

## Introduction

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### Purpose

Delivery of goods by the carrier is an indispensable part in contract of carriage of goods by sea. At first sight, delivery often seems to have been executed by transferring goods from the carrier to consignee(s) at the destination or other place(s). In a legal sense however, delivery of goods is an essential part of the obligations imposed on the carrier under the contract, and it contains more comprehensive implications.

It may be said that the issues in regard to delivery of goods came when the vessel operators were separated from merchant traders and that the contract of carriage of goods by sea emerged. To whom shall the goods be delivered has been, since then, one of the central topics in the shipping practice. Disputes concerning delivery are common in maritime field for years worldwide, and particularly, in China. Statistics shows that more than 75% of the litigation cases brought in Chinese maritime courts, which deal with the contract of carriage of goods by sea, are concerned with the delivery, especially deliveries to wrong person. In addition, we have reasons to believe that a certain number of disputes or legal problems on this topic may not yet at all, have been brought to courts.

The hits around the delivery of goods continue. Issues such as liabilities of delivery without bill of lading or delivery under straight bills of lading, relationship between delivery and the end of carrier's responsibility period, the right of suit for delivery, the resolution for the carrier when no taking over of the goods, so on and so forth, have drawn large attention and provoked hot discussions among scholars, judges and practitioners.

There are a few reasons observed, for the extended legal uncertainties and ambiguity in relation to delivery. **Firstly**, delivery itself concerns legal relationship

in more than one contract. Delivery is not only an issue under the contract of carriage, but also the sales contract. It concerns also the property law and others.<sup>1</sup> **Secondly**, and more importantly, it is the absence of a complete system regarding delivery under existing legislations that makes it difficult to resolve problems occurred. Most international conventions such as *Hague*, *Hague-Visby Rules*, and national laws in this respect, such as *COGSAs* in many countries as well as the China Maritime Code, have predominantly focus on the rights and obligations of the carrier for the carriage and safety of goods, while few has a detailed and precise legal interpretation on delivery of goods. As a consequence, the current law does not provide legal guidance for disputes arising from the delivery of goods. **A third** reason is believed to be the disparity among the national laws or international instruments, resulting in the uncertainty in rights and responsibilities of the carrier in terms of delivery. The conflicts of them have also led to chaos in practice.

During resolving the disputes on delivery of goods, one of the inclinations are some quoting the sales contract and/or property law in interpreting the liabilities of the carrier on delivery.<sup>2</sup> These applications have resolved some problems well, but they have even caused more arguments and confusion among practitioners, academicians and juries.

Seeing all the developments, the ambiguity, arguments, discussions and debates around the delivery of goods in carriage by sea, I finally decided to land my thesis on this controversial topic. A research of a systematic legal interpretation of issues regarding delivery will hopefully provide a resource for judicial decisions for unresolved problems and remove the disparities between theory and practices, and perfect the legal system with respect to delivery of goods in China as well.

In this thesis, the following issues will be dealt with: What are legal meanings of delivery of goods by the carrier? When a delivery can be deemed as completed? What will be the obligations of the carrier with respect to delivery? What are carrier's liabilities should he deliver goods to wrong person, especially when he delivers without the production of bill of lading? What are the relationships between the contract of carriage of goods by sea and the contract of sales? How can the disputes in practice be solved? How can the Chinese legislations be improved? And what can be the suggestions for the purpose of uniformity of international maritime laws?

The thesis adopts a comparative approach, and the focus, lies consistently in the China context, covering the legal theories, legislations and practices.

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<sup>1</sup> For the legal effects of delivery see Chapter 2 of this thesis.

<sup>2</sup> See, for example, the reasoning of *The Kota Maju* heard by Guangzhou Maritime Court of China. For the details and comments of this case see Part 1 of Chapter 6.

