

THE LEGAL NATURE OF A BILL OF LADING ISSUED BY THE CHINA-EUROPE RAILWAY EXPRESS: THE CHINESE PERSPECTIVE

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The traditional bill of lading is integral to the carriage of goods by sea. It serves as a receipt for goods taken by the carrier, is evidence of the carriage contract, and is a document of title functioning as a negotiable instrument. The corresponding instrument in railway transport is a consignment note, which serves as a receipt and is evidence of the contract but is not a title document and, like the sea waybill, is not a negotiable instrument. However, this may be changing in China. Since the first route of the China-Europe Railway Express (CERE), YuXinOu, started operations on 19 March 2011, along with the development of the Belt and Road Initiative in 2013, the CERE has been growing rapidly. Consequently, the traditional nature of the consignment note on the CERE route is facing challenges. There are expectations of it serving as a document of title and, similar to the maritime bill of lading, acquiring a transferability function. The first judgment of a Chinese court on a dispute involving a railway bill of lading was delivered on 30 June 2020. It was held in that decision that a railway bill of lading could be regarded as a valid document of title with the attendant function of transferability. Notably, however, no express legislation has thus far been adopted; nor has any judicial interpretation been given that specifies its legal nature, even if market demand and policy considerations are in favour of this decision. Accordingly, whether there is sufficient legal foundation to confirm that a railway bill of lading can serve as a negotiable document of title remains uncertain. This article attempts to address these crucial issues.

Keywords: bill of lading; COTIF; SMGS; transport documents; negotiability; non-negotiable document; document of title; carriage of goods by railway; Belt and Road Initiative.

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1. BACKGROUND AND INTRODUCTION

The first China-Europe Railway Express (hereinafter: CERE), called the YuXinOu train (Chongqing-Xinjiang-Europe International Railway), carrying hardware products left Chongqing municipality in Southeast China on 19 March 2011 for the destination of Duisburg in Germany. Its primary purpose was to create new opportunities for Chinese hardware companies to transport their hardware products to the west among different countries connected by land.¹ It is generally accepted that the mode of railway transportation is much cheaper than that of air transportation, and faster than that of sea transportation between China and Europe.² Following the Belt and Road Initiative (hereinafter: BRI) as an internationalisation development strategy launched by the Chinese government in 2013, the CERE has significantly improved in terms of the number of operations and the categories of cargoes transported. Until the end of 2020, the CERE had connected 71 Chinese cities to 92 European ones located in 21 different countries.³ In the face of the disruption of the international supply chain by way of air and ocean transportation during the Covid-19 pandemic in 2020, the demand for transport by the CERE has been dramatically increasing. The CERE transported 1.85 billion tons of cargo ranging from cars, electronic products, and household goods to medical supplies in the first half of 2022, up 8.9 per cent year-on-year. It is clear that the CERE has offered, and will continue to offer, an effective and convenient channel to expand economic and trade exchanges among countries and to contribute to global trade stability and growth.

However, unlike in maritime transportation, in the field of railway transportation, an international railway consignment note rather than an ocean/maritime bill of lading (hereinafter: maritime B/L) is employed. The traditional bill of lading is integral to the carriage of goods by sea. It serves as a receipt for goods taken by the carrier, is evidence of the carriage contract, and is a document of title functioning

¹ Papatolios, N., China-Europe Express Celebrates Ten Year Anniversary, Rail Freight, 19 March 2021, <https://www.railfreight.com/beltandroad/2021/03/19/china-europe-express-celebrates-ten-years-anniversary/> (accessed 28 January 2022).

² Generally speaking, railway freight amounts to one quarter or one fifth of air freight, and the transportation duration is one third or half the maritime transportation period. See Yangkun, W., Tough Work for Ten Years and Steady Achievements: Overview of the Development of the CERE in the Past Ten Years (I), China Transportation News, 12 March 2021, https://www.zgjtbc.com/2021-03/12/content_258250.htm (accessed 28 January 2022).

³ Yangkun, W., Tough Work for Ten Years and Steady Achievements: Overview of the Development of the CERE in the Past Ten Years (I), China Transportation News, 12 March 2021, https://www.zgjtbc.com/2021-03/12/content_258250.htm (accessed 28 January 2022).

as a negotiable instrument.⁴ Conversely, the international railway consignment note has only two functions, a railway transport contract and a cargo receipt, rather than being a negotiable document of title. It cannot be applied for the settlement and financing of letters of credit (L/C), as a B/L can.

Against the above background, how a railway B/L can be used as a negotiable document of title has attracted special attention from the Chinese government, the logistics and railway industry, the finance industry, and relevant practitioners. This article will first explore under what circumstances the concept of a railway B/L in the current Chinese environment is created and developed; afterwards, turning to the first judgment of a Chinese court arising from a dispute over a railway B/L, which was delivered on 30 June 2020, it will examine how this judgment has affirmed the legal nature of the railway B/L as having the function of a document of title under certain conditions. What the legal reasoning is behind this judgment will be discussed in detail. The article will conclude with a critical analysis of whether the *ratio decidendi* raised by this first judgment can be applied in similar disputes to come.

2. CREATION OF A RAILWAY BILL OF LADING AND POLICY CONSIDERATIONS

2.1. Overview of Transport Documents

It is safe to say that any mode of transport is closely associated with transport documents that provide evidence of contracts of carriage and the taking over or loading of goods by carriers. In any specific transportation industry, transport documents normally follow a uniform standard, such as a bill of lading and a sea waybill in the shipping industry, an air waybill in the aviation industry, and a rail/road consignment note in land transport.⁵ However, a report by the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) issued in 2003 states that there is no uniform international convention providing the characteristics and effects of different transport documents.

⁴ It should be noted that in this article a maritime B/L does not cover a straight bill of lading on the ground that a straight bill of lading is often treated as having been made out to a named consignee rather than as a negotiable document, even if it has been recognised as a document of title. However, the purpose of a railway B/L is to give such a railway B/L the status of a negotiable document of title. Therefore, the concept of a straight B/L is far from focus of this article. In terms of the nature of a straight B/L, see Aikens, R.; Lord, R.; Boals, M., *Bills of Lading*, 2nd Edition, Informa Law, London, 2015, No. 6.9-6.11.

⁵ Spanjaart, M., *Multimodal Transport Law*, Taylor & Francis, Abington, 2018, p. 25.

Even so, the customs of merchants in different modes of transport have resulted in the creation of similar rules in most jurisdictions.⁶

In light of the tentative conclusion handed down by the Secretariat of the United Nations Commissions on International Trade Law (UNCITRAL) in different types of transport documents, only a maritime B/L arising from centuries of evolution of commercial law can generally be treated as a document of title functioning as a negotiable instrument. Such a function of the B/L has been codified in various international instruments and domestic laws on the carriage of goods.⁷ However, other transport documents, such as a railway consignment note and an air waybill, do not have the special functions of a bill of lading as a document of title.

