *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)*, [2005] 1 *Lloyd’s Rep* 347 at 350 (HL(Eng)).

⁷⁰ See *Provisions of the Supreme People’s Court on Several Issues Concerning the Application of Law during the Trial of Cases about Delivery of Goods without an Original Bill of Lading*, adopted on 16 February 2009, arts. 1, 2. Article 1 of the Provisions provides that: The term “original bill of lading” as mentioned in these Provisions shall refer to a straight bill of lading, an order bill of lading or a bearer bill of lading.

Article 2 of the Provisions provides that:

Where a carrier does, in violation of law, the delivery of goods without an original bill of lading which damages the rights of the holder of the original bill of lading, the holder may require the carrier to bear the civil liability for the losses resulting therefrom.

⁷¹ See Yuzhuo Si et al, “Theory and Practices on the Delivery of Goods without Bill of Lading” (2000) 11 *Annual of China Maritime Law* 18 at 23; Deyi Ma, “Review of the Culture of Maritime Law and Reconsideration of the Delivery of Goods without Bill of Lading” (2009) 23 *Contemporary Law Review* 107 at 109.

Rules which virtually affords them necessary protection against undutiful buyers and carriers.

4. Protection for holders of negotiable transport documents

Prior to the emergence of the Rotterdam Rules, there was no provision on the right of control in the conventions governing the carriage of goods by sea. A mechanism similar to the right of control has been included in some conventions governing other modes of transport, but it is named “the right to dispose of the goods”.⁷² The formulation of “the right of control” appeared for the first time in the CMI Uniform Rules for Sea Waybills,⁷³ but the whole rules apparently apply only to sea waybills, a kind of non-negotiable transport documents. The fact is that negotiable transport documents are widely used in the carriage of goods by sea.⁷⁴ Article 51.3 of the Rotterdam Rules, which prescribes that the holder shall be the controlling party if a negotiable transport document is issued,⁷⁵ provides an effective remedy for holders of such documents when it becomes necessary to make changes to the contract of carriage covering the goods in transit.

5. Secure environment of electronic commerce

Generally speaking, electronic commerce refers to sharing of business information, maintaining business relationships and conducting business

⁷² Article 12.1 of the Warsaw Convention (*supra* note 11) provides that: Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right. Article 12.1 of the CMR (*supra* note 11) provides that: The sender has the right to dispose of the goods, in particular by asking the carrier to stop the goods in transit, to change the place at which delivery is to take place or to deliver the goods to a consignee other than the consignee indicated in the consignment note.

⁷³ See *Uniform Rules*, *supra* note 33, art. 6.

⁷⁴ See Charles Debattista, *Bills of Lading in Export Trade*, 3d ed (Haywards Heath: Tottel, 2009) at 76. See also Boris Kozolchik, “Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective” (1992) 23 J. Mar. L. & Com. 161 at 166.

⁷⁵ *Rotterdam Rules*, *supra* note 10, art. 51.3.

transactions by means of the telecommunication network.⁷⁶ It is developing rapidly and has penetrated newly emerging legal instruments.⁷⁷ The draftsmen of the Rotterdam Rules have taken into account the overwhelming trend when drawing up the text of the Rules. It has been acknowledged in the Rules that “the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.”⁷⁸ If an electronic transport record as provided for in Article 1.18 of the Rules is issued, the shipper or the holder of the electronic transport record shall be presumed to be the controlling party depending on whether it is negotiable or not.⁷⁹ There seems to be another possibility that neither a traditional transport document nor an electronic transport record is issued for shipment due to the rise of certain new modes of electronic commerce. That possibility may fall within the scope of Article 51.1 of the Rules which stipulates that the shipper shall be the controlling party “[e]xcept in the cases referred to in paragraphs 2, 3 and 4 of this article”.⁸⁰ On the whole, the provisions in the Rules relating to the identification of the controlling party provide a secure transaction environment for cargo interests no matter whether they choose a traditional or a new way of doing business.

B. Negative influences

1. Damage to interests of sellers under the FOB term

FOB (Free on Board) is a trade term frequently used for sea or inland waterway transport.⁸¹ It means that the seller delivers the goods on board

⁷⁶ Vladimir Zwass, “Electronic Commerce: Structures and Issues” (1996) 1 *International Journal of Electronic Commerce* 3 at 3.

⁷⁷ See generally Michael Chissick & Alistair Kelman, *Electronic Commerce: Law and Practice*, 3d ed. (London: Sweet & Maxwell, 2002) at 36; Alan Davidson, *The Law of Electronic Commerce* (Cambridge: Cambridge University Press, 2009) at 23; Ronald J. Mann, *Electronic Commerce*, 4th ed. (New York: Aspen Publishers, 2011) at 20.

⁷⁸ *Rotterdam Rules*, *supra* note 10, art. 8(b).

⁷⁹ *Ibid*, arts. 51.1, 51.4.

⁸⁰ *Ibid*, art. 51.1. In the Rotterdam Rules, the exercise of the right of control and the possession of a transport document are not necessarily linked as, pursuant to Article 51.1 of the Rules, the shipper is the controlling party if no transport document is issued for shipment. See van der Ziel, *supra* note 13 at 384.