## Research references

Though not the focus in most of the works, the issues on delivery of goods are often touched and some have relatively extensive interpretation. Some authors have constructed the legal frame on it under the traditional common law, e.g., *Carver's Carriage by sea*,<sup>3</sup> *Scrutton on Charterparties and Bills of Lading*.<sup>4</sup> Some has extensively explained the shipping practices as well as the current legislations in modern systems, such as the *Bill of Lading: Law and Practice*,<sup>5</sup> or, through establishing the theoretical bases of the system of bill of lading, helped to resolve certain difficulties in theory with respect to delivery, e.g. *Carver on Bills of lading*.<sup>6</sup> In addition, some peripheral studies have also given hints and legal explanations on which people can count or quote, for example in research for the systems of international sales, the connection of sales contract and shipping performance, such as *Sale of Goods Carried By Sea*.<sup>7</sup>

In China, more and more articles, academic essays and discussions have been brought to the topic of delivery of goods in the contract of carriage of goods by sea in recent years. Key cases on delivery occurred, and were published, which evoked also hot discussions, posing a stark difference comparing to years ago, where few textbooks had barely attention to the topic.

All these works and publications helped me keep track with the development with regard to delivery of goods, theoretically, practically and legally. They also make it more conspicuous, about the existing controversies in the understandings and the non-harmonization of the issues of delivery from both the legislative and practical point of view. All such, has further inspired me well while giving me a resource for reference.

However, most of the works have a limited coverage on delivery of goods, or just a simple reference. A systematic and comprehensive research is still needed. Most recently in the review of *China Maritime Code* that started from 2000 and was undertaken by universities in China,<sup>8</sup> the subject of delivery of goods did not draw enough attention either. In addition, among the existing works, some of the viewpoints or theories need further examination.

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<sup>3</sup> Raoul Colinvaux, *Carver's Carriage by Sea*, 13<sup>th</sup> ed., Stevens & Sons, 1982.

<sup>4</sup> Stewart C. Boyd and others, *Scrutton on Charterparties and Bills of Lading*, 20<sup>th</sup> ed., London Sweet & Maxwell, 1996.

<sup>5</sup> Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contract*, 1<sup>st</sup> ed., LLP, 2000.

<sup>6</sup> Guenter Treitel, F. M. B. Reynolds, *Carver on Bills of Lading*, 1<sup>st</sup> ed., London Sweet & Maxwell, 2001.

<sup>7</sup> Charles Debattista, *The Sale of Goods Carried by Sea*, 2<sup>nd</sup> ed., Butterworths, 1998.

<sup>8</sup> From the later 1990s, the revision of the China Maritime Code was appealed. From 2000-2002, research teams that were organized by Shanghai Maritime University and Dalian Maritime University were working on the "Study of Modification of China Maritime Code" under the auspices of the Ministry of Communication of PRC. Two separate collections of reports were completed and surrendered by them.

The insufficiency of previous researches in this field therefore, is the most difficulty in my study and completion of this thesis. On the other hand, it once again, proves the meaning and the value of the thesis that it will contribute to the development and perfection of legal system, academic research, and judicial process and decisions as well as the practices, concerning the delivery of goods.

I must admit that the limit in language, as an English and Chinese speaker, has contained my research within Chinese and English publications and legislations only. A broader comparison to other legal systems and practices in other languages, were not able to attain.

It is worth pointing out also, which has inspired me as well in my research work that the UNCITRAL Draft Instrument of Transportation Law<sup>9</sup> pays more attention to the delivery of goods by carrier and tries to establish a complete system on this issue. The proposals of provisions and discussions during the drafting unfold the fruits of researches and practices under various regimes as well as the tendency of international legislation.

## **Methodology**

The research for the thesis has taken predominantly three methods: theoretical review, case study and personal investigations, where theoretical review of the concerned issues forms the base. Adhering to them, comparative study is also important.

Theoretical review centers on the legal systems with respect to contract of carriage of goods by sea both in China and abroad. Besides, review on peripheral laws and legislations makes a necessary supplement, such as the principles in contract law, law of sale of goods, property law, law of instrument of value and maritime procedure law.

The theoretical review is further a comparative review. China laws and interpretations are compared with those in common law as well as civil law systems, such as the United Kingdom, the United States, Germany and Nordic Countries.

Case study is an indispensable part in the research as the subject of delivery is such that theory and practice go and develop always side-by-side. Chinese and foreign cases are inserted appropriately in the thesis to elaborate the issues and to support the analysis.

Finally, during my research I conducted many interviews with people working directly in shipping companies, shipping agencies, courts and research institutes in

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<sup>9</sup> For the background and progress of this draft instrument see Chapter 1.

