Delivery of Cargo without the Production of the Bill of Lading

The delivery of cargo without the production of the corresponding bill of lading is neither a new nor an ignored problem. In French law today, it is well known that this delivery constitutes a fault, whether the bill of lading in question is a bearer bill, an order bill, or a straight bill of lading. This fault has often been considered to be inevitable in certain situations where the bill of lading cannot be produced through no fault on the part of the consignee. An example is the case of a short-distance voyage where the cargo travels faster than the bill of lading representing it. The documentary credit which serves as the basis for the bill of lading can often require time in order to be achieved. Banking circuits could be the reason for which the consignee is still not in possession of the bill of lading at the time the delivery of the goods is supposed to take place. Post office strikes, not unknown in France, or just the overall slowness of the postal service could also be the cause.

Nevertheless, it is common for the cargo to be delivered without the production of the bill of lading, although this production is required by decree n°66-1078 of the 31st of December, 1966 Relating to Contracts of Maritime Charter and Transportation, whose article 50 states that "[t]he handing over of the bill of lading to the carrier or his representative establishes delivery, unless proved otherwise. " This delivery constitutes a fault which is not subject to the carrier's limitation of liability, as it is not a fault relative to the loss or damage of the goods, which are the only two faults covered by the limitation of liability. In practice, a delivery without the production of the bill of lading is accepted if it is accompanied by a letter of indemnity for the carrier's benefit. Such a letter of indemnity engages the consignee to cover any potential claim from an actual consignee to which the carrier may be subject. This letter of indemnity is often emitted by a bank for a fixed amount, an amount which may not cover the true value of the goods.

The use of the letter of indemnity is contrary to the law, yet it flourishes still. There doesn't seem to exist another method of resolving the problem of delivery without the production of the bill of lading, a problem which, unresolved, could generate considerable costs relating to the risks run by the goods if they are of a perishable nature and demurrage, among others. A faulty but tolerated practice, one must ask oneself why it is tolerated if it is irregular, and if it is inevitable, why it is not formally acknowledged by jurisprudence or by the French texts.

Delivery in exchange for a letter of indemnity but without the production of the bill of lading has however become something of a requirement in practice. "The exception proving the rule, the same Master who, ten years ago, found himself to be stigmatized for having proceeded with a delivery to an unqualified third party, now finds himself liable for having refused it, as soon as a letter of indemnity has been presented to him. " It is therefore common, to say the least, that this letter of indemnity found the delivery, even if delivery isn't legally accomplished.

The jurisprudence seems to tolerate this practice. Some authors even assert the possibility that the courts have rendered the production of the bill of lading voluntary in the event of the emission of a letter of indemnity. It is probably not necessary to extend the principle that far. When the shipper accepts that the cargo be delivered against the production, not of the bill of lading, but of a letter of indemnity, an action brought against the carrier who delivers not only without the production of the bill of lading but also without the presentation of said letter is subject to the yearly time bar that

characterizes Transportation Law. This results from the case law of the Commercial Chamber of the French Supreme Court. It is difficult to see how the Supreme Court can rule on the prescription of the suit if the practice of delivery without the production of the bill of lading is not, if not accepted, at least tolerated. A delivery which takes place without either the bill of lading or the letter of indemnity is another matter. A delivery of this kind is doubtlessly irregular and always constitutes a fault.

However, the use of letters of indemnity is not a problem-free practice. As the carrier's limitation of liability does not concern irregular delivery, he remains liable for "all the direct and indirect consequences of the fault thus committed at delivery. " The carrier could have trouble evaluating the amount that this indemnity might attain. He may not have other information than the value of the goods at loading, an amount which may not coincide with the value at arrival or the value that it represents to the consignee. The bank that is to emit this letter of indemnity may not necessarily be favorable to the emission of a guarantee for an unlimited sum. It would therefore be necessary to run a risk in determining the amount to be guaranteed by the letter of indemnity. This amount should be sufficient coverage for all the damages resulting from the irregular delivery, and a calculation taking into account the greatest number of possible consequences must be accepted by the bank that is to emit the letter of indemnity.

