

Chapter 2

Legal Meanings of Delivery

Before a deep probe into the responsibilities of the carrier on delivery, a general review of the legal meanings of this act seems necessary and helpful.

1. Legal meanings under contract of carriage

1.1 The vagueness under China laws

Under CMC, the definition of the contract of carriage of goods by sea is “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.”¹ *Domestic Waterway Regulations* stipulates similarly.² In addition, CLC also provides a definition to contract of carriage of passengers or goods as “a contract whereby the carrier carries the passengers or the goods from the starting place of the carriage to the agreed destination, and the passenger or the shipper or the consignee pays for the ticket-fare or freight.”³

All of these definitions embrace only the stage of the carriage, and as introduced in Chapter 1, the focuses of these acts are the obligations and liabilities of the carrier to the performance of carriage, or in other words, of the transportation. Though the abovementioned Chinese regulations have some stipulations dealing

¹ Art. 41 CMC.

² Art.3 (1) of *Domestic Waterway Regulations* provides that “a contract of carriage of goods by waterway is a contract under which the carrier, against payment of freight, undertakes to carry by waterway the goods contracted for shipment by the shipper from one port (yard or point) to another port (yard or point).”

³ Art.288 CLC.

with the delivery of goods, they ignore the legal status of the delivery to certain extent and don not demonstrate the meaning of it under a contract of carriage of goods.

1.2 Delivery: carrier's essential contractual obligation

Despite the vagueness of the legal meanings of delivery, those limited statutory provisions on this issue and the practice of carriage of goods indicate that delivery of goods by carrier is an indispensable segment under a contract of carriage of goods. It is one of the essential obligations of the carrier under a contract of carriage of goods.

It is not very difficult to understand that from the purpose of the contract of carriage of goods. Generally, the purpose of the contract of carriage is to convey the concerned goods from one place to another, and let them available to the shipper, or usually, a third party at the destination. We call the third party or the shipper who gets the goods as "consignee." If the goods are not intended to be available to the consignee, generally, the carriage itself is meaningless,⁴ and of course, in most of the cases, the transportation will not be employed. Different from passengers, the goods cannot be moved by themselves from the ships or the places controlled by the carrier to the person for whom the shipper has hoped the goods to be carried. Therefore, the goods have to be moved, or "delivered" by the carrier or his agent or employees and others on his part. Even if the consignee comes to the ship or other places of the carrier to collect the goods from the hands of the latter, it is still necessary for the carrier to release them and make them available to the consignee. These actions of moving or releasing of goods by the carrier are usually the "delivery" by him. In this sense, delivery of goods is firstly the obligation upon the part of the carrier.⁵ The transportation or the carrying of the goods and the care of them are vital to a contract of carriage, but in my view, the delivery of the goods is the final object of the contract

Delivery of goods as a contractual obligation is supported and detailed by authorities. It is held that "the duty of the shipowner (carrier) ⁶ is to deliver to each

⁴ In ancient time and in some special cases, it might be possible that the owner of merchandise was the vessel operator and he carried the goods for his own account. But in such circumstances, there will be no contract of carriage of good, nor be delivery of the goods from the carrier.

⁵ On the other hand, taking delivery will be the obligation of the counterpart to the carrier in most circumstances. For further discussion see Chapter 7.

⁶ "Shipowner" is a customary term from charterparties. Strictly, it shall be expressed as the "carrier" in the contract of carriage by sea and a charteree in a charterparty. This citation is summed up on the delivery under a voyage C/P, but this charterparty belongs to the contract of carriage of goods by sea under CMC. See *Yu 's Maritime Law*, p.82. Though the voyage charterparty is not totally same as the contract of carriage of goods under the liner trading or under a bill of lading, the main purposes of the contracts are same, i.e. conveying the goods and delivering them to the consignee.

consignee the goods entrusted to the shipment for carriage to him,”⁷ and the shipowner is “under a contractual obligation” to deliver the cargo to a specified, or identifiable person.⁸ Or, “the contract of shipowner (carrier)··· is, implied to deliver the goods at their destination ‘in the like good order and condition’ in which they were when shipped,”⁹ et cetera. Although these recommendations are focused on different points, they all confirm that delivery of goods is an obligation on the carriers under the contract, though impliedly. These expressions point out the implications of this obligation, such as delivery of goods with good condition, delivery to proper consignee and so on. The detailed obligations of the carrier on delivery will be discussed in Chapter 4.

The theories under civil law also hold this view, the contents of the contract of carriage of goods are “not only the conveying of the goods, but also put the delivery of the goods at the destination as its final object.”¹⁰ The general opinions in Japan and Germany regard the delivery as the obligation on the carrier, too.¹¹

Therefore, some modern scholars redefine the term “carriage of goods” as “the transport of the received cargo to its destination and its custody from its receipt until delivery at its destination,”¹² which automatically includes the delivery of goods. When it applies to the sea carriage, it is beyond the traditional concepts of “carriage of goods” in *Hague Rules*,¹³ CMC¹⁴ and in others acts or traditional textbooks.

1.3 Statutory provisions

Besides the theories, the statutes in some countries stipulate delivery of goods as an obligation under the contract of carriage. As introduced in Chapter 1, the *Harter Act* firstly defined the “proper delivery” as a compulsory obligation on the carrier.¹⁵ Certain of the new legislations after the *Hague* or *Hague-Visby Rules* did similarly. For example, the article 21 in the book 8 of the Netherlands Civil Code¹⁶

⁷ Raoul Colinvaux, *Carver Carriage by Sea* (hereinafter referred to as “*Carver’s Carriage by Sea*”), 13rd ed., London Stevens & sons, 1982, para. 1655.

⁸ John F. Wilson, *Carriage of Goods by Sea* (hereinafter referred to as “*Wilson*”), Financial Times Pitman Publishing, 3rd ed., 1998, p.82.

⁹ *Carver’s Carriage by Sea*, para. 131.

¹⁰ Shi Shang-kuang, *Specific Obligatory Laws* (hereinafter as “*Shi’s Specific Obligatory Law*”), 1st ed., Publishing House of China University of Politics and Laws, 2000, p.583.

¹¹ *Ibid*, p.584.

¹² Georgios i. Zekos, *The Contractual Role of Documents issued under the CMI Draft Instrument on Transport*, Vol.35, JMLC, 2004, 1, p102.

¹³ Art. 1 (e) “carriage of goods” covers the period from the time the goods are loaded on to the time they are discharged from the ship, *Hague Rules*.

¹⁴ See the definition of “contract of carriage of goods by sea,” art. 41 CMC.

¹⁵ See art.1 of *Harter Act*.

