Chapter 4

Obligations of Carrier on Delivery

As an essential contractual undertaking of the carrier, delivery of goods gives rise to a series of related obligations and liabilities. According to the provisions in contracts of carriage of goods or the carriage laws, impliedly or expressly, also partly based on the discussions in the former three chapters, the obligations focus on the followings, *inter alias*:

Firstly, a carrier shall deliver the goods safely; secondly, deliver at an agreed place, or in some special circumstances, at a proper place other than the agreed one; thirdly, deliver in time; fourthly, deliver with the proper mode; and, the last, deliver to the proper person.

The first one is a general rule applying to the carrier to deliver the goods in a likely good order or conditions, and the core of it is about the physical safety of the goods and the obligations of carriage and care of goods. This part is the traditional focus of the laws and contracts of carriage as mentioned in Chapter 1, and a relatively mature system of the liabilities of the carrier has been established. With the harmonization of the delivery and the end of a responsibility period when a carrier breaches this obligation, his liabilities will be settled by the system related to the loss of or damages to the goods in most of the cases.

The place, time and modes of delivery shall be determined by the criterions established in chapter 3, but some stipulations under present Chinese laws concerned with the place and time of delivery may not be in accordance with these standards, and the liabilities of breach of such obligations are not very clear, so the present legislations need further examinations.

As to the person, to whom a delivery shall be made is the core of the obligations of delivery and cannot be omitted. Therefore, the followings in this chapter shall focus on the obligations concerning the place, time and the person when a delivery

is to be made.

1. Delivery of goods at an agreed/proper place

1.1 Place of delivery as agreed

1.1.1 Normal situation under CMC: discharging port

According to the provisions of CMC, but not very expressly, the place of the delivery will always be defined as the discharging port. For example, the contract of carriage is defined as the carriage of goods from one port to another,[1] and the carrier is obliged to carry the goods to the discharging port via agreed routes.[2] More obviously, as far as the responsibility period under a containerized-goods carriage is concerned, the delivery of the goods will be ended "at the discharge port,"[3] and a delay of delivery constitutes when the goods are not delivered on the agreed time "at the agreed discharging port."[4]

From these provisions, it may be inferred that the CMC applies to the "port to port" contract, which may not comply with the development of the "door to door" carriage of the container transport. And, even under the "port to port" contract, the term "discharge port" as the delivery place is not precise enough, nor may it match the practice very well nowadays.

1.1.2 Point as agreed

Although a discharging port is usually determined by agreement, in practice, the agreement of the place of discharge or delivery may often be more detailed than only the name of a port. In some cases, the geographical or administration range of a port is rather broad. For example, the dock in Wai-gao-qiao in Shanghai port is a several hours' drive from the Wusong or other docks, therefore, it needs to be specified as a detailed place when Shanghai port is agreed as the discharging port. Meanwhile, when a container carriage is concerned, the point of delivery may very commonly be a CY or a CFS that is near to the discharging port. In these cases, the carrier shall deliver the goods to the points specified in a contract.

In order to be geared to the development of practice, the place of delivery shall not be limited to the "discharging port." The *Domestic Water Way Regulations* has

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[1] Art.41 CMC.
[2] Art.49 CMC.
[3] Art.46 CMC.
[4] Art.50 CMC. For further discussion see Part 2 below.

noticed this development and defines the "contract of carriage of goods by water-way" is a contract under which the carrier undertakes to carry the goods from one port (or place, point) to another port (or place, point).[5]

Some foreign legislation does not put forward the discharging port as the place of delivery, either, for example, the German TRAT embodies that the place is designated by the parties, and give the parties rights for determining the place of delivery.[6]

Similarly, the UNCITRAL Draft Instrument provides that "the location agreed"[7] as the place of delivery.

It is suggested that CMC shall also provide the place of delivery as an "agreed place" or "designated location or point" or other similar words instead of the discharging port.

1.2 Liabilities for breaching under Chinese system

It is also not rare that the goods may be carried and delivered to a port or place other than the agreed one. As to the liabilities for such a breach the CMC is not very clear.

