Chapter 1

Legal Systems on Delivery

In this chapter, I will make a sketchy review of the rules on delivery in the international and Chinese regimes. Mainly, the rules shall be the special maritime legislations or the contract of carriage ones. Without such special provisions, the general systems that may be applicable to the delivery of the goods or the contract of carriage by sea shall be introduced.

1. International regimes

As we all know, the legislating on contract of carriage of goods by sea began at the later part of the 19th century.

In the 19th century, or even earlier, the carriers added various exemptions into the bills of lading, which discharged them from the liabilities for the safety of the goods. The exemptions in some bills of lading even amounted to sixty or seventy articles. It is even so observed that the carriers were only entitled to the payment of freight but without any responsibility.[1] Under such situation, the USA started to confine the "freedom of contract" on the bill of lading. In 1893, the *Harter Act* was promulgated and established certain statutory responsibilities and exemptions for the carriers on the carriage of goods from or between ports of USA. The act was the first statute that obligates the shipowner to exercise due diligence to make the vessel seaworthy,[2] and to properly load, stow, custody, care of and deliver the goods.[3] Meanwhile, it provides for the exemptions of the faults or errors in

[1] Yu Shi-cheng, Yang Zhao-nan and Wang Huai-jiang, *Maritime Law (*hereinafter as "*Yu's Maritime Law*"), 1st ed., law press, 1997, p.127.
[2] Sect. 2 *Harter Act*.
[3] Sect.1 *Harter Act*.

navigation and the management of the said vessel.[4] Following the *Harter Act*, Australia, Canada and other countries wrote the similar laws. So, this act is a landmark in the field of maritime law, and the principles established by it have been broadly accepted by the later national legislations or international conventions up to now.[5] However, though the *Harter Act* establishes the obligations on the carrier including proper delivery of goods, the act itself and the later legislations have not paid enough attention to the delivery of goods.

1.1 International conventions

The *Harter Act* and the following national legislations reflected the desires for the certainty and uniformity of the responsibilities of the carrier under carriage of goods by sea. The *Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* 1924, i.e. *Hague Rules* is an achievement with this purpose.

According the Rules, the "carriage of goods" covers the period "from the time when the goods are loaded on to the time they are discharged from the ship."[6] So, delivery is beyond the scope of this convention and the provisions all focus on the rights and obligations to the transport and the safety of the goods.

The protocol and amendment to *Hague Rules*, the *Hague-Visby Rules*[7] does not eliminate the former limitation of the scope of the convention, therefore, delivery is still not its essence issue.[8]

1978 *United Nations Convention on the Carriage of Goods by Sea*, i.e. *Hamburg Rules* does not limit its application to the bill of lading, but covers the contract of carriage of goods by sea. The *Hamburg Rules* deals with certain issues of delivery. It extends the responsibility period of the carrier to the delivery,[9] provides the criteria for the identification of delivery,[10] and, has established the definition and liabilities of delay in delivery.[11] However, to whom the goods shall be delivered, what will be the liabilities on the carrier when he makes wrong delivery and the issues alike are not involved in this Rules.

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[4] Sect.3 *Harter Act*.
[5] However, the systems under the *Harter Act* and *Hague Rules* and other regimes are not the same altogether.
[6] Art.1 (e) *Hague Rules*.
[7] February 1968, *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* that called as *Visby Rules* or *Brussels Protocol* was promulgated; the amended convention is called as *Hague-Visby Rules*.
[8] However, when the time for the notice of loss or damage of the goods and the time bar is concerned, delivery is involved under the both the *Hague* and *Hague-Visby Rules*. E.g., "the carrier and the ship may in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their *delivery or when they should have been delivered*" (emphasis added), art. 3.6 of *Hague-Visby Rule*s, see also art. 3.6 of *Hague Rule*s.
[9] Article 4.1, *Hamburg Rules*. For further reference see Chapter 2 .
[10] Article 4.2 (b). *Hamburg Rules*. For further research see Chapter 3.
[11] See Article 5,6, *Hamburg Rules*.

Except for these international conventions, some international instruments have dealt with the issues of the delivery, such as the *CMI Uniform Rules for Sea Waybill*.[12] But the explorations are very limited.

1.2 National legislations

The *Harter Act* and its followers established the compulsory obligation of proper delivery of goods on the carrier, but they do not provide further detailed principles of the responsibilities of delivery. Later, with the acceptance of *Hague Rules*, major shipping countries introduced the rules into their national regimes and promulgated in number of Carriage of Goods by Sea Acts (abbreviated as "COGSAs"), such as COGSA 1936 of USA, COGSA 1924 and 1971of UK and so on. These Acts usually are the copies of *Hague* or *Hague-Visby Rules* and do not deal with the delivery. The legislations in other Common Law countries, such as Australia, Canada and so on are the similar.