It should be noted that, although it is provided in the Uniform Customs and Practice for Documentary Credits (2007 Version) (UCP600) that banks can accept railway consignment notes,⁸ these notes are not of the same nature as documents of title, which therefore makes it impossible to address the issue of controlling and taking delivery of cargo by their presentation. In other words, UCP 600 does not provide a sufficient legal foundation for railway consignment notes to be used for the purposes of settlement and financing. In practice, this means that once banks accept consignment notes to achieve the purpose of financing, they will be exposed to huge risks on the ground that they cannot require the delivery of cargo unless they are the consignee under the consignment notes. However, as non-negotiable documents, the named consignee cannot be changed. Accordingly, it is impossible for the banks to be appointed to be the consignee. Therefore, it is understandable that few banks are willing to accept railway consignment notes to engage in letter of credit business.⁹ Accordingly, on a route of the CERE, if a railway consignment note is issued, it cannot be used for the purposes

⁶ The Use of Transport Documents in International Trade, The UNCTAD Secretariat Report (26 November 2003), see https://unctad.org/system/files/official-document/sdtetlb20033_en.pdf (accessed on 10 January 2022).

⁷ Possible Future Work on Railway Consignment Notes, The Secretariat of UNCITRAL (11 May 2020), p. 2, see <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/024/81/PDF/V2002481.pdf?OpenElement> (accessed on 10 January 2022).

⁸ Under the UCP 600, documents include a bill of lading, a sea waybill, and an air/road/rail transport document. All these documents can be used for presentation which means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered. See Articles 2, 20-24, UCP 600.

⁹ Proposal by the Government of the People's Republic of China on UNCITRAL's Future Work: Solving the problems of railway consignment notes which are not of the same nature as documents of title (14 June 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/051/90/PDF/V1905190.pdf?OpenElement> (accessed 6 September 2021).

of financing and settlement. On the contrary, if such a railway consignment note has a function similar to that of a bill of lading serving as a negotiable document of title, the international transaction resting on the CERE would be more dramatically developed. It is in this context that the concept of a railway “bill of lading” emerges in Chinese instruments and in the Chinese railway industry.

2.2. A Railway Transport Document in the Current Legal Regime

2.2.1. *International Regime*

There are nowadays two main international conventions regarding railway transport documents issued by two major intergovernmental railway organisations, namely the Intergovernmental Organisation for International Carriage by Rail (OTIF)¹⁰ and the Organisation for Co-operation between Railways (OSJD).¹¹

The first convention issued by the OTIF is the Convention concerning International Carriage by Rail (COTIF 1999), which contains the treaty text itself and its seven appendices.¹²

The Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) (Appendix B to the Convention) expressly provides in Article 6 for the concept of “a consignment note” and its legal nature: “the consignment notes shall not have effect as a bill of lading”.¹³ The rationale of this Article is to avoid debate on the legal nature of a consignment note because it is interpreted that such a CMI consignment note, like other transport documents,

¹⁰ The Intergovernmental Organisation for International Carriage by Rail (OTIF) is the oldest international organisation in the international rail transport sector, founded in 1893. It currently has 50 member states and one associate member, all mainly in Europe, North Africa and the Middle East, and its headquarters is in Bern, Switzerland. See https://otif.org/en/?page_id=15 (accessed 20 January 2022).

¹¹ The Organisation for Co-operation between Railways (OSJD) was established in Sofia in June 1956 and now has 29 member states, mainly in Asia and Eastern Europe. Before its establishment, a number of meetings were held between 1950 and 1951 to discuss a series of agreements regarding railway transport including the original version of the Agreement on International Goods Transport by Rail (SMGS). See <https://en.osjd.org/en/9176> (accessed 20 January 2022).

¹² The Convention concerning International Carriage by Rail (COTIF) 1999, also known as the Vilnius Protocol 1999, derived from the original version of the Convention concerning International Carriage by Rail 1980 (including the CIM Uniform Rules).

¹³ Article 6(2)-(5), The Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) (Appendix B to the Convention). See http://otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff2/02_COTIF_99/2016/COTIF_1999_01_03_2019_en.pdf (accessed 20 January 2022).

“has a role as contract note and a receipt for the goods but not, as is the case of a maritime bill of lading, a document of title”.¹⁴

In contrast, another convention issued by the OSJD is the Agreement on International Railway Freight Communications (SMGS), which contains the treaty text, rules of procedure, and six annexes.¹⁵ Unlike the CIM 1999, the SMGS does not specify whether a consignment note is of the same nature as a bill of lading or a document of title. It stipulates in Articles 6 and 7 only that a railway consignment note must be accompanied by the goods from the departure station to the arrival station throughout the whole course of the carriage, and a stamped railway consignment note may be used to confirm the conclusion of a contract of carriage. Even so, it is generally accepted that an SMGS consignment note serves simply as a receipt and is evidence of the contract, not a negotiable instrument.

The OTIF and its CIM consignment note serve members from Western Europe, North Africa, and the Middle East, while the OSJD and its SMGS consignment note serve mainly members from Asia and Eastern Europe.¹⁶ It follows that the CIM consignment note is often used in West European countries, but the SMGS consignment note is widely used in Asian and East European countries. In this context, if a CIM consignment note were to be issued by an OTIF country, it has to be reproduced as an SMGS consignment note when the railway proceeds to an OSJD country. This situation obviously reduces the efficiency and increases the cost of railway transportation. The OTIF and the OSJD therefore worked together in 2006 to issue a CIM-SMGS consignment note that can be used in countries of both the OTIF and the OSJD.

Among the above conventions, although China joined the SMGS only in 1953, after a CIM-SMGS consignment note was issued in October 2012, a tentative CIM-SMGS consignment note started to be used on the YuXinOu route of the CERE, from Chongqing to Duisburg, belonging to the first route of the CERE. On 3 May 2017, the National Railway Administration of the People’s Republic of China officially announced that, during the transport of a container train between China and Europe, a shipper can voluntarily choose to apply a CIM-SMGS.¹⁷ This arrangement is clearly beneficial to the development of the railway industry in China.

¹⁴ Clarke, A. M.; Yates, D., *Carriage of Goods by Land and Air*, 2nd Edition, Informa Law, London, 2008, No. 2.495.

¹⁵ See <https://en.osjd.org/en/9176> (accessed 20 January 2022).

¹⁶ See https://otif.org/en/?page_id=15 and <https://en.osjd.org/en/9176> (accessed 20 January 2022).

¹⁷ Notice of Adoption of a CIM-SMGS Consignment Note by the National Railway Administration of the People’s Republic of China (3 May 2017) http://www.nra.gov.cn/xwzx/gjjl/jjty/201705/t20170503_37685.shtml (accessed 20 January 2022).

