

Chapter 3

Identification of Delivery

As concluded in Chapter 2, delivery of the carried goods will bring the completion of contract of carriage as well as the end of the carrier's responsibilities to the goods. In addition, under most of the regimes, such as the three conventions on carriage of goods by sea and certain national laws including China law, the time bar of the suit or claim against the carrier under a contract of carriage of goods by sea usually is counted from the date of delivery or when the goods should have been delivered.¹ Moreover, though not systematical or sufficient enough, certain regulations have tried to stipulate the rights and obligations of the parties in respect of delivery, for example, the carrier shall deliver the goods against the production of the original bill of lading,² a consignee is obligated to take the delivery.³

Based on these reasons, the problems may arise: what will be the delivery, how to decide a delivery has been fulfilled or not, when are the carrier or the counterparts bound by these obligations, so on and so forth. The identification of the delivery of goods by the carrier, therefore, is very important.

1. The Ambiguity of the definition of delivery

What exactly is a delivery? The definition of delivery is always ambiguous.

CMC and other legislations in China never give the explanation for "delivery"

¹ For example, art. 257 of CMC provides: "Time bar for claim against carrier for carriage of goods by sea shall be one year counted from the day when the carrier delivered the goods or the goods should have been delivered." See also art.3.6, *Hague Rules*, Art.20, *Hamburg Rules*.

² For a full research see Chapter 5, 6.

³ E.g, the Scandinavian Maritime Code, see section 18 of *Finnish Maritime Code*. For further discussion see Chapter 7.

under a contract of carriage of goods. The international conventions such as the *Hague, Hague –Visby Rules* and the national schemes in so far as my knowledge, rarely⁴ provide with the definition of delivery. Meanwhile, it is also difficult to find the definition from the authorities or textbooks.

It seems that the delivery is a term that does not need any explanation; people may understand it by practice. But the fact is not like this, even in practice, it may very often bring some confusion on the identification of it.

1.1 Traditional definition: handing over

Hamburg Rules is the first convention in this field that provides the criteria for the identification of delivery.

First of all, delivery shall occur by “handing over the goods to the consignee”⁵. This definition is also accepted by the Maritime laws of Nordic countries⁶ and the *UNCTAD/ICC Rules for Multimodal Transport Document*.⁷ Consequently, the bill of lading Multidoc 95 designed under the latter *UNCTAD/ICC Rules* uses the same standards: “‘delivery’ means (I) the handing over of the goods to the consignee ...”⁸ But as a general situation, few of the bills of lading provide the definition on delivery.

Very similar to the language of “handing over,” “putting the goods under the custody of the consignee from the carrier,” “transfer of goods from the carrier to the consignee” and so on, are the usual understandings of delivery. So, according to the traditional opinion, delivery is related to the physical transferring of the goods between the carrier and the counterparts. Even some of the authors are in favor of this kind of point, though not very expressly, delivery means the carrier “surrender physical possession of the goods.”⁹

Indeed, generally, delivery may be accomplished by the physical handing or transferring of the goods from the carrier to the consignee. However, with the more

⁴ *Hamburg Rules* is the first convention in the field of contract of carriage of goods by sea that stipulates the specific circumstances that a delivery may occur, article 4.2. For further demonstration see following parts of this chapter.

⁵ Article 4.2: “(b) ...he has delivered the goods: (I) by handing over the goods to the consignee,” *Hamburg Rules*.

⁶ Sect. 24 of the *Finnish Maritime Code*, the first situation for delivery is as same as the “handing over” rule in *Hamburg Rules*.

⁷ Art. 2.6 *UNCTAD/ICC Rules for Multimodal Transport Document*. According to this Article, the identifications for delivery are as same as the provisions of art. 4. 2(b) of the *Hamburg Rules*.

⁸ The other two options are: “ (ii) the placing of the Goods at the disposal of the Consignee in accordance with the Multimodal Transport Contract or with the law or usage of the particular trade applicable at the place of delivery; (iii) the handing over of the Goods to an authority or other third party to whom, pursuant the law or regulation applicable at the place of delivery, the Goods must be handed over,” which coincide with the art. 4(b) of *Hamburg Rules*. See *Gaskell*, p.443.

⁹ See Charles Debatista, *The Sale of Goods Carried by Sea* (hereafter as “*Debatista*”), 2nd ed., Butterworths, 1998, 2-07, p.27.

and more common usage of the machines and the extensive involvement of the intermediaries in the operations of the goods in modern shipping, the physical transfer of the goods between persons in practice almost does not occur¹⁰ as I have mentioned in Chapter 2. The terms like “hand over” or other similar ones may not be suitable to define the delivery under a lot of circumstances.

According to the definition based on the “hand over” or similar acts, in addition, it is very likely that delivery may never occur and the carrier may continue to be responsible for the goods when the consignee does not show up or does not take over the goods. It seems not very fair to the carrier.

1.2 Placing the goods at disposal of consignee

Hamburg Rules give another specification for identifying delivery. Article 4. 2 (b) (ii) provides that when the consignee does not receive the goods, delivery may be identified by “placing them (the goods) at the disposal of the consignee” “in accordance with the contract or with the law or with the usage of the particular trade.”

Different from the *Hamburg Rules* that puts this definition as a secondary choice, CMNI convention gives the single definition for delivery as “the placing of the goods at the disposal of the consignee in accordance with the contract of carriage or with the usage of the particular trade or with the statutory regulations applicable at the port of discharge shall be considered a delivery.”¹¹ Although this convention deals with inland water carriage, it reflects another concept or wide understanding of delivery.

The advantage of this definition is its basis of the legal effect by the delivery irrespective of the physical appearance of the act. Indeed, usually, the delivery may result in the placing of the goods at consignee’s disposal. Usually, by placing them at consignee’s disposal, the carrier will be deprived of his physical custody on the goods, and discharged from his obligations to the them

But in light of the usage of the machines and intermediaries abovementioned, it is very difficult defining at which point the goods have been under the disposal of the consignee. Even without disturbance from the technical elements, in a traditional handling process of the goods, it also makes confusion to identify the exact point of delivery among consequent chain acts. For example, in case it is agreed that the carrier shall deliver the goods to the lighter alongside the carrying ship, it may also bring disputes as to whether the goods may be at the disposal of

¹⁰ See also G. J. van der Ziel, *The UNCITRAL/CMI Draft for a New Convention Relating the Contract of Carriage by Sea*, *Transportrecht*, 7/8 2002, p.269 at pp.265-277.

¹¹ See the first sentence of Art.10.2 of CMNI,.

the part of the consignee as soon as they have been discharged from the vessel or until the time when all the goods have been loaded on board the lighter?