⁸¹ FOB is one of the terms contained in the Incoterms rules. The Incoterms rules have become an essential part of the daily language of trade. They have been incorporated

the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.⁸²

How to protect the interests of sellers under the FOB term, who are vulnerable to fraud, has been a hot topic for a long time.⁸³ Sellers under the FOB term are adequately protected in the Hamburg Rules as they have the status as shipper pursuant to Article 1.3 of the Rules which provides that shipper means “any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.”⁸⁴ However, sellers under the FOB term are excluded from the ambit of shipper in the Rotterdam Rules as shipper is defined in the Rules as “a

in contracts for the sale of goods worldwide and provide rules and guidance to importers, exporters, lawyers, transporters, insurers and students of international trade. See Jan Ramberg, *ICC Guide to Incoterms 2010: Understanding and Practical Use* (Paris: ICC Services, 2011) at 7-8.

⁸² The definition is derived from the Incoterms 2010 edition. The reference to “procure” in the definition caters for multiple sales down a chain (“string sales”), particularly common in the commodity trades. FOB may not be appropriate where goods are handed over to the carrier before they are on board the vessel, for example goods in containers, which are typically delivered at a terminal. In such situations, the FCA rule should be used. FOB requires the seller to clear the goods for export, where applicable. However, the seller has no obligation to clear the goods for import, pay any import duty or carry out any import customs formalities. International Chamber of Commerce, *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms* (Paris: ICC Services, 2010) at 30 [*Incoterms*].

⁸³ See Wenhao Han & Ya Li, “On the Legal Status and Rights of the FOB Seller as the Shipper” (2002) 26 *World Shipping* 32 at 32; Xinchao Yao & Bojun Leng, “Seller’s Status as Shipper under the FOB Term” (2014) 26 *Journal of International Trade* 167 at 169.

⁸⁴ *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, 1695 U.N.T.S. 3, 17 I.L.M. 608, art. 1.3. A similar provision has been included in the Maritime Code of China. See *Maritime Code of the People’s Republic of China*, adopted on 7 November 1992, art 42.3. Article 42.3 of the Code provides that:

“Shipper” means:

- a) The person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier;
- b) The person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea.

person that enters into a contract of carriage with a carrier”.⁸⁵ There is another concept in the Rules – documentary shipper – which may cover sellers under the FOB term.⁸⁶ However, it should be noted that a seller under the FOB term is merely able to passively accept to be named as “shipper” in a transport document or an electronic transport record and that he is unable to obtain a transport document or an electronic transport record as a documentary shipper without the consent of the contractual shipper.⁸⁷

Even if the seller under the FOB term becomes the documentary shipper, it is still hard for him to be able to exercise the right of control over the goods in transit.⁸⁸ When a non-negotiable transport document not indicating that it shall be surrendered in order to obtain delivery of the goods, a non-negotiable electronic transport record, or no transport document or electronic transport record is issued, the shipper (the buyer under the FOB term) is the controlling party unless he designates, upon the conclusion of the contract of carriage, the documentary shipper (the seller under the

⁸⁵ *Rotterdam Rules*, *supra* note 10, art. 1.8.

⁸⁶ Article 1.9 of the *Rotterdam Rules* (*ibid*) provides that:

“Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

⁸⁷ The passivity of a documentary shipper in having such status and being given a transport document or an electronic transport record may be seen from the reference to “accept” in the definition of documentary shipper in Article 1.9 of the Rules and from Article 35 of the Rules concerning issuance of transport documents or electronic transport records. See Belma Bulut, “Being an F.O.B. Seller under the Rotterdam Rules: Better or Worse?” (2014) 49 *Eur Transp L* 291 at 294, 297-298; Article 35 of the *Rotterdam Rules* (*supra* note 10) provides that:

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper’s option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

⁸⁸ See Yuechuan Jiang & Zuoxian Zhu, “Legislative Features and Analysis of Several Issues Concerning Vital Interests of the Rotterdam Rules” (2010) 21 *Annual of China Maritime Law* 26 at 33.

FOB term) as the controlling party;⁸⁹ when a non-negotiable transport document indicating that it shall be surrendered in order to obtain delivery of the goods is issued, the shipper (the buyer under the FOB term) is the controlling party and he is only allowed to transfer the right of control to the consignee named in the transport document that cannot be the seller under the FOB term;⁹⁰ and when a negotiable transport document or a negotiable electronic transport record is issued, the seller under the FOB term may become the controlling party only if the transport document or the electronic transport record is issued to him with the consent of the shipper (the buyer under the FOB term).⁹¹ The position of advantage enjoyed by the shipper over the documentary shipper in several aspects under the Rotterdam Rules arises from the idea that the former and the carrier are the parties to the contract of carriage.⁹² During the negotiations for the Rotterdam Rules, a concern was expressed that the seller under the FOB term might not be adequately protected as he was the consignor rather than the shipper, but the draft text of the Rules was not revised due to such concern.⁹³

It is foreseeable that the provisions in the Rotterdam Rules relating to the identity of the controlling party may have an adverse effect on Chinese FOB sellers.⁹⁴ The effect may be enormous as a lot of merchandise is exported from China at the FOB price.⁹⁵ Therefore, it would be highly necessary for Chinese sellers to take some precautions against risks associated with the use of the FOB term if the era of the Rotterdam Rules really comes.