Even so, this arrangement does not enable a unified CIM/SMGS consignment note to be used widely due to the onerous formality of producing this combined consignment note in different languages; neither does it address the legal issue regarding the transferability of the consignment note.¹⁸ Accordingly, this combined consignment note, like a solo railway consignment note, cannot be used for the settlement and financing of letters of credit in international trade.

In order to develop the railway consignment note as a document of title, a change of formality is not enough. In this context, the Chinese government presented a proposal on possible future work by UNCITRAL towards the development of a negotiable transport document to facilitate the multimodal carriage of goods, particularly by railway in the Euro-Asian space in 2019.¹⁹ The purpose of this proposal is to advise UNCITRAL to assess the possibility of drafting an international instrument to create a unified bill of lading to apply to railway, road, and air transport in one or more modes.²⁰

Following China's proposal, the Secretariat of UNCITRAL conducted research on the legal issues relating to the use of railway and other consignment notes. Based on a preliminary conclusion by the Secretariat, a negotiable transport document, not limited to a maritime negotiable transport document, should primarily be considered regarding whether it may be used as an electronic form in different modes of transportation such as railway and road. If so, it might be necessary to draft a new instrument to unify and regulate a negotiable transport document in different modes of transportation. Up to now, no further work programme on the project of the new instrument has been discussed, as hosted by UNCITRAL or other international organisations.

2.2.2. Domestic Law Regime in China

Apart from an SMGS and a CIM/SMG consignment note, from the perspective of international conventions, in the Chinese domestic legal system, the special law and regulations relating to railway transportation, including the

¹⁸ *Ibid.*, Possible Future Work on Railway Consignment Notes, The Secretariat of UNCITRAL (11 May 2020), p. 4; see <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/024/81/PDF/V2002481.pdf?OpenElement> (accessed on 10 January 2022).

¹⁹ Proposal by the Government of the People's Republic of China on UNCITRAL's Future Work: Solving the Problems of Railway Consignment Notes which are not of the Same Nature as Documents of Title (14 June 2019); see <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/051/90/PDF/V1905190.pdf?OpenElement> (accessed on 10 January 2022).

²⁰ *Ibid.*

Railway Law 1990 (2015 Amendment)²¹ and the Rules of Carriage of Goods by Railway 1991,²² also provide for the concept of a railway consignment note in railway transport. However, the domestic legal system does not transcend the traditional legal nature of a railway consignment note to confer to it the status of a document of title.

To be clear, Article 11 of the Railway Law 1990 (2015 Amendment) provides that:

“A railway transport contract shall be an agreement in which the mutual rights and obligations between the railway transport enterprise and the passenger(s) or shipper(s) are defined.

A passenger ticket, a luggage, parcel or goods consignment note shall represent a contract or a constituent part of a contract”.²³

Article 34 of Rules of Carriage of Goods by Railway 1991 provides that:

“After the goods arrive at the destination, they shall be delivered to the consignee stated in the railway consignment note”.²⁴

It is generally recognised in Chinese legal circles that a consignment note serves as a receipt and as evidence of the contract, but nothing more. It follows that a carrier must deliver the cargo to a named consignee, but has no right or obligation to deliver the cargo to the named consignee’s “order or assigns”. In the event that the carrier is required to deliver the cargo based on the holder of the railway B/L rather than the named consignee, it is arguable that this requirement is in conflict with the current legislation on the ground that it imposes an onerous obligation on the carrier.²⁵ Therefore, even if domestic law does not expressly provide for the legal nature of a railway consignment note, there is no doubt that the consignment note cannot be used as a negotiable document of title.

In conclusion, a railway transport document is simply treated as a consignment note, unlike a maritime B/L serving as a negotiable document of title.

²¹ The Railway Law of the People’s Republic of China (hereinafter: Railway Law 1990 (2015 Amendment)), adopted at the 15th Meeting of the Standing Committee of the 7th National People’s Congress on 7 September 1990, coming into force on 1 May 1991. The latest amendment was issued on 24 April 2015.

²² Rules of Carriage of Goods by Railway 1991 (Tie Yun [1991] No. 40), as a legal regulation, was issued by the Ministry of Railways. It mainly provides operational guidance, while the Railway Law 1990 simply stipulates some general rules.

²³ Railway Law 1990 (2015 Amendment), Article 11.

²⁴ Rules of Carriage of Goods by Railway 1991, Article 34.

²⁵ Xing, H., Legal Foundation of a Railway Bill of Lading in the Context of BIR, *Hebei Law Science*, Issue 4, 2021, p. 36.

2.3. Policy Considerations and the Creation of a Railway “Bill of Lading”

Following the above discussion, a railway consignment note, without the function of a document of title, should have been used in the CERE. However, as discussed in the first section, after the BRI, as an internationalisation development strategy launched by the Chinese government in 2013, the CERE has been significantly developed in a number of operations and in the categories of cargoes transported. However, on the ground that the current function of a railway consignment note does not satisfy the demand of financing and settlement, its transferrable function must be given based on the creation of this new function of such a railway transport document. In this context, the State Council of the People’s Republic of China issued the Overall Plan for the China (Chongqing) Pilot Free Trade Zone (PFTZ) (hereinafter: Overall Plan), which is part of the third batch of government-endorsed PFTZs in 2017 to proffer possible policy instructions for creating some innovations.²⁶

In light of the development strategy raised in the Overall Plan, the Chongqing PFTZ will seek to establish an international multimodal transport logistical system. In addition, depending on the CERE, this region will frame an international trade corridor and rules.²⁷ It follows that the comprehensive service of the CERE from Chongqing has been further highlighted and expanded and a corresponding series of positive measures provided.

First, on the YuXinOu route of the CERE (Chongqing PFTZ), the Chongqing Zhongji Car Trading Company, which imported vehicles from Germany, used a railway bill of lading to apply for documentary credit, the first documentary credit in the world negotiated on the basis of a railway B/L. As discussed above, in practice, banks are not willing to take the huge risk of accepting a railway consignment note to finance documentary credit. For this reason, there are two important legal effects. To begin with, this is the first time that the concept of a railway B/L rather than a railway consignment note was used in railway transport. In addition, after the Chinese bank issued the documentary credit on the basis of the railway B/L on 22 December 2017,²⁸ it follows that a railway B/L can be accepted and applied in the financing system, like a maritime B/L.

²⁶ Overview of China (Chongqing) Pilot Free Trade Zone, <https://www.ichongqing.info/business/opening-up-platforms/ftz/overview-of-china-chongqing-pilot-free-trade-zone/> (accessed 15 January 2022).

²⁷ *Ibid.*, see also, Overall Plan for the China (Chongqing) Pilot Free Trade Zone (The State Council, Guo Fa [2017] No. 19, 15 March 2017).

²⁸ Yang, L., An Innovative Mechanism of Cooperation of Both Railway “Bill of Lading” and “Consignment Note” in the Context of the Chinese Belt and Road Initiative, *Chinese Law*, Issue 6, 2019, p. 66.