More importantly, the legal meaning of “disposal” itself may be different from its popular meaning in practice. As discussed in Chapter 2, during the transit, the carrier is holding goods for the legal possessor, and the right of disposal of the goods is vested in other person, the owner, the seller or the holder of bill of lading or any other appropriate party under most circumstances. So, the carrier shall comply with the latter’s directions on disposal of goods under certain conditions. In addition, a holder of bill of lading may be entitled to resell the goods and transfer the bill of lading. This reselling of goods and the transfer of bill also is called as “disposal of goods” though it is a documentary approach. In this sense, even before the delivery of goods, the goods have been under the disposal of the consignee or other party. So, What exactly does “disposal of goods” mean? Is it just a legal possibility or a physical one? The law shall provide further definition for this terminology.

Therefore, “placing the disposal of the goods at the consignee” can’t resolve the identification of the delivery well either. Maybe for the same reason the *Hamburg Rules* and the *CMNI convention* add “in accordance with the contract or with the law or with the particular trade” as the supplements for this definition. However, without the clear and uniform interpretation of the “disposal of goods”, these supplements are not very functional.

Although the *Hamburg Rules* provides the options for defining delivery in different circumstances, in view of the confusion of the meaning of the phraseology, as well as the development of the practice of cargo handling process, it still does not offer sufficient definition for the delivery. Nevertheless, the method of providing optional schemes for identifications of delivery under different circumstances by the *Hamburg Rules* is of great value of reference for later legislations.

1.3 Delivery: a matter both of fact and law

It may be said that until now, there is no accurate and sufficient definition on delivery. Actually, the multiple criteria for delivery in the *Hamburg Rules* reflect the difficulty and the complexity of the identification of delivery. Even during the drafting of the *Hague Rules*, the problem has been encountered by the draftsmen, “delivery” undoubtedly is open to various interpretations ... it would lead to considerable variance of practice in the various countries ...”¹² So, in my

¹² CMI, *The Travaux Préparatoires of the Hague Rules and of the Hague Visby Rules*, 3340, p. 137.

understanding, the difficulty of the identification of “delivery” is one of the reasons for the replacement of the proposal on the period of the carriage of goods “to the time when they are delivered from the ship”¹³ by the present one.

However, the difficulty of the identification shall not ignore the importance of it.

In my view, delivery of the carried goods under a contract of carriage is not only a matter of fact but also a legal one.

In most cases, the delivery will occur closely with the special time, place or point during the actual flow of the goods. The identification of it shall be based on the virtual process of the operations of the goods and it may be identified with the actual transfer of the goods.

However, the actual transfer of goods may not always occur and the exact point of a delivery may not be easy to be identified for reasons as discussed above. Even if there are actual flows of goods, particular trades and districts may bring various deliveries, which are difficult to be comprehended by a single or uniform phraseology. In addition, if the goods remained unmoved by the consignee, it will be unfair for the carrier to be bound by the responsibilities to the delivery all the time. Therefore, what is more important is to look into the legal meanings of the delivery while identification is to be made.

Primarily, as discussed in Chapter 2, delivery of goods is a contractual obligation, and it will complete the contract and discharge the carrier from the responsibilities and risks to the goods. So, these legal functions may be realized by the intentions of the contractual parties or by stipulations of law and other ways, not necessarily always by a physical or actual operation of the goods.

As a contractual obligation, the detailed responsibilities on delivery such as the place, time, etc., usually are determined by the contract. Even without such direct agreement on the detailed obligations on delivery, it still can be deduced by the intention of the completion of the contract or the completion of all the responsibilities to the contract.¹⁴ I would like to make an extreme assumption. For instance, it is also very possible that the carried goods shall be deemed as having been delivered when they are still on board under the custody of the carrier by the agreement like “as soon as the carrying vessel arrives at the port of discharge, the responsibilities and risks of the goods as well as the rights under this contract by the carrier shall cease and afterwards, the carrier shall act as the agent of the consignee before the goods being taken over by the consignee.”¹⁵

¹³ It was once so proposed, see *ibid*.

¹⁴ I emphasizes here that it is “all the responsibilities to the contract” but not only “the responsibilities to the safety of the goods,” because the responsibility period of carrier may not coincide with the delivery, for example, the CMC, as I discussed in Chapter 2.

¹⁵ We assume this kind of agreement is effective under certain regimes. The principles governing the effect of agreement, contract, and covenant on the delivery shall be discussed in part 3 and 4 below.

If there is no such agreement or provisions, the usual practices or customs may be used to examine these legal results and consequently, to recognize the delivery.

In summary, the points and manners of deliveries in practice are different. It is very difficult to provide a single definition for it. However, to remove the confusions and disputes in practice, the establishment of the system of basic criteria for identifying it is crucial. These criteria should be taken into consideration together with the actual flow of the goods as well as the legal meanings of a delivery. Besides, they should be made most applicable to all kinds of situations. In this sense, the approach in the *Hamburg Rules* is very useful as abovementioned, though the definitions under it are not sufficient at all.

The UNCITRAL Draft Instrument omits too a clear-cut definition of delivery, but provides for a series of principles for identifying it. The time and point of delivery of goods shall be identified by, primarily, contractual agreement, failing this kind of agreement, the customs, practices or usage in trade. Moreover, in absence of the former ones, delivery shall be defined by “discharge or unloading from the final vessel or vehicle.” These legislations shall give reference to China’s legislation and theory on this issue.

2. Points of delivery in practice

In practice, delivery may occur at different places and times, for instance:

Delivery may occur alongside the carrying vessel, on the quay or on a lighter, etc. Or even earlier to this point, carrier may deliver the goods on board or when the goods are passing the ship’s manifolds and at other points before the discharging of them from the ship.

However, these points of delivery are very rare in the modern shipping. Only in the carriages of very valuable goods or certain special goods, which are not suitable to be stored in the port for a period, they may be taken over alongside the ship. Or, under the charterparties, delivering the goods alongside the vessel is also common. But in a liner trade, especially in container carriage, mostly, the goods are discharged to a CY or a CFS, and are delivered there. Even there is general cargoes under liner trade, (which is very few now), generally they are delivered at a warehouse or storing yard and other similar places at the destination.

In addition, with the development of the “door to door” shipment, conveying and delivering the goods to a factory, a warehouse or other specified place far beyond the discharge port is also frequent.

The aforesaid points of delivery usually are indicated in the contract of carriage or transportation documents or are established by the customs or particular

practices.

3. Criteria for identifying delivery

In China, the criteria for identifying a delivery are still vague and it seems none of the textbooks deals with this topic.¹⁶ Making reference to the provisions under the UNCITRAL Draft Instrument and the *Hamburg Rules* as well as the theories and practices, I will try to analyze the principles for identification of delivery hereafter.

3.1 Agreement by parties

3.1.1 Priority of an agreement

It is reasonable to set the agreement on delivery at the first position for identifying it.

As discussed above, delivery is a contractual obligation and has contractual legal meanings, so the obligations on it, including the point, time and manner may be determined by the contract.

