https://doi.org/10.37420/j.mlr.2024.004

Issues on the Identification of B/L Carrier: Judicial Practice, Theories and the Proposed Revision on China's Maritime Law

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Abstract

The identification of the carrier is relevant to the determination of the subject of rights and the subject of liabilities in the contract of carriage of goods by sea. This paper summarizes the methods of the identification of carrier from the statistics and classification of related cases. There are two theoretical issues with these identification methods. Firstly, whether the identification of carrier can be carried out only in accordance with the definition of carrier under Article 42 (1) of the Chinese Maritime Law? Secondly, what is the legal basis behind the presumption of carrier and the employer liability under the method of the origin of right of issuance of B/L? This paper views that it is logically inconsistent to identify the carrier soly relying on the definition of carrier under Article 42 (1); the carrier presumption method should only be adopted where the carrier cannot be identified through the method of interpreting the B/L and other special methods, it is also necessary to limit the times of presumption and the extension of the burden of proof for rebuttal of the presumed carrier.

Keywords

identification of carrier; *employer liability*; *presumption of carrier*

1.Introduction

The identification of the carrier is of important issue for the determination of the subject of rights and liabilities in the contract for the carriage of goods by sea. However, in the practice of carriage of goods by sea, complex chains are often involved in the charterparty such as bareboat charters, financial leases, time charters and voyage charters, the issuance of bills of lading by the port of loading agent "for and on behalf of" the captain of the vessel carrying the goods, and irregularities in the recording of the contents of the B/L, which have led to some difficulties to the identification of the carrier. The Chinese Maritime Law ("Maritime Law"), Article 72, paragraph 2, provides that "[T]he bill of lading may be signed by a person authorized by the carrier. A bill of lading signed by the captain of the ship carrying the goods is deemed to have been signed on behalf of the carrier", and Article 78, paragraph 1, provides that "The relationship between the carrier and the holder of the bill of lading with respect to their rights and obligations shall be defined by the clauses of the bill of lading". The aforementioned provisions indicate that the identification of the carrier under the B/L issued by the

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captain of the cargo-carrying vessel shall be based on the provisions of the B/L, but do not provide for the identification of the carrier under other circumstances, which has led to inconsistencies in the identification of the carrier in Chinese judicial practice. Against the background of the initiation of the amendments to the Maritime Law, (See Legislative Plan of the 13th Standing Committee of the National People's Congress of 10 Sept 2018 lists the revision of the Maritime Law as the second category of items, www.npc.gov.cn/npc/c30834/201809/f9bff485a57f498e8d5e22e0b56740f6.shtml.) this paper intends to compile statistics and classify the cases related to the identification of the carrier under the Maritime Law, summarise and analyse the different identification methods and paths of identification, as well as the theoretical issues involved in these identification methods, and put forward suggestions for the revision of the Maritime Law.

2. Main Methods and Identification Paths for Carrier Identification in Chinese Judicial Practice

An empirical analysis of carrier identification in Chinese judicial practice can help to reduce the arbitrariness of the value argument and bring into play the normative and predictive role of the law. By searching for "carrier" and "holder of B/L" on the China Judgements Online, a total of 132 relevant cases were found; 11 cases were obtained after filtering one by one. These cases are all second instance and retrial judgements or rulings between the B/L holder and the carrier in respect of disputes over the contract of carriage by sea, and since the judgements of the court of first instance have already been mentioned in these judgements, the original judgements will not be listed separately.In addition, the Tianjin Maritime Court issued a series of for judgements in December 2021, all of which found that the shipowner was the carrier, one of them as a sample for empirical analysis. These cases show the main methods of identifying the carrier in Chinese judicial practice and the results of the identification, which are briefly described below.

Case 1: The Dispute over the Contract of Carriage of Goods by Sea and Sea Waters between New Shang Hai International Limited and Hanjin Shipping Co., Ltd. [Higher People's Court of Zhejiang Province (2014) Zhejiang Hai Zhong Zi No. 61 Civil Judgement]. The court held that the holder of the B/L entered into a voyage charter but had the right to choose to sue on the grounds of the contract for carriage of goods by sea based on the B/L. The B/L was issued by the loading port agent on behalf of the captain of the ship, who was employed by and exercised authority on behalf of the bareboat charterer, and the bareboat charterer should be identified as the carrier.

Case 2: The Dispute over the Contract for the Carriage of Goods by Sea between Joho Trading Corporation and Great Harvest (Hong Kong) Shipping Company Limited [Supreme People's Court (2016) Supreme Court Min Zai No. 17 Civil Judgement]. The Court held that: in the absence of the existence of a charterparty, the B/L is the proof of the contract of carriage, and the shipper has the right to identify the carrier based on the B/L record. The judgement of the second instance found that the bareboat charterer was not the carrier of the goods in question solely on the ground that the vessel in question had been time chartered, which lacked sufficient factual and legal basis. The B/L was issued by the captain of the ship and stamped with a ship's seal containing the English name of the bareboat charterer of the ship, and the carrier should be presumed to be the bareboat charterer in the first place.

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Case 3: The Dispute for Carriage of Goods by Sea and Tonghai Waters between People's Property and Casualty Insurance Company of China Limited, Tianjin Branch, and Guangxi Hongchen Investment Company Limited and SHL Maritime Company Limited [Guangxi Zhuang Autonomous Region Higher People's Court (2016) Gui Minzhong No. 69 Civil Judgement]. The court held that the B/L was issued under the authority of the captain of the ship and could be regarded as issued by the carrier. According to Article 7 of the Maritime Law, "The ownership of a ship means the shipowner's rights to lawfully possess, utilize, profit from and dispose of the ship in his ownership", and the registered owner should be recognized as the carrier.

Case 4: The Contract Dispute for the Carriage of Goods by Sea between Pioneer Export Company and Others v. Audacious Shipping & Trading S.A. and Others [Shanghai Higher People's Court (2016) Shanghai Min Zhong No. 119 Civil Judgement]. The Court held that: according to the agreement of the time charter contract, the Owner was responsible for equipping the captain and crew, and for the navigation and internal management affairs of the vessel. Unless otherwise expressly declared in advance by the Owner, the B/L issued by the captain shall be deemed to be issued on behalf of the owner. The authorisation of the loading agent is limited to issuing the B/L according to the record of the first mate's receipt, which is the internal agreement between the Owner and the loading agent, and has nothing to do with the shipper recorded in the B/L issued externally. The owner is the carrier of the maritime carriage of goods in question.

Case 5: The Dispute over Delivery of Goods without Original Bills of Lading between Shandong Province Xin Mai Te Hardware and Minerals Co. Ltd. et al v. Skyline Transportation Ltd. [Shandong Province Higher People's Court (2017) Lu Min Zhong No. 649 Civil Judgement]. The court held that the B/L was issued under the authority of the captain of the ship, and the B/L recorded the name of the carrier, whereby it should be identified as the carrier.

Case 6: The Dispute for Carriage of Goods by Sea between Transport Commercial Service JSC et al. v. Carmont International Group Limited [Zhejiang Provincial Higher People's Court (2017) ZJMF No. 93 Civil Judgement]. The court held that the time charter contract stipulated that the charterer or its agent was authorised by the shipowner to issue the B/L on behalf of the captain and/or the shipowner according to the first mate's receipt, and that the charterer could release the goods on the basis of the letter of guarantee when the original B/L did not arrive at the port of discharge in time. The B/L is issued on behalf of the captain, who is employed by and exercises authority on behalf of the shipowner, who should be identified as the carrier.