2. Conflict with the stoppage in transit

Chapter 10 of the Rotterdam Rules has fulfilled the connection between the right of control in the transport law and the stoppage in tran-

⁸⁹ See *Rotterdam Rules*, *supra* note 10, art. 51.1.

⁹⁰ See *ibid.*, art. 51.2.

⁹¹ See *ibid.*, arts. 35, 51.3, 51.4.

⁹² Si & Han, *supra* note 25 at 327.

⁹³ *Report*, *supra* note 32 at para. 24.

⁹⁴ See generally Qingsheng Xia, "Influences of the Rotterdam Rules on the Seller (the Consignor)" (2010) 21 *Annual of China Maritime Law* 30 at 31-44.

⁹⁵ See Liying Zhang, "Research Report on the Influences of the Rotterdam Rules on China's Import and Export" (2010) 21 *Annual of China Maritime Law* 15 at 22-23.

sit in the sales law, but Article 51 of the Rules regarding the identity of the controlling party may lead to conflicts between the two rights.

In the domestic laws and international conventions relating to sale of goods, it is common that the seller is treated as the party entitled to exercise the stoppage in transit.⁹⁶ According to Article 51 of the Rotterdam Rules, when a non-negotiable transport document, a non-negotiable electronic transport record, or no transport document or electronic transport record is issued, the shipper is the controlling party.⁹⁷ Under such terms as CIF and CFR, the seller is the shipper.⁹⁸ When the goods are shipped under these terms, the conflict between the right of control and the stoppage in transit is not evident since the party entitled to exercise the former is exactly the one entitled to exercise the latter. However, under such terms as FOB and FAS, the buyer is the shipper.⁹⁹ When the goods are shipped under these terms, the conflict between the two rights becomes noticeable since the seller is entitled to exercise the stoppage in transit while the buyer, also the shipper under the contract of carriage, is entitled to exercise the right of control.

In addition, the conflict may happen when a negotiable transport document or a negotiable electronic transport record is issued. According to Articles 51.3 and 51.4 of the Rotterdam Rules, the holder is the control-

⁹⁶ See *Act*, *supra* note 38, s. 44; *UCC*, *supra* note 39, § 2-705; *CISG*, *supra* note 40, art. 71. *Rotterdam Rules*, *supra* note 10, arts. 51.1, 51.2.

⁹⁸ CIF (Cost, Insurance and Freight) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, he will need to either agree as much expressly with the seller or make his own extra insurance arrangements. CFR (Cost and Freight) means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. *Incoterms*, *supra* note 82 at 22-25.

⁹⁹ FAS (Free Alongside Ship) means that the seller delivers when the goods are placed alongside the vessel (e.g. on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards. *Ibid* at 28.

ling party in the aforementioned cases.¹⁰⁰ Once a contract of sale is concluded, the seller is fixed, but the holder of the negotiable transport document or the negotiable electronic transport record issued for the carriage of the goods covered by the contract of sale may change as the document or the record is transferred from one person to another. The holder becomes the controlling party as a result of such transfer, but the stoppage in transit is still in the hands of the original seller.

The conflict between the right of control and the stoppage in transit arises when there is a separation between the party entitled to exercise the former and the party entitled to exercise the latter, which may occur no matter whether the transport document or electronic transport record issued for the carriage of goods is negotiable or not, or even no matter whether there is a transport document or an electronic transport record or not. When such separation exists, there follows the confusion about whose instructions with regard to the goods in transit should be followed. It is not exaggerated to say that the conflict may have devastating impacts on the exercise of the two rights as well as on the achievement of the purpose for which they have been created.¹⁰¹

Conclusion

There is no provision on the right of control in the Maritime Code of China in force as the legislators focused on how to regulate the relationships between the shipper and the carrier but little attention was paid to the connection of the transport law with the sales law.¹⁰² Notwithstanding such legislative loophole, it has not been uncommon in practice that Chinese cargo interests give carriers instructions, when necessary, with respect to the goods in transit.¹⁰³ There is no doubt that the regime of the right of control, as prescribed in the Rotterdam Rules, should be incorporated into the Chinese maritime law given its merits and values, but prudence is still needed in the light of its potential negative influences on Chinese cargo interests.

¹⁰⁰ *Rotterdam Rules*, *supra* note 10, arts. 51.3, 51.4.

¹⁰¹ See Pejovic, *supra* note 59 at 140-141. See also Adelbert Hamilton, "Stoppage in Transit" (1883) 16 *Central Law Journal* 82 at 82.

¹⁰² Tingzhong Fu, "Comments on Certain Issues Regarding the Right of Control" (2008) 19 *Annual of China Maritime Law* 55 at 65.

¹⁰³ See Zhang, *supra* note 95 at 22.