Under the system of the CMC, the provisions of "deviation" may be applied in some cases. According to article 49, the carrier shall carry the goods to the discharging port on the agreed, or customary or geographical route, if the carrier fails to do so, it will be a deviation, and the carrier shall be liable for it except for reasonable or justifiable deviations. In some cases, carrying the goods to or delivering them at the place other than the agreed destination may be regarded as an unreasonable or unjustifiable deviation.[8] However, the deviation theory does not settle this problem very well until now, at least under Chinese law.

Generally, deviation is considered as an intentional change, or a deliberate act on the part of the carrier to the carriage,[9] but the change of the place of delivery may result from various reasons, and, it is difficult to regard all of them as deviations. In addition, the CMC does not provide specific systems for determining the liabilities for deviation, but usually focuses on the compensation to the loss or damages of the

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[5] Art. 3(1), *Domestic Waterway Regulations*.

[6] For example, in section 419 of "obstacles to carriage and delivery" of TRAT, it puts forward the remedies for the carrier encountering the obstacles of delivery before or when the goods arrive at the "place designated for delivery".

[7] Art.2, art.7 (3) in WP.32, art.1.3, art.4.1.3 in WP.32. From the application scope pf this draft instrument, it may be applied to "door to door" or multi-model transport, see also Michael Sturley, *Scope of Coverage under the UNCITRAL Draft Instrument*, JIML 10, (2004) 2, pp.144-7 at 138-154.

[8] In China "deviation" is only considered in respect of the geographical one, unlikely in Some USA courts, "deviation" may include over-carriage and delay, which may be called as "quasi-deviation". See *Tetley's Cargo Claim*, p.102.

[9] *Ibid*; see also *Wilson*, p17, *Yin & Guo's Carriage Law*, p. 92.

goods or the loss of the right to the limitation and so on, which are usually not what the consignee actually wants when the goods are not damaged but arrive at other port.

Therefore, the cargo interests have to seek for recourse in the Contract Law of P. R. China.

According to the CLC, any party under the contract "shall perform their obligations thoroughly according to the terms of the contract,"[10] and, if one party to the contract "fails to perform the contract obligations or its performance fails to satisfy the terms of the contract," he shall bear the liabilities, *inter alia*, "to continue to perform its obligations, to take remedial measures, or to compensate for losses."[11]

So, when the goods are carried to or is announced to be carried to another place than the originally agreed one, **first of all,** the carrier is still obliged to carry the goods to the agreed place or port upon the requirement of the consignee or other parties who is entitled to do so under the contract of carriage. In practice, carriers often convey the goods to the agreed place by truck or railway in the given cases, which is a remedial measure replacing the performance by sea when the latter is impossible or the other party agrees on it. In addition, it is also the very common practice that the consignee goes to take the goods at the place where the goods arrived if he agrees to do so, and, usually, the carrier shall pay for the transportation and over cost resulted from this "transshipment".

Secondly, the carrier shall compensate the other party for the losses suffered by this breach. These losses usually are the overpaid transportation freight to the truck or railway, the over-paid charges for a container yard or for the rents of the containers in the extra period and so on. However, generally, the loss resulted from the delay of the goods or the loss from the repudiation of a consequent contract related to the contract of carriage shall not be compensated unless it is agreed otherwise or the carrier was informed by these results of the breach when he made the contract with the shipper. As to the scope of compensation, the rules of "reasonably foreseeable" shall apply.[12] The carrier may bear both of the two liabilities in most times when damages actually incur by such changing of destination.

1.3 Delivery at the place other than the agreed one

However, under some special circumstances, the carrier is entitled to change the

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[10] Paragraph 1 art. 60, CLC.
[11] Art.107, CLC.
[12] Paragraph 1 art. 113 of CLC. See also Jiang Ping, *Detailed Interpretations of Contract Law of P. R. China,* 1st ed., Publishing House of China University of Politics and Law, 1999, pp.93-94.

place of delivery, in other words, the destination, without breaching the contract when the statutory or contractual conditions are met.

1.3.1 Statutory authorizations

Paragraph 1 of Article 91 of CMC provides that "if due to the *force majeure* or any other causes not attributable to the fault of the carrier or the shipper, the ship could not discharge its goods at the port of destination as provided for in the contract of carriage, unless the contract provides otherwise, the master shall be entitled to discharge the goods at a safe port or place near the port of destination and the contract shall be deemed to have been fulfilled." The right for the master to discharge at a near place is equal to the right for the carrier to do so.