However, USA is the country that provides relatively developed stipulations on the obligation of the carrier to delivery. The *Federal Bill of Lading Act* 1916, i.e. *Pomerene Act*, and its successor, USCA Title 49, Ch.801, deal with the title and rights and obligation under the bill of lading. They have stipulated carrier's duties to deliver the goods under different bills of lading.[13] The focus in this aspect is on the person to whom the goods shall be delivered. The further researches shall be done in the later chapters.

As to the UK, there is no special statute that applies to delivery directly. The *Bill of Lading Act 1855* had established that the rights and obligations of the consignee and endorsees under bills of lading were transferred through the transfer of the property on the goods. Therefore, the aforesaid important principles had influenced the right for demanding the delivery and right of suit for the delivery. However, the *Bill of Lading Act* was repealed by the COGSA 1992. The new act reflects great developments in the theories of contract of carriage of goods by sea and has resolved the rights of suit against the carrier under bills of lading and other shipping documents. These rights of suits will include the rights of demanding for the delivery. So, this is an important act that may help to decide to whom the goods shall be delivered under various documents. Chapters 4 to 6 will make further reference to this act.

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[12] *CMI Uniform Rules for Sea Waybills* is a rule issued for the voluntarily adoption by the concerned parties. Art.7 provides: "(i) The carrier shall deliver the goods to the consignee upon production of proper identification. (ii) The carrier shall be under no liability for wrong delivery if he can prove that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact that party." For further introduction of this Rule see Chapter 4 of this thesis.

[13] See § 80110,80111 of USCA Title 49.

Meantime, in some new water legislations, delivery begins to get a position under them. For example, the *Scandinavian Maritime Code* provides a relatively complete system of the duty of delivery under bill of lading and sea waybill,[14] *German Transport Reform Act* (hereinafter referred to as "German TRAT" or "TRAT") makes stipulations on the time of delivery,[15] the resolutions for the obstacles of delivery,[16] delivery on exchanging the consignment bill[17] and so on.

In addition, vast leading cases in the common law countries have provided guidance to the carrier's responsibilities for delivery of the goods. These statute developments and case law are of great reference to both Chinese and international legislations.

Nevertheless, in the worldwide range, the legal systems on delivery are still rare and limited.

2. Chinese legislations

Traditionally, China is one of a civil law, or, in other words, statute law countries. Generally, the sources of law consist of statutory regulations. Since China is not a member country of any of the aforesaid three international maritime conventions, the legal system on the carriage of goods by sea is composed of national laws.

At present, in China, there are four acts that may apply directly to the contract of carriage of goods by sea: the *General Principles of Civil Law, Maritime Code of P. R. China*, *Contract Law of P. R. China*, *Regulations on Carriage of Goods by Domestic Water-way*.

2.1 General Principles of Civil Law

After the "Culture Revolution,"[18] China resumed attention to the development of the economy and to the protection of civil rights. Meanwhile, the country tried to make up or re-establish the legal system that had been almost totally destroyed during the past decade. In this background, *General Principles of Civil Law* (hereinafter as *"General Principles"*) was approved by National Congress of China and promulgated in 1982.

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[14] E.g. section 18-22, 54,55,58 of the *Finnish Maritime Code*.
[15] E.g. section 423 TRAT.
[16] Section 419 TRAT.
[17] Section 445 TRAT.
[18] The duration was from 1966 to 1976.

General Principles is the "constitution" of the Civil Law[19] in China, which intends to provide the basic principles for all the civil legal relations including those relating to the personal right, property title, family relationship, contract, tort and so on. This act had played a very important role over the past twenty years. However, to some extent, most of the provisions are too general and need a further interpretation. Therefore, the Supreme Court of P. R. China formulated the *Legal Views on the Implement of General Principles of Civil Law* in January 1988 (hereafter as *"Legal Views"*) in order to provide precise guidance for the judicial practice as well. The *Legal Views* achieves effectiveness in the practice.

In addition, for the reason being made under the planned-economy system of China, one of the principles of this Act is "forbidding the destroy of the national economy plans."[20] Therefore, with the development of "market- economy" in China, this act gradually does not conform to the practices and theories very well. With the improvement of the legal system, some of the out-of-date provisions have been revised, and some absences under it have been filled by *Contract Law of PRC* and other special acts.

Though certain principles established by the *General Principles* will be applied to the contract of carriage of goods by sea in general, this Act does not provide any special provisions on the contract of carriage, nor does it give the provisions on the delivery under any contract of carriage.

In the following parts, I will put more words on the other three acts on this issue. And, they shall be the focus of discussion on Chinese systems. Nonetheless, it's also very possible to make reference to the *General Principles* for the research in some circumstances.

