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Judicial Decree to Terminate the Validity of Lost Bills of Lading—Usefulness and Jurisdiction

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When a bill of lading has been lost, there is a risk that it may be acquired bona fide and for value. In such cases,[1] a judicial decree is available in Japan to render bills of lading null and void. The decree (hereafter "the invalidating decree") is available generally for negotiable instruments,[2] which in this context mean instruments embodying rights. Bills of lading are among them since the right to claim the delivery of goods is embodied in them. The decree has been sought and issued more often in respect of share certificates,[3] promissory notes and bills of exchange. But it was also issued in respect of bills of lading in no less than 440 cases in the past 60 years,[4] a sufficient number to merit attention.[5] A petition for the invalidating decree in

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[1]As well as the cases where bills of lading have been destroyed or stolen or where it is not clear which of those has happened.

[2]Part 3, Chapter 2 of *Hisho Jiken Tetsuzuki Ho* (hereafter "Non-Contentious Procedure Act").

[3]The invalidating decree ceased to be available in respect of share certificates with the law reform in 2002 which introduced the system of registration of their loss with the issuing company.

[4]The invalidating decree must be announced in the official gazette (Article 149 of Non-Contentious Procedure Act). With the help of his student assistant, Ms Asuka Noda, the present author has counted the number of the announcements in the gazette.

[5]The problems discussed in this article which arise from the loss of bills of lading will not arise with electronic bills of lading. Numerous attempts of expanding the use of electronic bills have been made over the past few decades, dating back at least to the SeaDocs Experiment in mid-1980s. But the trading community is still slow to embrace them on a global scale. A range of reasons from the market inertia to the remaining legal uncertainty has been suggested. Given the past record, unless there is a catalyst for change, paper bills of lading will stay put along with the problems discussed in this article for some more considerable time.

the event of the loss of a bill of lading is recommended by the JETRO (Japan External Trade Organization).[6]

Generally, no similar decree is available in the common law countries.[7] In some of the civil law countries where a similar decree is available,[8] it does not seem to be sought or issued often in practice in respect of bills of lading.[9] The use to which the invalidating decree in Japan is put may therefore be of interest.

This article will first outline the procedure to obtain the decree and explain its legal effects before proceeding to examine the purposes for which it is sought in practice and consider its usefulness to achieve the intended purposes. As the usefulness of the decree is not confined within the boundary of Japan, this article will also consider in what circumstances the Japanese courts have jurisdiction to issue the decree.

I
PROCEDURE FOR OBTAINING THE INVALIDATING DECREE

To obtain the invalidating decree, the petitioner must make a *prima facie* showing that he was the last holder or the last endorsee of the bill of lading which has been lost, destroyed or stolen.[10] After examining the evidence, the

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[6]http://www.jetro.go.jp/jpn/regulations/import_04/04A-A10837 (in Japanese). JETRO is a semi-government body advising Japanese business on various trade issues.

[7]The courts in those countries may instead have power to order the carrier to deliver the goods or not to set up the loss of bills of lading as a defence upon furnishing of a sufficient security by the consignee. See e.g. The Houda [1994] 2 Lloyd's Rep. 541, 553 (CA); Motis Exports Ltd. v. Dampskibsselskabet [1999] 1 Lloyd's Rep. 837, 842; the Federal Bills of Lading Act, 49 U.S.C. 80114; Art 7-601 of the Uniform Commercial Code adopted by all constituent states. It must be noted, though, that the lost bill of lading remains valid and at risk of being acquired *bona fide* and for value under those common law procedures, unlike the invalidating decrees of the civil law countries.

[8]e.g. Germany, Italy, the Nordic countries, the People's Republic of China, and the Republic of China. The Nordic countries and the People's Republic of China have specific provisions confirming the availability of an invalidating decree for bills of lading: Art. 100 of the Maritime Procedure Law 1999 of the P. R. China, Art. 305 of the Danish/Norwegian Maritime Code and Ch. 13, sect. 55 of the Swedish/Finnish Maritime Code (The Nordic countries collaborated in the preparation of their maritime codes, which resulted in similar provisions).

[9]Ms Marie Meling, a research assistant of the Scandinavian Institute of Maritime Law at the University of Oslo, has kindly carried out a thorough survey in 2007 for the present author and ascertained that in Norway no announcement of a decree cancelling bills of lading was made in the official gazette for the past seven years despite that such an announcement is mandatory and that the publishers of the gazette and the Oslo City Court had no recollection of such cases. Likewise, Professor Hugo Tiberg of the Institute for Maritime and Transport Law of the University of Stockholm has informed the present author in his correspondence in the autumn of 2007 that he had no recollection of any reported cases in which the Swedish decree was used for bills of lading, though he did not rule out the possibility of unreported cases.

[10]Article 158(2) of the Non-Contentious Procedure Act.

court may decide to post a public notice on the bulletin board of the court and publish it in the official gazette[11] for a period of at least two months,[12] urging any lawful holder of the bill to come forward and present the bill.[13] If somebody comes forward and the petitioner of the invalidating decree disputes the identity of the bill presented, the court will hold *inter parte* proceedings to examine which party has the right.[14] If, on the other hand, nobody comes forward, the court will issue the invalidating decree to cancel the bill.[15] This procedure admittedly has weakness in that it relies on the public notice[16] which in practice often goes unnoticed by the lawful holder.[17] So the whole procedure is based on the legal fiction that the public notice is checked by all concerned.