The *Domestic Water-way Regulations* provides similarly.[13] The only difference between the CMC and this Regulation is that the latter one puts only the "*force majeure*" as the exemption, which is because the liability scheme under the CLC is near to the strict liability base,[14] but under the CMC, it is the fault bases system.

However the conditions for constitution of a *"force majeure"* are very strict in China and it refers to the objective circumstances, which are unforeseeable, unavoidable as well as insurmountable.[15] Sticking to this definition, it will be very possible that a serious port jam, heavy Typhoon or other very bad weather shall not be a *"force majeure"* and not be the exemption for the carrier to change the destination when a domestic carriage is taken into consideration.[16] And, the range of the cases entitling the carrier to do so under the CMC will be wider, although there are still some confines on the carrier when he tries to exercise this kind of right on both the international and domestic water carriage.

The above authorities to the carrier in CMC and *Domestic Waterway Regulations* are making some references to those so called "near clause" in a charterparty.[17] Under voyage charter parties, these clauses mainly deal with the risks and responsibilities of the safety of the ports or other places, and is usually one of the protections to relieve the shipowner from the obligation to sail to the named ports,[18] the rules established by case law or shipping custom may be of great

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[13] Paragraph 1, art. 35, *Domestic Waterway Regulations*.
[14] See Art. 107 of CLC.
[15] Art.153 of *General Principles of Civil Law*, see also paragraph 2 art.117 of CLC.
[16] In some recent cases, there is a sign that some judges would like to lower the standard for the "force majeure." For example, in the unpublished case, *Yunlin Paper Corp. and others* v. *Sino-trans Co, Jinling Branch*, waterlogging resulted from a Typhoon and heavy rain not met in several decades was defined as a "*force majeure*" even it had been alarmed by the media in advance.
[17] Under a voyage charterparty, while shipowner's obligation is to bring his ship to the port named in the charter or nominated by the charterer and it is very commonly qualified such as "one safe port of X X, or so near thereto as she may safely get" on the loading or discharging port respectively.
[18] For a fuller interpretation see Julian Cooke and others, *Voyage Charters*, 1st ed., LLP, 1993, pp.86-89, Yang

reference for the application of the CMC.

First of all, these *force majeure* or other non-fault events above mentioned shall be the direct causes for the failure of the ship to get to the formerly agreed place and to discharge or delivery.

Secondly, the events or obstacles that prevent the ship from getting into the agreed port must be relatively permanent. In *The Athamsa*,[19] the vessel was not allowed by the pilotage authorities on the Mekong River to proceed upstream to the port of Pnom Penh for the river currents persisted. And, the Court of Appeal decided that the master could invoke the "or so near thereto as she may safely get" clause, on establishing that the river passage would not have been "safe" for a further five months. The shipowner could rely on such a clause when he is prevented from entering a port by a danger or obstructions of a permanent nature or would delay him for an unreasonable time.

Generally, "a temporary obstacle, such as an unfavorable state of the tide or insufficient water to enable the ship to get into the dock, will not make the place unsafe and so as to discharge the shipowner from liability to unload there."[20] The ship must wait until a temporary obstacle is removed, but he is not bound to wait an unreasonable time.[21] *Interpretation of Maritime Code of P. R. China* holds the similar opinion, but the expression as "the master shall *wait for a while* (emphasis added) and is not entitled to exercise this right immediately"[22] is a little too vague on the restriction on the carrier.

Actually, waiting for a reasonable period or the permanent obstacles and so on are the matters of fact and should be further identified or determined by cases in consideration with commercial customs and the commercial objects of a contract.

However, this is very important for preventing the carrier from abusing the right to change the destination.

Thirdly, the obstacles shall not exist when the ship sets out to the destination. As generally accepted, the shipowner is more familiar with the situation of a port than the charterer or other merchant party in most cases. So if the obstacle for safely sailing has existed when the contract is concluded or when the port is designated or before the ship sets out to it, the shipowner or the carrier is entitled to change the destination or stop the carriage, otherwise, it will be a "waive" by the shipowner

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Liang-yi, *Voyage CharterParties* (hereafter as "*Yang's Voyage Charter*"), 1st ed., Dalian Maritime University press, 1998, pp.208-211.