The time bar relating to a suit brought on the grounds of delivery without the production of the bill of lading has been the subject of great debate. The question asked is whether the time bar is that of ordinary law or the yearly limit ensuing from article L5422-18 of the Transport Code (previously article 32 of law n°66-420 of the 16th of June, 1966). The latter states: "the suit brought against the carrier owing to loss or damage shall be prescribed after one year. " One must therefore ask if the delivery without the bill of lading is comparable to a loss or damage even when the delivery takes place without either the production of the bill of lading or the establishment of a letter of indemnity. In a case of the 22nd of May, 2007, the Supreme Court dismissed the action brought by a shipper against a carrier for not having required a letter of indemnity at delivery. The contract of carriage admitted that the goods be delivered without the production of the bill of lading provided that a letter of indemnity be emitted, a condition which was not fulfilled. The suit was dismissed on the grounds that it was prescribed according to the yearly time bar ensuing from article L5422-18 of the Transport Code (article 32 of the law of 1966 according to the Court's wording). The principle that an action based on the delivery without a bill of lading was subject to the one-year time bar was thus established. It follows that the requirement of a letter of indemnity is not an undertaking in itself, but is linked to the contract of carriage. The contract of carriage is the grounds for the action. The time for suit is definitively reduced to one year. Suits should henceforth be brought as early as possible, something which is not always easily done given the commercial interests and relations between the shipper and carrier.

All maritime countries are not ready to accept the idea of delivery without the production of the bill of lading. On the 16th of February, the Chinese Supreme Court adopted a text of judiciary interpretation on the subject of the delivery without the bill of lading. This text "requires that the carrier deliver the goods on production of the original bill of lading, no matter what type of bill the bill of lading may be. Failing that, the carrier shall be held liable with respect to the holder of the bill of lading. " The Supreme Court also refused to accord the carrier the benefit of the limitation of liability when the delivery took place without the production of the original bill of lading. Moreover, Chinese insurance for legal liability and marine cargo does not cover the delivery

without a bill of lading. Even a letter of indemnity instead of the production of the bill of lading may not be recognized by Chinese maritime law. Other countries may also adopt a similar point of view.

In Air Transport Law, a subject which has often influenced Maritime Law, the French Supreme Court has recently ruled on a clause contained in the sales conditions that permitted the carrier to deliver the goods to a person other than the consignee in the air waybill. In respect to article 23 of the Warsaw Convention, such a clause is null and void because it tends to exonerate the carrier from his liability. This issue, even though it doesn't directly concern delivery of cargo without the bill of lading, is still of interest because delivery to a person other than the consignee or his representative would not normally take place except in the event of the bill of lading not being produced. A possible exception is the event where the bill of lading has been accomplished, but the cargo has not yet been delivered to the consignee. Yet even in such a case, the person who accepts delivery of the goods would normally be the representative of the consignee. One must not forget that the air waybill is not comparable to the bill of lading, but the systems governing the liability of the air carrier and the maritime carrier are based on the same principles and are therefore related. It would not be unreasonable to think that this Air Transport Law jurisprudence could have an effect on Maritime Law.

The Rotterdam Rules have taken into consideration some of the problems relating to delivery without the production of a bill of lading. In this international convention, the carrier's limitation of liability can be invoked even in the event of such a delivery. Article 59 states that the carrier can limit his liability for "breaches" of his obligations and not only for "loss and damage" which is the case at present.

These Rules have also instituted solutions to the problem of delivery without the production of the bill of lading –or, more accurately– without the "transport document," as the term "bill of lading" does not appear once in the entire convention. According to article 46, in the case of a negotiable transport document, the carrier can deliver the cargo without the production of said document if the shipper instructs him to do so. Article 45 lays down the same rule for a non-negotiable transport document. The carrier, by following the instructions given to him by the shipper in a certain number of cases, can be relieved of his obligation to deliver to the consignee and will be indemnified by the shipper who gave the instructions for his liability with regards to the holder of the document of transport. In accordance with article 47 the carrier can also request to be furnished with a guarantee before executing the shipper's instructions. This guarantee seems to fit the description of the letter of indemnity, and, if that is indeed the case, the convention is explicitly acknowledging this common practice.

Although the emission of a letter of indemnity for delivery without the production of a bill of lading is a common and widespread –yet not universally accepted– practice, it is not yet problem-free and in fact needs more precision on the part of the law-maker or jurisprudence before it is accepted as a legal practice. It is always preferable to deliver the cargo in exchange for the bill of lading, even more so as this is provided for by the law. In order to avoid falling into the habit of dubious practices and possibly finding oneself in a delicate situation, one should consult someone who possesses the experience and education necessary to serve as an advisor. A lawyer specialized in Maritime Law and Business Law is an indispensable asset. Before making any important decisions relating to one's contract of carriage, it would be prudent to consult an expert.