II
EFFECTS OF THE INVALIDATING DECREE

The invalidating decree has the following two effects.

A. Rendering the Instrument Invalid

The invalidating decree has the effect of terminating the validity of the lost negotiable instrument in respect of which it is issued. It means that there will no longer be the risk of the instrument being acquired *bona fide* and for value. It also follows that if there is a lawful holder of the instrument, he is deprived of the status as the holder. The lawful holders include a holder in due course who has acquired the instrument before the invalidating decree

[11]Article 144(1) of the Non-Contentious Procedure Act. The official gazette can be accessed from anywhere in the world via internet (http://kanpou.npb.go.jp/) but it is published only in Japanese. The court may, if it sees fit, also order the petitioner to publish an announcement in daily newspapers (Article 144(2) of the Non-Contentious Procedure Act).

[12]Article 145 of the Non-Contentious Procedure Act.

[13]Article 159(1)(iii) of the Non-Contentious Procedure Act.

[14]Article 147(2) of the Non-Contentious Procedure Act.

[15]Article 160(1) of the Non-Contentious Procedure Act.

[16]The decree invalidating negotiable instruments is not the only purpose for which public notice is used. Thus, some legal systems, including Japanese law, have a decree pronouncing a missing person as dead after a period of public notice. See the Convention on the Declaration of Death of Missing Persons, which remained in force until 1972 (On this convention, see D. St. L. Kelly, J. Varsanyi "Declarations of Death: Reappearance and Status" 20 (1971) ICLQ 535).

[17]It may be interesting to note in this regard that the United Nations Convention on International Bills of Exchange and International Promissory Notes does not provide for a decree terminating the validity of lost bills of exchange or promissory notes because the public notice was thought to be insufficient. See the Report of the Secretary-General: Commentary on Draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/213) p. 182.

is issued and his assigns. Where the instrument is a bill of lading, the lawful holders also include the consignor and its assigns if the petition for the invalidating decree is made fraudulently by the consignee who has not received the bill for failing to pay to the consignor.

It must be noted, though, that the invalidating decree does not have the effect of depriving the lawful holder of his right.[18] As the decree deprives him of his status as the holder of the instrument, he has to endure the inconvenience of adducing other evidence to prove his right, such as the fact showing that he has acquired the bill *bona fide* and for value before the issuance of the decree.

It is to safeguard the interests of the lawful holders or would-be holders that the invalidating decree is issued only after the expiry of a period of public notice. Thus if somebody who is about to acquire the lost instrument becomes aware of the public notice, he will avoid acquiring it. If a lawful holder becomes aware of the public notice, he may present the instrument to the court and dispute the right of the petitioner.

B. Restoring to the Petitioner the Status of the Holder

As well as cancelling the lost negotiable instrument, the invalidating decree also has the effect of restoring to the petitioner the status of the holder of the instrument.[19] It thus serves as the substitute for the lost instrument. As a general rule, the right embodied in a negotiable instrument cannot be asserted without the production of the instrument.[20] By way of an exception, the invalidating decree enables the petitioner to assert the right without actually possessing the instrument. Thus where the invalidating decree is issued in respect of a bill of lading, the petitioner can claim the delivery of goods without producing the bill. It must be noted, though, that the invalidating decree restores to the petitioner only the status of the holder and does not go so far as to confer on him the right embodied in the instrument.[21]

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[18]The Supreme Court confirmed this principle in its decision on 25 January 2001 (reported in 55-1 *Minshu* 1 in Japanese) involving a decree invalidating promissory notes, holding that if a holder in due course were to be deprived of his right on the promissory note by the issuance of the decree, it could undermine the general principle of negotiable instruments which is designed to facilitate the circulation of such instruments.

[19]Article 160(2) of the Non-Contentious Procedure Act.

[20]Thus Article 584 of the Commercial Code, which is also incorporated by reference into the Carriage of Goods by Sea Act, provides that the delivery of goods cannot be demanded without the production of bills of lading.

[21]The Supreme Court confirmed this principle in the case of 19 February 1954 (reported in 8-2 *Minshu* 523 in Japanese) involving a decree invalidating share certificates.

A further point to note is that under Article 518 of the Japanese Commercial Code, a petitioner for the invalidating decree is entitled to exercise the right embodied in the lost negotiable instrument by putting up security. It thereby alleviates the inconvenience of having to wait for the invalidating decree to be issued under the procedure outlined above, which in practice takes at least three months.[22] By today's means of maritime transport, three months would be enough to circle the globe. If the issuance of the invalidating decree had to be awaited, the ship would sail away with the goods on board, since warehousing would not be an appropriate solution in many cases as, for example, where the security of goods at the port of discharge is doubtful. The petitioner would therefore find it helpful if, as under Japanese law, he did not have to wait for the invalidating decree to be actually issued. Under some of the other legal systems which make a similar invalidating decree available, the exercise of the petitioner's right is facilitated in the same way.[23]

III
EFFECTIVENESS OF THE INVALIDATING DECREE OUTSIDE JAPAN

Each country has its own rules determining what decisions of foreign courts are to be given legal effect.[24] The Japanese invalidating decree seems unlikely to be given legal effect in other countries. It is firstly because the public notice may strike the foreign recognising courts as an insufficient measure to safeguard the interests of the lawful holders since it does not often come to the notice of them, all the more so if they are foreigners as the notice is written in Japanese only. It is also because some countries may

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[22]The minimum two-month period for public notice (Article 145 of the Non-Contentious Procedure Act) plus the time actually needed for administration.