Case 7: The Contract Dispute for Carriage of Goods by Sea and Sea Waters between Simon Ship Co. Ltd, Bank of China Limited Rizhao Lanshan Sub-branch and Others [Zhejiang Provincial Higher People's Court (2018) Zhe Min Zhong 694 Civil Judgement]. The court held that, as to the question of whether the shipowner is bound by the incorrect shipowner's bills of lading issued by the time charterer without actual authorization, the time charterer is responsible for equipping the captain and crew and the ship is under the direct control of the captain, who should normally be aware of the issuance of the B/L, and the shipowner is liable as the carrier.

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Case 8: The Dispute for Carriage of Goods by Sea and in Sea Waters between Xuzhou Evergrande Foods Co., Ltd., and Cheng Lien Aviation Co., Ltd. [Supreme People's Court (2020) Supreme People's Court Min Shen No. 424]. The B/L contained the name of the carrier, the B/L issued column printing "Signed for the Carrier XXX by...As Agents for the Carrier", the agent's signing stamp contains the text "Signed as Agent for Carrier of B/L Title". The B/L is identified as the carrier by the carrier's identification on the B/L's letterhead.

Case 9: The Case of Maritime Dispute between Dashun Shipping Company Limited and Hongyuan Holdings Company Limited Maritime [Zhejiang Province Higher People's Court (2019) Zhe Min Zhong Np.425 Civil Judgement]. The court held that the B/L was issued in the capacity of captain's agent, not in the capacity of charterer's agent. The captain authorised the loading agent to issue the B/L on his behalf, and the shipowner was the carrier under the B/L.

Case 10: The Dispute over the Contract of Carriage of Goods by Sea and Sea Waters between Combined Rich Co. Ltd. and COSCO [Tianjin Maritime Court (2022) Jin 72 Min Zhong No.717 Civil Judgement]The court held that: the ship owner did not submit evidence to prove that the holder of the B/L was aware of the existence of the carrier of the voyage charterer when the contract was concluded, the holder of the B/L did not participate in the signing of the time charter contract, and it was not possible to identify the carrier on the basis of the definition of the carrier in Article 42 (1) of the Maritime Law, and that the identification of the carrier should be based on the record of the B/L itself, and that the B/L in case was issued by the port of loading agent on behalf of the captain of the vessel, who was employed by the owner. and the shipowner should be identified as the carrier.

Case 11: The Contract Dispute for Carriage of Goods by Sea between Shandong Xianglong Industrial Group Co. Ltd. v. Northern Shipping Co. Ltd. and Other Companies [Supreme People's Court (2016) Supreme People's Court Min Zai No. 530]. The court held that identifying the carrier under the contract of carriage evidenced by the B/L requires focusing on the source of the captain's right to issue the B/L. The primary legal basis is the definition of the carrier in Article 42, subparagraph 1 of the Maritime Law. Time Charterparty usually agreed that the charterer is responsible for soliciting and operating freight business and signed the contract of carriage, accordingly, the Owner agreed to the charterer issued B/L, When the B/L is issued by the captain of the vessel without specifying the name of the carrier, the time charterer should generally be identified as the carrier.

Case 12: The Contract Dispute for the Carriage of Goods by Sea and Sea Waters between Shente Iron & Steel (Hong Kong) Limited and Fujian Shipping Company [Hubei Province Higher People's Court (2018) E Min Zhong No. 925 Civil Judgement]. The court held that the B/L, which stated that it was "issued on behalf of the captain of the ship", proved that the shipowner was the carrier was not in accordance with the provisions of Article 72 of the Maritime Law, and that Article 42 of the Maritime Law stipulated that the carrier referred to the person who entered into a contract for the carriage of goods by sea with the shipper. The shipowner did not enter into a contract with the holder of the B/L and did not issue the B/L, and was not the carrier under the contract of carriage.

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2.1 B/L textual identification methods and their identification paths

This method is also known as the usual identification method, and its identification path is: according to the "literalness" of the B/L, the carrier in the B/L record or signature can be directly identified as the carrier. Specifically, this method includes the following ways. First, the identification of the carrier is typically based on the heading of the B/L, specifically whether the term "Carrier" is mentioned on the face of the bill. If it is stated, it is used to identify the carrier. Second, the identification of the carrier is based on the issuer of the B/L. If the bill is issued by the carrier itself or by the master or agent on behalf of the carrier, in such cases, the identity of the carrier is clear and easily identifiable. Third, the definition of the carrier on the back of the B/L or the relevant provisions to identify, such as "carrier identification clause" and other agreements. The identification process by Chinese courts under the method of textual identification of B/L typically follows that, according to the B/L head records, the B/L on the content of the ship's seal, there is no disagreement regarding the identification of the carrier based on the contents of the B/L. Such as the aforementioned Cases 2, 5, 7 & 8 all apply this path. For example, in Case 5, although the ship owner defended that it did not participate in the issuing of the B/L and it is unaware of the process of B/L issuance and the contents recorded on the bill. The designation as the carrier on the B/L has been imposed by the shipper and a third party and it is not binding on it; but the court held that, the necessity to rely on additional information to identify the carrier arises only when it is not possible to identify the carrier based on the contents and signatures recorded on the B/L, in light of this, the carrier was identified as the carrier. In Case 8, the court also identified the carrier stated on the B/L as the carrier based on the carrier stated on the B/L's head and the fact that the B/L was signed by the loading agent "as an agent of the carrier on whose header the B/L is issued".

2.2 Special identification methods and their identification paths

When the B/L textual identification method cannot identify who is the carrier, the court often adopts special identification methods, combined with the actual situation of negotiation, conclusion and performance of the contract of carriage to specific analysis to determine who is the carrier of the B/L involved in the contract of carriage of goods by sea, which includes: identifying the carrier from the source of the right to issue the B/L; identifying the carrier from the subject that accepts a bond for the release of goods without a B/L; and identifying the carrier from the subject of the right to give instructions for the lading of goods.

2.2.1 Identification of the carrier from the source of authority for the issuance of B/L

Article 72 of the Maritime Law provides that: "When the goods have been taken over by the carrier or have been loaded on board, the carrier shall, on demand of the shipper, issue to the shipper a B/L..." This provision shows: First, the carrier is the subject of the B/L, for the shipper, the issuance of a B/L is an obligation of the carrier, the obligation to sign the B/L is the delivery of the goods of the consideration. For the charterer, if he delivers the goods to the owner and asks the owner to issue a B/L, the owner also has the obligation to issue a B/L, only this B/L is not the proof of the contract of carriage, but it is still a receipt for the goods and a B/L.For people other than the shipper, such as the consignee or B/L holder, the issuance of a B/L is a legitimate right of the carrier, that is, only the carrier has the right to issue a B/L, because the carrier

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has a legal obligation to fulfill duties towards parties other than the shipper. (Article 95 of the Maritime Law stipulates: Where the holder of the B/L is not the charterer in the case of a B/L issued under a voyage charter, the rights and obligations of the carrier and the holder of the B/L shall be governed by the clauses of the B/L. However, if the clauses of the voyage charter party are incorporated into the B/L, the relevant clauses of the voyage charter party shall apply. Accordingly, the owner of the voyage charter contract issued the B/L, the B/L is not the charterer of the B/L holders also in accordance with the B/L responsibility.)Secondly, the carrier can authorise others, including the captain, to issue the B/L, but it does not change the status and obligations of the carrier as the subject of the B/L, that is, the right to issue the B/L originates from the carrier. In chartered transportation, the owner may also issue a B/L upon the request of the charterer, however this B/L between the owner and the charterer is not a proof of contract of carriage but only the goods receipt and delivery order. Even if the B/L contains provisions incorporating the charter party agreement, it does not change the charterparty relationship between the owner and the carrier. When the B/L is transferred to a third person, according to Maritime Law Article 95, the holder and the issuance of the B/L owner (i.e., the carrier) will establish a B/L contract, it can be observed, for the third party other than the charterer, the person who has the authority to issue the B/L is considered the carrier. Therefore, in Chinese judicial practice, it is common to identify the carrier based on the source of the B/L issuance rights, that is, "who authorised the issuance of bills of lading", and according to the theory of "agency" "control" or "employer's liability", to identify the captain's right to issue the B/L from the shipowner, and accordingly identify the shipowner as the carrier.