Secondly, on 4 January 2018, nine public authorities (including the High People's Court of Chongqing) of the Chongqing Municipality issued a joint governmental instrument titled *Guiding Opinions on Developing Trade by Land and Promoting Financing by Consignment Notes in the Chongqing Municipality*. This governmental guidance states that:

“To improve the issuance of a multimodal bill of lading and a (land) consignment note, where a multimodal bill of lading and a (land) consignment note comply with the relevant legislation and regulation, all banks shall treat such a bill of lading and consignment note as an effective document to use for international settlement and trade financing”.²⁹

It can be seen that the main purpose of this guidance is to grant to a (land) consignment note the function, like a negotiable B/L, of financing international trade.

Thirdly, following the use of a railway B/L in practice and the local government's support to further coordinate the complex relationship among the different authorities involving the use of a railway B/L, on 7 November 2018 the State Council issued *Several Measures for Supporting the Deepening of Reform and Innovation in Pilot Free Trade Zones*. Item (18) of Article 2 stipulates that:

“In order to enhance the carriage of goods by international railway transport, the Ministry of Commerce, the China Banking and Insurance Regulatory Commission, the National Railway Administration and the China Railway Corporation shall support competent pilot free trade zones in studying the endowing of an international railway consignment note with the function of a document of title and to explore a railway consignment note as a negotiable document under a letter of credit”.³⁰

Finally, based on the Reply of the State Council,³¹ the National Development and Reform Commission issued the *Overall Plan for the New Western Land-Sea Corridor* to present the concept of a railway B/L, which is the first time that the legal term of a railway B/L appeared in a Chinese official instrument.³² It also

²⁹ *Guiding Opinions on Developing Trade by Land and Promoting Financing by Consignment notes in Chongqing Municipality* (Nine Authorities of Chongqing Municipality, 4 January 2018).

³⁰ *Several Measures for Supporting the Deepening of Reform and Innovation in Pilot Free Trade Zones* (The State Council, Guo Fa [2018] No. 38, 7 November 2018).

³¹ *Reply of the Overall Plan for the New Western Land-Sea Corridor* (The State Council, G.H. [2019] No. 67), <https://www.ndrc.gov.cn/fggz/zcssfz/zcgh/?code=&state=123> (accessed 16 January 2022).

³² *Overall Plan for the New Western Land-Sea Corridor* (The National Development and Reform Commission, F.G.J.C [2019] No. 1333), https://www.ndrc.gov.cn/fggz/zcssfz/zcgh/201908/t20190815_1145787.html?code=&state=123 (accessed 16 January 2022).

highlighted that this Overall Plan will seek to “promote and improve the international railway bill of lading financing project, so that it can play a better role in international trade”.³³ At the same time, in July 2019 the Chinese government submitted a proposal to the UNCITRAL for “solving the problems of railway consignment notes that are not of the same nature as documents of title”.³⁴

Viewing the creation of the concept of a railway B/L, it is safe to state that such an innovation in law is closely associated with policy support. There is no doubt that it also suits market demand. A question arises concerning whether both policy support and market demand can have an impact on the innovation of the current legal regime. In other words, as discussed above, whether domestic law may expressly grant the railway consignment note the right to be a negotiable document without a revision of legislation, and whether there is sufficient legal foundation to apply the railway bill of lading as a negotiable document of title. A recent Chinese judgment presents a controversial answer, as presented in the next section.

3. THE LEGAL NATURE OF A RAILWAY BILL OF LADING IN THE FIRST JUDGMENT OF A CHINESE COURT

It was observed in Section 2.3 that a railway bill of lading was created because of policy considerations and the operation of the market. However, to make sure that banks or other financial institutions accept the railway B/L as a financial tool, it is important and necessary for its nature as a negotiable document of title to be provided by law or to be recognised by a court. Nowadays, although no legislation, as discussed in Sections 2.2.1 and 2.2.2, has confirmed the legal nature of a bill of lading, in *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.*,³⁵ the Primary Court of Chongqing Pilot Free Trade Zone issued an innovative, but controversial judgment on 24 June 2020 that a railway B/L could be regarded as a valid document of title with the attendant function of transferability. Furthermore, in 2020 this judgment was published as No. 8 of the Top 10 Typical Disputes of Chinese People’s Courts by

³³ *Ibid.*

³⁴ Proposal by the Government of the People’s Republic of China on UNCITRAL’s Future Work: Solving the Problems of Railway Consignment Notes which are not of the Same Nature as Documents of Title (14 June 2019). See <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/V19/051/90/PDF/V1905190.pdf?OpenElement> (accessed on 10 January 2022).

³⁵ *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.* (dispute over a property right) [2019] Yu 0192 Civil Chu No. 10868 (The Primary People’s Court of Chongqing Pilot Free Trade Zone, first instance and final judgment).

China Trial.³⁶ It follows that this judgment has an important influence on Chinese legal circles. Faced with a similar dispute, local courts in Chongqing or other regional courts may in the future refer to the *ratio decidendi* of this judgment.³⁷

3.1. Background Facts

On 28 February 2019, Chongqing Sinotrans Logistics Co. Ltd. (Sinotrans), a freight forwarder, Chongqing Logistics Finance Service Co. Ltd. (Logistics Finance), and IMSA (Chongqing) Trading Co., Ltd. (IMSA), an importer, signed a tripartite agreement titled, A Collaboration Agreement for Railway Bills of Lading on Importing Vehicles (A Collaboration Agreement), on importation and financing issues. In light of this agreement, IMSA, as an importer company, imported vehicles from Düren, Germany, to Chongqing, China, by the CERE route. Sinotrans, as a Non-Rail Operating Common Carrier, was in charge of transporting the cargoes from Düren to Chongqing and, on receipt of the cars, issued a railway B/L to the seller in German. To assist IMSA in obtaining financing from the bank, Logistics Finance, as a guarantor, provided a guarantee to IMSA's bank. Meanwhile, IMSA pledged the Railway B/L to Logistics Finance as counter security.

According to this agreement, after Sinotrans took over the vehicles, on 10 May 2019 it issued a railway B/L to the seller. Based on the description on this railway B/L, the seller was recorded as the consignor and IMSA was the notifying party. In the "consignee" field of the railway B/L, it was recorded as "to order Logistics Finance".³⁸ Because of the performance of the payment obligation

³⁶ Wei, X., The First Dispute over a Railway Bill of Lading in China, *China Trial* 263, 2021, pp. 1, 24.

³⁷ It should be noted that this judgment was regarded as one of several typical cases, but this result was simply chosen by *China Trial*, an authoritative journal organised by the Supreme People's Court and was not officially published by the Supreme People's Court. In this context, in light of the Guiding Opinions of the Supreme People's Court on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases (for Trial Implementation) 2020, this judgment cannot constitute a reference case for further disputes. The Guiding Opinions of the Supreme People's Court on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases (for Trial Implementation) 2020 was issued and came into effect on 31 July 2020.