[23]e.g. Article 305 of the Norwegian Maritime Code provides:

> A request to have a lost bill of lading declared null and void shall be made to a County or Town Court at the place where the goods are to be delivered. In other respects the provisions of Act of 18 December, 1959, No. 1 Relating to the Declaration of Nullification of Debt Instruments shall apply. When the Court has decided to proceed with such a case, delivery of the goods can be demanded against security for claims which the holder of the lost bill of lading may bring against the carrier. (The English translation by Peter Bilton, Trond Solvang, and Erik Røsæg at http://folk.uio.no/erikro/WWW/NMC.pdf).

A similar provision is to be found in Swedish law: See Hugo Tiberg "Legal Qualities of Transport Documents" (1998) 23 Tul. Mar. L.J. 1, 18.

[24]e.g. Chapter III of the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

refuse to recognise foreign decisions arising out of *ex parte* proceedings,[25] though they may make an exception for decisions arising out of non-contentious procedures[26] since the defendant's interests are generally not at stake in such procedures.

It should be noted that even if the invalidating decree is given no legal effect in the relevant foreign countries, it may nevertheless have practical usefulness, as will be explained in a chapter below.

IV
PURPOSES FOR WHICH THE INVALIDATING DECREE IS SOUGHT IN PRACTICE

Where a carrier has lost a set of bills of lading which it had issued before surrendering them to the consignor, it may, while re-issuing another set of bills, petition for the invalidating decree in order to prevent two sets of valid bills from circulating. But bills of lading are more often lost while in the hands of persons other than the carrier. In those cases, two purposes are conceivable for which the invalidating decree is sought. Those purposes will be examined in turn below.

A. To Demand the Carrier to Deliver the Goods without the Production of the Bill of Lading

Where the delivery of goods is requested without the production of the bill of lading, the carrier may accede to the request if sufficient security is tendered in the form of letters of indemnity. Among the factors taken into account by the carrier when deciding whether to accede to the request are[27] whether its P&I club will indemnify it for its potential liability for misdelivery,[28] the consignee's financial standing to honour its letter of indemnity, whether the consignor or a reputable bank are also willing to provide letters

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[25]Thus, for example, judicial decisions authorizing provisional or protective measures which are made *ex parte* and which are intended to be enforced without prior service are not to be recognized or enforced under the EU Council Regulation No. 44/2001. (See Denilauler v. Couchet Case 125/79 [1980] E.C.R. 1553). The invalidating decree arises from e*x parte* proceedings as outlined in the chapter "Procedure for obtaining the invalidating decree" above.

[26]As outlined in the chapter "Procedure for obtaining the invalidating decree" above, the invalidating decree arises out of non-contentious procedure unless a holder of the lost instrument, noticing the public notice, comes forward and disputes the right of the petitioner.

[27]See "London Club warns on dangers of misdelivery" Lloyd's List June 2, 1999.

[28]The rules of most P & I Clubs expressly provide that liabilities and costs arising out of delivery of goods without the production of bills of lading are not covered unless otherwise decided by discretion of the Club. See e.g. section 17(c)(ii) of the 2008 Rules of the UK P&I Club.

of indemnity, the enforceability of the letters of indemnity particularly in the country where the port of discharge is situated and whether there is the alternative of warehousing the cargo and recovering the expenses from the consignee. Even if the carrier is unwilling to deliver without the production of the bill of lading, the consignee is entitled to receive delivery by obtaining the invalidating decree or, as explained in a preceding chapter, simply by petitioning for the invalidating decree and furnishing security under Article 518 of the Commercial Code.

It seems, however, rarely for this purpose is the invalidating decree sought in practice. One possible reason is that while the person who has lost a bill of lading is entitled under Article 518 of the Commercial Code to demand delivery, only the consignee would have interest in making such a demand. Where a bill of lading has been lost whilst in the custody of other persons, they may have little incentive to invoke Article 518. There is indeed no reported case on that provision with respect to bills of lading while there are some cases with respect to other negotiable instruments. In fact, the awareness of the entitlement under Article 518 among the Japanese maritime practitioners does not seem high. Another more significant reason would be that carriers normally agree to deliver the goods without the production of bills of lading if sufficient security in the form of letters of indemnity is provided.[29] This is the case not only where there is a delay in the arrival of the bills but also where the bills have been lost. It would therefore be unnecessary in most cases to seek the decree for the purpose of demanding the delivery of goods. In fact, in most of the total of some 440 cases in which the invalidating decree was issued in respect of bills of lading, the decree was petitioned for considerably later than the time at which the goods would have arrived at the port of discharge assuming that the ship had not spent too much time at ports along the way. In those cases, demanding the delivery of goods would not have been the purpose for which the decree was sought.

B. To Request the Return of the Banker's Letter of Indemnity from the Carrier

In practice, it is mainly for the purpose of seeking the return of banker's letters of indemnity from the carrier that the invalidating decree is sought in respect of bills of lading.

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[29]For an English decision mentioning this practice, see The Houda [1994] 2 Lloyd's Rep. 541, 553 (C.A.). For the Chinese practice, see Yingying Zou "Delivery of Goods by the Carrier under the Contract of Carriage by Sea; a focus on China" (http://hdl.handle.net/1765/6943), which at p. 241 says that in China, as well as delivering goods against a letter of indemnity, the carriers sometimes take the risk of making delivery on the consignee's announcement of the loss of bills in newspapers. See also, Lixin Han, "A Study on the Liability of the Carrier and the Actual Carrier for Delivery of Goods without a B/L in China", 39 J. Mar. Law & Com. 275 (2008).