The identification path of this method is as follows: first, based on Article 72, paragraph 2, of the Maritime Law, "A bill of lading signed by the captain of the ship carrying the goods is deemed to have been signed on behalf of the carrier.", it can be concluded that a B/L issued by or on behalf of the captain is deemed to be issued on behalf of the carrier; Furthermore, Based on the authorization of the vessel's captain to issue the B/L, as well as the employment or appointment of the captain by the shipowner or bareboat charterer to act on their behalf, it can be established that the captain's authority to issue the B/L originates from the shipowner or bareboat charterer. Consequently, the shipowner or bareboat charterer can be recognized as the carrier. As in Case Two, the Court held that a time charter contract binds only the parties and such binding force cannot be extent to a third person (the holder of the B/L). The identification of the carrier should still be based on the issuance of the B/L. The B/L is a proof of the contract of carriage and if it is issued by the captain of the ship, it is deemed to have been issued on behalf of the carrier. The shipper who delivers the goods (i.e. the actual shipper) is entitled to identify the carrier and claim its rights against it on the basis of the B/L. The B/L was issued by the captain of the ship and stamped with a ship's seal containing the English name of the bareboat charterer, the bareboat charterer should be presumed to be the carrier in the first instance. In Case Nine, the captain issued an authorisation to issue the B/L to the time charterer's agent at the port of loading in accordance with the agreement in the time charter contract. The time charterer later requested the time owner to split the original B/L in order to exchange it for two new sets of Bs/L and to issue a letter of guarantee to the time owner regularly. The loading port agent, without consulting the shipowner and the captain, exchanged the original B/L for the B/L in question on the instructions of the time charterer. The Court held that the signature line of the two Bs/L in question showed that "the loading

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port agent acted as the agent of the captain of the vessel XX", and did not issue the B/L as the agent of the time charterer. The two new sets of B/L were issued under the authority of the captain of the ship, and the shipowner was the carrier under the contract of carriage evidenced by the bills of lading in question. In Case 7, the signature of the B/L stated "as Owner for and on behalf of captain of XX". The court held that the signature of the B/L used the words "as Owner" rather than "as Carrier", and that the owner of the vessel, as a time charterer, was responsible for employment the crew and the captain, was usually in direct control of the vessel and it should be aware of the issuance of the B/L by the agent at the port of loading. Therefore the shipowner should assume the liability as a carrier.

2.2.2 Identify the carrier from the subject of the acceptance of the release bond without B/L

Article 71 of the Maritime Law provides that the bill of lading is "the document by which the carrier guarantees the delivery of the goods", so in the delivery of goods, the carrier shall be the subject that accepts the original bill of lading submitted by the holder of the bill of lading and delivers the goods accordingly. The carrier has the obligation to deliver the goods and bears the risk of delivering the goods. Therefore, the entity accepting the letter of indemnity for the release of goods without the original B/L should be regarded as the carrier. The letter of indemnity by the consignee to the carrier is a remedial measure taken by the carrier to mitigate the risk of delivering goods without the original B/L, and it is closely related to their interests. In judicial practice, the court may identify the carrier based on the beneficiary of the delivery (discharge) letter of indemnity under the relevant transportation contract involved in the case. In shipping practice, the beneficiary of the acceptance of the letter of guarantee to release the goods without the B/L is divided into the following cases: the beneficiary mentioned in the letter of indemnity for delivery issued by the consignee is the shipowner (or the owner in the case of a time-charter party; although the letter of indemnity is issued specifically for the purpose of delivery, the risks covered by the letter of indemnity still pertain to the beneficiary, who, in the absence of the original B/L, may face potential risks associated with unloading the goods at the port. In some terminals (especially those owned by the cargo owner), the shipowner is unable to effectively control the cargo after unloading, and this risk is similar to the risk of "releasing the cargo without the original B/L". In addition, this type of bond usually also requires that "when the guarantor obtains the original B/L, it shall immediately submit the original B/L to the beneficiary", and the subject who has the right to take back the original B/L should also be the carrier who issued the B/L. In this case, the carrier under the B/L should be the shipowner, not the time charterer or the voyage time charterer. In other words, if the time charterer or voyage charterer is the carrier under the B/L in question, it is the time charterer or voyage charterer that bear obligation to deliver the goods to the consignee under the original B/L. In this situation, the beneficiary of the letter of guarantee should be directed to the time charterer or voyage charterer, not the shipowner, and there is no need to agree that the issuer of the letter of guarantee will hand over the original B/L to the shipowner after receiving the original B/L. As in Case 7, the time charter party stipulated that the time charterer or his agent had been authorised by the shipowner to issue the B/L on behalf of the captain or the shipowner in strict accordance with the first mate's receipt and to indemnify for any loss caused thereby. The court held that the time charter agreement contained the provision of releasing the goods without original B/L and the original copy of the bond should be handed over to the shipowner, which indicated that the shipowner had the right to control and decide the release of

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goods without original B/L at the port of discharge, and that the time charterer had to follow the instructions of the shipowner and was responsible for retrieving the corresponding original B/L, and that the shipowner should be recognized as the carrier.

2.2.3 Identify the carrier from the subject who has the right to make releasing instructions

In the shipping business operation, in general, the process of cargo delivery at Chinese ports involves the consignee exchanging the original B/L for a delivery order (D/O) at the shipping agent designated by the carrier, the D/O is issued by the shipping agent designated by the carrier. Subsequently, the consignee with the delivery order (and for imported goods, also need to be stamped by the Customs and Excise Department in the delivery order for the release of the goods) goes to the goods storage yard to pick up the goods. This delivery process essentially reflects that the carrier is the subject with the authority to issue delivery instructions. It corresponds to the carrier's role as the subject that issues the B/L. Through the issuance and retrieval of the B/L, the carrier fulfills its obligations under the transportation contract. In other words, the delivery order is issued by the vessel agent company at the port of discharge. As under the transportation contract as evidenced by the B/L, only the carrier who issues the B/L has the obligation to deliver the goods to the consignee. Therefore, it is the responsibility of the carrier to issue the delivery order to fulfill the contractual obligation of delivering the goods to the holder of the B/L. Based on this, the fact that the B/L was issued by the shipping agency company, it can be ascertained that the shipowner shall be the carrier of the contract of carriage by sea evidenced by the B/L. If the time charterer or voyage charterer is the carrier under the B/L in question, it is the time charterer or voyage charterer or their agent at the port of discharge that issues the delivery order to the consignee and fulfils the obligation to deliver the goods based on the original B/L, not the shipping agency that issues the delivery order to the consignee holding the B/L.