¹⁶ Book 8 of *Netherlands Civil Law* covers the provisions on Traffic and Transport, art.21 is under the title 2 “General Provisions regarding Transport”, “Section 1 the Contract of Carriage of Goods”.

prescribes: “The carrier must deliver the things which he has received for carriage to destination, and in the state in which he has received them.” Article 378 under section of “contract of carriage of goods by sea” repeats this obligation. *Germany Transport Law Reform Act* (hereafter as “German TRAT”) is even clearer: “By virtue of the contract of carriage the carrier is obliged to carry the goods to their destination and to deliver them to the consignee.”¹⁷ In addition, *Budapest Convention on the Contract for the Carriage of Goods in Inland Navigation* (hereinafter abbreviated as “CMNI Convention”), which applies to the carriage of goods in European rivers, expressly puts the obligation on the carrier. “The carrier shall carry the goods to the place of the delivery within the specified time and deliver them to the consignee in the condition in which they were handed over to him.”¹⁸ And the UNCITRAL Draft Instrument provides, “The carrier shall, subject to the provisions of this instrument and in accordance with terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.”¹⁹

1.4 Delivery: completion of a contract

Generally, with the fact that the goods have been handed over to the party of the consignee and out of the custody of the carrier,²⁰ the performance of the contract of carriage is regarded as completed, hence, carrier’s obligations are fulfilled, and, he is usually discharged from the obligations under the contract thereafter.²¹ Therefore, the accomplishment of the delivery of goods usually brings the end of a contract of carriage of goods and the end of the responsibilities on the carrier to the goods.²²

In summary, delivery of goods is an essential obligation of the carrier under the contract of carriage. But most of the legislations do not provide it expressly, some legislation even makes it uncertain as to whether the carrier is obliged to a proper delivery, such as Chinese law.²³

¹⁷ Section 407 (1) TRAT.

¹⁸ Art.3.1 CMNI.

¹⁹ Sect.5.1 in WP.21, art.10 in WP.32.

²⁰ I herewith just put forward the very traditional and general condition of delivery. For the identification of delivery see Chapter 3 of this thesis.

²¹ This conclusion is based on the hypothesis that the delivery by the carrier is proper and justifiable. The discussions of the contractual legal meaning of delivery in this part are based on this premise.

²² But because of the provisions on responsibility period of carrier, the carrier’s responsibility to the goods may be completed earlier than a delivery, for fuller discussion see part 2 below.

²³ See the next part on the responsibility period in this chapter.

2. Delivery and responsibility period of carrier

2.1 Provisions of responsibility period

In the law of carriage of goods by sea, *Hamburg Rules* first put forward an express phrase of “period of responsibility” of the carrier. Article 4 “Period of responsibility” provides that the responsibility of the carrier under the convention covers the “period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.”²⁴ Following that, it gives further interpretations for the period of “in charge of” the goods from the time that the carrier takes over the goods to the time the goods have been delivered from him.²⁵

CMC also specifies the responsibility period of the carrier. Different from the *Hamburg Rules* providing a uniform period under the contract, the responsibility period of a carrier under CMC is divided into two categories:²⁶

One is concerned with the carriage of containerized-goods. In this case, the responsibility period of the carrier covers the “entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge.” In line with this provision, the delivery, the end of the responsibility period and the end of the carriage contract occur at the same time. The carrier shall be discharged from the obligations and liabilities to the goods by delivery of the goods.

The other one is dealing with the carriage of non-containerized goods. The responsibility period of the carrier for such kind of goods covers the period “during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom.” This definition is borrowed from article 1(e) “carriage of goods” of the *Hague Rules*²⁷ and is traditionally called as the “tackle to tackle”,²⁸ or “ship-rail to ship-rail”,²⁹ period, or sometimes as the “load to discharge” period.

²⁴ Art.1.1, *Hamburg Rules*.

²⁵ Art.4.2 of *Hamburg Rules* provides detailed criterions for identifying the “take over” and “delivery”. Further discussions see Chapter 3 below.

²⁶ Art.46 CMC.

²⁷ Division of Polices and Regulations of Ministry of Communications of PRC, *Interpretations of Maritime Code of P. R. China* (hereafter as “*Interpretations of CMC*”), The People’s Communications Press, 1994, pp. 37-38.

²⁸ *Ibid.*

²⁹ Yang Liang-yi, *The Bills of Lading and Related Shipping Documents* (hereafter as “*Yang’s Bill of Lading*”), 1st ed, Publishing House of China University of Politics and Laws. 2001, p.459.

So, the provision of the responsibility periods of the carrier under CMC is some of a mixture of the one defined in the *Hamburg Rules* and the scope under the *Hague Rules*.

However, the difference of the responsibility period between the two modes of transportations has brought confusion in China. The misunderstandings and the problems are mainly around the non-containerized goods, usually, the general and bulk goods. The following discussion on the responsibility period and the delivery shall mainly focus on this kind of goods if without indicating otherwise.

2.2 Legal nature of responsibility period

Though the laws don't give express definition for the responsibility period, we may conclude the legal nature of it.

Art. 5 "basic liability" under the *Hamburg Rules* provides that "the carrier is liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge defined in Art. 4..."³⁰ The CMC provides similarly, "During the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods,"³¹ "the carrier shall not be liable for the loss of or damage to the goods occurred during the period of the carrier's responsibility arising or resulting from any of the following causes (exceptions)..."³² In addition, the carrier is allowed to enter into "any agreement concerning carrier's responsibilities" with regard to non-containerized goods in the period prior to lading on and after the discharging of them.³³

In practices, for strengthening carrier's rights and diminishing possible uncertainty in that extending period, most of the bills of lading include a "before and after clause"³⁴ to exclude carrier's liabilities to the goods in the specified before loading and after discharging period.

Briefly, responsibility period means the period of the mandatory obligations of the carrier to the safety of the goods. The carrier shall be liable for the damages and losses that occur in this period. And, if the damages of the goods occur beyond this period, as a usual opinion, the carrier will not be liable for it if there is no gross negligence of them. Actually, the liabilities of the carrier for the damages to the

³⁰ Art. 4 of *Hamburg Rules* defined the responsibility period of the carrier.

³¹ Art.46 CMC.

³² Art.51 CMC.

³³ Art. 46 CMC.

³⁴ "Before & after" clause mainly deals with the carrier's responsibilities to the goods during the period before the loading of goods onto the ship and after the discharging therefrom. Usually, this kind of clause relieves the carrier from the responsibilities for the goods during this period.

goods that occur beyond the responsibility period are still controversial.³⁵

2.3 The end of responsibility period and delivery

In China, there is a viewpoint that the period of the responsibility of the carrier is as same as the period of the performance of the carriage contract.³⁶ According to this opinion, there is no difference in the point of delivery and the end of responsibility period under the carriage of containerized goods. However, in the carriage of non-containerized goods, the contract is completed at the end of the responsibility period when the goods have been discharged from the vessel, and the carrier will not be responsible for the performance of the contract any more.

I don not agree with this opinion. Especially, as far as the non- containerized goods are concerned, the discharging of the goods is not always the end of the performance of the contract, or is not always the delivery of goods.

Firstly, with the developments of the shipping practice, performance of a contract of carriage is usually beyond the responsibility period and the discharging of the goods.