2.2 Maritime Code of P. R. China

2.2.1 General introduction

In the 1950s, at the early stage after the founding of the People's Republic of China, the country commenced to make a maritime code. Several drafts had been

[19] In China, civil law has the broad meaning that means the regulations adjusting the personal and property relationships between the parties with equal positions. It consists of the contract law, tort law, family law, personal law and so on. Traditionally and theoretically, P.R. China is under the system of the "integration of civil and commercial law," the code will cover the narrow civil law rules and commercial law rules, see Liang Hui-xing, *General on Civil La*w, 1st ed., law press, 1996, p.11. If not indicated expressly, in the thesis, "civil law" has the broad sense including both the "civil law" in narrow sense and "commercial law." It needs to be noted that in recent years, more and more scholars have appealed for the independence of commercial law from the civil law, see for example, Wang Xiao-neng, Guo Yu, *Necessity of the Independent of Commercial Code from the Civil law*, www.law-thinker.com, 20,sept, 2004.

[20] See Art.7, *General Principles of Civil Law.*

written, but the process was suspended by the "Culture Revolution" and other disturbances from time to time.

After the adoption of the "reforming and opening" policy in China since the later period of 1970s, the desire for a maritime code was intensified unprecedentedly with the quick development of the foreign trade and maritime activities. The drafting was on its track again. *Maritime Code of P. R. China* (hereinafter abbreviated as "CMC") finally came into force on 1st July 1993, after scores of drafts in decades.[21]

With one of the main purposes to "regulating the relations arising from maritime transport and those pertaining to ships,"[22] CMC establishes a comprehensive system on maritime activities in P. R. China and the contents of the code range from the "ship" to the "contract of carriage of goods/passenger by sea," "charterparties," and the admiralty affairs and the "choice of law in foreign related affaires."

Despite a few provisions may be defined as public law system such as the vessel's right of flagging[23] and the public obligations upon crews,[24] most of the Act governs the private legal relationship between parties in equal positions such as a contract. Therefore, the code was deemed as a special law in civil law system. According to the rule of *lex specialis derogat generali*, when the provisions or certain principles of it conflict with theses in *General Principles of Civil law* or other general acts, the CMC is or will be prevailing. In fact, certain principles and systems under maritime law are very special and different from the traditional civil law theories; it is the same under the CMC.[25]

One of the distinguished characteristics of the CMC is its wide absorption of international conventions or instruments. For example, it transplanted certain systems from the *1976 Convention on Limitation for Liability for Maritime Claims, International Convention on Maritime Lien and Mortgage, 1993*(draft) to the mortgage of ships and the limitation of liability for maritime claims.[26] In addition, as the contract of carriage of goods is concerned, the law borrowed from or made a lot of references to the provisions of The *Hague, Hague-Visby* and the *Hamburg Rules*, though China accepts none of them. Further research of the relevant provisions will be made in the following chapters. Moreover, the law gives priority for the application of the international treaty accepted by China.[27]

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[21] Based on *Yu's Maritime Law*, pp.14-15.
[22] Art.1, CMC.
[23] Art.5, CMC.
[24] Chapter 3, CMC.
[25] For example the exemptions for the carrier of the negligence of navigation, the limitation of the liabilities and others.
[26] See Chapter 2 and 11 of CMC.
[27] Paragraph 1 art.268, CMC, "If any international treaty concluded or accepted to by the People's Republic of

In addition, the CMC endows international practice or customs with legal effectiveness. According to paragraph 2 article 268, in the field where no provisions are embodied in international conventions and CMC, just is the international practices. Furthermore, some sections in the code were directly borrowed from international customs, e.g., the provisions of general average in Chapter 10 are directly taken from York-Antwerp Rules.

Attaching importance to international conventions and international practices is very helpful for the improvement of the theory and practice in China. Undoubtedly, it is also important for my research in this thesis.

2.2.2 Chapter IV and provisions on delivery

Chapter IV "Contract of carriage of goods by sea" has established the basic legal system on the rights, responsibilities, liabilities of the carrier, shipper, sometimes, as well as the consignee under a contract of carriage of goods by sea. In addition to the provisions on carrier and shipper's responsibilities,[28] this chapter embraces the functions and the contents of transport documents,[29] delivery of goods[30] as well as voyage charterparty,[31] multimodal transport contract[32] and so on. However, the provisions contained in this chapter shall not be applicable to the maritime transport between the ports of the People's Republic of China,[33] thus, the code merely apply to the international carriage contract of goods by sea.

Except most of the provisions on the voyage charterparty, the stipulations under this chapter are mandatory.[34] Article 44 specifies "any stipulations in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of this Chapter shall be null and void …", and it is not allowed to reduce the liabilities on the carrier, while the increase of his duties and obligations shall be effective.[35]

China contains provisions differing from those contained in this Code, the provisions of the relevant international treaty shall apply, unless the provisions are those on which the People's Republic of China has announced reservations."

[28] Art.46-70 CMC.

[29] Art.71-80 CMC.

[30] Art.81-88 CMC.

[31] Art.92-101CMC. The provisions are permissive for voyage charterparty except for the applying to the shipowner of art. 47 concerning with the obligation of seaworthiness and art. 49 on the obligation "direct carriage" or "prohibition of deviation", see Art. 94 CMC.