19 (1963) 1 Lloyd's Rep 287.

20 E R Hardy Ivamy, P*ayne and Ivamy's Carriage of Goods by Sea* (hereafter as "*Payne & Ivamy*"), 12th ed., London, Butterworths, 1985, pp.146.

21 For example *Dahl* v. *Nelson*, quoted in the *Payne & Ivamy*, p.146-147.

22 Edited by Policy and Regulations Division of the Ministry of Communications of PRC, 1st ed., the People's communication press, 1993, p.73.

under English law, and he is not protected by such "near clause."[23] For instance, in the *Metcalfe* v. *Britannia Ironworks,*[24] though the Sea of Azov was closed by the ice on the arrival of the ship and it was very likely that the passage would not be free until the following April. The court held that the shipowner was not allowed to invoke the clause to unload the goods at a port nearby. Part of reason for this judgment was that the court took the views that the shipowner should have been aware of the conditions in the Sea of Azov at that time of year since the port of the Sea was named in the charter.

When a contract other than a voyage charter is taken into consideration, if the obstacles exist before or at the beginning of the voyage, the carrier should have known about the situations of the discharging port. If he still goes to the agreed port, and later alters to a nearby safe place, whether he will be protected by article 90 of the CMC will be doubted.

Fourthly, the choice of the nearby safe port will take into consideration the convenience and the interests of the shipper or consignee. That is, the carrier shall deliver the goods in a proper place. In addition, paragraph 2 in both art.91 of CMC and art.35 of *Domestic Waterway Regulations* provide the same idea that the master shall inform the shipper or the consignee promptly and take into consideration their interests when he decides to unload the goods.

As to the word "proper", first of all, it will be a safe place.[25] In addition, it will be sufficient for unloading and keeping the goods there and will be convenient for the merchant party to take them. As to convenience to the merchant party, the English courts had imposed the "ambit" test, requiring the selected alterative port to be within an area or zone in "close proximity distance" to the original port.[26] However, with the development of recent cases, a more flexible approach will apply to the "ambit" test, and it is recognized that the distance is relative.[27] These theories and customs will be very helpful for the jurisdiction and shipping practices in China.

1.3.2 Contractual authorizations

To change the destination is also a modification to the contract, so it can be made if the parties reach a consensus on it. In practice, if allowed by the contractual provisions, the carrier may also change the place of delivery.

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[23] See 18, *Yang's Voyage Charter,* p.p.196-197.
[24] (1877) 2 QBD 423, quoted in *Wilson's*, pp.63-4.
[25] An outstanding point remains that "safe" refers to the safety to the ship but not to the cargo, see *Wilson*, p.64, but it is difficult to say that a port will be a proper place if it is obviously unsafe for the cargo.
[26] *Wilson, ibid*.
[27] *Ibid*.

(1) Near clause

The "one safe port of X X, or so near thereto as she may safely get" and similar expressions which entitle the shipowner or the carrier to sail to the near safe port is similar to the abovementioned provisions under laws, so, I will not repeat it here. However, it is worth noting that under the bill of lading or the contract of carriage other than a charterparty, the agreed "near clause" and so on shall not conflict with the mandatory obligations on the carrier such as the care of goods, the seaworthiness of vessel and the no deviation of the carriage and so on.

(2) Liberty clause

Most standard charterparties and bills of lading include a clause like the follows:

"The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without the pilots, to tow and /or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property," or even some of them entitle the carrier to carry the goods to the place other than the agreed destination.[28] These clauses are usually called as liberty clause[29] and often are invoked by the carrier as the defense against the claims by the consignee or the shipper based on the causes of deviation or the breach of "reasonable dispatch."

Whether the carrier can invoke this clause to excuse the liabilities for changing the destination, it will depend on the effect of these clauses. Under CMC, these clauses are usually regarded as the violation of the article 49 and the article 94,[30] and may be invalid under bill of lading or voyage charterparty. While in other countries, there may be more freedom under charterparties, but these clauses still are limited to satisfaction of the "commercial object" or "main objects" of the contract, and the shipowner is not authorized to carry in any route or with any method out of the scope of the contract,[31] inevitably not to deliver the goods at any place other than the agreed.