2.3 Presumptive carrier identification methods and their identification paths

When the carrier still cannot be identified by the B/L's textual and special identification methods, then court would apply the principle of presumption and presumes the shipowner to be the carrier unless the shipowner proves not, i.e., as long as the goods are loaded on board the ship, it is presumed that the registered shipowner is the carrier, and the burden of proof for reversing the presumption is shifted to the shipowner, unless the shipowner proves that the ship has been bareboat chartered and indicates the name and address of the bareboat charterer, or directly proves who the true carrier is. The bareboat charterer may also rebut the presumption in the same way. The identification path of this method is: when the B/L does not contain any carrier information, it is presumed that the shipowner or the bareboat charterer is the carrier; if the shipowner or the bareboat charterer can prove that there is a contract of carriage between the time charterer or other third party and the holder of the B/L, then the carrier should be the time charterer or the third party. In this approach, merely proving the existence of a time-charter agreement by the shipowner or bareboat charterer is not sufficient to negate their status as the carrier, it must further prove that there is a contract of carriage of goods by sea between the time charterer or third person and the holder of the B/L. Case 2 is a typical example in this regard, the court held that the bareboat charterer can demonstrate that they are not the carrier for the transportation of the goods in question solely based on their time charter agreement with the shipowner. However, there is no evidence indicating a contractual relationship between the time

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charterer and the shipper mentioned in the B/L. In the absence of it, according to the fact that the B/L issued by the captain of the ship and stamped with the English name of the company's MV Jisheng, it should be determined that the holder of the B/L and the bareboat charterer has concluded a contract of carriage of goods by sea. The judgement of the second instance found that the bareboat charterer was not the carrier of the goods in question only on the ground that the vessel in question had been time chartered, which lacked sufficient factual and legal basis. In Case 2, the court further held that the agreement on the issuance of the B/L in the time charter contract signed between Jiangsu Xinglian Company, the bareboat charterer, and Qingdao Guangya Company was valid only between the parties to the time charter contract, and could not have effect on the third party outside of the contract, and could not be the basis for Xinglian to exempt itself from its external liability.

In addition, Case 11 presumes that the time charterer is the carrier. The court held that the primary legal basis for identifying the carrier in the international carriage of goods by sea was the definition of the carrier in Article 42, subparagraph 1, of the Maritime Law. The legislative trust of Article 72, paragraph 2, is to reject in principle the position that a B/L issued by the captain of the ship in question is to be regarded as issued on behalf of the shipowner, and the typical situation it addresses is mainly the issuance of a B/L under a time charter. The time charter contract usually agreed that the time charterer is responsible for soliciting and operating the freight business and signing the contract of carriage, accordingly, the owner agrees that the time charterer can issue the B/L. Therefore, when the B/L is issued by the captain without specifying the name of the carrier, the time charterer is generally recognized as the carrier. However, the time charterer's presumption is wrong, which is based on the premise that the captain, when signing the B/L, excludes the shipowner and bareboat charterer from being the representatives, in fact, the captain on behalf of the carrier to issue a B/L does not ipso facto exclude the carrier is the shipowner or bareboat charterer.

3. Theoretical issues involved in carrier identification methods in Chinese judicial practice

The 12 cases mentioned above are all second-instance judgements of the Higher People's Court or retrial or trial judgements of the Supreme People's Court, but none of them are currently part of China's guiding or typical cases, and whether or not they have the effect of analogous cases needs to be further analysed. (On 26 November 2010, the Supreme People's Court promulgated the Provisions on Case Guidance Work, establishing a case guidance system with Chinese characteristics; for typical cases, see the Typical Cases Release section of the website of the Supreme People's Court, www.court.gov.cn/zixun-gengduo-104.html.) Firstly, the prerequisite for the application of the class cases is the similarity between these cases and the pending cases in terms of basic facts, disputes and application of law. Cases 7 and 9 are two typical examples, in both cases the ship owner submitted the judgement of Case Eleven to the court to support his claim that the time charterer is the carrier, but the court considered that the facts and disputed legal issues in the case were not identical to the pending case and did not adopt it. Secondly, Cases 2 and 11 clearly diverged in the application of the law, and although they both used the presumptive carrier identification method, the different paths of presumption led to different conclusions, which fails to serve the function of ensuring

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the correct and uniform application of the law. In such cases, Article 2 of the Implementation Measures of the Supreme People's Court on Establishing a Mechanism for Resolving Disagreements on the Application of Laws stipulates that: "The operational departments of the Supreme People's Court, the higher people's courts and the specialised people's courts shall apply to the OATM to resolve disagreements on the application of laws if, in the course of the trial of a case or in the course of its execution, they find that there are (a) Differences in the application of the law between decisions in force of the Supreme People's Court; (b) Differences between the results of decisions made in cases under trial and the principles or standards for the application of the law established by decisions in force of the Supreme People's Court."However, these cases show that when the courts are unable to identify the carrier by the identification method based on the text of the B/L, the paths of identifying the carrier by the special identification method and the presumptive carrier identification method are not consistent, and involve the following two theoretical issues.

Question 1: Is it possible to identify the carrier solely on the basis of the definition of the carrier provided in Article 41, subparagraph 1, of the Maritime Law? This relates not only to the application of Article 78, paragraph 1, of the Maritime Law, which provides that "the relationship of rights and obligations between the carrier and the consignee and the holder of the B/L is to be determined in accordance with the provisions of the B/L", but also to the question of whether it is possible to identify the carrier solely on the basis of the definition of the carrier in Article 42, subparagraph 1, of the Maritime Law and whether the legislative intent of Article 72, paragraph 2, of the Maritime Law is to deny in principle that the captain's B/L is to be regarded as representing the shipowner.

Question 2: What is the difference between the identification of the presumptive carrier and the identification of the source of the right to issue the B/L, in particular the theory of employer's liability under the latter? This further presents a question of identification of the captain of the ship who issued the B/L, i.e. whose B/L did the captain issue, the shipowner's or the charterer's B/L? the question associated with this is whether the carrier needs to be further identified by the source of the right to issue the B/L, i.e., does the captain's right to issue the B/L ultimately derive from the employer's responsibility or control of the captain by the shipowner, or does it derive from the instructions of the time charterer? Does the ultimate source of the time charterer's instructions derive from the agreement in the time charter contract between the shipowner and the time charterer, or from the time charterer's own intent to act as the carrier? Can such unilateral intent or instructions bind the holder of the B/L, who is unaware of the contents of the time charter contract, when the time charterer has not issued a B/L in its own name and has not included on the B/L information about its status as the carrier?

3.1 Whether a carrier can be identified solely on the basis of the definition of carrier under Article 41, subparagraph 1 of the Maritime Law

The definition of the "carrier" in Article 42, subparagraph 1, of the Maritime Law is not materially different from the definition of the carrier in Article 1, subparagraph 1, of the United Nations Convention on the Carriage of Goods by Sea, 1978 (hereinafter referred to as "the Hamburg Rules"). According to that definition, "the carrier is the person who, either by himself or by another person entrusted to him, enters into a contract for the carriage of goods by sea with the shipper in his own name". Accordingly, some scholars

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believe that China has adopted a "carrier bill of lading system", where the issuer of the B/L and the carrier are considered to be the same person. There is also judicial practice hold the view that the Maritime Law attempts to solve the problem of carrier identification through the contract of carriage of goods by sea, different from the British law under the "shipowner B/L doctrine", but draws on the "Hamburg Rules" under the "carrier bill of lading doctrine", and specific embodiment in the Case 11. However, if the carrier under the contract of carriage evidenced by the B/L is identified solely on the basis of the definition of carrier in Article 42, subparagraph 1, of the Maritime Law or the "carrier's bill of lading doctrine", and if the provisions of Article 72, paragraph 2, of the Maritime Law are regarded as having the legislative intent of "negating the position that a B/L issued by the captain of a ship is to be regarded as representing the shipowner. This not only overlooks the distinction between the legal relationships of "concluding a maritime cargo transportation contract" as stated in Article 42(1) and "the bill of lading as a document to evidence the maritime cargo transportation contract" as stated in Article 71 of the Maritime Law, but it also raises concerns regarding logic, semantics, and commercial necessity.