Loading and discharging of goods are two stages of transport, in other words, the carriage of the goods. But the performance of the contract of carriage usually is beyond these two points. In China, there is a viewpoint that the performance of a contract of carriage is from the receipt of goods by the carrier to the delivery of them,³⁷ which may extend beyond the discharging. But in my view, very possibly, the performance of a contract commences even earlier than the receipt of the goods. Usually, as soon as the contract of carriage is concluded, the carrier shall be engaged for the performance of the contract, for instance, the carrier shall employ a proper warehouse or place to receive and to store the goods, to inform the shipper to surrender the goods, or, make the vessel seaworthy before he receives the goods from the shipper. Nevertheless, the point of the end of the performance is always the delivery, although the delivery itself will be different in various contracts or practices.³⁸

In ancient practice, the end of the performance of the contract and the discharging were usually overlapped because the consignee generally took over the cargo alongside the ship. In modern time, this situation is still popular under charterparties. “Charters often stipulate that the cargo shall be taken from alongside

³⁵ For further discussion see part 2.4 of this chapter.

³⁶ See Guo Yu, *Duration of Contract and the Responsibility Period – the Application Scope of Chapter IV of the CMC*, Admiralty Trial, 1993, p.8-11.

³⁷ *Ibid.*

³⁸ For further research see Chapter 3 of this thesis.

by the merchant,”³⁹ and the shipowner’s obligation is performed by delivery alongside the vessel.⁴⁰

However, as to the carriage under the modern liner trade, most of the goods are received by the carrier in a warehouse or other places prior to the loading of the goods, and, delivered at the place other than the shipside after the discharging. As far as the container trade is concerned, almost under all situations, the delivery of goods occurs at a CY or CFS or some other places after the discharging of them. Even under a charterparty on container carriage, it is usually agreed that the consignee shall take the delivery at a certain place after the discharging, and the responsibility of the carrier “may be extended by customs”⁴¹ or by the provisions of the contract and not be relieved as soon as the goods have been discharged from the ship.

Secondly, the real intention of the “load on to discharge from” period does not mean the performance of the contract.

Though the responsibility period on general cargos under the CMC is borrowed from *Hague Rules*, it does not mean that the contract will be ended always by discharging of the goods. The period of “load on to discharge from vessel” in the Rules was put to define the “carriage of goods”⁴² but not to the whole contract of carriage. This period relates to the application scope of the Rules. From the provisions we may conclude that the Rules are mainly focused on the rights and obligations of the carrier under a bill of lading to the carriage and to the physical safety of the goods. They do not deal with the delivery. However, from the definitions and other provisions, it shall not be deduced that the contract is ended at the time of discharge. And, the Rules authorizes the carrier or a shipper to enter into any agreement on the responsibility and liability of the carrier or the ship for the safety of the goods and the care or custody or handling of goods “prior to the loading on, and subsequent to, the discharge from the vessel.”⁴³ So, the performance and the duration of the contract are very possibly beyond the loading and discharging. Some scholars confirm this in that “they (the rules) do not necessarily govern performance of the contract in its entirety,” but “are merely relevant to that part of the contract relating to sea.”⁴⁴ According to some others, the rules will apply to the period from receipt of goods to the delivery of them with

³⁹ *Carver’s Carriage by Sea*, para. 1550,1549.

⁴⁰ *Ibid*, para. 1549. However, the “alongside a ship” also raises questions. What is the exact point of it, after the goods have been discharged from the ship or just when the goods are passing the manifold? For a further discussion see Chapter 3.

⁴¹ *Ibid*.

⁴² Art. 1(e) *Hague Rules*.

⁴³ Art.7 *Hague Rules*.

⁴⁴ *Wilson*, p.179.

different carriage contracts in given.⁴⁵

In addition, the English cases distinguished the “delivery” from the “discharge.” “‘Discharge’ is employed rather than ‘delivery’ because the period of responsibility ends when the goods are discharged from the ship, which may not be the same as their delivery.”⁴⁶

Moreover, neither those *Hague Rules* countries support the view that discharging shall complete the contract of carriage, and some of them emphasize the obligation on delivery.

The COGSA 1924, 1971 of UK are the applications of the *Hague Rules* into the national law, but they deal with the responsibilities of the carrier to the goods after the discharging by the theories of bailment and/or by case law.⁴⁷ For instance, in famous *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co.*,⁴⁸ a clause in the bill of lading was stated: “The responsibility of the carrier ... shall be deemed ... to cease absolutely after the goods are discharged from the ship.” The goods were released by the carrier’s agent without the production of a bill. The Court held that such a clause did not cover the delivery and the carrier was liable to the shipper for such wrong delivery. Moreover, in *The Ines*,⁴⁹ *The Motis Exports Ltd. v. Dampskibsselskaber AF 1912 Aktiseeselskab and another*⁵⁰ and so on, all the courts held that such kind of “before & after” clauses should not exclude the carrier’s obligations from a proper delivery of goods.⁵¹ Furthermore, those “before and after clause,” which usually try to exclude the carrier from the liability to the goods before the loading onto and discharging from the vessel, were accepted by the courts that they can exclude the carrier’s for a whole range of “physical damage or loss connected with goods,”⁵² but can not exclude the delivery obligation.

COGSA 1936 of the U. S. A. provides for the same definition of the “carriage of goods,”⁵³ but the *Harter Act* 1893 stipulates the mandatory obligation of “proper delivery” of the goods on the carrier under bills of lading.⁵⁴ Therefore, in USA, in the period after the discharging to the delivery, *Harter Act* will be applicable. This period is still within the scope of the period of the contract. *Carriage of Goods by*

⁴⁵ John Richardson, *A Guide to the Hague and Hague-Visby Rules*, 3rd ed., LLP,1994, p.36.

⁴⁶ *Carver on Bill of Lading*, citation in fn 73, 9-114, p.469.

⁴⁷ See *Yang’s Bills of Lading*, pp.16-20.

⁴⁸ (1959) A. C. 576.

⁴⁹ *MB Pyramid Sound NV v. Briese Schifffahrts GmbH and Co. KG MS “SINA” & Latvin Shipping Association Ltd.*, (1995) 2 LLR, 144.

⁵⁰ (2000) 1 LLR. 211.

⁵¹ All these cases are concerning with the obligation of delivery against presentation of bill of lading. For fuller discussion on the presentation rule see Chapter 5 of this thesis.

⁵² Cited in Nicholas Gaskell and others, *Bills of Lading: Law and Contract* (hereafter as “Gaskell”), 1st ed., LLP, 2000, 14.92, p.451.

⁵³ Title 1(e) GOGSA 1936, US.

⁵⁴ Art.1 *Harter Act*.

Sea Act of New Zealand provides similarly.⁵⁵

Strictly speaking, the periods defined for the carriage of goods in the *Hague Rules* or in the COGSAs, are the mandatory application scope of these laws. They did not give the end of the contract by discharging of the goods if they are not agreed to be delivered at that point. Furthermore, from the provisions that “the carrier shall not be prevented from entering into any agreement concerning carrier’s responsibilities with regard to non-containerized goods prior to loading onto and after discharging from the ship,”⁵⁶ CMC itself recognizes that the performance of the contract may continue after the discharging of the goods.