³⁸ A maritime B/L that can be transferred by its consignee to a third party by signing (endorsing) and delivering it to another party (the new consignee). The new consignee can then transfer it to another party, and so on. To be negotiable, such a B/L must be written "To Order" of the consignee and must be clean. In this dispute, in order to enable the railway B/L to satisfy the same function as a maritime B/L, the named consignee, Logistics Finance, is entitled to transfer the railway B/L to others by endorsement. It is therefore recorded as "To Order Logistics Finance".

for the cargo and the relevant fees to the bank by Sinotrans, Logistics Finance was spared payment of the guarantor's duty. Accordingly, Logistics Finance released the railway B/L and endorsed it to IMSA.

In order to resell the imported vehicles under the railway B/L above, on 24 June 2019 IMSA, the seller, and Fuqi Automobile, the buyer, signed a Contract for Vehicle Purchase. In light of this contract, the delivery of the railway B/L should be deemed delivery of the vehicles. Along with the performance of this contract, IMSA endorsed the railway B/L released by Logistics Finance to Fuqi Automobile.

However, when Fuqi Automobile presented the railway B/L to Sinotrans for the delivery of the vehicles, the latter refused to deliver them to them on the ground that Sinotrans ought to deliver the vehicles to IMSA, pursuant to the Collaboration Agreement. Furthermore, IMSA did not pay the freight forwarder fee due under the Collaboration Agreement. Sinotrans, therefore, argued that it had no obligation to deliver the vehicles.

Consequently, Fuqi Automobile brought this dispute to the Primary Court of Chongqing Pilot Free Trade Zone against Sinotrans as defendant and IMSA and Logistics Finance as third parties, requesting the court to confirm the role of the ownership of vehicles under the railway B/L and to take over the vehicles from Sinotrans.

3.2. Legal Issues in the Dispute and the Legal Reasoning of the Court

Against the above background facts in Section 3.1, two crucial legal issues were brought before the court.

First, in terms of the role of Fuqi Automobile, is the claimant, as the holder of a railway B/L, entitled to take delivery of the vehicles?

Second, in respect of the nature of a railway B/L, is the endorsed railway B/L by Logistics Finance and IMSA valid; in other words, does it have a similar function to a document of title?

3.2.1. *The Right of a Holder of a Railway B/L*

The court affirmed Fuqi Automobile's right, as the holder of a railway B/L, although Fuqi Automobile was not the consignee or the consignor under the original railway B/L. The legal reasoning behind this decision is mainly on the basis of the Collaboration Agreement among the defendant, Sinotrans, and two third parties, IMSA and Logistics Finance. A detailed analysis is presented below.

Article 1(5) of this Collaboration Agreement provided that:

“The name of a railway bill of lading is given by this Agreement which is different from the traditional international railway consignment note. Such a railway bill of lading, as a document, is issued by a freight forwarder that certifies that the goods have been received or loaded by the freight forwarder and transported to the destination port and guarantees the delivery of the goods. Such a document is an uncontroversial and exclusive document of title to take delivery of the cargo. In the ‘consignee’ field of the bill of lading, it is expressly stated ‘to order of Logistics Finance’”.³⁹

The court held that this Article demonstrated that the three parties to this Agreement voluntarily allocated to a railway B/L the nature of a negotiable document of title.

Following this Article, Article 3 stipulated that:

“IMSA shall not contend that it is as a consignor to unilaterally request Sinotrans to deliver the cargo”.⁴⁰ And:

Article 7 provided that:

“IMSA is entitled only to take delivery of the cargo on the basis of the original railway bill of lading”.⁴¹

It was handed down by the court that Article 3 was to further clarify that the status of IMSA, as a consignor of the freight forwarder, could not prove that it must be entitled to take delivery of the cargo; only the holder of the railway B/L was entitled to claim the cargo. To be clear, if IMSA held the original railway B/L to claim the cargo, Sinotrans should release the cargo to it. In contrast, if the

³⁹ *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.* (dispute over a property right) [2019] Yu 0192 Civil Chu No. 10868 (The Primary People’s Court of Chongqing Pilot Free Trade Zone, first instance and final judgment).

⁴⁰ *Ibid.*

⁴¹ It should be noted that in the facts section of the judgment, the court stated that Article 7 of the Collaboration Agreement provided that “Sinotrans agrees to issue a railway bill of lading to the exporter after Sinotrans receives the cargo and both IMSA and Logistics Finance confirm the condition of the cargo” and Article 8 provided that “during the period of Sinotrans’ control of the cargo... IMSA is only entitled to take delivery of the cargo on the basis of the original railway bill of lading (after one railway bill of lading has been used to take delivery of the cargo, the other original bill of lading or copy is also invalid)”. However, in the *obiter dictum* section, the judge mentioned Article 7 rather than Article 8. This author reasonably assumes that Article 7 here is a slip of the pen. However, to follow the original judgment, this author still quotes the incorrect text in the *obiter dictum*; see *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.* (dispute over a property right) [2019] Yu 0192 Civil Chu No. 10868 (The Primary People’s Court of Chongqing Pilot Free Trade Zone, first instance and final judgment).

railway B/L had been transferred to the new consignee, only the new one, as the holder of the railway B/L, was entitled to claim the cargo.

Furthermore, the court confirmed that the railway B/L itself in this dispute represented the right to take delivery of the cargo and, as such, the railway B/L was a negotiable instrument, on the ground that its text had shown that any holder of such a railway B/L, depending on the endorsement, was entitled to require the issuing party, namely Sinotrans, to take delivery of the cargo. It was therefore held that the transfer to another party of the railway B/L in this dispute was not forbidden; it followed that the issuing party under this B/L promised to hand over the cargo to whichever party was the holder of the railway B/L.

3.2.2. The Validity of the Railway B/L

The validity of the railway B/L depended on whether Fuqi Automobile, as the current holder, received the railway B/L lawfully and whether the formality of this B/L complied with the law. Based on the fact that in the “consignee” field of the B/L it was expressly stated “to order Logistics Finance”, Logistics Finance endorsed the railway B/L to IMSA and then IMSA endorsed it to Fuqi Automobile, which obtained the railway B/L along with a continuous endorsement. The court, therefore, held that:

“In the process of cargo transportation, the ownership and the possessor of cargoes are separated. The parties to this case have pre-confirmed or approved a special delivery rule by way of the transferability of a railway B/L, that is, the railway B/L itself represents the right to require the delivery of cargoes. The contractual carrier issues the railway B/L and makes a commitment to deliver the cargoes based on the record of this B/L. Accordingly, the endorsement or delivery of the railway B/L by its holder will be regarded as the transfer of the right to claim for the delivery of cargo. The special rule agreed by the contractual parties complies with Article 26 of the Property Law of the People’s Republic of China (providing that ‘Where a third party has taken possession of a movable property prior to the creation and transfer of the real right of the movable property, the party under an obligation to make delivery may substitute delivery by transferring the right to require the third party to return the original property’ [added by author]). In this dispute, the delivery of the railway B/L by IMSA to Fuqi Automobile can be deemed as a performance of the obligation of delivery of the vehicles by IMSA. Thus, the ownership of the vehicles has been passed to Fuqi Automobile in consideration of the terms of the resale contract between IMSA and Fuqi Automobile and then Fuqi Automobile is entitled to require Sinotrans to deliver the vehicles”.⁴²