Firstly, the logical issue. According to the definition of carrier in Article 42, subparagraph 1, of the Maritime Law, the carrier is the party who enters into a maritime cargo transportation contract with the bill of lading holder. However, for individuals who obtain a B/L through trade contracts, bank transfers, or even through gifts, they have not entered into a maritime cargo transportation contract with any party. If the conclusion of a contract of carriage by sea is used as the primary legal basis for identifying the carrier, it is clear that there is an error in the logical premise that neither the shipowner nor the time charterer can be identified as the carrier under this path, since none of these persons has concluded a contract of carriage of goods by sea with the holder of the B/L. The courts may also be aware of this problem and have adopted the presumptive carrier identification approach to it by stating that "time charter contracts usually provide that the time charterer is responsible for soliciting goods and operating the cargo business and entering into a contract of carriage" (Case 11) or based on that "the carriage of goods by a ship does not necessarily have a de facto and de jure connection with the shipowner" (Case 12) to infer that the time charterer is presumed to be the carrier. However, this still does not address the factual issue that the time charterer has not entered into a contract of carriage of goods by sea with the holder of the B/L, and wrongly excludes the possibility that the captain of the ship carrying the goods may issue the B/L on behalf of the shipowner. Secondly, when the chain of charters for goods under a B/L involves several time charter contracts, Article 136 of the Maritime Law stipulates that the time charterer has the right to give instructions to the captain of the ship with respect to the operation of the ship, and further the charterer may sublet the chartered ship, and that after the subletting, the rights and obligations agreed upon in the original charter contract remain unaffected. Therefore, in the absence of an agreement to the contrary of the charter party, the time charterers are all entitled to give instructions to the captain in respect of the operation of the ship, in such a scenario, the question of which time charterer should be identified as the carrier would arise. In fact, Case 11, "the owner accordingly consents to the issuance of the B/L by the charterer" reveals the logical problem of the constructive carrier, that is, the time charterer's right to issue the B/L (including authorisation for the captain to issue the B/L) in fact derives from the consent of the time charterer.

Secondly, there is a textual problem. From the two sentences of Article 72, paragraph 2, of the Maritime

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Law have different meanings. The first sentence clearly stipulates that "the bill of lading may be issued by a person authorised by the carrier", this sentence has two meanings: First, the carrier has the right to issue its own B/L, non-carrier third party signing of the B/L must be authorised by the carrier. Secondly, it is not clear who the carrier is, it may be the shipowner or the bareboat charterer, or the time charterer. The latter sentence stipulates that, "A bill of lading is deemed to be issued on behalf of the carrier if it is issued by the captain of the ship on which the goods are carried", in which the word "deemed" is used as a colloquial term in the regulatory legal documents, specifically meaning "to be recognized". The term is generally recognised as expressing a legal fiction, the essence of which is that the legislator, based on specific values or policy considerations, treating two different legal facts with different natures as the same and applying the same legal evaluation to them would result in them having the same legal consequences. Accordingly, the B/L issued by the captain of a ship carrying goods is "deemed" by the legislator, to have been issued on behalf of the carrier. Therefore, the latter sentence as a whole has two meanings: one is to solve the binding effect of the B/L issued by the captain of the cargo-carrying ship in practice, that is to say, it is deemed to be issued on behalf of the carrier and binds the carrier. The second is that when the shipowner or bareboat charterer authorises the captain to issue a B/L, the B/L issued by the captain is issued on behalf of the shipowner or bareboat charterer; when the time charterer authorises the captain to issue a B/L (of its own), the time charterer is the carrier. Furthermore, it is proposed that there are certain characteristics in which the two factual properties in the legal fiction are different, and the legislator is in a state of knowing. In other words, the nature of the facts of the issuance of the B/L by the captain of the ship carrying the cargo and the issuance of the B/L by the carrier are different. The nature of the issuance of the B/L by the carrier is clear, i.e., the carrier himself issues the B/L; but the nature of the issuance of the B/L by the captain of the ship carrying the cargo may be unclear, because the captain of the ship carrying the cargo may issue the B/L under the authority of the time charterer, or under the authority of the shipowner or of the bareboat charterer, or even without the authorisation of any person. But in any case, the legislator still "deems" it to have been issued on behalf of the carrier based on considerations of legal economy and the similarity of the constituent elements of these facts. Therefore, it is not clear from the context of the content of Article 72, paragraph 2, of the Maritime Law that the "legislative intent of this paragraph is to reject in principle the position that bills of lading issued by the captain of the ship in question are to be regarded as issued on behalf of the shipowner", and that this paragraph only addresses the issue of bills of lading issued by the captain of the ship that is carrying the cargo being regarded as being issued on behalf of the carrier, and does not have the legislative purpose of precluding any party to be recognised as the carrier.

Thirdly, the question of commercial necessity. In today's increasingly complex and diversified international trade and maritime transport, where the B/L does not contain any carrier information, and in the case of a short form B/L or a CONGENBILL 1994 form B/L, it is not an easy task to require the bill holder, who is not the shipper, to find every lessee involved in the lease chain of the goods under the bill, as well as to determine who issued the authorization for bill issuance on behalf of the captain or the representative of the loading port. Even after the case is brought to court, the court may not be able to identify all the relationships in the chain of leases or the source of the captain's or loading port agent's authorisation for the issuance of the B/L. This obviously does not meet the commercial needs and may result in the holder of

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the B/L being unable to exercise its rights because it cannot locate the carrier, or the holder of the B/L being forced to find ways to sue all the relevant parties in tort, resulting in multiple tort claims and inevitably increasing the burden of proof on the holder of the B/L. Although the law does have its own development path and relative independence, it cannot be separated from the social environment and societal needs. Commercial law prioritizes the value of efficiency, and whether it is freedom of transactions, fairness in transactions, or transactional order, they all ultimately serve the realization of efficiency value. If the provisions on transaction procedures and methods are too cumbersome and rigid, it will inevitably affect the efficiency of transactions and increase transaction costs. In international trade and shipping activities, as Mr Phillip Yang said: "in a series of buying and selling process, sometimes it is impossible for the final buyer to find the original shipper or the original seller, ..." Therefore, the 1855 Bills of Lading Act, Section 1 provides: Every consignee and endorsee of the B/L mentioned therein, who acquires ownership of the goods described in the B/L by or through such consignment or endorsement, shall also transfer and acquire all the rights of litigation. Additionally, Section 518 of the German Commercial Code (Position of the Ship Owner in the Absence of Information on the Carrier) states, If a bill of lading is issued by the captain of the ship, as well as by any other party entitled to issue a bill of lading on behalf of the shipowner, without identifying the carrier, or if some person who is not a carrier is identified in the said bill of lading as a carrier, the rights and obligations set forth in the bill of lading shall be transferred to the shipowner and not the carrier.

In conclusion, the complex identification of the carrier cannot be resolved solely on the basis of the definition of the carrier in Article 42, subparagraph (a), of the Maritime Law. The identification of the carrier should be given importance in accordance with the value stated in Article 78(1). According to the definition of the carrier in Article 42(1), the parties to the transportation contract are only the carrier and the shipper. The relationship between the B/L holder and the carrier is a B/L relationship as provided by Article 78(1). This makes the identification of the other party to the contract of carriage of goods by sea evidenced by the B/L, i.e., the carrier, cannot be based solely on the definition of the carrier in Article 42, subparagraph (a), or else there will be confusion between the two legal relationships of "contract of carriage of goods by sea" and "contract of carriage of goods by sea evidenced by a B/L". Moreover, even under the legal relationship of the contract for the carriage of goods by sea evidenced by a B/L, the B/L evidences only the contract for the carriage of goods by sea between the carrier and the shipper, and does not evidence that the holder of the B/L is a party to the contract of carriage of goods by sea. In addition, although Article 72, paragraph 2, of the Maritime Law does not address the question of who the specific carrier is, it cannot be considered that this paragraph is only a provision on the manner of issuance of a B/L under a time charter contract. It also provides guidance on the identification of the carrier, i.e., It is particularly important to clarify that while the captain issues the B/L on behalf of the carrier, the carrier refers to the person behind the captain (representative of the captain or person granting authorization to the captain), especially when the B/L holder is not the shipper.