As mentioned above, where a bill of lading has been lost, the prevailing practice is for the carrier to deliver the goods to the consignee in exchange for letters of indemnity.[30] If the carrier does not find the consignee's letter of indemnity sufficient as security, it may also require the consignee to procure a letter of indemnity from a reputable bank.

The bank will charge the consignee for its letter of indemnity. The charges may keep accruing while the letter remains in the hands of the carrier.[31] Some letters of indemnity provide that they are valid for a fixed period of time,[32] in which case the charges will stop mounting when that period has expired. The charges will also stop mounting when the potential liability of the carrier for misdelivery of the goods ceases to exist by virtue of the time bar[33] since the banker's liability for indemnity will then also be extinguished.

The consignee may demand the return of the letters of indemnity from the carrier on the basis that the liability on them has ceased to exist.[34] But the carrier may resist, arguing that it remains at risk of its liability for misdelivery being pursued in countries where the applicable time bars[35] are longer or

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[30]Where a bill of lading has been lost whilst in the hands of the consignor, the latter may request the carrier to issue a new bill of lading by furnishing a letter of indemnity. See e.g. http://www.kline.com/KAMFAQs/K-Line_FAQs_Bill_of_Ladings.asp/. In such cases, the text above should be read by replacing the word "consignee" with the word "consignor."

[31]In respect of bills of exchange and promissory notes, D.E. Murray, "The U.N. Convention on International Bills of Exchange and International Promissory Notes with Some Comparisons with the Former and Revised Article Three of the UCC" ([1993/1994] 25 U. Miami Inter-Am. L. Rev. 189, 223) says that premiums on a surety bond surrendered for a lost instrument could become enormous over the years. On the other hand, some letters of indemnity may be subject to a one-time charge.

[32]For example, the standard form letter of indemnity recommended by the International Group of P&I Clubs ("Standard Form Letter of Indemnity to be Given in Return for Delivering Cargo Without Production of the Original Bill of Lading Incorporating a Bank's Agreement to Join in the Letter of Indemnity") provides in clauses 4 and 5 that the bank's liability is to last six years but may be extended from time to time at the request of the shipowner for a period of two years at a time.

[33]One year under Article 3(6) of the Hague Visby Rules and two years under Article 20 of the Hamburg Rules after the goods were delivered or should have been delivered.

[34]With respect to bills of exchange and promissory notes, Article 80(2) of the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes provides that the person who has received payment by furnishing security is entitled to obtain release of the security when the party who paid and received the security is no longer at risk to be obliged to pay a second time. According to the Report of the Secretary-General, this is the case, for example, where the time bar has expired or where proof is brought that the lost instrument was in fact destroyed: Commentary on Draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/213) p. 122, 184.

[35]The law applicable to the time bar would be the governing law of the claim for the delivery of goods if the issue is characterized as substantive while it would be the *lex fori* if characterized as procedural.

uncertain.[36] Therefore, in an effort to cut down on the charges, the consignee may request the return of the letters of indemnity regardless of whether the liability for indemnity has been extinguished. In an attempt to persuade the carrier, the consignee may attach to his request a copy of the decree invalidating the lost bill of lading. How useful the decree is to achieve that purpose will be examined in the following chapter.

V
USEFULNESS OF THE INVALIDATING DECREE TO ACHIEVE THE INTENDED PURPOSES

How useful the invalidating decree is to achieve the two purposes mentioned above will be considered below.

A. To Demand the Carrier to Deliver the Goods without the Production of the Bill of Lading

It has been seen above that it would not be often that a petition for the invalidating decree is made for the purpose of demanding the delivery of goods without the production of bills of lading. But in the cases where a petition is made for that purpose, the usefulness of the decree depends primarily on the viewpoint taken by the country in which the port of discharge is situated. That is because it is in that country where the consignee intended to receive delivery when it entered into the transaction in the first place and because it is also in that country where the consignee would like its right to demand delivery to be enforced without delay. Even if its right to demand delivery is upheld by a judgment in another country and that judgment is enforceable in the country where the port of discharge is situated, the result may not be satisfactory for the consignee as it may take time for the foreign judgment to be enforced.

For the invalidating decree in Japan to be effective, it would therefore be necessary that (1) the law, including choice-of-law rules, of the country

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[36]Thus, in The Captain Gregos ([1990] 1 Lloyd's Rep. 310, 316 (CA)), Bingham L.J. held in obiter that the one-year time bar of the Hague Visby Rules was intended to apply to a claim for misdelivery resulting from the delivery of goods without the production of bills of lading. But the correctness of that view is doubted by Boyd, Burrows and Foxton, *Scrutton On Charterparties And Bills Of Lading* (1996, 20th ed) at p. 435, note 43, presumably on the basis that the Rules are applicable only until the discharge of the goods (See Articles 1(e) and 2). For a detailed survey of contradicting authorities of various jurisdictions, see William Leung "Misdelivery of Cargo without Production of Original Bill of Lading: Applicability of the Mandatory Legal Regime of Hague-Visby and the One Year Time Bar" 39 J. Mar. Law & Com. 205 (2008) in particular pp. 212 et seq.