[32] Art.102-106 CMC.

[33] Paragraph 2, Article 2, CMC, "The provisions concerning contracts of carriage of goods by sea as contained in Chapter IV of this code shall not be applicable to the maritime transport of goods between the ports of the People's Republic of China".

[34] Art.81-88 CMC.
The other provisions on the parties' rights and obligations shall be applied to the charterer and the charteree only if "there is no stipulations or no stipulations otherwise under a voyage charterparty," see Art. 94 CMC.

[35] "The provisions of Article 44 of this Code shall not prejudicing the increase of duties and obligations by the

However, the majority of the provisions are focused on the responsibilities of the carrier of those concerned with the carriage and the care of the goods, i.e. mainly with the physical safety of the goods, and very few of them deal with the process and the rights and obligations of the delivery.

The provisions directly relating to delivery are those in section 5 "Delivery of Goods". The provisions in this section concern the effectiveness of a notice of damages to or losses of the goods,[36] the inspection of goods,[37] the warehousing of goods when the goods are not taken over,[38] and the right of lien on the goods.[39] Though these provisions relate closely to the process of delivery, except the warehousing of goods in article 86, they do not handle the rights and the responsibilities of the carrier concerning the delivery of the goods, and some of them even still concentrate on the burden of the proof of the safety of the goods.

Besides the above-mentioned articles, some other provisions are concerned with the delivery. Article 50 defines the "delay in delivery" and provides for the liabilities of a carrier in this circumstance.[40] In addition, article 71 is usually regarded crucial to the obligations of the carrier on delivery. Apart from the two functions of a bill of lading as "the evidence of the contract of carriage of goods by sea" and "a receipt of the goods by carrier," it is stipulated in this article that a bill of lading "is a document……(and) based on which the carrier undertakes to deliver the goods."[41] Furthermore, this article prescribes, "A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking." This article puts forward the criterions identifying the consignee. However, this article is still under controversy and it is not very clear on the further obligations of the carrier for the delivery of the goods under the bill of lading. For instance, whether the rule of delivery against the presentation of bill of lading must be insisted or not when this kind of document has been issues, what will be the situation of delivery under straight bill of lading[42] and other questions are not clearly answered. Further discussion shall be in Chapter 4 to 6.

Moreover, article 91 provides that under some special circumstances, the master shall be entitled to discharge the goods at a safe port other than that provided for in a contract of carriage of goods by sea. Not very conspicuously, but impliedly, this

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carrier besides those set out in this Chapter." Art. 45.

[36] Art.81 ,82, 84, 85 CMC.

[37] Art .83, 84 CMC.

[38] Art. 86 CMC. Further study will be in chapter 7 below.

[39] Art. 87,88 CMC.

[40] For detailed study see Chapter 4 below.

[41] This is translated from the official version , the Chinese version, but in the published English version in China, it was translated as "(bill of lading) is document … based on which the carrier undertakes to deliver the goods *against surrendering of the same*" (emphasis added), see the appendix.

[42] This is the controversy under the Chinese version.

provision gives the carrier a right to change the place of delivery in special cases.

2.2.3 Evaluation

Frankly, the CMC is a successful instrument in certain period and has played a very important role in the maritime field. However, with the development of the practices and the researches, the shortcomings and insufficiencies of this code appear. The researches on improvement of this code have been launched.[43] Nevertheless, at present, the CMC is still the most important law that applies to the contract of carriage of goods by sea in China, and my research will also put relatively more energy on this act.

Though some of the provisions under CMC deal with the time, place of the delivery and the person to whom a delivery shall be made under a bill of lading, it does not handle the identification of consignee under other shipping documents, nor does it put clear obligations on the carrier to the delivery or the liabilities on him when he breaches the obligations. Briefly, the provisions on delivery are far from systematical; even, some provisions such as the responsibility period of carrier make the legal statue of the delivery confusing. The insufficiency on this topic has brought confusion, even chaos to both the judicial and shipping practices. Therefore, the research on the system of the responsibilities of the carrier on delivery is also very important for the improvement of the CMC, from another angle, the improvement of the law shall help to diminish the confusion and to resolve the disputes well.

2.3.Contract Law of P. R. China

2.3.1 Evolutions[44]

The evolution of the Chinese contract laws is related closely to the changes of the economic systems in China. On 13 December 1981, *Economic Contract Law of P. R. China* (hereafter abbreviated as "Economic Contract Law") became effective. As a legal production under a "planned economy" system, the law put forward the purpose as the "guarantee to the fulfillment of national economic plans," and only the socialist organizations are entitled to make "economic contracts."[45] With the

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[43] From 2000 to 2002, research teams that were organized by Shanghai Maritime University and Dalian Maritime University were working on the projects of "Study of Modification of CMC" under the auspices of the Ministry of communication of PRC. Two separate collections of reports were completed and surrendered by them.