China. It was these interviews and investigations that helped me have collected lots of first-hand materials and learnt about the difficulties of completion of delivery in practice. I felt even stronger the desire to uniform and perfect the legal systems as concerned. The investigations also helped me to identify better and more, the essential issues concerning delivery in practice and bridge my theoretical research with the reality even better.

## Structure and main contents

In this thesis, the terms of “delivery” and “delivery of goods” mean the delivery of goods by the carrier to the consignee or other person as agreed or authorized, at the destination, unless otherwise expressly indicated. For the purpose of a brief and logical structure, the research is made from the angle of the carrier’s responsibilities on the delivery, but it inevitably concerns with the rights and obligations of the shipper or consignee on delivery as well.

The issues are discussed under the contract of carriage of goods by sea. “Contract of carriage of goods by sea” in this thesis, has a relatively broader meaning as it usually does. Generally, “contract of carriage of goods by sea” means “a contract under which the carrier, against payment of freight, undertakes to carry by sea the goods contracted for shipment by the shipper from one port to another,”<sup>10</sup> or “from one place to another.”<sup>11</sup> In practice, it usually refers to the contract of carriage of goods that is made under the liner shipping, or, is evidenced by the bill of lading. In my thesis, under certain cases, “contract of carriage of goods by sea” may also refer to the contract under voyage charterparty or other appropriate contracts.

The research however, does not refer the topic directly to the contract of multi-modal transportation. It does not imply an exclusion of the contract of this kind however. I am of the opinion that whether a certain maritime law applies to the contract, which is partly or wholly carried by sea, shall depends on the application scope of the maritime law itself. The general principles on the obligations of the carrier on delivery of goods are similar under all the contracts of carriage of goods, being it partly or wholly, carried by sea.

The thesis starts with a general review of the subject of delivery of goods, including the general legislations, legal meanings, identifications of delivery, and the general obligations of the carrier on it. The thesis continues analysis then with focus on carrier’s obligation to deliver the goods to right person, and especially on

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<sup>10</sup> Article 41 of *Maritime Cod of PRC*.

<sup>11</sup> With the development of container shipping, place of starting and the destination usually may beyond the ports.

carrier's possible liabilities should he deliver the goods to the person without production of a bill of lading. Finally, the remedies for the carrier when he faces the obstacles, which is resulted from the reasons of the merchant part, in delivering the goods, are discussed. By this way, the object of constructing a legal system with the balance of legal interests among all the parties concerned, the obligations and remedies of the carrier with regard to the contract of carriage by sea, is hopefully achieved.

A further description of the structure of the thesis is as follows:

**Chapter 1**, legal systems on delivery: Chapter 1 presents a brief review over the legislations with regard to delivery under carriage of goods by sea. It is fairly noted that the topic, delivery of goods, is an omission under most legislations. It has not drawn enough attentions either in Chinese law or in international laws.

**Chapter 2**, legal meanings of delivery: Chapter 2 analyzes the legal meanings of delivery under the contract of carriage of goods by sea, legal meaning *in rem*, the delivery of goods and the end of responsibility period of the carrier, as well as the relations between the deliveries under contract of carriage of goods by sea and contract of sales.

It is concluded that delivery of goods is one of the essential contractual obligations on the carrier. It signals the completion of the contract and hence a relief of the carrier from his responsibilities to the goods under the contract. The point, where delivery can be considered as being finished, is suggested to be the end of the responsibility period of the carrier.

Delivery may have effectiveness *in rem* and the carrier is bound not to infringe the title to goods. However, the act of the delivery is not a juristic act of real right or an act *in rem*, as the carrier is not intended or entitled to transfer the property of the goods. However, the effect *in rem* of the delivery may influence the carrier's liability if he delivers the goods to a wrong person.

Though the contract of carriage by sea and sales contract are closely related, the independence between them is the preliminary rule. The suggestion is that the rights and obligations of the carrier on delivery shall be in principle, pertain to the contract of carriage instead of the contract of sales or others, which though, may provide a useful guidance in dealing with the carrier's rights and obligations under the contract of carriage. This opinion underlies all the analysis though the thesis.

**Chapter 3**, identification of delivery: When and how an action or point can be considered as the realization of delivery, i.e. identification of delivery is essential.

To draft a uniform definition of delivery, which is all-embracing in its ambit, is not easy. A series of criterions are introduced in this thesis, to apply for in different situations.