where the port of discharge is situated provides that the delivery of goods may be demanded in the absence of bills of lading by obtaining a decree terminating the validity of the bills or by petitioning for such a decree, (2) the invalidating decree or a petition for it under that law can be substituted for by the equivalent in Japan, and (3) the invalidating decree in Japan is entitled to recognition in that country. The requisite (1) will be satisfied if the applicable law provides for a decree terminating the validity of negotiable instruments. Article 305 of the Norwegian Maritime Code, for example, provides that the delivery of goods may be demanded against security if a petition is made to the court to have a lost bill of lading declared null and void and the court has decided to proceed with the case. But the requisite (2) is not likely to be satisfied since the procedure to follow before obtaining an invalidating decree may be different from the Japanese equivalent in important respects such as the method and duration of the public notice. The requisite (3), too, will be unlikely to be satisfied, as examined above.[37]

It may therefore be concluded that the invalidating decree or a petition for it in Japan is unlikely to be useful to achieve the purpose of demanding the delivery of goods without the production of bills of lading unless the port of discharge is situated in Japan and Japanese law is the applicable law. As for the applicable law, Japan has no express choice-of-law rule in the statutes or the case law for determining the law applicable to the question what steps must be taken to demand delivery in the absence of bills of lading. But the view that it is the law of the country in which the port of discharge is situated is widely supported among commentators. It would follow that in the cases where the port of discharge is not situated in Japan, the consignee would have to seek, in the country in which it is situated, a decree equivalent to the Japanese invalidating decree as may be available in some other civil law countries[38] or an order compelling the carrier to deliver without the production of bills of lading as may be available in some common law countries.[39]

B. To Request the Return of the Banker's Letter of Indemnity from the Carrier

Then, how useful is the invalidating decree for the purpose of supporting the request for the return of the banker's letter of indemnity from the carrier?

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[37]See the chapter "Effectiveness of the invalidating decree outside Japan."

[38]See fn 8 above.

[39]See fn 7 above.

Where the letter of indemnity provides that the liability on it will cease upon the delivery of the bill of lading,[40] presenting a copy of the invalidating decree would provide a sufficient legal ground for demanding the return of the letter of indemnity. This is because, as explained above,[41] the invalidating decree has the effect of restoring to the petitioner the status of the holder of the lost instrument.[42] But letters of indemnity with such a clause would not be appropriate to be used in the cases where the bill of lading has been lost though they may be suitable for the cases where it is late in arriving.

Where the letter of indemnity does not contain such a clause, it would seem that the invalidating decree would not provide a sufficient legal ground for obtaining the return of the letter. Two reasons present themselves.

Firstly, the liability for misdelivery for which the carrier is to be indemnified under the letter of indemnity is not extinguished by virtue of the issuance of the invalidating decree, since the decree only has the effect of depriving the lawful holder of the bill of lading of his status as the holder and does not have the effect of depriving him of his substantive right against the carrier to demand delivery or pursue liability for misdelivery.[43] If he successfully adduces other evidence than the invalidated bill of lading to prove his substantive right, the carrier will seek its liability to be indemnified under the letter of indemnity.

Secondly, the carrier will not be exonerated from its liability towards the lawful holder merely by returning the letter of indemnity against a copy of the invalidating decree. Although the carrier would be exonerated from its liability if it delivers the goods to the holder of bills of lading without gross negligence,[44] in the situation with which our present discussion is concerned, the carrier has delivered the goods without the production of bills of lading and therefore could not claim to have been without gross negligence even if it did so sincerely believing the words of the consignee that the bills have been lost.[45]

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[40]e.g. Article 5 of "Standard Form Letter of Indemnity to be Given in Return for Delivering Cargo Without Production of the Original Bill of Lading Incorporating a Bank's Agreement to Join in the Letter of Indemnity" (recommended by the International Group of P&I Clubs).

[41]See the chapter "Effects of the invalidating decree" above.

[42]Article 160(2) of the Non-Contentious Procedure Act.

[43]As explained in the chapter "Effects of the invalidating decree" above, with a reference to the Supreme Court decision on 25 January 2001.

[44]Article 20(1) of the Carriage of Goods by Sea Act incorporating by reference Article 519 of the Commercial Code which in turn incorporates by reference Article 19 of the Act on Checks.

[45]A carrier takes a major risk under virtually all legal systems if it delivers goods without requiring the production of bills of lading. A classic Japanese authority is the decision of the Grand Court of Judicature (the highest court in the pre-WWII period) on 16 September 1926 (reported in 5 *Daishinin Minshu* 688 in Japanese). For other legal systems, see William Tetley, "Letters of Indemnity at Shipment and Letters of Guarantee at Discharge" [2004] ETL 287 esp. text accompanying fn 107-118.

In practice, though, the banker's letters of indemnity may be returned on the initiative of the carriers in the exercise of their business judgment. In legal terms, it would constitute a waiver of their right to claim indemnity. A major factor which the carrier will take into account would be the need to keep cordial relationships with the cargo interests.[46] Another material factor would be the chances of facing a claim for damages for misdelivery, which may not be high since lost bills of lading are not as likely to be acquired *bona fide* and for value as lost promissory notes or bills of exchange.[47] Time bar, too, can be an inconclusive factor to be taken into account where the carrier is susceptible to be sued in a number of countries where time bars of different lengths are applicable. In addition to those factors, if a copy of the invalidating decree is presented, the carrier will take it into account in its business judgment. The carrier will be assured by the invalidating decree to the extent in which the bill of lading, having been rendered null and void, will no longer be acquired *bona fide* and for value. The invalidating decree also means nobody has come forward as the lawful holder during the period of public notice and therefore implies that the chances of the bill having been acquired *bona fide* and for value before the issuance of the decree are so much smaller. It also implies that the consignee's failure to produce the bill of lading was not due to the fact that it had failed to pay the price of the goods to the consignor. The invalidating decree is useful, in as much as it provides the carrier with assurance in those ways, to support the request for the return of the banker's letter of indemnity from the carrier.