⁴² Article 26 of the Property Law of the People’s Republic of China (replaced by the Civil Code 2020) provides that, “Where a third party has taken possession of a movable property prior

3.3. Impact of the First Judgment

After the Primary Court of Chongqing Pilot Free Trade Zone made this judgment on 24 June 2020, none of the parties appealed. Although the Primary Court is the lowest tier in the structure of the Chinese court system, in 2020 this case was declared as No. 8 of the Top 10 Typical Disputes of Chinese People's Courts by *China Trial*, which means that it is generally recognised that this judgment demonstrates that the innovation of the use of a railway B/L in the transportation industry has been, to some extent, approved by law.⁴³ Even if some controversial opinions have arisen from the *ratio decidendi* of this judgment, owing to its positive impact on trader finance and on policy support, it has an important influence on Chinese legal circles. In the face of a similar dispute, the local courts in Chongqing or other regional courts may in the future refer to this judgment's *ratio decidendi*.⁴⁴

4. CRITICAL ANALYSIS

Considering the market demand, policy support and legal reasoning discussed in Sections 2 and 3, along with the nature of a railway B/L handed down by a Chinese court, it seems that the result is clear that a railway B/L can be treated like a maritime B/L, functioning as a valid document of title. Furthermore, this result can be circulated and applied in Chinese legal practice. Even as discussed in the Section 2.2.1, it is possible for the Chinese model to be assessed and circulated to the international regime by way of the submission of China's proposal to the Secretariat of the UNCITRAL. However, viewing the Chinese legal framework and the legal reasoning handed down by the judgment carefully, the future of the nature of the railway B/L is not really positive.

to the creation and transfer of the real right of the movable property, the party under an obligation to make delivery may substitute delivery by transferring the right to require the third party to return the original property". It should be noted that, after the Civil Code 2020 came into effect on 1 January 2021, Article 26 of the Property Law of the People's Republic of China was replaced by Article 227 of the Civil Code, but the text is the same. See also, *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing SinoTrans Logistics Co. Ltd.* (dispute over a property right) [2019] Yu 0192 Civil Chu No. 10868 (The Primary People's Court of Chongqing Pilot Free Trade Zone, first instance and final judgment).

⁴³ Wei, X., *The First Dispute...*, pp. 1, 24.

⁴⁴ See fn. 38.

4.1. The Model of a Maritime Bill of Lading and the Feasibility of its Adoption under a Railway Consignment Note

From the historical point of view,⁴⁵ a maritime B/L started simply as a receipt when it was required to record the cargoes on a vessel in the fourteenth century. Up to the sixteenth and seventeenth centuries, the B/L came to represent its holder's right to delivery of the cargoes by virtue of the custom of merchants.⁴⁶ However, it is generally accepted that the modern history of the B/L started at the end of the nineteenth century along with the landmark decision in *Lickbarrow v. Mason*.⁴⁷ This is the first case where the court recognises the nature of a B/L as a document of title. Bowen L.J. held that:

“A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. It is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be”.⁴⁸

However, the decision above was by reference to the custom of merchants to presume that merchants had the intention of transferring property under a B/L. The B/L was therefore a document that was capable of transferring property.⁴⁹ Along with the development of legal authority, in *Barber v. Meyerstein* handed down by the House of Lords,⁵⁰ English law restated the function and nature of the B/L as follows:

“There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely that of dealing with the symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual

⁴⁵ Owing to the fact that the concept of a B/L in Chinese law is derived from that of the international B/L, particularly from that of the B/L in English law, this section pertaining to the history of the B/L focuses on English law.

⁴⁶ Aikens, R.; Lord, R.; Bools, M., *Bills of Lading...*, No. 1.1 and 1.27.

⁴⁷ *Ibid.*, No. 1.28 and 6.3; *Lickbarrow v. Mason* (1787), 2 T. R. 63.

⁴⁸ *Lickbarrow v. Mason* (1787) 2 T.R. 63.

⁴⁹ *Lickbarrow v. Mason* (1794) 5 T.R. 683, 685-686; Aikens, R.; Lord, R.; Bools, M., *Bills of Lading...*, No. 1.32 and 6.3.

⁵⁰ *Barber v. Meyerstein* (1870) L.R.4 H.L. 317.

possession of them, therefore the bill of lading is considered to be a symbol of the goods, and delivery to be a delivery of them”.⁵¹

After this case, a series of English cases amended the proposition in *Lickbarrow v. Mason* that a B/L is a document intended to transfer property. By contrast, the B/L has been deemed to be a document of title that is “a symbol of possession” in common law.⁵² Delivery of a B/L represents the delivery of the symbolical possession of cargoes.⁵³ This proposition has been employed up to now.

During the same period, thanks to the recognition of the function and nature of the B/L as a symbol of possession of cargoes, the B/L can be pledged as security. It is particularly observed that under the practice and usage of the early nineteenth century, the B/L was transferred to a factor for sale which extended finance for the cargo, “receiving the bill as a means of selling the goods and of securing an advance”.⁵⁴ The scope of the “factor” can certainly be extended to a bank or other financial institutions that may provide the finance to the holder of the B/L.

It is safe to say that the nature of a maritime B/L as a document of title becoming a financing tool is the consequence of the development of the mercantile practice in the past several centuries.

As far as Chinese law is concerned, the establishment of the concept and system of a maritime B/L is not derived from mercantile practice. Its concept is directly incorporated into the Maritime Code of the People’s Republic of China 1992 (hereinafter: CMC 1992) by reference to the general rules of a maritime B/L accepted by the international maritime domain. Article 71 of the CMC 1992 states that:

“A bill of lading is a document which serves as an evidence of the contract of carriage of goods by sea and the taking over or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking”.⁵⁵

In the Chinese theory and practice, there is no doubt that a maritime B/L is a document of title, but the difference from a document representing possession of cargoes in English law is that the CMC 1992 does not clarify the concepts of the

⁵¹ *Ibid.*, see also, Aikens, R.; Lord, R.; Bools, M., *Bills of Lading...*, No. 6.3.

⁵² *Barber v. Meyerstein* (1870) L.R.4 H.L. 317, 332; see also, Aikens, R.; Lord, R.; Bools, M., *Bills of Lading...*, No. 6.4.

⁵³ *Burgos v. Nascimento; McKeand* (1908) 100 L.T. 71, 73; *Mitchell Cotts & Co. (Middle East) Ltd. v. Hairco Ltd.* (1943) 77 Ll. L. Rep. 106.