Such kind of agreements or contractual provisions are common in practice. Vast of the booking notes, bills of lading or other particulars of the contracts of carriage include the articles or indications concerned with the agreement on delivery, though they may just deal with one element of it. For example, the “CY -- CY” or “CFS -- CFS” indication in addition to the loading and discharge ports may constitute the place of the delivery. The clauses under most of the bills of lading such as “the merchant shall take delivery of the Goods within the time provides for in the Carrier’s applicable Tariff,”¹⁷ “the merchant shall take delivery of the Goods within the free storage time provided for in the Carrier’s applicable Tariff or otherwise”¹⁸ will provide the time for delivery. Moreover, some broader clauses such as “the ocean Carrier shall have the right to deliver the goods at any time from or at the Vessel’s side, custom-house, warehouse or any other place designated by the ocean Carrier”¹⁹ is another way of agreement, though which gives too wide right for the carrier on delivery.

In addition, the goods and carriages may have their own features, which bring

¹⁶ There must have been some attempts to conclude the criteria for the identification, but there is no publication on this issue yet in so far as my knowledge.

¹⁷ E.g. “20. Notification and Delivery” in P&O Nedlloyd Bill.

¹⁸ E.g. “20. NOTIFICATION AND DELIVERY (2)” of Mitsui OSK Lines Combined Transport Bill of 1993.

¹⁹ “20(delivery)(1)”, “K” Line Bill of Lading. But in my view, this kind of agreement gives the carrier a too wide right, so the effect is questioned.

the diversities of the deliveries, so it is not easy to limit it or define it by law. And, usually, the parties to the carriage of goods (especially the carrier) may know the features of the goods and the carriages or the ports best, so agreement on delivery will adapt to particular trades better.

Furthermore, agreement on delivery will be a normal commercial arrangement. The diversity of the points and manners of delivery may result in the differences of the freight, charges to the goods and the allocations of the rights or obligation under the contract of carriage. So, the agreements on delivery may reflect the balance of the interests between the counterparts.

Therefore, an agreement on delivery shall be the primary standard. The *Hamburg Rules* has made the intention of the contract and agreement as the standard to decide “placing the disposal of the goods.” More expressly, the UNCITRAL Draft Instrument directly provides for the freedom of the agreement on time and point of delivery, and set the agreement as the first rule.²⁰

An agreement may be expressly written or implied in a contract, or sometimes, it is even possible that an agreement may be reflected by the act of the parties. For instance, before the arrival of the ship, the master informed the consignee that they would deliver the goods alongside the ship on a certain day. The consignee did not reply it in any form, but collected the goods when they were discharged from the vessel. This act constitutes an agreement on delivery.

Often, the agreed time, place and manner of delivery and their actual receiving by the part of the consignee will coincide, but they may differ, in this case, the agreed point will prevail.

3.1.2 Constraints on the agreement

An agreement on delivery shall be effective between the parties made it. But, it will not inevitably bind a third party. For example, the agreement made between the carrier and the shipper may be not effective to the consignee if it is not indicated in a bill of lading. So, in order to invoke an agreement against the third party consignee, it shall be included not only in the contract but also on the bill of lading or other transport documents which evidence the contract of carriage, or acknowledges the consignee about such agreement.

In addition, the freedom of agreement will be under some constraints; the provisions under UNCITRAL Draft Instrument providing wide freedom on agreement of delivery has also given rise to some queries.

First of all, an agreement of delivery shall not violate mandatory laws.²¹ The

²⁰ Sect. 4 .1.2 in wp.21, art.7.2 in WP.32.

²¹ Article 5 of CLC provides that making and performing a contract shall in line with the laws and

Hague Rules and the national laws such as CMC have established a series of statutory obligations on the carrier under a contract of carriage of goods by sea. However, whether a FIOS clause is effective under a bill of lading, whether a delivery can be agreed before the discharge of goods is still controversial, which will be discussed in part 4.

Then, according to the CLC, in a format contract,²² an agreement which will result in the exoneration of the party providing the form from one or some of the essential obligations or getting rid of the essential rights of the other party shall be deemed as invalid.²³ In China, a bill of lading contract usually is deemed similarly as a format contract. If it is printed (but not mutually agreed) in a bill of lading that the goods shall be delivered to the consignee during the transit or all the responsibilities to the contract shall cease at one point before the arrival of the goods at the destination, which very possibly will discharge the carrier from the fulfillment of the carriage. These kinds of clauses usually will be invalid.

Furthermore, according to general theories of contract law, where the agreement that is made under duress, or by fraudulence,²⁴ or which may infringe the legal interest of the country and so on, also may be invalid or shall be modified.

3.2 Customs, practices and usages in trade

Over a long period of shipping, there have formed some stable customs or usages of the delivery in practice. In fact, a considerable part of the contracts of carriage does not cover a very clear or comprehensive agreement on the point of delivery. In these cases, the customs, practices or usages in the trade at discharge port or other destination place shall be applicable to identify the time and place and the way of delivery.

For example, in a liquid goods transport, the goods are customarily deemed to be delivered when they are passing the ship's manifold in absence of otherwise agreement. Or, according to the customs in lots of ports, the period or the deadline of the free storage period of the container yard or other similar places is usually deemed as the time for the consignee to take delivery. And in domestic liner trades in China, before the effect of the *Domestic Waterway Regulations*, the carrier was not responsible for the loading, stowage and discharging of the goods. The consignee shall employ the stevedores and hire cranes to discharge the goods. So, customarily, delivery may be identified by the taking of the goods from the board

administrative regulations.

²² Format contract means those contracts with unified standard forms printed or made before the contracting, e. g. the insurance policy, realty trading contract etc. are the main format contracts in China.

²³ See Art. 40 CLC.

²⁴ Subpara. 1, Art.52 of CLC.

by the stevedores.

Though there is no statutory approval, the customs or the like are accepted to adjust the carrier's obligations on delivery by courts.

For example, in *The Sormovskiy 3068*,²⁵ it is indicated that delivery may be proper if it complies with the customs or the laws of the discharge port. In addition, the judges gave clear standards for a custom by citing from the authority *Scrutton on Charterparties* and told the difference between custom and practice. Custom on delivery shall be in its strict sense, it "must be reasonable, certain, consistent with the contract, universally acquiesced in and not contrary to the law,"²⁶ while a "practice must be distinguished from custom." The custom means the "settled and established practice of the port," and "where there is a settled and established practice at the port of discharge as to how, where and (perhaps) to whom the cargo is to be discharged or delivered," a shipowner performs his obligations under the contract if "he complies with that practice."²⁷

From the above description, a custom must be certain and commonly accepted in the range of destination. In addition, in line with the former wordings, a practice is likely to be defined as general methods, and is with less certainty and binding force than a custom. However, in my view, the underlying essence of a custom and a practice is similar. Custom of delivery is a relatively more stable practice. When the practice is widely accepted, it also may define the time and place of delivery

However, if there is clear agreement and mandatory legislation, the latter two shall prevail.