[44] See Liang Hui-xing, *The Success and the Insufficiency of the Contract Law*, www.jcrb.com/, 10 Sept. 2004; see also Jiang Ping (chief editor), *Detailed Interpretations of Contract Law of PRC*, 1st ed., 1999, Preface.

[45] This concept was borrowed from the theory of former USSR.

reverting to the "market economy" system and the private ownership system, the *Economic Contract Law* was revised in 1993. At the same time, the *Law of the P. R. China on Technology Contracts* and the *Law of P. R. China on Economic Contracts involving Foreign Interests* are promulgated and applied to special fields as the titles indicate.

However, the revisions of the Economic Contract Law were very limited and certain new coming contracts, such as brokerage, employment and so on are going on out of the scope of the former laws. The effectiveness of these new comers and the legal relationships under them remained vague in not a short period. Meanwhile, because of the short of deeper researches of the theories of contract law as well as the systems of foreign laws, some principles and systems established by these laws were with defects and deviated from the practice and the nature of the economic activities. And, the non-harmony among the three acts has resulted in the confusion of the contract systems. Therefore, closely consequent to the revision of Economic Contract Law in 1993, formulating a unified contract law was set to the agenda. After the six years' drafting, *Contract Law of P. R. China* (hereafter abbreviated as "Contract Law" or "CLC") came into force on 1 October 1999 and repealed the three others.[46]

The CLC was commented as a successful one with its development of the wide scope of application and the enrichment of the contract system. It establishes the strict liability rule to the breach of contracts,[47] introduces modern rules such as the freedom of contracting,[48] right of evocation,[49] subrogation,[50] agency by estoppels[51] and so on, though the insufficiencies exit[52] as every act may occur.

2.3.2 Influences on contract of carriage by sea

The provisions of CLC can be divided into two categories: The general rules and special ones on certain nominate contracts. In the former part, it includes the common principles, conclusion, performance, termination and a series of transactions of the contracts and the liabilities for breach of the contracts.[53] The other part concerns the special rights and obligations of counterparts under sales contract, loan contract, storage contract, brokerage contract etc., as well as contract

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[46] Art.428 CLC.
[47] In the former contract laws, the rule to govern the liability for breach of contract was the doctrine of fault liability. The new rule was regarded as the very improvement, Supra fn. 44.
[48] Art.4 CLC
[49] Art73 CLC.
[50] Art.74 CLC
[51] Art.49 CLC.
[52] supra fn.44, Liang Hui-xing's, see also Wei Zheng-yin, *Contract Law is a Good One of the Civil Legislatio*n, www.jcrb.com/zyw/n201, 10 sept.2004..
[53] Chapter 1 to 8 CLC.

of carriage.[54]

CLC applies to the contract of carriage of goods by domestic waterway. In the international carriage, when Chinese law is the proper law so determined by the rules of conflict law,[55] the relationship between CLC and the CMC is the general law and the special one. On the one hand, according to the principle of *lex specialis derogat generali*, the provisions under CMC shall prevail when they are different from those in the CLC. On the other hand, without the specified stipulations on certain issues under special law, the provisions under the general law in this field shall be applicable. Since CMC does not provide specifications on all aspects (some of them have been mentioned in the above part) of the contract of carriage of goods by sea, CLC shall be applied to these issues including those on delivery. Indeed, the CLC has brought series of influence to the carriage contracts by sea, such as the forms of the contract, variation, assignment and termination of the contracts, the right of control of the goods by the shipper, liabilities for compensations for damages and so on.[56]

2.3.3 Provisions on delivery

Chapter 17 "Carriage Contract" under *Contract Law* deals with the contracts of carriage of passengers and goods as well as multi-model transport contract.

Article 308 of this act provides the shipper with the rights to change the destination or the consignee as well as the right to suspend the carriage, requiring the return of the goods before the carrier delivers the goods. This provision gives the shipper very wide rights of the control of the carriage and delivery of the goods. Further discussions on shipper's right of control under the contract of carriage in various situations will be given in Chapters 4 to 7.

Article 309 puts the obligation on the consignee to take the delivery of goods promptly. In addition, Article 316 entitles the carrier to deposit the carried goods when the consignee is unknown or when the consignee refuses to take the goods over with no justifiable reasons,[57] which provide a remedy for the carrier when the goods are not taken over.

Moreover, CLC confers the inspection of the goods as both the right and the

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[54] Chapter 9 to Chapter23 CLC.

[55] Contract Law itself does not provide the provisions on the choice of law as to the contracts with foreign elements. Whistle, Chapter XIV of CMC is the "Application of Law in Relation to Foreign-related Matters," and there is a special chapter under the *General Principle of Civil law* on the choice of law too.

[56] Further study please see to Han Li-xin, "Certain Understandings on the Relationship between the CLC and the Chapter IV of CMC"; Zhou Hong-kai, "Influences on the Systems of International Carriage of Goods By Sea by the Contract Law," both in *Annual of China Maritime Trial*, Jin zheng-jia (chief editor), 2000, the people's communication press, 2000, pp.275-284, 265-274.