It must be noted, though, that the usefulness of the invalidating decree when used in persuading the carrier to return the letter of indemnity is limited. Its usefulness is especially limited where it is certain that a short time bar is applicable to the claim of misdelivery since the consignee would then be entitled to obtain the return of the letter of indemnity upon the expiry of the time bar, which will be due not long after the end of the period of public notice for obtaining the decree. The limited usefulness of the invalidat-

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[46]In fact, carriers sometimes take the legally dangerous step of delivering goods in the absence of bills of lading without requiring letters of indemnity in order to maintain cordial relationships with the cargo interests.

[47]It is firstly because, unlike the instruments which embody obligations to pay money, bills of lading could be exchanged for money under a letter of credit only by tendering other shipping documents called for by the letter and therefore the person acquiring a bill of lading intending to convert it into a sum of money would also have to obtain a letter of credit and the shipping documents called for under it. Secondly, a person about to acquire a bill of lading may find out that it has previously been lost if he contacts the notify party mentioned on it. He may do so especially where some time has elapsed since the issuance of the bill because the notify party, being the person to whom an arrival notice is to be given, is usually the intended consignee.

ing decree may explain why no serious inconvenience is known to exist[48] notwithstanding that no similar decrees are available in many countries including those with the common law tradition. It may also explain why similar decrees in some civil law countries such as Norway and Sweden seem to be hardly used for bills of lading.

On the other hand, it should also be noted that the cases in which the invalidating decree can be of some use are wide ranging. This is because its usefulness depends on the business judgment of the carrier and therefore whether it has legal effect in the relevant countries is not a decisive factor. In fact, among the total of some 440 cases in which the decree was announced in respect of bills of lading in the official gazette, some 130 cases appear to have involved foreign carriers.[49]

VI
JURISDICTION OF THE JAPANESE COURTS TO ISSUE THE INVALIDATING DECREE

Since the usefulness of the invalidating decree is not confined within the boundary of Japan, it may be of interest in what circumstances the invalidating decree may be obtained from the Japanese courts. Japan has no statutory provision determining the international jurisdiction of its courts to issue the invalidating decree.[50] So the case law will be examined below.

A. Case Law

The Tokyo Summary Court decision on 20 October 2005[51] is a recent case in point. In that case, the invalidating decree was sought in respect of bills

[48]To guard against the possible loss of a bill of lading, sometimes a set of multiple bills of lading are sent separately to the consignee, so that if one in the set is lost, the others may be used to claim delivery. But this preventative measure will not be available where payment is made under a letter of credit since Article 20(a)(iv) of the UCP 600 calls for the tender of a full set of bills.

[49]With the help of his student assistant, Ms Asuka Noda, the present author has counted the number of the cases in which the carriers (shipowners and charterers) or the issuers of the bills are incorporated outside Japan and, by the sound of their names, are apparently not the subsidiaries of Japanese companies.

[50]There is, however, a provision for determining the internal jurisdiction, which is applicable when the Japanese courts have international jurisdiction. Thus, Article 157(1) of the Non-Contentious Procedure Act confers jurisdiction on the court for the place of performance specified in the instrument and, in the absence of such designation, on the court for the place of domicile of the obligor on the instrument (such as the debtor on a promissory note).

[51]Reported in 196 (2007) *Kaiji-ho Kenkyu-kai Shi* 60 (Japan Shipping Exchange) in Japanese.

of lading issued in Tokyo on which Yokohama (Japan) was named as the port of loading and Keelung (Taiwan) as the port of discharge.[52] The court denied jurisdiction, holding that the Japanese courts had jurisdiction only where the port of discharge was situated in Japan. The court reasoned that, in view of the interests and convenience of those concerned, the decree should be sought in the country where the port of discharge was situated in order to ensure the effectiveness of the decree. The court acknowledged that a similar decree might not be available in that country but showed no concern, holding that there should be alternative rules in that country to deal with the same issue, i.e. how goods should be delivered where the bills of lading have been lost. The court disregarded the choice-of-court clause in the bills of lading on the ground that it was only concerned with adversarial actions to determine the rights and obligations of the carrier and as such did not extend to cover the non-contentious procedure for terminating the validity of bills of lading. Since this is a decision of a lower court, it is not binding on the courts in the future cases.