⁵⁴ Aikens, R.; Lord, R.; Bools, M., *Bills of Lading...*, No. 6.39.

⁵⁵ Chinese Maritime Code 1992, Article 71.

document of title to goods and property right on goods. Article 71 simply states that the function of a document of title is for the holder of the B/L to require and deliver cargoes rather than having direct connection with the property right to cargoes.⁵⁶ Nonetheless, both Article 71 of the CMC 1992 and legal practice affirm that the holder of the B/L enjoys the right to take delivery of cargo that is similar to the early theory in English law.⁵⁷ Accordingly, such a B/L can become an instrument of pledge, namely pledged property on the ground that the B/L may represent a sort of right. It follows that a B/L can be a financing tool which is stipulated in Article 440 of the Civil Code of the People's Republic of China 2020:

“The following rights of which an obligor or third party has the right of disposal may be pledged:

(III) warehouse receipts and bills of lading”.⁵⁸

Regardless of whether the concept of a document of title in different jurisdictions is consistent, the development of the maritime B/L and the creation of a document of title are derived from practice and usage in the international maritime law domain, and Chinese legislation borrows the function of the international maritime B/L serving as a document of title.

After examining the model of a maritime B/L above, turning to the concept of a railway consignment note, the question arises about whether the model of a maritime B/L can be transplanted into the railway industry directly. Although the development of the railway industry started from the middle of the nineteenth century and has not had the long experience of the shipping industry, the nature of a carriage of goods contract and the roles of the different parties involved have seemingly been similar in both the shipping and railway industries. A carrier or a freight forwarder issues a document after receiving the cargoes from a shipper/consignor. It is therefore reasonable to say that the document issued by the carrier or the freight forwarder⁵⁹ in the railway industry enjoys a concept similar to that of the maritime B/L.

⁵⁶ Zhang, H.; Hu, C., Nature, Risk and Application of a Railway Bill of Lading: Comments on the First Case of the Railway Bill of Lading, *Annual of China Maritime Law*, Issue 1, 2021, p. 70; Zhao, L.; Li, L., *Maritime Law and Practice in China*, 1st Edition, Informa Law from Routledge, London, 2017, No. 5.27.

⁵⁷ See fn. 47.

⁵⁸ Chinese Civil Code 2020, Article 440.

⁵⁹ It should be noted that on the CERE route, an actual carrier, a railway authority, issues a railway consignment note to a freight forwarder, as both a shipper and a consignee. Afterwards, the freight forwarder issues a railway B/L to the real shipper and then delivers cargoes to the holder of the railway B/L. Both the railway consignment note and the railway B/L refer to the same cargoes. Therefore, in this section, this author mentions both the carrier and the freight forwarder for issuing the document.

However, the presumption above lacks feasibility. First, even if it is not important to consider that the development and application of the railway B/L need the examination of long-term mercantile practice, railway transport, due to the short-term journey involved, may not achieve two crucial functions of a document containing the delivery of cargoes to the holder and the financing tool. The reason is that these two functions determine that the railway B/L has to be endorsed effectively and be verified by a bank or other financial institutions during railway transport. However, railway transport is comparatively short, so that the cargo usually arrives at the destination before the railway B/L is endorsed or has finished the process of finance. It is therefore, traditionally, not necessary to give a consignment note the function of a document of title, like the maritime B/L.

Secondly, it is arguable that long-term railway transport on the CERE route provides sufficient time to finish the endorsement and finance of the railway B/L. For example, the route between China and Poland can last 11 days which might be the shortest one, while the longest route between China and the UK lasts about 20 days.⁶⁰ On the one hand, the question at issue is whether the longer duration may satisfy the possibility of the endorsement of the railway B/L and the verification of the bank for the purpose of the finance; on the other hand, even though the CERE route simply belongs to a regional project, the establishment and adoption of the railway B/L serving as a document of title not only involves 21 countries, different legal systems and jurisdictions, various organisations, companies and financial institutions in this region, but may also have an impact on many legal entities beyond this region. In this context, a possible question arises whether it is meaningful for lawmakers and legal entities beyond this region to spend time on creating a new rule or law to meet the adoption of the railway B/L. Furthermore, apart from the legal issues, the adoption of the railway B/L also involves economic and political considerations.

Against the above discussion, this author is of the opinion that the model of the maritime B/L can in theory be transplanted into the railway industry, but this cannot operate in practice.

⁶⁰ For the duration of the CERE route, see <http://news.cctv.com/2017/05/02/ARTICA3uNXK-5WbAyANmZiYFG170502.shtml> (accessed 12 January 2022).

4.2. A Legal Right in a Railway B/L Handed Down by the Court?

Even though the first judgment held that the railway B/L could be regarded as a valid document of title with the attendant function of transferability,⁶¹ there is insufficient legal foundation to grant the holder of a railway B/L the legal right to claim the delivery of cargo under the current legal framework in China.

As discussed in Section 4.1, if the B/L could be treated as a document of title, it follows that the holder of this B/L enjoys the right to take delivery of the cargo. Thanks to the B/L representing the right to the goods, such a B/L can become an instrument of pledge. In this context, the understanding and application of the document of title should be governed by property law rather than contract law when the nature of the B/L is explored. In other words, the right to take delivery of cargo arising from the document of title is a sort of legal right rather than a contractual right on the ground that the holder of the B/L enjoys the right depending on the endorsed document rather than the underlying contract.⁶² This legal rationale is plain in the maritime B/L, but it is not reasonable for the railway B/L. The reason is as follows.

The principle of *numerus clausus* is the basis of Chinese property law, even if in recent years the application of this principle has been gradually loose. It follows that the creation of a legal right is derived from the legislation only, rather than being from the contract agreed. This doctrine has also been provided for by Article 115 of the Civil Code 2020. It is stipulated that:

“Property shall include real property and movable property. Where rights are deemed as the objects of real rights by provisions of the law, such provisions shall apply”.⁶³

It follows that the question of whether or not the railway B/L can be treated as a document of title representing a legal right should abide by the law. However, there is no express provision to grant the railway B/L a legal right. Article 440 (Right to Pledge) of the Civil Code 2020 stipulates that:

“The following rights of which an obligor or third party has the right of disposal may be pledged:

(III) warehouse receipts and bills of lading;

⁶¹ *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.* (dispute over a property right) [2019] Yu 0192 Civil Chu No. 10868 (The Primary People’s Court of Chongqing Pilot Free Trade Zone, first instance and final judgment).

⁶² In Chinese practice, a maritime B/L may not be treated as a document of title if the holder has given up entitlement to the delivery of goods; see *Hyosdoc (HK) Ltd. v. China Marine Shipping Agency Co. Ltd. Fangchenggang Company and others* [2002] Min Si Zhong Zi No. 27 (The Supreme People’s Court, retrial).

⁶³ Chinese Civil Code 2020, Article 115.