(3) Other clauses

Also very frequently, a contract or a bill of lading may include several separate clauses such as " ice," "strike," or a combined clause such as "war, quarantine, ice, strikes, congestion etc" to allow the carrier to discharge at any other safe and convenient port even at the port of loading under some specified circumstances. If they do not violate mandatory rules, these clauses usually apply.

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[28] E.g., Art.13 "forwarding, substitute of vessel, through cargo and transshipment" in the former COSCO bill of lading, which provided "if necessary, the Carrier shall be at liberty to carry the goods to their port of destination by other vessel or … other means of transport proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to transship, lighter, land … the Carrier's expenses but at Merchant's risk."

[29] In standard charterparty, such as Gencon Form 1976, (the newest is Gencon Form 1994), this was titled as "deviation clause" in article4.

[30] The article 49 of CMC is compulsorily applies to the charteree under a voyage charterparty.

[31] *Voyage Charters*, p. 192, see also *Yang's Voyage Charters*, pp137.

Nevertheless, the confines discussed in part 1.3.1 will also be put on these contractual authorities.

1.4 Redirection of place of delivery by the shipper

1.4.1 Redirection by the shipper

In the sales of goods (excepting a spot sale), it is often that the buyer may refuse to pay the goods, or become insolvent or reject the goods for various reasons after the contract has been concluded.

According to the provisions and theories of Chinese contract law, on the conclusive evidence that the other party of a contract loses its commercial credibility, or in serious deterioration of business conditions or loses it or is possible to lose the capacity of credit shown by other circumstances, the party who shall render its performance first may suspend its performance.[32] In addition, if one party refuses to fulfill its principal obligations under a contract no matter by words or act, or repudiates the contract leading to the failure of the object of the contract, the other party may rescind the contract.[33]

Therefore, under the abovementioned circumstances, as remedies to the seller (no matter he is the first instance seller or intermediate seller), he may recourse to stop the delivery to the buyer, or to retain the possession of the goods or to rescind the contract and resale the goods in the given cases. For example, The *Sale of Goods Act 1979* of UK provides the unpaid seller with one of these rights as stoppage in transit when the buyer becomes insolvent.[34] This right has been described as an "extraordinary right" of the seller based on "strict justice" or "equitable principle" or "custom of merchants."[35] The CISG provides that when one party will obviously not fulfill the main principal obligations of the sales contract for the reason of the defect of the credibility or the capacity of performance, the other party is entitled to suspend the performance of the contract and may stop the delivery of the goods to the buyer.[36]

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[32] Art.68 CLC.

[33] Art.94 CLC: The party to a contract may rescind the contract under any of the following circumstances: (1) the purpose of the contract is not able to be realized because of *force majeure*; (2) one party to the contract expresses explicitly or indicates through its acts, before the expiry of the performance period, that it will not perform the principal debt obligations; (3) One party to the contract delays in performing the principal debt obligations and fails, after being urged, to perform them within a reasonable time period; (4) One party to the contract delays in performing the debt obligations or commits other acts in breach of the contract so that the purpose of the contract is not able to be realized; or, (5) other circumstances as stipulated by law.

[34] Sect. 44 of *Sale of Goods Act 1979* UK.

[35] See quotations in Ewan Mckendrick, *Sale of Goods*, 1sr ed., LLP, 2000,p.440, fn.117.

[36] Art. 70 (1) (2) CISG.

However, if the goods have been delivered to the carrier, these remedies have to be exercised through the carrier. So the seller may try to stop the carriage, to have the goods returned or to change the destination to where a new buyer locates, so on and so forth. Therefore, the risks and remedies to the seller under a sales contract are usually the underlying reasons of a shipper's instruction to change the destination (when he is the seller in a related sales contract), in other words, the port or place of delivery besides his right of stoppage in transit or changing the consignee or so. As a result, the law of carriage of goods shall take into consideration of the exercising of the remedies under the sales contract when the goods are in transit.

Based on the similar consideration, CMC provides the shipper the right to rescind the contract of carriage. However, the right is limited to be exercised before the sailing at the loading port, and the shipper shall pay for half of the freight and the charges of stevedores and others relating to the goods.[37] However, CMC does not include provisions on the shipper's right to change the place of delivery or discharging port or so.