This is the only case on the jurisdiction of the Japanese courts to issue the invalidating decree in respect of bills of lading in which a reasoned decision was given.[53] Though the Japanese courts are supposed to ascertain their jurisdiction *ex officio*, they do not have to expressly state the jurisdictional bases, especially in the *ex parte* proceedings, such as those for obtaining the invalidating decree, in which no party disputes the jurisdiction. The other cases in which the invalidating decree was issued are announced in the official gazette which only mentions some particulars of the facts and does not set out the court reasoning. It is, therefore, unclear what jurisdictional bases were relied upon in those cases. In most of the total of some 440 cases announced in the official gazette in the past 60 years, the port of discharge was situated in Japan. But in nearly forty cases, the port of discharge was not situated in Japan. Among them, in almost all cases, the place of issuance of the bills of lading was situated in Japan. There is however a recent case in which clear-

[52]The facts in details were as follows. The bills of lading were issued on 26 April 2005 by a Japanese company with its principal place of business in Tokyo. They named a manufacturer of electrical appliances as the consignor and were made out to the order of a bank. There was a choice-of-law clause in favor of Japanese law with respect to the issues of contract evidenced by the bills and a choice-of-court clause giving the Tokyo District Court exclusive jurisdiction over actions against the carrier. Those bills of lading were lost sometime between 29 April and 6 May of the same year while they were stored in a building in Tokyo. The bills were apparently in the custody of the cargo division of an airline company, which presumably acted as the carrier of the bills between the consignor and the consignee. They made a petition to the Tokyo Summary Court for the invalidating decree.

[53]In respect of bonds, there is a decision on 25 July 1931 (reported in 10 *Daisihin Minshu* 603 in Japanese). In this case, the Grand Court of Judicature (the highest court in the pre-WWII period) declined jurisdiction to issue the invalidating decree in respect of lost bonds which had been issued by a Japanese company and were to be reimbursed in London and New York.

ly neither the port of discharge nor the place of issuance was situated in Japan.[54] In that case, a set of three bills of lading on which International Fisheries (a company incorporated in Myanmar) were named as the consignor were issued by Pacific International Lines (presumably a Singaporean company) in Yangon (Myanmar) on 25 September 2002 and were made out to the order of Sumitomo Corporation (a Japanese company). Yangon (Myanmar) was named as the port of loading and Singapore as the port of discharge. The bills of lading were lost while in the custody of Myanmar Investment and Commercial Bank. Presumably because they were to be transmitted via Hachinohe (Japan), a petition was made there for the invalidating decree by Sumitomo Corporation (which was presumably the last endorsee of the bills) and it was granted by the Hachinohe Summary Court.

The law in this area, therefore, remains to be settled. But it would be safe to assume that the Japanese courts will exercise jurisdiction to issue the invalidating decree in the cases where the port of discharge is situated in Japan since no contrary decisions have been found in the case law. What is less clear is whether they will do so in other cases. It was answered in the negative by the Tokyo Summary Court in its decision on 20 October 2005, but there are a number of cases in which jurisdiction was exercised notwithstanding that the port of discharge was situated outside Japan in the circumstances where the place of issuance of the bills of lading was situated in Japan. Though there is a case in which the court exercised jurisdiction notwithstanding that clearly neither the port of discharge nor the place of issuance was situated in Japan, it will be wrong to assume that jurisdiction is regularly exercised in such cases.

B. Comment

It is submitted that in the cases where the invalidating decree is useful, jurisdiction to issue the decree should be exercised to the extent in which it would not unduly impair the interests of the parties concerned such as the carrier and the lawful holder of the bill of lading. We will examine those factors in turn below.

1. The cases where the invalidating decree is useful

In order to grant the invalidating decree in the cases where it is useful to achieve the purpose for which it is usually sought in practice, it would seem too narrow to restrict the jurisdiction of the Japanese courts to the cases

[54]Hachinohe Summary Court 4 November 2003, announced in the official gazette on 2 December 2003.

where the port of discharge is situated in Japan. This restrictive view, adopted by decision of the Tokyo Summary Court on 20 October 2005 and supported by some commentators, is based on the premise that the invalidating decree is sought for the purpose of exercising the right embodied in the lost negotiable instrument without the possession of it. Thus, the Tokyo Summary Court in that decision held that the issue of jurisdiction would arise where the right embodied in the lost negotiable instrument was exercisable in the absence of the instrument by obtaining the invalidating decree under the applicable law. That premise is, however, erroneous in respect of bills of lading as explained above,[55] even if it may be correct with other negotiable instruments. The usual purpose for which the invalidating decree is sought in respect of bills of lading is, as seen above,[56] not to demand the delivery of goods without the production of bills of lading but to support the request for the return of the banker's letter of indemnity from the carrier. That would have been the purpose also in the case of the Tokyo Summary Court, though the courts and commentators have shown little awareness of it. It can be inferred from the fact that the bills of lading were issued on 26 April 2005 and the carriage was from Yokohama to Keelung but the decree was not sought until 27 July 2005. Since the bills were lost while they were in the custody in Tokyo of an airline company which presumably acted as the carrier of the bills between the consignor and the consignee, the carrier may have re-issued bills to the consignor at its request in Tokyo in exchange for letters of indemnity. So the decree may well have been sought to support the request for the return of the letters of indemnity in Tokyo from the carrier, which was a Japanese company with the principal place of business in Tokyo. Also, in the case of the Hachinohe Summary Court, the invalidating decree was sought by Sumitomo presumably to support their request to Pacific International Lines (the carrier) to return the banker's letter of indemnity which they would have submitted in receiving the delivery of goods in Singapore without the production of bills of lading. Even if the invalidating decree did not have legal effect in Singapore, the carrier may have taken it into account in their business judgment in deciding whether to return the letter of indemnity.