In order to diminish the disputes and uncertainties in identification, the law shall

encourage the parties to make express agreement on delivery. The agreement will be then the primarily determinant on delivery. Without an express agreement, the delivery is suggested being concluded by the customs, practices or usages in the trade, and where there is no such customs or practices or usages, discharging from vessel may be deemed as the delivery of goods.

Chapter 3 also introduces the common procedure of delivery in practice in Chinese ports. Following it, an analysis is made on the point when delivery can be legally considered as completed, under these procedures and special cases.

**Chapter 4**, obligations of carrier on delivery: Chapter 4 discusses the right place, time and person, which are the three pivotal elements with regard to carrier's responsibilities on delivery.

The carrier is obliged to deliver the cargo at the right place. Under special and agreed situations, the carrier is entitled to change the place for delivery. In this case, the focus shifts to the shipper's right and limitations of giving instructions of changing the destination.

As to the time element of delivery, Chapter 4 discusses the definition of delay in delivery, and the carrier's liabilities for the physical damages that may caused to the goods, and the economic losses on the party who may have a right on the goods.

Delivery to proper person is the key issue of carrier's obligations of delivery of goods.

As the first principle, the carrier shall deliver the goods in accordance with the contract of carriage. According to principles of continental contract law, when the consignee is different from the shipper, the contract of carriage is a contract for third party's benefits, from which, the rights of the consignee to the goods are derived. But the diversity of the documents issued under the contract causes the difference in terms of consignees and the obligations of the carrier. Under the sea waybill, usually, the goods shall be delivered to the named consignee. While in case of a negotiable bill of lading, it is the legal holder of the original bill of lading who is entitled to and therefore obligations on the carrier, the delivery.

Following above principle, with reference to some national legislations and the UNCITRAL Draft Instrument, the author suggests introducing "controlling party" to the law. Controlling party means the party who may dispose of the goods during the transit and is entitled to give instructions on the goods to the carrier. The instructions include such as the redirections of the place of delivery, change of the consignee and so on. Usually, the shipper is the controlling party unless he has appointed other person. When negotiable bill of lading has been issued, the legal holder of the bill of lading will be the controlling party. The author further suggests, when the controlling party transfers his rights on the goods, or when the goods

have been delivered, his right of control shall cease.

**Chapter 5** and **Chapter 6** “Liabilities on the carrier for delivery without production of B/L (1) (2)”: The topic has been hot in China in recent years, and is the important part of this thesis.

**Chapter 5** deals with the theories and principles underlying the rule of delivery against presentation of bill of lading, i.e. the presentation rule, and the general liabilities on the carrier, for delivery without bill of lading.

Presentation rule is established by the merchant customs, and, it is also the carriers undertakings under the contract of carriage and bills of lading. The requirement on presentation of the bill of lading however, is separated from the function of the bill of lading as “document of title.” Rather, being the “document of title,” the bill of lading strengthens the rule of presentation. In addition, the negotiability of the bill of lading also confers the right to the legal holder of B/L to demand the goods, which on the other hand, enhances the need to present the B/L in order to receive the delivery, though which is not the real reason for the presentation rule.

Despite the legal conditions, due to various reasons delivery without bill of lading is rather common in shipping practice. Carriers have been trying to exempt themselves from the presentation rule, each approach has limitations however and the contractual obligations on the carrier are just difficult to be discharged altogether. Telex-releasing of cargo, as the increasingly popular practice in China, is also explained in the thesis. All these practices, once again, proves the need to have a clear and complete system in regard to delivery.

Chapter 5 then looks into the causes of action against the carrier for delivery without B/L and, the carrier’s liabilities for the wrong delivery without B/L, both in general circumstances. Delivery without B/L may constitute a breach of contract, meanwhile also an infringement on tort. The author suggests dealing with the issue on basis of contract.

**Chapter 6** mainly deals with exemptions the carrier may have to his liabilities for delivery without bill of lading. Based on discussions about several Chinese cases, the thesis concludes that in special cases, the delivery by carrier without the presence of B/L may be justified. Such cases include the ratification of the delivery by the holder of the bill of lading, exhaustion of the bill of lading as a documents for delivery, and so on.