Furthermore, besides general custom or practices, there may also be some special usages as to certain trade. In this case, the special usages prevail. A brief analysis of the relationship between special usages and general practices in some ports of China under a certain circumstance will be made in the following part 5.

Moreover, the customs and practices may amend or interpret an agreement when it is not clear or not exhaustive. For example, it has been agreed that the carrier shall deliver the goods "alongside the vessel." It is not very clear, merely from the words on what the "alongside the vessel" is: does it mean the delivery is made when the goods are passing out the ship or have been discharged onto the quay alongside the ship, or until the consignee comes to collect the goods on the quay? Therefore, this kind of agreement needs a further supplementation by the customs or practice at the port.

From this discussion, we may conclude from another angle that the agreement and customs or special usages shall be combined for the identification of the

²⁵ *Scure Export Sa. v Northern River Shipping Ltd.*, (1994) 2 LLR. 266.

²⁶ *Ibid*, p.275.

²⁷ *ibid*.

delivery. And only when an agreement is definite and comprehensive (whether expressly or impliedly), it should totally prevail.

In Chinese ports, there are also a series of customs, practices formed or special usage employed. However, because the status of the customs, practices or usages for identification of delivery has not been affirmed in law, whether a delivery may be defined by customs or practices are not at consensus in the jurisdiction until now. Furthermore, the general procedure related to delivery at most of the ports obscures the customs or practices to a certain extent. Part 5 in this chapter will try to put forward the discussions on some concerning issues under this situation in China.

3.3 Discharging from the vessel

The UNCITRAL Draft Instrument further provides that “in the absence of any such specific provision in the contract of carriage or of such customs,” the time and location of delivery is that “of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.”²⁸ As far as a carriage wholly by sea is concerned, the delivery may occur by discharging the goods from the final carrying vessel.²⁹

The establishment of this criterion of identification has its reasonable basis. **First of all**, delivering the goods by discharging is still relatively common in practice, especially under the tramp carriages. Meanwhile, considerable bills of lading include such clauses as the merchant shall take delivery alongside the ship,³⁰ or in other words, the carrier shall deliver the goods by discharge and other similar provisions.

Secondly, after discharging of the goods from the final vessel, the goods have arrived at the destination and most of the “core obligations” on the carrier under a contract of carriage by sea may have been fulfilled. Therefore, the main objects of the carriage contract in terms of the shipper or consignee can be protected.

Thirdly and most importantly, in my view, the point by this principle is clear and certain and may reduce confusion on identification.

Introducing the discharging from the transport instrument as the supplement for

²⁸ Section 4.1.3 in WP.21, art. 7.3 in WP.32.

²⁹ The UNCITRAL Draft Instrument is intended to deal mainly with but not only the maritime leg under a contract of carriage, see Section 1 “Definition”, 1.5 in wp.21 (art.1 (a) in wp.32): “Contract of carriage means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another.” Therefore, it may involve a vehicle or other similar instrument other than a vessel. However, my discussion in this part will focus on the maritime transport only for the purpose of simplification, but which may also be applicable to carriage including other transport legs.

³⁰ Although the exact meaning of taking the goods alongside the vessel is still vague as I mentioned in part 3.2, this kind of agreement will be nearer to the delivery by discharging than others be.

identification can resolve the difficulty of it, and may keep the relative balance of the legal interests between counterparts well when there is no agreement or customs or practices or usages.

However, this criterion still raises a query: is the discharge rule too tolerant for the carrier? For instance, if the consignee fails to receive the goods because of the absence of the information of the arrival of the vessel, may the carrier be discharged from all the responsibilities to the contract? Is the carrier obligated to give the notice of arrival of vessel or the notice of delivery to the merchant party? In addition, what will be the responsibilities on the carrier to the goods after discharging and before they are taken over? Therefore, the criterions for identification of delivery are desirable for a systematical supporting of the systems under the contract of carriage. The resolutions for the aforesaid questions will be discussed in chapter 7.

3.4 Delivery granted by law

In certain circumstances, the regulations or the laws of the destination ports may influence the flow of the goods from the normal shipping practices. In such cases, it may enable the carrier to control the transfer of the goods to the consignee. For instance, in most of the South American countries, the goods must be discharged into a customs storehouse or to the warehouse of the port authority and handed over by the authorities to the merchant parties. In some South and East Asian or Russian ports, there are similar processes. Very often, the carrier can not control the goods any longer after he has been forced to hand over the goods to the abovementioned authorities. However, disputes often arise on carrier's liabilities for the delivery to a wrong person or delivery without bill of lading by the authorities and so on.

Hamburg Rules draw the carrier from these risks by providing that delivery will occur by "handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over."³¹ The CMNI,³² the UNCITRAL Draft Instrument³³ provide for it similarly as the special criterion. Actually, these statutory grants are trying to protect the carrier in light of fairness.

However, whether such surrendering of the goods to the authorities will constitute a delivery is still under controversy. The UK judges incline to interpret it more strictly. For example, in the *East West Corporation v. Dkbs 1912 and Akts*

³¹ Article 4.2(b)(iii) *Hamburg Rules*.

³² Art. 10.2, the second sentence CMNI.

³³ Section 4.1.4 in wp.21, art.7.4 in wp.32.

Svendborg and the combined *Utaniko Ltd. v. P&O Nedlloyd B.V.*,³⁴ in accordance with the Chilean customs law, as duty had not been paid in advance, the containers were placed on arrival in a licensed customs warehouse. fgBut the goods were released by the warehouseman without the production of bill of lading. Disputes arose on carrier's negligence for the misdelivery. Though the Chileans law was applicable which incorporates the Hamburg Rules, but the court held that delivery to a customs warehouse didn't constitute delivery under bill and didn't relinquish the carrier's control over the goods.

In USA, the divergences exist among the courts. But considerable of them regarded that handing the goods to the customs agent or governmental authorities as a proper delivery by the carrier and the carrier is discharged from the liabilities thereafter.³⁵ However, these recognitions of delivery are based on the principle that a proper delivery shall also be examined under the "laws, customs of the port."³⁶

Chinese law does not deal with such situations. A consensus is not met until now. In *Tianjin Jia hao Co. v. Tianjin Ship Industrial Development Co.*, the goods were discharged to the customs warehouse at the destination and released by the customs warehouse to the wrong person. In the first instance, Tianjin Maritime Court held that the carrier should still be liable for the misdelivery. However, the appeal court, Tianjin High Court reversed the judgment of the first instance.³⁷ Later, in *Jinyi Hardwear Trading Corp.v. Zim Shipping Co. Ltd.*,³⁸ Guangzhou Maritime Court exculpated the defendant for the releasing of the goods without bill of lading by the customs. The decision was based on the rule of the choice of law as the precondition and reasoning. In accordance with the applicable law, the law of the Dominica, which authorized the releasing of goods by the customs or the port authority, the carrier shall no longer be responsible for the delivery of the goods after he had handed over the goods to the competent authorities.