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3.2 The difference between the presumed carrier and the nature of the employer's liability issuing the B/L based on the right of issuance

For the presumptive carrier identification method, Chinese law has no conceptual provisions on the presumption. In Chinese jurisprudence there are doctrines like "transfer of the burden of proof" "reversal of the burden of proof" "normative distinction" "rights distinction" "rebuttal distinction. The prevailing view is that the presumption is divided into legal presumption and factual presumption: the former refers to the law expressly provides that when a fact is proved to exist, the existence of another fact should be deduced from it, and the latter refers to the presumption of the judge in the litigation activities based on certain rules of thumb and rules of logic. Article 10 of the Supreme People's Court Provisions on Evidence in Civil Litigation (the Civil Evidence Provisions), as amended in 2019, summarises this system in a more cursory manner, i.e. the parties do not need to prove facts that are presumed to exist in accordance with the provisions of the law, as well as another fact presumed to exist on the basis of known facts and the rules of thumb of daily life. The presumptions in this provision are themselves a system of evidence rather than a legal system relating to the subject matter of the civil legal relationship. Carrier identification is about identifying and determining, on the basis of the relevant facts, who is the carrier of the goods transported under the B/L. Moreover, the de facto presumption is rooted in the empirical rule and has the effect of shifting the full burden of proof, i.e., it is necessary to use an empirical rule to infer another fact based on known (or proven) facts. This is in fact a "rule of evidence".

In addition, Article 85 of the Provisions on Civil Evidence stipulates that judges shall, in accordance with legal procedures, examine the evidence comprehensively and objectively, and magnitude of the evidence in accordance with the provisions of the law, in compliance with the professional ethics of judges, and by applying logical reasoning and daily life experience. The interpretation of the law compiled by the Supreme People's Court emphasises that judges should satisfy the following elements when applying Article 9 of the 2001 Civil Evidence Provisions (adjusted to Article 10 in the 2019 revised Civil Evidence Provisions) to make a presumption: only when the fact to be proven cannot be demonstrated by other evidentiary rules, the foundational fact must be proven to be true, there is a necessary connection between the foundational fact and the inferred fact (meaning the empirical rule applied is reliable and trustworthy), and the opposing party is allowed to present counter-evidence.However, In practical shipping operations, the circumstances can be complex and diverse. The issuance and content of transport documents such as bills of lading are often not standardized. It is quite common for carriers to seek ways to mitigate risks. At the same time, some shipping enterprises conduct both freight forwarding and NVOCC business, confusing freight forwarders and carriers' identity, once the B/L or the signed content of the contains no information of the carrier, which leads to the B/L holders rely only on the B/L to find out who is the carrier is nearly impossible, and the only information that can be determined is the ship's information. Therefore, in the absence of a carrier on the B/L, when the goods have been loaded on a named ship, the registered owner of the ship is presumed to be the carrier, unless the registered owner can prove that the ship was under a bareboat charter at the time of the carriage of the goods and can point to the bareboat charterer and its address, in which case the bareboat charterer is presumed to be the carrier. Alternatively, the registered owner of the ship may rebut the presumption that it is to be treated as the carrier by identifying the carrier and its address. Under this presump-

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tion model, it is generally considered fairer, more just, and easier for the registered shipowner who is presumed to be the carrier to bear the burden of proof in establishing who the actual carrier is, rather than the shipper. Furthermore, the normal functioning of international trade is based on the reasonable trust placed by all parties in the B/L as a document of title and the fundamental principle that the carrier can deliver the goods against the presentation of the original B/L. This is a fundamental principle of the negotiability of the B/L. However, from the point of view of the legal effect, the use of presumptive carrier has an obvious disadvantage, that is, for the same ship on the same voyage of different bills of lading issued by different tickets of goods, there may be different results of the determination of the carrier.

The essence of a cargo claim is to hold the carrier liable, and there are two academic paths to identifying the presumptive carrier in various countries: one is to rely on the shipper to find the carrier, i.e., "the claimant should start with the shipper rather than the registered owner of the ship, and the burden of proving who the true carrier is should be placed on the shipper, through whom the contract of carriage was. However, the problem with this route are: the shipper has difficulty in locating the carrier in the complex chain of charters, there may be multiple intermediate trading parties between the claimant who ultimately holds the B/L and the original contracting shipper, the FOB seller may have no intention of being involved in the contract of carriage at all, and so on. Moreover, it is debatable to attribute the root cause of the inability to identify the carrier solely to the shipper's lack of due diligence.An example of this is the Uniform Customs and Practice for Documentary Credits (UCP600), which came into force in 2007, requires that multi modal transport documents, sea waybills, air waybills, road, rail and inland waterway transport documents must indicate the name of the carrier (indicate the name of the carrier), but due to the complexity of the carrier under the B/L of charterparty, the B/L of charterparty is the only exception under UCP600.Secondly, by presuming the shipowner as the carrier, as the shipowner directly or indirectly engages with the carrier, it is highly unlikely that a shipowner would agree to transport goods on their vessel without knowing who should bear the responsibility. Moreover, they often obtain some form of guarantee from the carrier who uses their vessel for transportation. This path is a legislative technique that shifts responsibility from the carrier to the shipowner, thus allows the shipowner to rebut the presumption by providing information about the real carrier or by proving that the ship is under a bareboat charter. This is also the reasonableness of the rebuttable presumption of liability of the registered shipowner constructed by the Rotterdam Rules. However, scholars hold the view that the Rotterdam Rules is still new and needs to be further examined in judicial practice for its reasonableness and feasibility Whether or not the Convention will enter into force remains unknown, and even if it does, it remains to be seen what its effect will be. Therefore, it is a major proposition to ensure that Chinese courts always apply the same presumption and high level of empirical law to presume the carrier in the same types of cases. In the absence of a presumptive carrier in the Maritime Law, the application of the de facto presumption should be limited and the concept should be restricted to the framework of the de jure presumption, and the presumptive carrier identification method should be applied only when the carrier cannot be identified by means of the B/L's textual and special identification methods.

With regard to employer's liability under the method of identifying the source of the right to issue a B/L, in maritime transport, the captain of a ship is a person employed or retained by the shipowner or bareboat charterer to be in charge of the administrative and technical affairs of the ship. As a person employed by

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the shipowner or bareboat charterer, the captain, based on the interests of the company, has the obligation to take proper care of the carriage and delivery of the goods, as well as the obligation to issue the B/L after loading the goods. Similarly, the shipowner or bareboat charterer relies on the captain of the ship to exercise management and control of the ship during the period of carriage by sea. Even under a time charter, if there is an agreement in the time charter regarding the issuance of a B/L and the release of the goods without an original B/L on the basis of a bond, the captain is required to act in accordance with those requirements and instructions. Therefore, in the case of the captain of the ship to issue a B/L, the shipowner is recognized as the carrier. According to the privity of contract, which is considered as an essential element for attributing carrier liability to the shipowner. The first aspect is the "actual connection" under property rights, which presumes that the shipowner, by virtue of possessing and controlling the vessel, is linked to the transportation of goods. This is consistent with the identification path used in Case 3, which relies on Article Seven of the Maritime Law regarding ship ownership to recognize the registered owner as the carrier. The other aspect is the "actual connection" under the rights of debt, which infers the factual connection between the shipowner and the transportation of goods based on the shipowner's issuance of transport documents and the substitutionary liability arising from the actions of agents. Professor William Tetley had also argued that the carriage of goods by sea was in fact a joint venture between the shipowner and the charterer of the ship, who should be jointly and severally liable as carriers at the same time.