[57] Among the general rules, art.101-104 of CLC deals with the right of depositing of the object.

obligation of the consignee when taking the delivery, and deals with the notice of the damages to goods in "agreed time or reasonable time."[58]

Except for notice of damages to the carrier under article 310, it's a general viewpoint that aforesaid provisions shall apply to the delivery under the contract of carriage of goods by sea.

2.3.4 Evaluation

CLC is a great development of the contract legal system in China as commonly commented, and also, it provides important supplements to the contract of carriage of goods. However, with the further research into it, we may find that some of its provisions on the contract of carriage of goods are not adapted to the contract of carriage of goods by waterway, especially to the international contract of carriage by sea, or to the functions of the bills of lading very well.

Nonetheless, because of the tradition of the statute law system, it seems very difficult for the judges and arbitrators in China to ignore the systems under contract law, when they make decisions on the disputes in respect of delivery even if certain of the provisions are unreasonable. So, the application of the contract law to the contract of carriage of goods by sea has been a conundrum for the practitioners, judges and scholars. It has been said that the shortage under CMC on delivery brings the ambiguity and disputes in this field, but more seriously, certain stipulations under CLC result in further chaos to the legal system and practices on delivery. The further analysis on the provisions under contract law shall be put in the later chapters.

2.4 Regulations on Carriage of Goods by Domestic Waterway

2.4.1 Evolutions

In order to implement the 1981 *Economic Contract Law* in the field of carriage contract, the State Council promulgated the *Implementation Rules on Contract of Carriage of Goods by Waterway* in 1986. In the same year, the Ministry of Communication issued the *Regulations on Carriage of Goods by Waterway* for a further detailed application.

With the modification of *Economic Contract Law* in 1993, the *Regulations on Carriage of Goods by Waterway* was replaced by the 1995 *Regulations*. Subsequently, with the enforcement of the 1999 CLC, *Regulations on Carriage of Goods by Domestic Waterway* (hereafter as the "*Domestic Waterway Regulations*"

[58] Art.310 CLC .

or "*the Regulations*") was promulgated by Ministry of Communications of P. R. China and entered into force on 1 January 2001. The former 1995 one was hence abolished. This regulation applies to the carriage of goods by domestic waterway, including the carriage between China's ports by sea.[59] Therefore, the international carriage of goods and the domestic one are governed by two systems.

The separation of the two systems has its historical reason. During the drafting of CMC, there was a warm debate on the integration of the international contract and the domestic one under the new act. However, to the majority, the differences between the two kinds of contracts seemed "impossibly to be reconciled" at that time: Firstly, the contract of carriage of goods by domestic waterway was governed by national economic plans, and, the freights even were fixed by the government. However, there was much more freedom to the arrangement of foreign trade and international shipping in China. Secondly, the traditions of the applicable laws were different. Usually, the *Hague Rules* or *Hague-Visby Rules* might be applied to the international carriage contracts through the paramount Clause in bills of lading, though China is not a member state of either of them. While, the domestic contracts were governed by the *Economic Contract Law* and its implementation rules as abovementioned. Moreover, it's very difficult to introduce the exemptions of the negligence of navigation, negligence of the management of vessel and the limitation of liabilities and other defenses for the carriers into the domestic arena.[60]

Therefore, CMC finally applies to the international carriage and leaves the carriage of goods between Chinese ports out of its scope.

Nevertheless, in recent years, more and more scholars are calling for the unification of them by the modification of the CMC for the reason that the independence of the systems on the international and domestic carriage do not exist any more.[61]

2.4.2 Waterway Regulations and CLC

The *Domestic Waterway Regulations* is an implementation of the Contract Law on the contract of carriage of goods by domestic waterway. During the drafting, the

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[59] The Domestic Waterway Regulation consists of "General rules," "Conclusion of a contract," "Rights and Obligations of the concerned parties under a contract," "Transport Document," "Receipt and delivery of the goods," "Special provisions on Voyage CharterParty," "Special provisions on container transport," "Special provisions on roll-in roll-out transport" and the "Supplementary provisions."

[60] Based on Hu Zheng-liang, *a Looking Back of the Points under Contract of Carriage of Goods by Sea During the Drafting of CMC*, www.logistics.nankai.edu, (resource from China Ocean Shipping, 2003,7), 1 Sept. 2004.

[61] E.g., Zhang Yong-jian, *On Establishing a Unified Legal System on Carriage by Sea*, Review of Maritime Law, 2002,1, pp.48-57.

legislators tried their best to give a full consideration to the main legal characteristics of this kind of contract and the practices of it. Compared with the CLC, the provisions under the *Waterway Regulations* are more detailed and practicable, and, some of them are more reasonable.