From these cases, it may demonstrate that certain parts of Chinese courts have recognized that if the goods are handed to certain authorities in accordance with laws of the destination, the carrier shall be discharged from the duty of delivery thereafter, though there are no clear ideas on the identification of delivery yet.

In my view, whether a delivery may occur by surrendering the goods to the authorities shall depend on the degree of the control on the goods by those

³⁴ (2003) 1 LLR., 239

³⁵ E.g. *Tan Hi v. United States of America*, 1951 AMC 127; *Allstate Insurance Co. and Delta Overseas, Inc., v. Imparca Lines*, 1982 AMC 423, Quoted in Wang Wei, "Countermeasures for Delivery Without Presentation of Bills of Lading" (hereinafter as "Wang Wei's Countermeasures"), in *Forum of International Economic Law*, Chen An (chief editor), vol. 6, law press, 2002, pp.466-467 at pp.437-487

³⁶ *Ibid*, pp.465-474.

³⁷ Commented in, Applied Law Institute of the Supreme Court of PRC, *Selected Cases---- Marine, Transport, 1992-1999*, 1st ed., China Legality press, 2000, pp.277-281.

³⁸ Cited in *Wang Wei's Countermeasures, ibid*.

authorities. In some ports, the stevedores, warehousing and all the handling of the goods must be carried out by the port authority, or the goods must be discharged to the custom warehouses, but the operation of the goods are still under the instruction of the carrier. In these cases, the warehouses may be regarded as the agent of the carrier and the latter is still controlling the releasing of the goods, so it is not very reasonable that the delivery is regarded as occurred by surrendering them to these authorities. However, if the carrier will lose any control over the goods after surrendering them by mandatory regulations, the provision making reference to the *Hamburg Rules* or the UNCITRAL Draft Instrument and others will be helpful. Therefore, I suggest adding a rule granting the delivery by surrendering the goods to the competence authorities in accordance with the mandatory regulations, but whether the carrier shall be discharged from the responsibilities thereafter shall be determined in given cases.

In addition, releasing the goods complying with the legal orders of court may also be regarded as a proper delivery.³⁹ This is another way of “delivery granted by law”.

4. FIO clauses and the agreement on delivery

As it has been questioned above, may a delivery of goods happen before the discharge does? In other words, is it permitted to agree to deliver the goods at one point before the discharge or to relieve the carrier from the liability of discharge and other operations of the goods?

At common law, it's the shipowner's obligation to load, stow and discharge the goods. The *Hague* and *Hague-Visby Rules* stipulates that carrier shall “properly and carefully” load, keep, stow, care of, and discharge the goods.⁴⁰ CMC borrows the same.⁴¹ These are usually deemed as the obligations of the carrier on the care of the goods. According to W. Tetley, the degree of “properly and carefully” is close to that responsibilities on the common carrier as an insurer to the goods under the common law, and, is higher than the standard of “due diligence.”⁴²

In practice, especially under liner trades, generally, the carriers take charge of the aforesaid operations of goods as well as the normal payment of them. However,

³⁹ Releasing the goods by orders of courts may occur when there are competing claims against the goods, or even sometimes the consignee refuse to take over the goods improperly. For further discussions see Chapter 4 and 7.

⁴⁰ Art.3 (2) *Hague-Visby Rules*.

⁴¹ Art.52 CMC.

⁴² W. Tetley, *Properly Carry, Keep and Care for Cargo --- Art. (3) of the Hague/Visby Rules* (hereafter as “*Tetley's Care for Goods*”), European Transport Law, 2001, pp.13-15 at pp.9-34.

most of the voyage charterparties include clauses such as “free in” (FI), “free out” (FO), “free in & out” (FIO) and “free in, out stow & trim” (FIOS) concerning the reallocation of the cost or the responsibilities to the one or some sections of the handling of goods, such as loading, discharging or stowage of them between the shipowner and the cargo interests. For the purpose of simplification, I would like to call all these kinds of clause “FIO clause.”

What will be the exact meanings of an FIO clause? It differs in various jurisdictions. Some deem it merely relate to the transfer of the cost of the operations of goods, some regard it as a relief of carrier’s responsibilities to the goods under certain sections, and some adhere to the theory that such a clause determines the scope of the contract, and the delivery of goods takes place on board of the vessel.⁴³

In China, usually, these clauses are under the introduction of “ allocation of cost of loading and discharging,”⁴⁴ but the exact meanings of them are not very clear either.⁴⁵ In my view, from the original wording, the pure “FIOS” clause or term just refers to the transfer of the cost of certain operation of goods from the carrier to the cargo interests. However, with the development of the practice, an FIO Clause usually is expanded. In such cases, the real implication of a FIO clause shall be determined by the context of the contract. For instance, Gencon form 1994 provides “the cargo shall be brought into the holds, loaded, stowed and/or trimmed …and discharge by the charterers, free of any risks, liability and expenses whatsoever to the Owners.”⁴⁶ The cost and responsibilities and risks to the goods during the operations shall be transferred from the shipowner together. In addition, under some contracts, an FIO Clause will be conjunction with other clause as to the reallocation of the responsibilities of certain section of the operation of the goods. For example, the Stemmor Voyage Charterparty form used in the English case *The Jordan II*⁴⁷ included both clause 3 stating “Freight to be paid at and after the rate of US\$…per metric tonne F. I. O. S. T.…” and clause 17 being indicated as “Shipper/Charters/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel …”, which are regarded as to relieve the expense, responsibility and risks to the relevant operations of the goods from the shipowner.

Under the charterparties, the effect of these clauses is of no doubt because the

⁴³ See G J. van der Ziel, *Background Paper on “Delivery”*, paper of the 38 the CMI Vancouver Conference, May, June 2004.

⁴⁴ *Yu’s Maritime Law*, pp.146 –147; see also Si Yu-zhuo and others, *Detailed Maritime Law*, 1st ed., Dalian Maritime University Press, 1995, pp.206-207.

⁴⁵ See *Yin & Guo’s Law of Carriage* pp.175-176.

⁴⁶ Art. 5 (a) of GENCON charter form 1994.

⁴⁷ *Jindal Iron and Steel Co. Ltd. and Others v. Islamic Solidarity Company Jordan Inc.*, (2004) UKHL 49, (2005) 1LLR, 57, see also the note of the case in www.onliedmc.co.uk/jindal_iron_v_solodarity_hofl.html>, 12 July 2005.

parties are free to allocate the responsibilities and risks to the goods. But the controversy arises when they are incorporated into bills of lading, or when they are concluded in a contract of carriage other than a charterparty.