Judicial practice in China often adopts employer's liability to identify the source of the right to issue a B/L, which in turn identifies the shipowner or bareboat charterer as the carrier. In Case 4, the court, based on the fact that the owner was responsible for the equipping of the captain and crew and for the navigation and internal management of the vessel as stipulated in the time charter contract, stated that, unless the owner expressly declared otherwise in advance, the B/L issued by the captain should be deemed to have been issued on behalf of the owner. Even if the lessor consistently claims that the authorized loading agent is limited to issuing bills of lading based on the chief mate's receipt, this was an internal agreement between the owner and the loading agent, and had nothing to do with the carrier as recorded in the externally issued B/L. Therefore, the shipowner was the carrier of the maritime carriage of goods in question, and should be liable to the shipper according to the record of the B/L. In Case 11, the Court held that, on the question of whether the time charterer bound the shipowner by issuing an incorrect shipowner's B/L without actual authorisation, the shipowner was liable for the B/L as the time charterer was responsible for equipping the ship with a captain and crew, and as the captain was in direct control of the ship, the captain should normally have been aware of the issuance of the B/L, and the shipowner shall bear the carrier's responsibility for the bills of lading involved in the case. In Cases 7 and 10, the court held that the captain was employed by the shipowner and exercised the authority on the shipowner's behalf, and the shipowner should be recognised as the carrier. It should be noted that the employer's liability is not a product of legal logical reasoning, it is a compromise of social public policy considerations, and the result of the coordination of the interests of the measurement and the legal logic of the conflict, reflecting the principle of consistency of rights and obligations. Article 51 of the Maritime Law provides: "The carrier shall not be liable for loss of or damage to the goods occurring during the period of liability if such loss or damage is due to one of the following causes: ... (xii) Any other cause arising without the fault of the carrier or his servant or agent. ..." But this provision

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refers to the carrier's employer liability, not necessarily the shipowner's employer liability.

From the above analysis, the presumption of the carrier and the issuance of bills of lading under the identification of the source of the employer's liability is essentially different, which specifically manifests in the following aspects. First, the application of the presumed carrier identification method is considered only when the carrier cannot be identified using the textual interpretation of the B/L and other specific identification methods and in the known (or has been proved) on the basis of the facts with the use of the rule of experience to infer another fact. Such presumption is divided into the fact presumption and law presumption. Employer liability" is one of the identification paths within the method of identifying the source of the B/L. It can be applied when the carrier cannot be determined using the method of textual interpretation of the B/L. Second, the essence of the law is different. Presumption of the carrier is a "rule of evidence"; employer's liability is the law of tort liability or a kind of alternative liability under Maritime Law Article 51, the basis of its attribution may be classified as "domination", "significant influence" and "control". "and "control theory". Thirdly, the burden of proof is different. Presumed carrier is a presumption of responsibility, allowing the presumed adverse party to put forward counter-evidence to prove that it is not the carrier; employer's liability is a statutory alternative liability, it does not allow the adverse party to put forward counter-evidence to prove that it is not the carrier, in addition, under the Maritime Law, carrier employer's liability is still a kind of incomplete fault, the carrier can invoke the exculpatory grounds provided in the Maritime Law to raise a defense. Fourth, the legal effects are different. the presumption of the carrier, influenced by known facts and the rule of experience, can lead to uncertain results. In fact, even under different bills of lading issued for different cargoes on the same vessel and voyage, there may arise issues of different carrier identification. Under the employer liability, the carrier is determined and is either the shipowner or the bareboat charterer. There is no issue of "differing judgments in similar cases.

4. Analysis of the carrier identification method in Chinese judicial practice and proposals for amendments to the Maritime Law

4.1 Analysis of the carrier identification method in Chinese judicial practice

The methods of carrier identification in Chinese judicial practice have been gradually accumulated by Chinese courts over the past nearly three decades, and they have enriched the path of carrier identification in China, but there are still some advantages and disadvantages. The essence of the identification path in Case 3 was based on the ship ownership provision in Article 7 of the Maritime Law under which the shipowner was presumed to be the carrier. Article 7 of the Maritime Law defines the ownership of a ship under the right of ownership of a ship in rem, and under the civil legal relationship in China, a party's ownership or possession of an object does not ipso facto make it the subject of the civil legal relationship. According to the Civil Code of the People's Republic of China (the "Civil Code"), only the subject who performs a civil legal act can become the subject of a civil legal relationship. The Civil Law Code provides that in Article 133, A civil juristic act is an act through which a person of the civil law, by expression of intent, creates, alters, or terminates a civil juristic relationship. And Article 134 stated that A civil juristic act may be accomplished through unanimous consent of two or more parties, or through one party's unilateral expression

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of intent. Where a legal person or an unincorporated organization makes a resolution in accordance with the procedure and voting method provided by law or stipulated in its articles of association, such a resolution is accomplished as a civil juristic act.Therefore, the provisions of Article 7 of the Maritime Law cannot be used as the legal basis for the identification of the carrier, or else it will lead to the "recognition of persons by objects".

The identification path of employer liability in Cases 1, Case 6, and Case 7 has a direct legal effect on the identification of the carrier. It applies the method of identifying the source of the B/L, namely that the authority of the captain to issue the B/L derives from the appointment or employment by the shipowner or bareboat charterer. However, Article 51 of the Maritime Law only stipulates the carrier's employer liability, it did not solve the problem of the ship owner's employer liability.

Cases 2, 11&12 applied the presumptive carrier identification method, and the significance of Case 2 lies in clarifying that it is not sufficient for the bareboat charterer, presumed to be the carrier, to merely provide evidence of the existence of a time charter contract. Additionally, they must also demonstrate the existence of a transportation contract between the holder of the B/L and the time charterer. Cases 11 & 12 had erred in presuming the time charterer to be the carrier on the basis of the rule of experience that the time charterer was normally responsible for the carriage of goods: on the one hand, they had ignored the distinction between "the conclusion of a contract for the carriage of goods by sea" and "a contract for the carriage of goods by sea evidenced by a B/L", i.e., for the B/L holder, they are considered a party to the B/L relationship as defined in Article 78(1) of the Maritime Law, rather than a party to the cargo carriage contract relationship as evidenced by the B/L. Therefore, the definition of the carrier under Article 42(1) of the Maritime Law cannot be used to identify the carrier in the context of the B/L relationship, on the other hand, it excludes the scenario where the captain acts on behalf of the shipowner in issuing the B/L, in fact, when the carrier is the shipowner, the carrier represented by the captain in issuing the B/L is indeed the shipowner.

4.1 Proposed Suggestions to Carrier Identification under the Chinese Maritime Law

On 7 January 2020, the Ministry of Transport submitted to the State Council the draft of the Maritime Law of the People's Republic of China (Draft for Revision) (the Draft for Revision). The Draft for Revision and Amendment adds a new Article 89, which is dedicated to the formulation of carrier identification rules, "If the contract of carriage of goods by sea and the transport document or electronic transport record contain different references to the carrier, the reference to the carrier in the transport document or electronic transport record prevails, unless the holder of the transport document or electronic transport record is the shipper. If the transport document or electronic transport record does not expressly state that it is the carrier, the carrier is deemed to be the carrier in accordance with: (a) If the transport document or electronic transport is issued by the captain of the ship on which the goods are carried or expressly states that the goods have been loaded on board the ship, it is presumed that the owner of that ship is the carrier, but if the owner of the ship proves that the ship has been leased on a bareboat charter, bareboat hire-purchase or financial lease, and the name and address of the charterer (b) If the owner of the ship in the preceding subparagraph or the charterer proves that a third person is the carrier and its address, that third person is the carrier. The provisions of the preceding paragraph do not apply if the person claiming compensation proves that the car-