However, the *Domestic Waterway Regulations* was enacted by the Ministry of Communication, but the CLC was approved by the National People's Congress of P. R. China, so it is inferior to the latter in the effect. The provisions under *the Regulations* shall not conflict with those in the Contract Law. And, the general stipulations and principles established by CLC are the bases of the *Regulations*, which will not be repeated here. Meanwhile, the *Regulations* had made lots of references to the CMC.

2.4.3 Provisions on delivery

The *Domestic Waterway Regulations* does not provide for many provisions on delivery except those in Chapter V. This Chapter "Receipt and delivery of goods" mainly deals with the practice during the processes of receipt and delivery of the goods. The Regulations emphasizes the measuring, counting and the records of the condition and order of the goods during the delivery of them. Different from the international shipping, only a water waybill or other similar document will be issued in the domestic carriage. *The Regulations* provides for a special stipulation on the person to whom the delivery should be made and Article 68 stipulates that when the carrier is delivering the goods, he shall check and confirm the proper identifications of the consignee and of the person who is entrusted to take the delivery.

2.4.4 Evaluation

As one of the draftsmen of *The Regulations*, I know clearly that this document had tried its best not only to introduce certain customs and legal systems of international shipping to the domestic field under the permission of the CLC,[62] but also to create some new stipulations in China in order to make up for the absence in the laws abovementioned in the field of carriage of goods, especially in the domestic field. These innovations are the wide application scope that covers the contract of carriage and the legal relationships relating closely to the contract, the system of actual carrier, the expanded responsibilities period, the definition of

[62] Certain of the draftsmen support the integration of the systems upon the international and domestic carriages.

delay in delivery, the practical guidance for the cargo transition and so on.[63] These innovations are very helpful to resolve some difficulties both in practice and theory. However, due to the restriction of its lower legal rank and the undeveloped theoretical researches at that time, the *Domestic Waterway Regulations* does not make up the defects under the contract law on delivery, nor demonstrates the legal meanings of delivery and systematical stipulations well. Some problems and confusions remain.

In addition to the above acts, the *Collateral law,*[64] *Regulations on Cargo Handling in Ports*[65] and some others may be applied to the carriage of goods by sea appropriately. Furthermore, though China is a statute law country and judgments are not the official source of law, the decisions of some special cases[66] are more and more influential and push the development of the theory, jurisdiction and legislations.

3.Tendency---- UNCITRAL Draft Instrument of Transport Law

3.1 General introduction

The whole project of the instrument originates in the UNCITRAL working group dealing with e-commerce. In 1995, the subjects of "document of title" was on its program and it was viewed that the functions of the ducument of title can be incorporated in a structure of electronic messages instead of the traditional virtulisation of the document. However, this "functional equivalent" approach raised many questions in respect of the the negotiable bill of lading. The laws on the fucntions of the bill of lading are far from uniform, though they are well known in the practice. In addition, the existing legislations mainly focus on the liabilities on the carrier to the carriage and care of the goods. As far as the exact rights and liabilites of the carrier, the shipper, the consignee and the intermediate holder of the bill of lading are concerned, in most of the regimes, there is no statutory rule, or, there are rules just based on the practices of the trade and case law.

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[63] See Ye Hong-jun, Weng Xiao-bing, *Interpretation of the Regulations on Carriage of Goods by Domestic Waterway & Regulations of Cargo Handling in Ports* (hereafter as *"Interpretation of Waterway Regulations"*), 1st ed., The people's Communication Press, 2000,pp.3-4.

[64] Promulgated by the Standing Commission of National People's Congress of PRC 30 June 1995, put in to force since 1 October 1995.

[65] Formulated by the Ministry of the Communication of PRC, came into force on 1 Jan. 2001.

[66] Especially the decisions published in the *Gazette of the Supreme Court of PRC*, which were made by the People's Supreme Court of China, will usually be the guidance for the followings decisions by the courts in the similar cases.

Moreover, because of the traditional paper appearance of the document, the bill of lading, much law is typically paper-related, and any use of the electronic bill of lading can't be based on a "simple reference to the law applicable to paper bills."[67] And, more importantly, if the use of electronic bill of lading was legally based on a transfer of rights and possibly the obligations, it must be clear that what are the rights and obligations involved. In order to make out these rights and obligations, the system for the contract of carriage became the focus. However, the lack of uniformity and certainty in law is the serious impediment to the development of the e-commerce in transport. So, UNCITRAL called for proposals to provide for uniformity of law relating to the contract of maritime carriage.[68]

CMI took up this challenge and submitted to the UNCITRAL an extensive preliminary draft instrument on transport law after more than three years' (1998-2001) productive efforts. With slight amendment, UNCITRAL published the instrument that is usually called as "UNCITRAL Draft Instrument"[69]in December 2001. Meanwhile, UNCITRAL set up work group III to take charge of it. After the general discussions on the urgency of the modernization of international law on the contract of maritime, the discussions are on the details of the individual provisions. The second detailed reading of the draft began two year ago. The revised drafts were published in 2003[70] and they are open for conversion.[71]

The main object of the Draft Instrument is to harmonize and unify the laws of international cargo carriage, especially those on the international contract of carriage of goods by sea,[72] in addition, to modernize the law to be apt to the practices under the globalization and the containerization background. Adaptation to the development of e-commerce is also one of its objects. So, UNCITRAL is working on the draft towards an international treaty. If it is successful, it will replace the *Hamburg Rules* and also will supersede The *Hague* and *Hague-Visby Rules*.