Under the *Hague, Hague-Visby Rules* and the most of national carriage laws, including the CMC, the regulations on the bills of lading and the carriage contract other than charter parties are generally mandatory. They usually stipulate that the obligations and responsibilities established on the carrier are not allowed to be relieved or reduced, but can be increased.⁴⁸ In light of these provisions, as a general understanding, the carrier's obligation abovementioned of the proper and careful loading, stowage and discharging and other operations of goods are the compulsory duty on the carrier, and shall not be exonerated. For example, in USA and South Africa, these obligations are stringent and "non-delegable,"⁴⁹ so the relieving of the carrier's responsibilities to the goods by FIO clauses will be null and void against the endorsee of the bill other than the original charterer.

In China, the CMC, CLC and Domestic *Waterway Regulations* do not give provisions on the effect of an FIO clause under a bill of lading or a contract of carriage other than a charterparty. If the clause only deals with the cost of the operations of the goods, it seems no hinder under the present law. But when a clause involves the transferring of the responsibilities to the goods, the controversies arise, but the majority denies the effect of such kind of clause in a bill of lading or a contract of carriage other than a charterparty. The reason is that the care of the goods during the process from the loading to discharging is compulsorily borne by the carrier.⁵⁰ In addition, in China, usually a FIO(s) clause does not define the scope of the contract. In practice, even if the discharge of goods is performed by the consignee, the goods may still under the control of the carrier until the delivery order is issued by the carrier and the goods are taken over from the warehouse at the port (see "5.1 general procedure of releasing of goods").

In the UK, though the loading, discharging and other relevant operations of the goods are carrier's obligation at the common law, but the long-standing judicial precedent enunciated that clear words, such as an express FIO Clause might transfer the responsibility for proper performance of this obligation to the cargo interests.⁵¹ In the newly famous *The Jordan II*,⁵² all the decisions at first instance, in the Court of Appeal and the House of Lord upheld that the FIOST clause (clause 3) conjunct with the clause 17 used in this case effectively transferred

⁴⁸ E.g., art. 3.8, art. 5 of *Hague Rules*, art. 44, 45 of the CMC.

⁴⁹ See *Tetley's Care for Goods*, p.16, see also *Gaskell's*, 8.28, p.262.

⁵⁰ See *Yin & Guo's Law of Carriage*, p.90.

⁵¹ E. g., *Pyrene v. Scindia*, (1954) 1 LLR. 321, *The Carol*, (1993)1 LLR. 1, cited in *Gaskell's*, 8.28, p.261, see also *Renton v. Palmyra* (1957) AC 149 cited in *The Jordan II*.

⁵² *Supra* fn.47.

responsibilities to the performances of the goods and the risks under them to the cargo interests, the shipper, charterer and the receiver of the goods.⁵³ So the cargo interests' claims against the defendant shipowner for damages to goods were rejected. The decisions approved these clauses not only in the charterparty but also under a bill of lading when the holder is not the charterer. Lord Steyn preferred to interpret the art. 3(2) of the *Hague Rules* beyond the linguistic matters but based on its purpose and context. Moreover, he cited Devlin J's observation of art. 3(2) that it was not to override freedom of contract to reallocate responsibility for the functions described in that Rule.

As my estimation, the decisions of *The Jordan II* may not only be influential on the later similar cases, but also, very possibly it may bring the review of the system of carrier's responsibility under the *Hague* or *Hague-Visby Rules*.

In addition, even some of the English judges accepted the possibility that the contract function would begin after the stowage or other stage but end before the unloading or so by a properly drawn FIO clause, which transfers the responsibilities to the goods under such operations to the cargo interests.⁵⁴ This view means that in UK, an FIO clause may define the scope of the contract. Nevertheless, the effectiveness of such clauses on the bill of lading is still questioned by some scholars.⁵⁵

During the drafting of the UNCITRAL Draft Instrument, the divergences of the effect of FIO clauses are reflected. The present draft is a compromise to a certain extent. Firstly, it provides a similarly provision as the art. 3(2) of *Hague Rules* that puts the obligation of functions of goods on the carrier during the responsibility period.⁵⁶ However, the parties may agree that certain of the aforesaid functions "may be performed by or on behalf of the shipper, the controlling party or the consignee."⁵⁷ Just like the explanations to this provision, the latter one "is intended to make provisions of FIO(S) or the like," and "the applicability of this draft instrument to negotiable transport documents issued under a charterparty makes this provision desirable."⁵⁸ From the wording of these provisions, it can be logically deduced that a FIO clause does not define the scope of the contract because the relieving of the operations is within the scope of "responsibility period", and the rest of the carrier's responsibility under this kind of clause "continues to be within the scope of the contract of carriage," and is "without

⁵³ However, as an exception, if the carrier has intervened the operation of the good, or the damages to the goods are resulted from the omission or fault of the carrier, they shall still be liable for the damages though there's an FIO clause. See the decision of the "Jordan II" in the Court of Appeal, (2003) 2LLR,87.

⁵⁴ *Gaskell*, citation, 8.28, p.262.

⁵⁵ See for example, *Gaskels*, *ibid*.

⁵⁶ Sect. 5.2.1 in WP.21, art. 11.1 in WP.32.

⁵⁷ Sect. 5.2.2 in WP.21, art. 11.2 in WP.32.

⁵⁸ Fn.63 in WP.21.

prejudice to” the carrier’s obligations to make the vessel seaworthy⁵⁹ and some other obligations. So, the party of the cargo interests performed the discharging of goods, the delivery still may occur after it. In such case, the delivery shall also be identified by the agreement, or the customs, practices or the discharge from the vessel that established in the instrument.

In my view, no matter a FIO Clause is effective to transfer the responsibilities and the risks of the operations of goods to the cargo interests or not, it will not exclude the contractual obligation of delivery from the carrier. In other words, even the discharge and the all the functions of the goods may be taken charged by the cargo interests, a delivery shall still occur.

Theoretically, I agree with the logical structure of the UNCITRAL Draft Instrument. Briefly, an FIOS clause involves only certain point or points of the operation of the goods, it will not affect the responsibility period of the carrier, the carrier shall still be responsible for the good in accordance with the instrument, though certain operation of them have been transferred to the cargo interests.

However, since the draft provides both the contractual freedom of the agreement of delivery and the relieving certain of the cargo operation from the carrier, it is very possible that the carrier may end all of his responsibilities under the contract by the discharging or even before the discharging of the goods.

So, as to the problem whether a delivery can be made on board before the discharge or other processes of the goods, or whether an FIO clause may define the scope of a contract of carriage, personally, the real meaning and the effectiveness of an FIO clause will still be the premise, i.e., whether the carrier is entitled to relieve some of his obligations on care of goods by agreement shall be the precondition taken into consideration. In the future legislation, this premise will be decided by the value underlying the law.