By contrast, the CLC gives a comprehensive clause for shipper's instructions and provides: "prior to the delivery of goods to the consignee by the carrier, the shipper may request the carrier to suspend the carriage, or return the goods, to alter the destination or to deliver the goods to another consignee. The shipper shall compensate the carrier losses thus caused."[38]

In lack of the provision under the CMC on this issue, Art. 308 of the CLC will apply to both the domestic and international carriage of goods by sea in China. From this Article, in a "non *force majeure*" or "non fault based" case, the shipper has the unilateral right to change the place of delivery and it seems that the carrier is obligated to follow the shipper's instruction except for the compensation by the shipper. However, this broad right for the shipper may conflict with the law of contract of carriage and of bills of lading, with the shipping practices, and, very possibly, put the carrier in a very awkward even dangerous position.

1.4.2 Awkward position of the carrier

First of all, this obligation upon the carrier is not adapted to the liner shipping.

Under voyage charter, usually the charterer (analogously as a "shipper" here) employs a whole vessel for the carriage and there are few mandatory regulations on the contract. So, under the authorities of the contract, following the instructions of the charterer will not bring too many legal risks to the shipowner. This may be safer

[37] Art.89 CMC.
[38] Art. 308 CLC.

for the carrier to follow his instruction to change a destination. However, concerning a liner shipping or even sometimes a vessel chartered by different charterers, the carrier is very difficult to follow the instructions of one of the shippers.

In the liner shipping, a carrier concludes contracts of carriage with various shippers, and the destinations of the goods are usually different, too. The orders of the calling ports published in a schedule are generally regarded as the part of the contractual route for the carriage and the carrier is not allowed to change the order of them, or is even not allowed to carry the goods to the port out of the schedule. Otherwise, it may constitute a deviation. So, when the shipper changes the destination, the carrier very possibly will be liable to the shippers or consignees under other contracts preformed by the same vessel on the basis of deviation or delay in delivery[39] or so. In addition, this change may also influence the vessel's next freight, which may make the carrier be liable for the breach of consequent contracts for failure to commence the carriage of the goods in an agreed time or so.

Though the shipper shall compensate the carrier's loss caused by this changing, but according to the principle of the "reasonably foreseeable" losses under contract law, or for the reason of failure of proving in some special cases, it's very possible that the compensation will not cover all the losses incurred by the carrier.

Besides the possibility of causing the economic loss to the carrier, this unlimited power of a shipper is a potential destruction for the traditional advantages of the liner shipping, such as stable carriage route, prompt conveying and so on.

Furthermore, quite possibly, this power will be a potential risk for other shippers or consignee because their goods may not arrive at the place, or at the time they should have envisaged and the risks to the goods during the carriage may also be increased.

The second, the shipper's right to change a destination may conflict with the carrier's obligation in a bill of lading or other similar negotiable document.

Not only in China, but also in most of other regimes, a bill of lading may evidence a contract of carriage under which it is issued.[40] However, when it is transferred from the shipper to a third party, the rights and obligations between the carriers and the holder of the bill shall be determined by the particulars and provisions in the bill of lading.[41] The particular of the "place of delivery" or the "discharging port" in it is the agreed place where the carrier transports and delivers the goods.

Thirdly, the controversy exists on the problem as to whether the right of

[39] The definition and liability of "delay in delivery" will be discussed in part 2 below.
[40] For examples, art. 71, CMC; Section 42 of the *Finninsh Maritime Code*, art.5 (1)(a) of COGSA 1992, UK and so on.
[41] For example, art.78 of CMC.

instruction or the right of the control of the carriage is still held by the shipper or has been transferred to the legal holder of the bill of lading when the it has been negotiated to the third party with good faith. So, whether there is any restriction on the shipper's right and the relation between the shipper and the legal holder of a bill of lading needs further discussions.

Fourthly, under China law, there may arise two shippers in one carriage of goods. According to the CMC, Shipper is the person 1) who makes the contract of carriage with the carrier; 2) who delivers the goods to the carrier.[42] According to this definition, there will be two shippers under an F. O. B. trade,[43] the buyer who makes the contract of carriage with the carrier, and the seller, who delivers the goods to the carrier.[44] Who will be the "shipper" being entitled to give instruction under the article 308 of the CLC? The CLC has no definition for "shipper".