3.2 Main contents

The instrument applies to a "contract of carriage" "wholly or partly by sea from one place to another"[73] and may cover a "door- to-door" or "port to port" carriage

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[67] See G. J. Van der Ziel, *Survey on History and Concept*, Transportrecht, Juli/August 2004, pp.275-276 at pp.275-278.

[68] *Ibid*, see also G. J van der Ziel, *The UNCITRAL/CMI Draft for a New Convention Relating to the Contract of Carriage by Sea*, Transportrecht, Juli/August, 2002, p.265 at pp.265—277.

[69] *Draft Instrument on the Carriage of Goods (Wholly or Partly)(by Sea*), Doc. No. A/CN.9/WG.III/WP.21. Hereinafter, the document number will be abbreviated as " WP.21".

[70] A/CN.9/WG.3/WP.32. Hereinafter the document number will be abbreviated as "WP.32".

[71] Various proposals are submitted by nations, which are published in the website: www.uncitral.org/.

[72] See "Introduction", WP.21.

[73] See Sect. 1.5 of WP.21, Art.1 (a) of WP.32.

or others depending on particulars of contract.

The Draft Instrument reverted from the traditional focus of the carrier's liabilities to the safety goods to a much wider structure that includes the rights and obligations of the carrier, the shipper, the intermediate holder of bill of lading, as well as the performance party and documentary shipper. In addition, it does not limit itself to bill of lading, but deals with all kinds of negotiable and non-negotiable transport documents.

Meanwhile, the instrument makes some innovations on the legal systems, such as the system of the documentary shipper, the comprehensive system of right of control and so on.

Furthermore, taking the interrelation between the contract of carriage of goods and contract of sale into serious consideration is one of its distinct characteristics.

These aforesaid features are also reflected by the rules about delivery. The draft Instrument is the first international legislation document that pays much attention to the delivery, and provides for a relatively complete system relating to delivery.

It expressly stipulates the delivery as one of the basic obligations on the carrier and covers the "period of responsibility" "from the carrier …has received the goods for the carriage until the time when the goods are delivered to the consignee." In addition, it provides for criterions for the identifications of delivery. Chapter 10 "delivery to consignee" totally deals with the issues around delivery, and establishes the obligations and rights on all the parties concerned. Moreover, Chapter8 "Transport document and electronic records" and Chapter11 "Right of control" and others are also related closely to the delivery.

Most importantly, the UNCITRAL Instrument is trying to establish a comprehensive and clear system on the rights, obligations and the liabilities of the shipper, carrier and almost all the parties concerned under the contract of carriage of goods by sea and under various transport documents, which embraces the system on the issues of the delivery of goods by the carrier.

4. Conclusions

From the short review above, it may be concluded: on the international level, from the three carriage conventions to the national legislations, most of them focus on the rights and liabilities of the carrier in respect with the physical safety to the goods. The insufficiency of the legal system on contract of carriage by sea brings the vagueness and uncertainty to the issues of delivery of goods.

In addition, the laws on the contract of carriage of goods by sea are far from uniformity. Even if the countries have written some provisions on the delivery like

the Germany and the Scandinavian countries, they may also under the conflicts. In fact, during the drafting and the discussion of the UNCITRAL Draft Instrument, the conflicts of the laws and viewpoints in the field of carriage of goods by sea are reflected very well. The non-harmonization of the legal systems in this field is an impediment for the globalization of the trade and economy.

In China, the main applicable regulations on the contract of carriage of goods by sea are the *Maritime Code*, *Contract Law* and the *Domestic Waterway Regulations*. Like the international legislations, the un-completeness and insufficiency of legal system of the carriage contract makes the system on delivery vague. What rights and obligations of the carrier on the delivery has not been systematically answered. Even more seriously, some unreasonable provisions have led to further confusions in shipping practice and jurisdiction.

In summary, the prefecting of the legal system on contract of carriage of goods by sea, which includes the system on delivery, is very necessary, and the uniformity of it in worldwide range is urgent. Though it may be still far from the eventual internatioanl convention, the UNCITRAL Draft Instruemnt mirrors the desirability for the uniformity of the law on marine carriage of goods, in addition, it can reflect the tendency and the new developments of the theory, legislations and practices in this field to a great extent, though there must be certain compromises in it. Therefore, making reference to it will be very helpful for the improvement of Chinese law, and no doubt, for my research on delivery.