So, as it has been pointed out in the former part, responsibility period is the period for the carrier’s mandatory responsibilities for the goods, but not always the duration or the performance period of the contract of carriage. However, delivery will always bring the completion of the contract.

I agree with the opinion that the concept “delivery” must be divorced from “discharge.” Often, the two will merge and delivery is given when the cargo is discharged from the carrying vessel. At other time, following arrival, “discharge may only be the first step in the process that will ultimately result in delivery.”⁵⁷ Despite the variety of the actual points of deliveries in practice, I think that the legal meanings of it are the same: it is the completion of the contract. Though it is very possible that delivery occurs when the goods are discharged from the ship in line with a contract or practice, but discharge is not always the delivery. And, the end of the responsibility period in non-containerized cargo under CMC shall not always bring the end of the performance of the contract and the discharge of goods may not relieve the carrier from the obligation of the delivery.

2.4 Coinciding: the end of responsibility period and delivery

Though a responsibility period is different from the performance period of a contract of carriage, and the discharge is not always the delivery of goods under it, but the divergence between the end of the responsibility period and the delivery raises certain problems.

2.4.1 Carrier’s liabilities to goods after discharge before the delivery

Under the CMC, in so far as the non-containerized cargo is concerned, the problem

⁵⁵ Quoted in *Gaskell*, 14.87, p.450.

⁵⁶ Para.2, art.46 CMC.

⁵⁷ D. Rhidian Thomas, *Review of Contemporary Legal Developments, the Position of Holders and Intermediate Holders under the English Carriage of Goods by Sea Act 1992* (hereinafter as “*Thomas COGSA 1992*”), Vol.8, *International Maritime Law*, 2001,5, p.169 at pp.165-170.

arises on the responsibilities of the carrier to the goods after the discharge of them from the vessel but before or upon the delivery of them.

The common understanding of this issue does not meet in China. One wildly adopted viewpoint in practice is: after the discharge of them, if the goods are still under the charge of the carrier, he shall be liable for loss or damage of the goods occurs in this period in consideration of the rule of fairness. But, the applicable law to the liabilities in this period is the *Contract Law* or *General Principles of Civil Law*, but not the CMC. This point is based on the view that the responsibility period is the period of the application of CMC, no more or no less.

Another point accepts that the responsibility period is just the period of the mandatory application of the CMC, the parties are allowed to make agreement on carrier's liabilities to the goods before the loading after the discharging. Without such agreement, the CMC shall be applied to that extending period.⁵⁸ However, this point does not answer these questions well: what will be the scope of the application of the CMC to this "before and after" period, and what are the exact liabilities on the carrier during these extended period.

I agree with the idea of the fairness and the wider duration of the contract than the responsibility period (especially of the carriage of non-containerized goods) reflected by the abovementioned points. However, under the present legislations, in my view, these points do not comply with the original intention of the CMC very well. In addition, they are not in line with the relationship between the CMC and the China's *Contract Law* or *General Principles of Civil Law*.

As is shown in the analysis above, the carrier is not forced to be liable for the damages to the goods occur in the period beyond the responsibility one if there is no contrast covenant, and the CMC authorizes those such as "before and after clause" to exclude carrier's liabilities to the goods in the specified period. Compared with *Contract Law* and *General Principles of Civil Law*, CMC is the special law and the exemptions authorized by it shall prevail over those provisions under the other two acts. Therefore, the carrier shall not be liable for the damages of the goods occurred after discharging in most circumstances.⁵⁹

Some scholars describe the carrier's responsibility of taking care of the goods after discharge as *negotiorum gestio*. According to the theory of civil law, *negotiorum gestio* means a person taking charge of things for the interests of others when no statutory or contractual obligation is upon him. For example, when a man repairs his neighbor's house after a hurricane without his neighbor's entrustment when the latter is on his business trip, *negotiorum gestio* constitutes.

⁵⁸ Yin Dong-nian, Guo Yu, *Law of Carriage of Goods by Sea* (hereafter as "Yin & Guo's Carriage Law"), 1st ed., the People's Court Press, p.117.

⁵⁹ Of course, the carrier shall not be excused from the damages caused by his intended acts and gross negligence.

However, whether *negotiorum gestio* exists after the discharge but before the delivery of goods is still under doubt under Chinese Maritime Law. Since CMC does not stipulate the delivery of goods as a statutory or contractual obligation of the carrier, it will be under the argument about carrier's obligation for taking charge of the goods. If the carrier is not obliged to take charge of the goods, the custody of the goods before the delivery will be deemed as *negotiorum gestio*.

As I emphasized in part 1, if the delivery will be later than the discharge, like the common ideas among the English courts,⁶⁰ those "before and after clause" and the end of responsibility period just end up carrier's liabilities for the physical losses or damages to the goods, the obligation of performance of contract will be continued until the delivery. So, taking charge of the goods will be still the obligation on the carrier. On this basis, it is very difficult to claim *negotiorum gestio* in this case.

Nevertheless, what will be the degree of the carrier's responsibility for the safety and the care of the goods after the responsibility period is still need further researching. Personally, the end of the responsibility period of the carrier will lessen carrier's responsibilities for the safety of the goods, and he will be discharged from the contractual obligations for the care of the goods. And, the carrier shall still be liable for the losses or damages to the goods caused by his gross negligence or intentional acts.

In addition, in some special cases, e.g., the consignee does not show up or the goods are not taken over by the consignee at the destination for the reasons of the merchants, what will be the responsibilities on the carrier to the goods after the discharging? A Further research will be done in Chapter 7.

2.4.2 Coinciding the end of responsibility period with delivery

Though I have given rough ideas to the problems on the liabilities of the carrier to the goods to the period after the discharging to the delivery of the goods, but they are not the final resolutions.

The divergence between the responsibility period and the performance of the contract under the non-containerized goods has brought these difficulties and controversies in both the theory and practice. Even though it may be met that the carrier is still liable for the interests of the goods, the separation of the liability systems on the carrier before and after the discharge of the goods also brings the confusion and the uncertainty of the carrier's rights and responsibilities, and, more importantly, it's not good for the protection of merchant parties' interests.

Indeed, the consignee or other entitled person may claim for the damages against the warehouseman, wharfingers or others who take the actual custody of the goods.

⁶⁰ *Supra* fn. 49.

But without the contractual relationship with these parties in most events, the claimants usually fail due to the insufficiency of proving the fault of the defendants other than a carrier.

The protection of the legal interests of the merchant party has become the tendency of the maritime legislating. The calling for diminishing the navigation negligence exemption, increasing the liability limitation etc. reflects these underlying ideas. The regulations on the responsibility period and the delivery shall reflect this tendency too.

More seriously, the present provision on the responsibility period of the non-containerized goods has led or may lead to the ignorance of contractual obligation of delivery.