To follow the instruction of the shipper, or, to comply with the undertakings in other legal relationships, such as the contracts of carriage with other shippers? This is the awkward position of the carrier.

1.4.3 Conditions for the right of re-instruction

I'd like to say that article 308 under the CLC is a transplanting of the remedies of a seller under a sales contract to the shipper under the contract of carriage. However, being different from the provisions under the *Sale of Goods Act 1979* of UK, the CISG and so on, which put clear conditions on seller's right to suspend the contract, the transplanting by the CLC is rather simple and goes a little too far. Hereafter, I'd like to make a study on this right by making reference to other regimes.

1.4.3.1 Right of disposal/control of goods

The redirection on the carriage is also the common issue under vast carriage laws.[45] Some of them call this as the right of disposal. For example, art. 12 of the CMR provides: "The sender has the right to dispose of the goods, in particular by asking the carrier to stop the goods in transit, to change the place at which delivery is to

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[42] Art.42, para 3 (1), (2) CMC.

[43] FOB contracts may be divided into three categories: the classic contract, the extended one and the straight one, see *Debattista*, pp.8-12. The FOB contract here means the straight one, under which the buyer is the shipper under the contract of carriage.

[44] The identification of the shipper and the allocation of the rights and obligations between the two shippers have been the difficulties and hits in China since the enforcement of the CMC in 1993, and the modification of this definition is called. Refer to Yao Hong-xiu, Lin Hui, *Study of Two kinds of Shippers under the CMC*, Annual of China Maritime Law, 1995, pp.31-40, Weng Zi-ming, "Statutory Nature of the Actual Carrier and Actual shipper", in *Annual of China Maritime Trial*, 1999, Jin Zheng-jia (chief editor), The People's Communication Press, pp.44-56.

[45] However, none of the three maritime conventions deal with such kind of right.

take lace or to delivery the goods to a consignee other than the consignee indicated in the consignment note."

It is similar in the waterway field. The German TRAT provides that "the right of disposal in relation to the goods is vested in the sender,"[46] and he may give instructions to the carrier to stop the goods in transit, to change consignee as well as to deliver them to another destination. In addition, in "holder of the right of disposal" in the CMNI convention, "the shipper shall be authorized to dispose of the goods, in particular, he may require the carrier to discontinue the carriage of the goods, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document."[47] In the contents of the right of disposal, art. 308 under CLC are similar to these acts. While in some other drafts, this kind of right is called as " right of control," e. g. in the *CMI Uniform Rules for Sea Waybill,*[48] the *CMI Rules for Electronic Bill of Lading,*[49] which deal with the right of instructions in relations with contract or the goods, including changing the consignee. However, the two rules do not indicate the right to change the destination by the shipper or the holder of this kind of right. The UNCITRAL Draft Instrument establishes an even more comprehensive system on right of control[50] and introduces the term "controlling party". The core of the right of control of goods is giving the carrier instructions in respect of the goods during the period of its responsibility under the draft, including giving or modifying instruction in respect of the goods, demanding delivery of the goods before their arrival at the place of destination, replacing the consignee and agreeing with the carrier to a variation of the contract. Although the particulars are not as same as those in the German law or CMNI convention, it is also very difficult to be deduced that the instruction for changing the place of delivery is excluded from the variations of the contract of carriage,[51] and the demanding delivery of the goods before their arrival is usually a changing of the place of delivery.

1.4.3.2 Constraints on controlling right

Although the German TRAT and CMNI give the very similar provisions as the art.308 of CLC, they provide the limitation for exercising this right.

In paragraph 1of section 418 in the TRAT, the carrier is obliged to comply with the sender's instructions "only in so far as this can be done without the risk of

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[46] In this act, "sender" is the counterpart to the carrier, analogues to shipper in other countries, and "is obliged to pay the agreed freight', see sec.407 (2) TRAT.
[47] Art.14, Para. 1 CMNI.
[48] "6. Right of Control" of *CMI Uniform Rules for Sea Waybill*.
[49] "7. Right of Control and Transfer" of *CMI Rules for Electronic Bill of Lading*.
[50] Chapter 11 "Right of Control" in versions of WP.21 & WP.32.
[51] This is a controversy in the revised version of the Draft Instrument and with square brackets. See *ibid*.

prejudice to his business or damage to the senders or consignee of other consignments." To a certain extent, this condition may give the carrier right to refuse the instructions by the sender and may relieve the carrier of the dilemma in a liner shipping or in the relationship with a holder of a bill of lading as discussed above.