(VII) Other property rights that can be pledged as prescribed by any law or administrative regulation”.

It follows that a B/L is granted the legal right to pledge. However, in the Chinese legal framework, only the CMC 1992 expressly provides for a B/L in the shipping industry.⁶⁴ It is observed in Section 2.2.2 that in the railway industry there is no concept of a B/L in the current law, even if it is created in practice based on governmental instruments and policy support.

It can be argued that Article 440 (VII) of the Civil Code 2020 amounts to a catch-all clause; thereby, it might consider that a railway consignment note/bill of lading can be incorporated into this catch-all clause. If so, this railway B/L, like the maritime B/L, represents a legal right. However, the condition precedent of this catch-all clause is that there is a law or regulation to provide the concept of a railway B/L, as provided by Article (VII). Without this premise, the creation of a railway B/L in the field of property law will violate the principle of the *numerus clausus*.

In short, China has a civil law tradition rather than a judge-made law system like common law, so that the judges in *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.* could not recognise a railway B/L as a document that confers on its holder the legal right to take delivery of cargo. Without such a legal right, its function as a finance tool can accordingly not be achieved.

4.3. A Contractual Right in a Railway B/L Handed Down by the Court?

Following the discussion in Sections 4.1 and 4.2, it is submitted that the nature of a railway B/L cannot be similar to that of a maritime B/L because the former can simply be regarded as a contractual instrument while the latter is in effect a legal instrument. In the *ratio decidendi* raised by the first judgment, this opinion is apparent. The court held that “in this case, the railway bill of lading is an innovative document issued by market entities to carry out international carriage of goods and international trade relying on the CERE route. The purpose of such an innovative document is to meet the needs of land trade financing and to improve the efficiency of land trade transactions. The people’s court should respect party autonomy and support innovation in the mercantile practice in accordance with the law. Where the court examines the validity of the innovation, the basic approach is to consider whether such innovation violates the existing law, regulation and public policy and meanwhile how to maintain safety in transactions”.⁶⁵

⁶⁴ CMC, Article 71.

⁶⁵ *Chongqing Fuqi Automobile Sales Co. Ltd. v. Chongqing Sinotrans Logistics Co. Ltd.* (dispute over a property right) [2019] Yu 0192 Civil Chu No. 10868 (The Primary People’s Court of Chongqing Pilot Free Trade Zone, first instance and final judgment).

The leading case confirms that the railway B/L is a valid negotiable document of title on the CECR route, but the nature of the railway B/L serving as a document of title cannot be recognised universally in the railway industry. Its recognition is on the basis of the contractual terms which simply bind the contractual parties. Therefore, this judicial decision to accept and recognise the nature of a railway B/L is a “piecemeal” solution which cannot be applied widely without any condition precedent.

5. CONCLUSION

The innovative shift from a railway consignment note to a railway B/L is meaningful to address the transferability and finance of the document in the railway industry. In particular, the model of the maritime B/L is well developed, and the longer duration of railway transport makes it possible for the document to take on the function of endorsement and finance of a railway B/L. This is one of the important reasons for a railway B/L to be launched and applied on the CERE route.

However, it is observed that in the current international and domestic legal regimes, the concept of a railway B/L is still missing. Furthermore, such a railway B/L is only employed on the CERE route. In the event that this innovation is recognised and applied, it would be directly beneficial to the CERE project while other jurisdictions and many legal entities beyond this region have to be obliged to accept it.

Certainly, modernisation and harmonisation in international trade are always being considered by international organisations. For this reason, the Chinese government submitted a proposal to create a unified B/L that can be applied to railway, road and aviation transport. However, before a possible international rule is issued, the railway B/L has to rely on domestic law. From this point of view, Chinese legal practice has played a leading role in triggering the development of the railway B/L by way of the first judgment discussed in this article. The only issue is that in the Chinese legal framework the concept of a railway B/L has not yet been incorporated into the legislation. For this reason, if the railway B/L could be treated as a document of title to grant its holder the right to take delivery of cargo, this right is derived from a contract only, rather than from the operation of the law. For this reason, the court in this case stresses that the decision on a railway B/L functioning as a valid document of title with the attendant function of transferability mainly examines and relies on contractual terms.

In addition, the performance of the financing function is not dependent on the function of the railway B/L itself in this case. It relies on the third party,

Logistics Finance, as a guarantor, to provide a guarantee to IMSA's bank. Meanwhile, IMSA pledged the railway B/L to Logistics Finance as counter security. It is therefore not reasonable to presume that a railway B/L arising from a contract has been accepted by the financial institutions directly.

In conclusion, the nature of a railway B/L is merely derived from a contract rather than from legislation. The first judicial decision on a dispute involving a railway B/L is positive, but its impact lies within the confines of a single case.

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Sažetak:

PRAVNA PRIRODA TERETNICE KOJU IZDAJE CHINA-EUROPE RAILWAY EXPRESS – KINESKA PERSPEKTIVA

Tradicionalna teretnica sastavni je dio prijevoza stvari morem. Ona služi kao potvrda da je prijevoznik preuzeo robu za prijevoz te je dokaz ugovora o prijevozu i prenosivi vrijednosni papir. Odgovarajuća prijevozna isprava u željezničkom prometu je teretni list koji služi kao potvrda i dokaz je ugovora, ali nije vrijednosni papir i nije prenosiv za razliku od teretnice u pomorskom prijevozu. Međutim, to bi se u Kini moglo promijeniti. Otakako je prva ruta China – Europe Railway Express (CERE), YuXinOu, počela s radom 19. ožujka 2011. godine, zajedno s razvojem inicijative »Jedan pojas, jedan put« 2013. godine, CERE je brzo rastao. U tom smislu, tradicionalna priroda teretnog lista na CERE ruti suočava se s izazovima. Postoje očekivanja kako će početi služiti kao vrijednosni papir i, slično kao pomorska teretnica, poprimiti funkciju prenosivosti. Prva takva presuda kineskog suda u sporu, koji uključuje željeznički teretni list, donesena je 30. lipnja 2020. godine. U toj odluci utvrđeno je kako se željeznički teretni list može smatrati valjanim vrijednosnim papirom s pratećom funkcijom prenosivosti. Primjetno je, međutim, da do sada u tom smislu nije usvojen nikakav izričit propis, niti postoji bilo kakvo sudsko tumačenje koje bi preciziralo njegovu pravnu prirodu, premda potražnja na tržištu i politička razmatranja idu u prilog ovoj odluci. U skladu s tim, ostaje neizvjesno postoji li dovoljna pravna osnova za potvrđivanje stava da željeznički teretni list služi kao prenosivi vrijednosni papir. U ovom radu autorica nastoji riješiti predmetna ključna pitanja.

Ključne riječi: teretnica; COTIF; SMGS; prijevozne isprave; prenosivi vrijednosni papir; prijevoz robe željeznicom; inicijativa »Jedan pojas, jedan put«.