In addition, with the development of the shipping practice, there is no enough reason for the separation of the responsibility periods of the containerized and non-containerized goods.

Nowadays, more and more laws of carriage of goods have provided responsibility periods of the carrier that cover the total period from the receipt of the goods to the delivery of them. For example, the *Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956*, provides that the carrier shall be liable for the loss of and damages to the goods occurring “between the time when he takes over the goods and the time of delivery.”⁶¹

The tendency is the same in the maritime field. Certain instruments have extended or are trying to extend the responsibility period to the time of the delivery without dividing into containerized and non-containerized goods. The *Hamburg Rules* covers the period from the taking-over of goods to the delivery as introduced above. German TRAT provides that the carrier shall be liable for the loss of or damage to the goods when it occurs in the period “from the time the carrier receives the goods until the time the carrier delivers the goods.”⁶² The Scandinavian Maritime Code also abandons the “tackle to tackle” principle of the Hague-Visby Rules and prohibits the carrier to exclude his liability for damage to or loss of the goods which occurs before loading onto the ship, or after the discharging.⁶³ Furthermore, the proposals or revision of the COGSA1936 put forward by American Maritime Lawyers Association (AMLA) in 1999 suggested the same.⁶⁴ The UNCITRAL Draft Instrument provides similarly.⁶⁵

⁶¹ Art.17,1 CMR.

⁶² “The carrier is liable for any damage resulting from loss of or damage to the goods occurs during the time between the taking over of the goods and their delivery, or resulting from delay in delivery,” Sect. 425 (1) TRAT.

⁶³ See Sect.24, 4 of the *Finnish Maritime Law*.

⁶⁴ “A Carrier shall, properly and carefully, receive, load, handle, stow, carry, keep, care for, discharge, and deliver goods.” See Section 6 “Responsibilities of Carrier and ship” (b) of *Staff Working Draft (Proposal on revision of COGSA 1936)*, 106th Congress, 1st Session, Sept. 24, 1999.

In China, *Domestic Waterway Regulations* has provided that “the carrier shall be liable to the loss of, damage to or the delay in delivery of the goods occur during the period of the performance of the contract, except the carrier have proved that the loss of, damage to or delay in delivery of the goods were occurred by one or some of following reasons.....”⁶⁶ Although there is a dissension on the beginning of the period of performance as discussed in part 2.2, the end is the same, i.e., the delivery.⁶⁷

Based on the above discussion, I’d like to suggest that the period of the carrier on the non-containerized goods shall be integrated with that on the container goods, and define the responsibility period of the carrier to the goods from the time of the receipt of the goods to the time of the delivery of them by the carrier under CMC.⁶⁸

3. Legal meanings *in rem*

As one of the essential contractual undertakings, delivery of goods may have legal meanings *in rem* in most of the circumstances. This kind of legal meaning is mainly reflected in two aspects:

3.1 Delivery: returning /transfer actual possession of goods

Generally, the carrier is not the owner or the interested party of the carried goods. The basis of his right to keep or hold the carried goods is explained or described by various theories.

According to traditional theory of English law, with the transfer of the goods by the shipper to the carrier, the relation of bailment was established between the shipper and the carrier. Or, through the attornment by the carrier, the bailment springs up between the carrier and a third party⁶⁹ who may be the named consignee or the holder of bills of lading. The carrier, the bailee of the goods, holds or possesses the goods on behalf of the original bailor or the third party. When the

⁶⁵ Article 7.1 in wp.32: “Subject to article 9, the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing party under this instrument covers the goods for the carriage until the time when the goods delivered to the consignee”.

⁶⁶ Art.48 *Domestic Waterway Regulations*.

⁶⁷ This was the common sense among the draftsmen during the drafting.

⁶⁸ But this does not meet consent in China. In the sub-report (2) of research project on *Study of Revision of CMC* drawn by Dalian Maritime University, the art.46 of CMC was revised similarly to my suggestions, except for remaining the second paragraph which is on the rights of the carrier to made agreement on their liabilities to the goods during the period before the loading of them and after the discharge, when non-containerized goods are concerned. Whilst, Shanghai Maritime University preferred to keep the article 46 unchanged, see sub-report “suggestions for revisions”.

⁶⁹ See *The Future Express*, (1993) 1 Lloyd’ Rep, 542.

bailor claims for the goods, the carrier shall return him the goods, otherwise, it may constitute a conversion by the carrier.

American law makes this issue relatively simpler by statutory confirmation. The carrier is regarded as to hold the possession for another, when a negotiable bill of lading is negotiated. The carrier issuing the bill “becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill.”⁷⁰

As to the origination of the carrier’s right to possess the goods, it is still under controversy in China. I agree with the point that the carrier has the direct possession of the goods,⁷¹ or in other usual words, has the actual or physical possession of the goods.

According to civil law theory, “possession” may be divided into the “direct possession” and “indirect possession” when the thing is under the physical custody by another.⁷² Or, by a more common expression, it can be divided into the “actual or physical possession” and the “legal possession”⁷³ of the goods. The main elements of the “legal possession” shall be as the follows: first, the holder is taking physical custody of the things; secondly, the holder shall dispose of the thing complying with the principal’s intention. And, the holder is obliged to return the goods to the principal. So, the holder of the things is not actually entitled to the right *in rem* to the things, he is just holding the things for the principal.⁷⁴

The custody of the goods by the carrier meets the above elements. It may be concluded that through the consignment of the goods to the carrier, the shipper establishes the legal possession of the goods, and the carrier is holding the goods on behalf of the shipper. Furthermore, with the assignment or transfer of the rights to the goods under the carriage contract or under the bill of lading,⁷⁵ usually, the shipper may transfer this legal possession to the transferee.⁷⁶ Hence then, the

⁷⁰ § 80105 (a) (2) of USCA TITLE 49, CH. 801.

⁷¹ E.g., Guo Yu, *Legal Systems of Bill of Lading* (hereinafter as “*Guo Yu’s Bill of Lading*”), 1st ed., Beijing University Press, 1997, p.86. See also Wang Qian-hua, “On Legal Natures of Bill of Lading as Instrument of Value,” in *Theories and Practices of Modern Maritime Law*, Yin Dong-nian (chief editor), 1st ed., the People’s Communication Press, 1997, P.8 at pp. 1-40.

⁷² See Wang Ze-jian, *Possession, Beneficial Use of Property*, China Politics and Laws University Press, 1st ed., 2001, pp.183-184. See also Yamadateruaki, *Laws of Realty* (hereinafter as “*Yamadateruaki*”), translated by Lu Qing-sheng, 1st ed., Law Press, 2001, p.122.

⁷³ “Legal possession” may have a wider meaning, which refers to the right of possession with legal condition or status. But in this context, “legal possession” is limited to the right of possession enjoyed by the person who is not physically holding the things.

⁷⁴ *Yamadateruaki*, p.122.

⁷⁵ A negotiable bill of lading is usually regarded as a document of title, and transfer of it may usually transfer the possession to the goods under it. For detailed discussions see Chapter 5 of this thesis.