As to the application of the presentation rule to straight bill of lading, the thesis gives a comparison on this issue among theories and practices in countries. Based on the analysis of the underlying principles and attributions of the presentation rule, and the function of straight bill of lading, it is suggested that the presentation rule shall apply, unless there are express provisions otherwise towards this purpose in

the bill of lading or under the contract of carriage, or there is express statute that excludes this rule to the straight bill of lading.

In addition, the thesis identifies the consignee under a straight bill of lading as either the shipper named on a bill of lading, or the named consignee who holds the bill of lading, who are entitled to the delivery of the goods unless the rights under such contract or the document have been successfully transferred to another person.

In the end, the thesis also offers suggestion for the situation when the bill of lading is claimed to be lost, and the interpleading is regarded as a practical approach.

**Chapter 7**, remedies for the carrier when the consignee fails to take delivery: the thesis illustrates the situations of the obstacles for the carrier to deliver the goods, analyses the legal natures of taking delivery, and, puts forward the remedies for the carrier when the goods are retained in his hands for the reason of merchant party.

It is concluded in this thesis that taking delivery properly is both a right and an obligation. The one who is obliged to take the delivery is the consignee if he claims, or indicates his intention by actions, to obtain the right in relation to the goods under the contract of carriage, or the controlling party should such a consignee be missing. Without such controlling party, the shipper then will be the person who is finally bound to make the goods deliverable or to take the delivery.

The remedies provided by national law will discharge the carrier from the obligation of the actual delivery or of the manner as agreed, and may constitute a constructive delivery. Meanwhile, they may reduce the carrier's responsibilities to the safety of the goods and transfer the risks and expenses from the carrier to others accordingly.

After analyses of the conditions for exercising legal remedies, the thesis suggests a more comprehensive system of remedies for the carrier in addition to the warehousing of goods, which may be applied to different situations: 1) seeking the instruction of delivery or disposal of goods by the controlling party or the shipper; if he fails to do so, 2) storing the goods at appropriate place; 3) retaining the goods as a lien; 4) compelling the taking delivery of the goods by injunction; 5) selling the goods by order of court; 6) opening, unpacking the goods etc.; 7) depositing of goods at appropriate place.

## **Limitation of the thesis**

The research of this thesis is concentrated on the system of the contract of carriage. However, as mentioned at the beginning, delivery of goods by carrier is a complex issue. The rights and responsibilities of the carrier and the counterparts may also

connect with and be subject to the transfer of the ownership, the transfer of the risks of the goods and so on. The interrelations between the right for delivery of the goods and the property right or risks of the goods might well deserve another research under a specific subject. Limited by the scope of my thesis, I did not include these subjects in it.

In addition, the identification of carrier is another difficult, challenging and interesting subject, which has been hovering around the maritime circles for years. The issue in my opinion is the subject for another big book, while valuable work has been carried out and achievements attained, by Erasmus University Rotterdam.<sup>12</sup> In my thesis, all the discussions are based on the assumptions and conditions that the carrier has been properly identified.

Another interesting subject that is yet again, not touched in this thesis is the legal status of the shipping agent as well as the actual carrier with respect to delivery.<sup>13</sup> Though these two subjects can never be ignored in maritime theory or practice, as aforesaid, I limit my thesis, for the same reason, to the contractual carrier opposing to the shipper or the consignee, in discussing the contractual obligations, rights, liabilities and remedies on delivery for, and of the carrier.

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<sup>12</sup> See F. G.M. Smeele, *Passieve Legitimatie Uit Cognossement* (“Identity of the Carrier Legitimated by the Bills of Lading”, in Dutch), 1<sup>st</sup> ed., Kluwer , 1998. This book is the publication of the author’s Doctorate dissertation in 1998 in Law Faculty of Erasmus University Rotterdam.

<sup>13</sup> The liabilities of these two parties on delivery also are the hits in China in these years. See, for example, Xu Yang-yong, “Liabilities on Carrier when the Goods are Delivered by the Shipping Agent Without Bill of Lading,” in *Practice and Theory on Maritime Justice*, Tang Neng-zhong (chief editor), 1st ed., Law Press, 2002, pp.77-93; see also Yin Dong-nian, Zou Ying-ying, *Liabilities between the NVOCC and the Ocean Carrier under Contract of Carriage of Goods by Sea*, Shipping Exchange Bulletin (Shanghai), 15, 2003,pp.6-7.