The final solution of article 11.2 under the UNCITRAL Draft instrument is still open. The provision has both of its reasonable basis and possible danger. With the widespread practices of the FIO clauses, it needs a unified attitude in statute. Usually, FIO(s) clauses derive from the charterparties, the agreement on the cost and/or responsibilities may adjust the freight or other charges of the goods and may bring a balance of the legal and commercial interests between the parties. In addition, the endorsees of the negotiable transport documents issued under a charter party, usually know about the charter party and the FIO (S) clauses from the process of trades. As a result, it will be reasonable under the tramp trading, to recognize the effect of such clauses and to protect the carrier from the damages of the goods not resulted from any of his faults.

⁵⁹ G. J. van der Ziel, *The UNCITRAL/ CMI Draft for a New Convention Relating the Contract of Carriage by Sea*, *Transportrecht*, 7/8 2002, p. 272 at pp.265-277.

However, the worries and criticisms come from the possible abuse of such provisions by the carrier. It is so worried that the permission of exceptions of goods operation shall “effectively allow a carrier to contract out all liability except the actual ocean voyage after loading and before discharge,”⁶⁰ and the freedom will spread from the tramp shipping to the liner trade, which may result in another unfairness to the consignee under a bill of lading and similar negotiable documents. And it would not only “make the whole mandatory nature of the Instrument unnecessary,”⁶¹ but also very possibly break the mandatory systems and legal ideas on the common carrier established from the *Harter Act*, the *Hague Rules* to the consequent national laws. Therefore, the introduction of such a provision to effect a FIO(S) clause into a bill of lading or the contract of carriage under the liner trading shall be very prudent.

5. General procedure of delivery in China and related Problems

5.1 General procedure of releasing of goods

In most ports of China, the general procedures of releasing the goods to the consignee are the similar.

Firstly, the goods are discharged to an outside or inside warehouse or CY or other places in the port of destination. Under the liner shipping, the stevedores and the CY, warehousemen are generally employed by the carrier. While in the tramp trades, according to the agreements like the FIOS clause, the performance of the discharge or some operations of goods may be appointed by the merchant party.

Secondly, the carrier or his agent shall issue a Delivery Order (D/O)⁶² to the consignee upon the presentation of the original bills of lading or against an identity or against a LOI in the given cases.⁶³

Before the issuance of a D/O, generally the due freight or other charges of the goods shall have been paid.

A D/O is handed to the consignee and will be presented to the warehouseman or

⁶⁰ See the Commentary of UNCATAD, Doc. No.: UNCTAD/SDTE/TLB/4, pp.22, <www.unctad.org/en/docs/posdtetlbd4/en.pdf>, 16 July 2004, see also UNCITRAL, Doc. No.: A/CN.9/WG.III/WP.21/Add.1, p.20, para. 50.

⁶¹ Hannu Honka, *Main Obligations and Liabilities of the Carrier*, *Transportrecht*, 7/8 2004, p. 279 at pp.278-284.

⁶² This kind of D/O is different from a ship's D/O and a trader's D/O. For the functions of the latter two see Guenter Treitel, Reynolds, *Carver on Bills of Lading* (hereafter a s “*Caver on Bill of Lading*”), 1st ed., Sweet & Maxwell (London), 2001, pp, 377-401; see also Chapter 4 in this thesis.

⁶³ The obligations and liabilities of the carrier on delivery under different transport documents will be discussed in chapter 4, 5.

CY when the consignee takes over the goods. At the top of a D/O, it is usually so stated:

“To: (name of Terminal, warehouse or a CY etc.)

Deliver (hand over) the goods to the following consignee, please,

Consignee: (Name and telephone number of the consignee, usually includes the address of it)”.

In addition, brief descriptions of the goods including the name, quantity/measurement, mark etc. will be specified.

Another necessary part in a D/O is several boxes for stampings or signatures. One of them is for the stamp of the consignee. In theory, the stamp shall be in accordance with the name of the consignee stated at the top of D/O. The other important box is for the customs. The rest are for the signature or stamp of the person who is actually take the goods and the warehouseman or CY etc. to stamp or sign when the goods are collected by the consignee.

Thirdly, the consignee submits the D/O with other data of the goods to the customs for clearance. The customs will stamp in the relevant box as an approval.

It is also permitted that the clearance is made on an original bill of lading.

Finally, the consignee collects the goods from the places where they are stored, and the D/O will be surrendered to the warehouseman or the CY or others.

So, in China, a delivery order may have multiple functions. The first one is it is the instruction by the carrier for releasing the goods. Then, it may be data for the customs clearance and will be a document evidencing the customs' approval of importing the goods by a customs on it. In addition, it will be receipt of taking over the goods by the consignee when it is returned to the warehouseman.

In fact, the multiplied functions on one D/O are just based on the efficiency purpose of the operations. Actually, these functions and legal relationships are independent from each other, e. g., a D/O may be still used for customs clearance after the goods have been actually delivered, or, if the other receipt has been signed by the consignee when taking the goods, the D/O will be unnecessary for such evidential function.

However, the foregoing is just the general procedure, and it is possibly different when related to particular trades. Nevertheless, this general procedure in China causes some problems on delivery in practice, most of which are related to the identification of it. I'd like to select two of them, which have brought very common disputes in recent years, for discussion.

5.2 The point of delivery: at issuance of D/O or the taking over of goods?

There are some disputes on the damages of the goods occurred after the issuance of the D/O but before the handing over of them. Occasionally, disputes may arise between the legal consignee and the carrier when the dock man released the goods to the person other than the one indicated in the D/O. Whether the carrier is liable for the damages resulted therefrom is usually the focus.

Assuming the issuance of the D/O is proper, there are two arguments in China. One is supporting that the carrier shall still be responsible for the damages of the goods or the delivery of them, because the delivery shall not be made until the consignee has taken over the goods. The other point is that the carrier shall not be liable for damages or mis-delivery occurred by the warehouseman or others after he has issued a D/O, especially not for the mis-delivery.

I am in favor of the first one.⁶⁴ Though the issuance of a D/O indicates the intention of the carrier to deliver the goods to the named person, it does not constitute the actual delivery. As discussed in the former parts, delivery shall be identified according to the contract firstly. Looking into the contracts or the contract particulars in the bill of lading or other transport documents, there is no agreement that indicates a delivery shall occur by the issuance of D/O. Contrarily, it may be deduced that the delivery shall be made at the CY or CFS or other places. The place where a D/O is issued usually is not within the scope. With the EDI application to the issuance of D/O and other documents, it will be very difficult to tell a place of such issuance.

Even if there is no agreement on the delivery, from the practice and the functions of D/Os, it may be concluded that, generally, the issuance of d/o combined with the actual surrendering of the goods shall be a delivery of goods. The carrier instructs the warehouse or other place to release the goods to the named person by a D/O, and in most cases, the CY or other warehouse is the agent of the carrier to hold and release the goods. So, before the goods are actually taken over by the consignee under the D/O, the delivery has not occurred, and the carrier may still be responsible for safety and delivery of the goods, he may even be liable for the damages resulted from the fault of the wharfing or carrier's agent.