⁷⁶ However, in some special circumstances, the transfer of a bill of lading may not eventually transfer the right of possession of the goods under it. The title transferred with the bill of lading shall be decided by the intention of the transferee. See Chapter 5.

carrier is holding the goods for the transferee.⁷⁷ Different from the bailment theory, under the legal possession theory, the carrier shall not have to acknowledge the transferee of such holding for him. In addition, the carrier shall not be entitled to dispose of the goods, unless he exercises his rights under the contract of carriage, or, the carrier may dispose of the goods only if he is complying with the intention of the legal possessor, and, generally, the carrier is obliged to return the goods to the principal.

Therefore, no matter the theories of the bailment or the legal possession, or the direct statutory approach, they all indicate that the carrier is holding the goods for another, the shipper or other consignee. The carrier is not allowed to keep the holding of the goods all the time and is obligated to return the goods. So, the delivery of goods from the carrier usually is the transferring or the returning of the actual possession to the goods. If the carrier fails to do so, it may constitute a conversion and an infringement to the person who is entitled to the goods.

3.2 Consignee's title *in rem*

The arrangement of the carriage contract usually is the consequence of the arrangement of the sale of goods or the transfer of goods. The same is the transfer of the rights under the contract of carriage or under the transport document. So, in most of the cases, accompanying with the transfer of the contract of carriage or the bill of lading, the consignee may be entitled to not only the contractual right of demanding for the goods under the contract of carriage but also the title *in rem* to the goods, such as the ownership, or the legal possession (which may be changed into the physical possession by delivery) or the collateral title and so on. So, if delivery is made to a wrong person, the carrier might infringe not only the contractual rights but also the *title in rem*.

In summary, these are the implications of the legal meaning *in rem* of the delivery. Delivery often is described as the “voluntary transfer of the possession from one person to another” and the delivery of goods under contract of carriage involves “a full transfer of the possession of the relevant goods by the carrier to the bill of lading holder”⁷⁸ or others. In my view, for a more precise wording, the legal meaning *in rem* of delivery refers to the situation in which the carrier is in the physical possession of the goods and delivery may be a return of the goods to be

⁷⁷ As to whether the right of possession or other titles are transferred or assigned by the shipper or the transferor, shall be determined by the intention between the transferor and the transferee. Even sometimes, there is no title *in rem* is transferred, but the transferee may still be entitled to the goods base on the obligatory right. For further discussions see Chapter5 of this thesis.

⁷⁸ Thomas *COGSA 1992*, p.169.

under the actual possession of the consignee. In addition, the delivery shall be made to the right person who is entitled to the goods, otherwise, it may infringe the legal consignee's title, and the carrier may be sued on tort, or on a non-contractual base.

3.3 Contractual meaning prevails

However, the legal meanings *in rem* just mean the delivery may have effect on the proprietary status of the goods. Delivery of goods by the carrier is not an action *in rem*, it does not transfer the property itself. The first nature of delivery of goods is still the contractual obligation.

First of all, the right to hold the goods by the carrier is authorized by the contract of carriage, regardless of the difference among the theories of the bailment or legal possession and so on. Delivery of goods is a promise by the carrier under the contract of carriage of goods. Taking the physical possession and delivering the goods are the consequences of the fulfillment of the contract. Like a Tai Wan Scholar says, "taking charge of goods is the inevitable result of the contract of carriage and there is no need for another bailment relationship."⁷⁹ The former US *Pomerene Act* and the present USCA also restrict the carrier's obligation to take the possession of goods for the holder of a bill of lading "according to (under) the terms of the bill as same as if the carrier had contracted directly with him"⁸⁰ or "issue the bill to that person."⁸¹

In addition, it is very difficult for a carrier to identify the person who is entitled to the title to the goods. So, the carrier shall deliver the goods in accordance with the directions from the contract of carriage. The contract may tell the carrier to deliver the goods to the person who is named in advance, or determined by shipper's direction or indicated by transport document, mostly the bill of lading, and other appropriate methods. So, if the carrier makes a wrong delivery, firstly, it shall be a violation of the contract of carriage.

Moreover, though delivery of goods may transfer the actual possession of the goods, it is just the returning of the holding of the goods. From the point of the carrier, he has no intention to transfer the property or any other real right to the goods by delivery, nor is he entitled to do so. So, effectiveness *in rem* will not always be the function of a delivery.⁸²

Though the transfer of the right to the goods under the contract of carriage may usually be accompanied with the transfer or the establishment of the title *in rem* to

⁷⁹ See *Shi's Specific Obligatory Law*, P584.

⁸⁰ Art. 31(b) *Pomerene Act*.

⁸¹ USCA, TITLE 49, CH. 801, 80105 (a) (2).

⁸² For what exactly is the delivery shall be dealt with in Chapter 3 of this thesis.

the goods, it is not always the same. Even the transfer of the contract of carriage or the bill of lading does not effect the flow of the title *in rem* to the transferee, the latter might still be entitled to demanding the delivery of the goods under the contract, which is a claim with obligatory right.⁸³ Contrarily, demanding delivery is regarded as a “contractual concept”: “there can only be a demand for delivery when a contractual right is being asserted.”⁸⁴ Further discussion dealing with the right under the bill of lading will be in Chapter 5.

In recent years, the proprietary function of the delivery is weakened, and the contractual base of it is playing a more and more important role. For example, COGSA 1992 of UK endows the holder of a bill of lading and named consignee under sea waybills with contractual rights against the carrier, which may include the right of demanding the delivery against the carrier. This Act repeals the *Bill of Lading Act 1855*, which established the rule that the right of suit under the bill of lading was based on the property to the goods. Meanwhile, the importance of the bailment theory is weakening. So, the COGSA 1992 confers independent contractual rights on certain parties under the contract of carriage, without contractual justification, a demand for the delivery shall not be “demand for delivery within the meaning of the 1992 act.”⁸⁵

What can't be denied is that delivery may influence the status of the title to things, such as the right to possession as I discussed above. Therefore, the restrictions upon the freedom of contract on the delivery and the restriction on the carrier when he fulfills the delivery are necessary. For example, if the carrier has the knowledge that the delivery in accordance with the contract of carriage may infringe the legal title to the goods, or there is competing claims for the titles to possession or the delivery of the goods, so on and so forth, the carrier shall do very prudently, and, he may surrender the disputes to the court or other jurisdiction body in order to avoid the infringement of the title to the goods and the possible legal risks on himself. The competing claims on the delivery shall be dealt with in Chapter 4.

Therefore, the legal meanings of delivery *in rem* may bring influence on the act of the carrier during the delivery and the liabilities on him for a wrong delivery. Analyzing the carrier's responsibilities and liabilities for delivery shall not only be based on its legal meanings under a contract of carriage, but also on its proprietary meaning if necessary.

⁸³ For fuller discussions see Chapter 5.