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rier is the carrier."basically absorbing the provisions of Article 37 of the Rotterdam Rules and adopting the "Documentation - Presumption (Shipowner) - Proof - Re-presumption (Bareboat Chartering, bareboat chartering, bareboat hire-purchase or financial charterer)-reprove (third party)....." multiple presumption mode. However, there are the following problems with this model: Firstly, when drafting the Rotterdam Rules, there were divergent views on the legislative model of "presumption", and the biggest controversy was how to construct the presumptive carrier clause. Secondly, the degree of proof of the presumptive carrier has not been clarified. According to the jurisprudence of "shifting the burden of proof", the process of presumption is the process of shifting the burden of proof, and when the result of the presumption is in favour of party A, the court shall allow party B to provide evidence to rebut the result until the original result of the presumption is not established. In other words, the presumptive carrier, if it wants to overturn the presumption that it is the carrier, in addition to providing the bareboat charter contract or time charter contract and the carrier's address, it is also necessary to demonstrate the existence of a transportation contract between the carrier and the B/L holder. Thirdly, the presumption and re-presumption of multiple presumption is not in line with the legal efficiency (efficacy) principle, This multiple presumption approach significantly increases the uncertainty of the civil legal relationships under the B/L, leading to challenges in exercising B/L rights and potentially affecting the negotiable function of the B/L in international trade. Fourthly, it is not possible to solve the problem of "different judgement in similar cases" in the trial practice, that is, for the same ship, the same voyage, multiple tickets of goods issued multiple similar bills of lading, if the presumptive carrier in one case choose to acknowledge the presumption of fact, but in the other case choose to rebut the presumption of fact, it may produce inconsistent results of the identification of the carrier.

Whether it is the "carrier B/L doctrine" in the Hamburg Rules or the "shipowner B/L doctrine" in common law, the issue of carrier identification boils down to the question of how the holder of the B/L identifies the carrier of the goods transported under the B/L. If the shipper and the carrier signed a contract of carriage of goods by sea, there is no identification of the carrier, and no need to rely on the provisions of the B/L to identify the carrier. It is different for the holder of the B/L without a contract for carriage of goods by sea, it must rely on the B/L to identify the carrier, that is, the principle of "documentary identification" holds that the person in possession of the B/L is recognized as the carrier. Since issuing the B/L is the carrier's obligation, identifying the carrier based on who holds the B/L or who authorized its issuance is the most effective approach. If we adhere strictly to the principles of "identifying individuals through individuals or "identifying individuals through objects, that is, according to the Maritime Law Article 42, paragraph 1 of the definition of the carrier or Article 7 of the ownership of the ship to identify the carrier, it would lead to logical inconsistencies or legal errors. The fundamental problem is that it is divorced from the basic factual issue of the creation of the B/L. Therefore, the problem of identifying the carrier cannot be solved by simply "identifying individuals through individuals or "identifying individuals through objects. Only in the case that the carrier cannot be identified by documentary identification or that no document has been issued, can the presumptive carrier be implemented, but the registered owner of the ship or the registered bareboat charterer should be presumed to be the carrier. Secondly, Presuming the carrier implies creating a presumption regarding a specific fact about the carrier. It means that when a civil relationship is uncertain or not fully determined due to the actions or events of the parties involved, and no determination can be made based

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on known facts, a certain fact is presumed based on known facts or rules of experience. This allows the civil legal relationship to be determined. The legal effect of such formulation effectively shifts or reverses the burden of proof, and the person presumed to be the carrier shall be permitted to adduce evidence to rebut the presumption until the original presumption is rebutted. However, the purpose of the presumption is to enable the civil legal relationship to be determined, in accordance with Article 89 of the Draft for Review and Amendment, "Presumption (shipowner) - Proof - Re-presumption (demise charter, demise hire-purchase, or financial owner) - Proof (third party)", which is a multi-layered approach. ....." This multiple presumption model creates uncertainty in the civil legal relationship for the B/L holder and results in difficulties in exercising B/L rights, as well as affecting the efficiency and value of the legal process. It is advisable to limit the number of presumptions or clearly define the burden of proof for the party disadvantaged by the presumption. Specifically, if the party disadvantaged by the presumption can only prove the existence of a time charter contract but cannot effectively rebut the legal effect of being recognized as the carrier, further evidence is required to demonstrate the existence of a transportation contract between the time charterer or another third party and the B/L holder in order to successfully rebut the presumption's legal effect. Moreover, the identification of the carrier should only be considered for application of the presumptive carrier identification method if the carrier cannot be identified using the B/L's textual and special identification methods.

In addition, when comparing legislative provisions in various countries, the German law adopts a statutory approach, directly stipulating that the B/L must contain information about the carrier, and if it does not, or if the "carrier" contained therein is not the carrier, then the shipowner shall bear the responsibility of the carrier. The English law adopts the way of "employer's theory is the principle, the time charterer expressly expresses as the exception", unless the B/L "validly and clearly" states that the time charterer is the carrier, otherwise, the captain and the shipowner under the B/L issued for the captain (or the demise charterer if there is a demise charter) shall be the carrier. If the B/L is issued by the captain, the shipowner shall be the carrier because the captain is an employee of the shipowner; the same applies if the ship is under a bareboat charter.The same applies even though the B/L is not signed by the captain himself, but is signed "for the captain" by an authorised agent in a charter party or other contract. That is to say, under English law, if the B/L is issued by the captain of the ship, it is considered that the B/L is issued by the captain of the ship as an employee, and it is binding on the shipowner; even if the B/L is issued by an agent "for the captain of the ship", regardless of whether the agent is authorised under the charter party or under other authorisation, the carrier is still the shipowner. For a B/L to be considered a time charterer, the time charterer must be "validly and clearly" identified in the B/L as the carrier. For what is "valid and clear", should be based on the B/L head "name", B/L signed content, handwritten printing is better than the printing of the basic facts for identification. Although the British and German laws adopt different identification modes, they solve the problem of identifying the carrier in a similar way.

The rapid development of multi-modal transport in China has made the mode of carriage of goods by sea, the subject, and the period of responsibility more sophisticated and complicated; the integration of ship construction and trading with finance has made the property rights of ships more complex, which requires a legal system that is more targeted, adaptable and flexible. China's courts have already had judicial

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practice in identifying the meaning of the B/L, special identification methods and identification methods of the presumptive carrier, which have played an important role in China's trade and transport. The revision of the Maritime Law should build on these judicial practices, clarify the order of the above several carrier identification methods, and avoid the uncertainty of the civil legal relationship of the B/L under the multiple presumption model of Article 89 of the Draft Revision. Based on the above analysis, it is proposed that paragraph 2 of Article 89 of the Revision Draft to be amended as:

"If the carrier is not expressly stated in the transport document or electronic transport record, the carrier shall be identified in accordance with the following:

(a) the carrier is identified in accordance with the source of the right to issue the B/L, the subject of the acceptance of the bond for the release of the goods without a B/L and the subject of the right to make the lading order;

(b) If the carrier still cannot be identified by the application of paragraph 1 of this Article and subparagraph 1 of this paragraph, and the transport document or electronic transport record is issued by the captain of the ship on which the goods are carried or it is expressly stated that the goods have been loaded on board the ship, the captain of the ship is presumed to be the employee of the shipowner who issued the transport document or electronic transport record, and the shipowner is the carrier; provided, however, that if the ship has been chartered out on a bareboat charter, bareboat hire-purchase or financial lease, and has been registered with the ship registration authority If the ship has been leased under a bareboat charter or finance lease and registered with the ship registration authority, the captain of the ship is presumed to issue the transport document or electronic transport record as an employee of the bareboat charterer, and the bareboat charterer is the carrier;

(c) if the shipowner or the bareboat charterer under the preceding subparagraph proves that a contract for the carriage of goods by sea exists between the time charterer or a third person and the holder of the transport document or electronic transport record, the time charterer or the third person shall be the carrier. "

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