Nevertheless, if the consignee delays to take over the goods or "disappears" after the issuance of the D/O, the delivery shall be identified by another way. Further discussion will be made in Chapter 7.

⁶⁴ In this part, I'll focus on the identification of the delivery in these cases. Under the CMC, the liabilities of the carrier for the damages suffered to goods during the period after discharge may be different as to the containerized goods or non-containerized ones, because the responsibility periods of them are distinguished as I have mentioned in Chapter 2.

However, if the warehouse or a CY or other party holding the goods is appointed by the consignee or is under the control of the consignee, the situation may be different. The next problem is related to this kind of category.

5.3 Delivery occurs before a D/O is issued

In some special trades, such as oil or other liquid goods, it is the usual practice that the consignee shall appoint the stevedores or hire tanks and other similar containers to collect and keep the goods. Moreover, in China, terminals operated by some big merchant owners are getting more, the vessels will arrive at these private wharfs and discharge their goods.

I have been involved in some of these cases as a legal adviser. In one case, the oil had been discharged through the pipes directly to the tanks hired by the buyer of them, but the original “to order of bank” bills of lading were still in the hand of the bank. In order to get through the customs clearance in time, the buyer asked for a D/O from the agent of the carrier at the destination port by a LOI and took over the goods from the tanks. Then, the unpaid bank brought a suit against the agent of the carrier for delivery without presentation of production of original bills of lading.⁶⁵

I will not discuss the shipping agent’s liabilities for his issuance of a D/O without a bill of lading. However, as to the causation between the shipping agent’s issuing of the D/O and the damages of the holder of the bill of lading, it shall be related to the point of delivery. In this case, there was no specific agreement on the point of delivery under the bill of lading. But in practice, usually, under the terms of a charterparty, the shipowner’s responsibilities for the goods begin and end as the cargo crosses the ship’s rail on loading and discharging respectively.⁶⁶ So, it has also been the common practice that under tank or liquid goods carriage, the delivery usually is made as soon as the goods pass the ship’s manifold and flow into the hose supplied by the cargo owners for taking them.⁶⁷ In such a case, the delivery has occurred before the shipping agent issues the D/O. In addition, the tanks were hired by the buyer, and in accordance with their contract of storage and hiring, the operator of the tanks should follow the instructions of the buyer. So, the delivery without bill of lading happens at the discharging of the goods from the vessel to the hose of the tanks on shore. At that point, the delivery was under the control of vessel, or, in other words, under the control of the master.

Because of the special practice of the tanker or liquid carriages, P& I Club has

⁶⁵ For further research on specific obligations of the carrier on delivery against original bill of lading see Chapter 5, 6.

⁶⁶ Christof Luddeke and contributors, *Marine Claims, a Guide for the Handling and Prevention of Marine Claims*, 2nd ed., LLP, 1996, p.107.

⁶⁷ *Tetley’s Cargo Claims*, p. 570.

made some warnings to the master of recalling original bills of lading or confirming the identity of the consignee if there is no bill of lading is issued when the ship is ready to discharge the liquid goods.

In these cases, when a D/O is issued after the delivery of goods, it will not be the instruction for the releasing of the goods. Because of the traditional usages, the D/O may also be used as the data for the customs clearance and bears the stamp of the approval.⁶⁸ But the delivery is independent from the customs administration as above mentioned, so, after the delivery, the goods may be still under the control of the customs but not under that of the carrier. So, under this circumstance, the D/O is issued only for the purpose of customs clearance, and its functions of an instruction for releasing the goods and a receipt by the consignee have ceased. The issuing of the D/O in these cases is not related to the delivery.

6. Conclusions

To establish a set of criteria for identifying delivery will be conducive to the certainty in the practice and reducing the confusions and disputes. The criteria shall be: the agreement on the time and location of delivery is the priority, in absence of such an agreement; the customs, practices and usages in trade shall be applicable. Without the former two situations, the discharge of the goods from the vessel or other transport instrument is the time and the location of the delivery. The law may also regard a delivery constituted under certain special circumstances such as the surrendering of goods to the authorities complying with mandatory regulations of the destination port.

The points provided by these criteria are not only the principles for identification of delivery, but more importantly, are the obligations on the time and location in respect of delivery and taking delivery by the carrier and the merchant party. In other words, the carrier shall deliver the goods, and the merchant party shall take over the goods at the time and the location in accordance with the agreement or custom and so on. If either of the party fails to do so, it will be a breach of contract.

Making the agreement as the primary rule for identification is because of the contractual feature of the delivery. Meanwhile, such suggestion in the future legislation will provide guidance for and encouragement to a clear agreement on delivery, which may diminish the confusions to the greatest extent.

⁶⁸ There are some arguments that put an administrative function on D/O is not too reasonable. In some ports, such as Xia-men, Fuzhou and others in Southern China, the importers may go through clearance by a copy of bills of lading but not the original one or the D/O with other data of goods.

However, the agreement on delivery shall not deviate from the general principle of the contract law, nor can it relieve the mandatory obligations from the carrier.

As to the relation between a FIO (s) clause and the point of delivery, theoretically, an FIO clause shall not discharge the carrier from his obligation of the delivery, no matter the clause has relieved the carrier from the responsibilities to one or some functions of the goods or not. The criteria for identifying the delivery are the same. However as to the problems that whether a delivery may occur on board before the discharge or other operations of the goods, and whether an FIO clause may define the scope of a contract of carriage, we still have to turn to the points on the effectiveness of a FIO(s) clause trying to transfer some of the sections during the traditional care of goods to the cargo interests (the discussion is focused on the bill of lading and contract of carriage other than a charterparty). In my view, only if an FIO clause has successfully transfer the responsibilities of discharge and other process of the goods to the cargo interests, the parties also may define the delivery before these points. Divergences exist among the countries. The majority in China is denying the effectiveness of such kind of clause under a bill of lading or a contract of carriage other than a charterparty. However, the cases in the UK and the proposal in the UNCITRAL Draft Instrument incline to provide the parties the freedom on the care and functions of the goods. These tolerances have their reasonable bases under the tramper trading. But as the liner shipping is concerned, they may shake the legal value of the mandatory system on the common carrier under the existing legislations. Therefore, introduction of the innovation to laws concerning liner trades or bill of lading shall be very prudent. It will be determined by the underlying value of the law. So, a further consideration is necessary.

As the procedures of delivery of goods in China, the suggested criterions for identification will also be applied. During the general procedure, the issuing of a D/O and the actual taking over of the goods constitutes the process of delivery. But in some special trades, such as the tanker carriage, or under some special usage, such as the discharging and storage of goods thereafter that are controlled by the consignee, delivery may happen differently from that in the general procedure.