⁸⁴ *Thomas COGSA 1992, ibid.*

⁸⁵ *Thomas COGSA 1992, ibid.*

4. Brief comparison: deliveries under contract of carriage and sales contract

In practice, especially in international trade, a contract of carriage of goods by sea is usually related closely to a sales contract. One reason is that a sales contract usually is the cause of an arrangement of carriage, because the buyer and the seller are not in the same place in most cases. Making a contract of carriage is also one of the obligations of the buyer or the seller under the sales contract. And, the particulars of a contract of carriage usually shall be in accordance with the provisions of the sales contract. The other reason involves a bill of lading that is used widely in international trade, “mingles” through the shipping and trade and makes the two contracts closer.

For these reasons, when delivery of goods by the carrier is under consideration, it is not very rare that the two contracts are linked together, and, in some Chinese cases, the liabilities of the carrier on delivery under a contract of carriage are even judged on the basis of the sales contract of the concerned goods.⁸⁶ But this is not the right way in most cases regarding the deliveries under the two kinds of contracts which are separate and independent from each other.

4.1 Distinctions

First of all, the deliveries under these two kinds of contracts are separate and independent from each other.

Delivery of goods under a sales contract is the seller’s obligation, and the receiver generally is the buyer. But, under a contract of carriage, the carrier, who is the third party to the traders of the sales of goods, is obligated to deliver the goods to the consignee.⁸⁷ According to the theory of *privity* of the contract, the two contracts are independent, and actually, the implications and objects of the two kinds of contracts are totally different. So, the carrier’s contractual obligations and rights only come from the contract of carriage. He shall not be involved in the rights and obligations under a sales contract. *Vice versa*, the seller or the buyer, even he is also a counterpart of the carrier under a contract of carriage, shall not invoke the defenses or rights on the goods from the sales contract against the

⁸⁶ For the example, *The Kota Maju*, see Chapter 6.

⁸⁷ Usually the consignee is the buyer of the goods, but sometime it’s very possible that consignee may be another person, for example, the *mortgagee* of the goods.

carrier. For example, the buyer may claim against the seller if the latter fails to deliver the goods as per the conditions under a sales contract, or the buyer may reject the delivery of goods under the sales contract. In such cases, generally, the buyer, if he is also the consignee under the contract of carriage is not entitled to exercise the same rejection against the carrier or to claim against the carrier, unless he is so authorized by the contract of carriage, for instance, when the buyer has rejected the goods at the destination under a sales contract, he may still be obligated to collect the goods from the carrier.⁸⁸

The second, the legal natures of deliveries under two contracts are different.

Under the *Contract Law* of China, a sales contract is a contract “whereby the seller transfers the ownership of an object to the buyer,” and the buyer pays the price.⁸⁹ Furthermore, without otherwise statutory provisions or agreement upon the parties, the ownership of the cargos shall be transferred by the delivery of them from the seller.⁹⁰

Under English law, the concept of the sales contract is similar.⁹¹ But the *Sale of Goods Act 1979* of UK does not stipulate that property or ownership of the goods shall be transferred with the delivery. It provides that the delivery of goods under a sales contract is “a voluntary transfer of the possession from one person to another.”⁹²

“Delivery is exactly the transfer of possession”⁹³ is also the common viewpoint that under the sales contract. In practice and under other regimes, the transferring of ownership is not always simultaneous with the delivery of them by the seller, may be earlier or later.⁹⁴ But the final result of a sales contract is generally the transfer of the ownership of the goods from the seller to the buyer.

So, with the intention and the arrangements between the traders, delivery of goods under a sales contract may bring the result of the transferring of the ownership, or at least, as a common situation, it will transfer the possession of the goods to the buyer. In this sense, the delivery under the sales contract itself is defined as an *act in rem* under some regimes, such as Germany civil law system,⁹⁵

⁸⁸ As to the relationship between the sales contract and the carriage contract, as well as the consignee’s obligation to accept the goods from the carrier see Chapter 6 and 7.

⁸⁹ Art. 130 CLC.

⁹⁰ Art.133 CLC.

⁹¹ Art.2 (1) of the *Sale of Goods Act 1979* provides “A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”

⁹² Art. 61 (1) *Sale of Goods Act 1979* UK.

⁹³ See Yu Yan-man, *Comparative Researches on the Transferring of the property and the Risks of the Goods* (hereinafter as “*Yu Yan-man*”), 1st ed., Wuhan University Press, 2002, p80.

⁹⁴ P. S. Atiyah, John N. Adams, Hector Macqueen, *The Sale of Goods*, 10th ed., Pearson Education Ltd., 2001, pp.114-115.

⁹⁵ *Yu Yan-man*, pp.92-94. But this theory is different from that under French law or others, and it is not commonly approved in China either, see *ibid*, pp.94-111.

though it is also a contractual obligation on the seller under a sales contract.

However, the object of the contract of carriage is service, including the carriage, care of and the delivery of the goods. The contract will not involve in the transfer or the intention to transfer the titles to the goods, no matter the ownership or the possession of the goods. In addition, the carrier is not entitled to do so, because he is not the owner or the legal possessor of the goods as above discussed. Therefore, delivery under a contract of carriage is always a contractual act, but not an act *in rem*, though it may bring effectiveness *in rem* as I mentioned in part 3. So, the discussion on carrier's obligations on delivery will be mainly focused on the contract of carriage.

The third, the manners and the points of the deliveries under two kinds of contract usually differ from each other.

The manner of delivery under sales contracts will be various depending on contracts or practices. It often occurs with such a physical transfer of goods as to move the goods to the buyer at seller's premise, or hand over the goods to the carrier who is the agent of the buyer and so on. But, delivery may take place symbolically. "The handing over of the documents and the particulars of the goods, especially the document for taking over the goods, is deemed as the delivery of the goods."⁹⁶ Especially in international sales, according to sales contracts, delivery may be completed by either physical transfer of goods or the documentary surrender. Or, when the goods are in transit, delivery of a bill of lading is a very common practice and is generally regarded as a constructive delivery of the goods.⁹⁷ In addition, the transfer of the bill may operate the constructive transfer of the possession of goods without the carrier's need to make any acknowledgement in this process.⁹⁸

While as to delivery under contract of carriage, the main manners, according to the existing laws and the traditional practices, generally involve a physical transfer of the goods. It is very rare to deliver the goods via issuing a document, though it is suggested that the parties are free to agree on the method of delivery.⁹⁹

Consequently, the points of the two deliveries are usually distinct.

As a general rule, the parties may fix the point of delivery under a sales contract freely. However, not only by the agreement but also by the statutes, delivery under a sales contract often occurs when the goods are handed to the carrier. Article 32(1) of UK *Sale of Goods Act 1979* stipulates that "delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer." The CLC made a

⁹⁶ *Ibid*, p.328.

⁹⁷ See Ewan Mckendrick (Chief Editor), *Sale of Goods*, 1st ed., LLP, 2000, 6-006, p.292.

⁹⁸ *Ibid*, 6-008, pp.292-293.