In those and other cases where the port of discharge is not situated in Japan, the invalidating decree obtained in Japan can be useful to support the request for the return of letters of indemnity from the carrier. The decree is a factor to be taken into account by the carrier in its business judgment and therefore whether it is given legal effect in other relevant countries is not

[55]See the chapter "Purposes for which the invalidating decree is sought in practice" above.
[56]*Ibid*.

decisive. It follows that jurisdiction to issue the decree should be exercised except to the extent it is necessary to restrict it to protect the interests of the carrier and the lawful holder of the bill of lading, if there is any.

2. Protecting the carrier from the risk of being subjected to multiple claims

If the carrier has delivered goods after the invalidating decree was issued, it may be held liable for misdelivery towards the holder of the bill of lading in a country where the decree is not recognised. The risk of being subjected to multiple claims for a single liability is in fact not unique to this area of law but generally exists because the recognition of foreign judgments is not guaranteed and because different legal systems are applicable to the same issue in different countries due to the differences in their choice-of-law rules. But the risk is greater to the extent that the invalidating decree, in comparison with other types of court decisions, is unlikely to be recognised in other countries. On the basis that the invalidating decree may not have effect in countries other than the country of issuance, the proponents of the view that jurisdiction to issue the decree should be given only to the courts for the place of performance of the obligation on the instrument points out the risk of the obligee facing multiple claims in respect of a single obligation at the place of performance. But this would not be a sufficient reason to support their view, at least where the instrument is a bill of lading, since the carrier could not avoid the risk of facing multiple claims even if their view were adopted. The reason is that the carrier's liability for misdelivery might be pursued in other countries than the country where the port of discharge is situated, such as the country chosen by a jurisdiction agreement in the bill of lading and the country where the carrier's principal place of business is situated, because the invalidating decree issued in the country where the port of discharge is situated may not be recognised in those countries.

As explained in an earlier chapter,[57] the main purpose for which the invalidating decree is sought in respect of bills of lading is to request the return of the banker's letters of indemnity from the carrier. But the decree does not provide a sufficient legal ground for demanding the return and the letters of indemnity are in practice returned on the carrier's own volition based on its business judgment.[58] The risk of facing multiple claims is a factor to be taken into account by the carrier. It is true that it would be more assuring for the carrier if the invalidating decree has legal effect in all the countries where it may face a claim for damages for misdelivery from the lawful holder of the bill of lading. But even if not, the risk of facing multiple claims may not be

[57] *Ibid*.

[58] See the chapter "Usefulness of the invalidating decree to achieve the intended purposes" above.

a conclusive factor in determining whether to return the letters of indemnity.

For those reasons, it is submitted that the risk of the carrier facing multiple claims should not be treated as a significant consideration in shaping the rules for jurisdiction to issue the invalidating decree.

3. Protecting the interests of the lawful holder of the bill of lading

The invalidating decree has the effect of depriving the lawful holder of the bills of lading of his status as the holder. He will, thereafter, have to take the trouble of adducing other evidence to prove his entitlement to demand the delivery of goods. The invalidating decree should therefore be issued only where the lawful holder would not be unfairly taken by surprise when he is deprived of his status as the holder by the decree and would acquiesce to it by virtue of the public notice posted.

It is therefore submitted that the Japanese courts should exercise jurisdiction only where the place of issuance of the bill of lading, the port of loading, or the port of discharge mentioned in the lost bill of lading is situated in Japan. Those places are usually mentioned on the face of bills of lading[59] and are situated along the supposed course of circulation of the lost bill. The place of the issuance of the bill and the port of loading, if not the same, are usually situated in the same country.

If the lost bill of lading contains a jurisdiction clause choosing the Japanese courts, it should not be read as pertaining to the jurisdiction to issue the invalidating decree. It is because a jurisdiction clause in a bill of lading is usually concerned with a suit by or against the carrier and as such is not concerned with the non-contentious procedure for terminating the validity of bills of lading. It is also because bills of lading containing a Japanese jurisdiction clause are not necessarily supposed to make their way through Japan in the course of their circulation. Neither does the carrier's principal place of business, even if mentioned on the face of the lost bill, constitute a good jurisdictional base since bills of lading are not necessarily issued at, or otherwise connected with, the carrier's principal place of business. The lawful holder would, therefore, not acquiesce to being deprived of his status as the holder by the invalidating decree if it is issued in the country where the carrier's principal place of business is situated or the country chosen by a jurisdiction agreement in the bill of lading.

[59]Article 15(1)(f)(g)(i) of the Hamburg Rules and Article 7(8)(9)(12) of the Japanese Carriage of Goods by Sea Act require bills of lading to mention those places.

VII
FINAL REMARK

Where bills of lading have been lost, those who have submitted letters of indemnity to the carrier may wish to request the carrier to return of the banker's letter of indemnity in order to avoid the banker's charges mounting on it. They may then wish to consider petitioning for the invalidating decree in order to support the request. If the port of loading, the place of issuance of the bill, or the port of discharge is situated in Japan, it may be worth considering petitioning before a Japanese court. A Japanese court will exercise jurisdiction to grant the decree if the port of discharge is situated in Japan. Otherwise, if the court seeks to be persuaded that it should exercise jurisdiction, the petitioner would be advised to stress the practical usefulness, rather than the legal effectiveness, of the invalidating decree for their intended purpose of requesting the return of the banker's letters of indemnity and to argue that other interested parties, such as the lawful holder of the bill (if there is any), will not be unfairly taken by surprise.

Similar decrees are available in some other civil law countries. Though they do not seem to be invoked as often as the Japanese counterpart, it is hoped that this article will rekindle interests in their usefulness and raise awareness of the jurisdictional question.