⁹⁹ For a further research see Chapter 3 "Identification of delivery".

reference to article 31(a) of the *United Nations Convention on Contracts for the International Sale of Goods* 1980 (the Vienna Convention, abbreviated as “CISG”),¹⁰⁰ and provides that, if there is no clear agreement or practices on the place of delivery, in case the object needs carriage, the seller shall deliver the object to the first carrier so as to hand it over to the buyer.¹⁰¹ Under sea carriage, the delivery of goods under a sales contract usually occurs at the loading port when they are handed over to the carrier.

Though the points of delivery under contract of carriage may be discrepant in the given contracts of carriage or the shipping practices, it usually occurs at the destination of the carriage, and, it seems impossible to occur at the port of loading. Therefore, it will be very usual that delivery under sales contract takes place before the delivery under a carriage contract does.

4.2 Interrelations

Though the two deliveries are distinct from each other, it is undeniable that, the two kinds of contracts have very close relationship as mentioned at the beginning of this part and will bring influences on each other to a certain extent:

First of all, the arrangement under a sales contract may influence carrier’s rights and liabilities of the delivery under the contract of carriage:

A sales contract will decide who will make the contract of carriage with the carrier, for example, under a CIF sales, usually, the seller of the goods will be the shipper in a contract of carriage.

More importantly, a sales contract may decide the type of the transport document. The difference of the transport documents may result in the differences of carrier’s obligations of the delivery on one hand. On the other hand, it also may bring the differences of the points and the mechanisms of the transfer of ownership or titles to the goods between the traders under a sales contract.

For instance, when a bill of lading is required and has been issued by the carrier, the carrier is obligated to deliver the goods against the production of the bill, and usually the holder of the bill is entitled to claim against the carrier for the damages or the mis-delivery of the goods under the contract of carriage. Meanwhile, the bill of lading as the important document in the international trading and shipping, may represent the goods it covers. So it runs essential functions in the carriages as well as in the transfer of the title to the goods under the contract of sales and other

¹⁰⁰ Art.31 CISG, “If the seller is not bound to deliver the goods at any other particular place, his obligation to delivery consists: (a) if the contract of sale involves carriage of the goods-- in handing the goods over to the first carrier for the transmission to the buyer”.

¹⁰¹ Art. 141 (1) CLC.

arrangements.¹⁰² So, this document brings the two kinds of contracts even closer.

However, if the buyer and seller have agreed to accept a sea waybill or have agreed to transfer the property and other titles to the goods by other way but not by the transfer of a bill of lading, in such case, the carrier shall deliver the goods against the proper identity of the consignee or by other manner.¹⁰³

Secondly, the breach of the obligations in one contract may be reflected or involved in the liabilities under both of the contracts.

For example, when the shipment of the goods is later than the date fixed in a sales contract and an anti-dated bill of lading is issued, the seller has breached both of his obligations of the physical shipment and documentary surrendering under the sales contract. While, generally, the carrier also is liable to the bona fide holder of the bill of lading for this inaccurate document. For another instance, when the carrier delivers the goods to the buyer without the bill of lading, usually, he shall be liable for the seller who still holds the bill of lading. Meanwhile, the buyer shall be liable for the seller if he fails to pay the price. In such cases, the plaintiff may have two approaches to the reimbursement under both the contract of sales and contract of carriage. However, he shall not get extra benefits from both of them.

As an assumption, if the carrier had compensated the seller who is the holder of a bill of lading for delivered the goods without bill of lading, the seller will not be entitled to claims against the buyer. Or, the seller is only entitled to claim against the buyer for the balance he has not been compensated for, *vice versa*.

Thirdly, some remedies under the sales contract may have to be exercised during the carriage of goods. For example, *stoppage in transitu* is a remedy for the seller under a sales contract, but it must be exercised during the carriage of the goods and shall affect the performance of the contract of carriage. In addition, art. 308 of the CLC also provides shipper with the right to suspend the carriage or change the consignee or to change the destination and so on, which usually is motivated from the remedies under a sales contract.

Moreover, under some special trades, the points of the deliveries of goods under a sales contract and under a contract of carriage may be overlapped. For instance, when no bill of lading is required, a sales contract may agree that the delivery of the goods by the seller to the buyer occurs when the goods are taken over by the buyer from the carrier at the destination.

In addition, when no bill of lading is issued, the arrangements on the transfer of the ownership or the risks of the goods under the sales contract may decide who,

¹⁰² The function of the bill of lading as the document for delivery of goods by the carrier and its title function under a contract of sales or other arrangements under international trades will be discussed in Chapter 5 of this thesis.

¹⁰³ For carrier's obligation on delivery under a bill of lading and the exemptions of his liability for delivery without bill of lading, see Chapter 5, 6 of this thesis.

the seller, the buyer or the others, is the party entitled to claim for the delivery of the goods against the carrier, and may determine the right of suit against the damages and the losses of the goods incurred during the carriage, so on and so forth.

So, the influences brought by the sales contract on the contract of carriage shall not be ignored when the carrier's obligations of delivery under a contract of carriage is under consideration. However, as emphasized above, being a primary rule, the contract of carriage is independent from the sales contract, the carrier's rights and obligations on the delivery of goods shall be first examined under the scope of the contract of carriage. Nevertheless, the research on the degree and the extent of the influence a related sales contract may bring on the carrier's rights and obligations under the contract of carriage is worthwhile.

5. Conclusions

Delivery of goods is an essential contractual obligation of the carrier under the contract of carriage, in addition to the transport, custody and the care of the goods. So, the obligations and the responsibilities of the carrier around the delivery shall be determined by the carriage contract. In addition, Delivery is the end of the performance and the duration of the contract of carriage, and it brings the completion of the carrier's responsibilities and obligations under the contract. The responsibilities and rights of the carrier around the delivery will be in accordance with the contract.

However, the CMC does not put the clear obligation of the delivery on the carrier. The responsibility period ended by discharging of the goods under the carriage non-containerized goods even makes this obligation uncertain, and brings confusion on carrier's liabilities to the goods after the discharge before the delivery. I suggest diminishing the difference of the responsibilities periods between the container or non-container carriage and coinciding the end of the responsibility period with the delivery.

The delivery of goods may have legal meanings *in rem*. First of all, the carrier usually is holding the goods on behalf of the legal possessor of the goods, and he shall return the actual or physical possession of goods to that person. Furthermore, the carrier shall do prudently during the delivery of goods in order to avoid the possible infringement of the title possessed by person who is entitled to the goods. However, the legal meanings *in rem* just refer to the possible proprietary effectiveness. Delivery of goods by the carrier is not an act *in rem*, but a contractual

one. So the analyses on carrier's responsibilities and liabilities on delivery shall be mainly focused on the contractual structure, though the result *in rem* needs attention in some special circumstances.

The relationship between the contract of carriage and the sales contract is double sided. On the one hand, they are independent from each other; on the other hand, they may have very close relation. The independence of them is the primary principle, and the obligations and liabilities of the carrier for the delivery shall be first examined under the contract of carriage. Nevertheless, the influences on the contract of carriage by the sales contract is worth further researching, which is especially important in China.