In addition, it is also suggested to the UNCITRAL Draft Instrument that the right of control is the right to "agree with the carrier to a variation to the contract of carriage and the right under the carriage contract to give instructions in respect of goods."[52] Though the right to give instructions without the pre-wording of "to agree with carrier" may be unilateral, it also is conditioned that these instruction shall "reasonable be executed" and "will not interfere the normal operations of the carrier"[53] or the "performing parties,"[54] otherwise, the carrier is not obligated to follow these instructions. In addition, I prefer to make "would not cause any additional expenses, loss, damages to the carrier, performing party, or any person interested in other goods carried on the same voyage" as one more condition, though this limitation under the Draft Instrument is still under controversy.[55]

So, under the UNCITRAL Draft Instrument, if the instruction for changing the place of delivery is included in the "variation of the contract," a mutual agreement between the carrier and the instructor may be required. Even if it is not in the former one, it might be covered by the situations when the consignee demands delivery before the arrival of the goods, the above mentioned conditions, such as "can be reasonably executed"[56] and so on also are applicable.

Therefore, the instruction of changing the place of destination will be usually under the constraints by laws.

1.4.3.3 Controlling party

Under the CLC, the right to dispose the carriage and to change the place of delivery is always vested in the shipper until the goods have been delivered to the consignee,[57] but this single situation may not be in line with the features of different transport documents, especially not with those of the negotiable transport document or negotiable bill of lading.

CMNI provides that the shipper's right of disposal shall cease to exist once the

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[52] Art. 53 in WP.32, sect. 11.1 in Wp.21. But it is suggested deleting the right to modify or vary the contract and keeping the right of control as the unilateral one, see fn 180 in WP.32.
[53] Art. 53 in the WP.32.
[54] "Performing party" means a person other than the carrier that physically performs any carrier's responsibilities under the carriage contract of the operations of the goods, art.1 (e) in WP.32.
[55] See Variants A and B under Article 55 in the WP.32.
[56] See Art. 53 in the WP.32.
[57] Art.308 CLC.

consignee has requested the delivery of the goods, besides, if the carriage is under a consignment note, "once the original has been handed over to the consignee," or "once the shipper has relinquished all the originals in his possession by handing them over to the consignee," if the carriage is under a bill of lading.[58] In addition, the shipper may waive his right by an appropriate entry in the consignment note.[59] And, if the person wishes to exercise his right, he shall submit all original bills of lading or other transport document.[60] So, in general situations, the right of disposal shall cease by the demanding for delivery by the consignee, but the consignee's right to the delivery is combined with the handing over of the documents. Therefore, from the wording in this convention, it may be deduced that if the bill of lading is still held by the shipper, his right of disposal may not cease to exist. However, the CMNI does not provide the right of disposal to the holder of the bill of lading or other documents.

UNCITRAL Draft Instrument provides clear criterions for a controlling party. When no negotiable transport document/ electronic record[61]is issued, generally, the shipper is the controlling party.[62] However, when a negotiable transport document or electronic record is issued, the holder of the originals or of the record is the controlling party.[63] In addition, the controlling party is entitled to transfer the right of control to another person by notifying the carrier of such transfer or by passing the original negotiable document or electronic record to another,[64] henceforth, the transferor loses his right of controlling.[65]

The right of control or the right of instructions to goods usually is concerned with the performance of the carriage and the interests of the goods, so in my view, it will be more reasonable to confer this right on the counterpart to the carrier as well as to the cargo interests. Usually, the shipper is the counterpart to the carrier and often holds the interest of the goods. With the transfer of negotiable transport document or records, the rights and obligations spring up between the carrier and the holder. On the legitimate function of these kinds of transport document or electronic records, the particulars in the document or records are determining and may be independent from the original contract.[66] In addition, with the transfer of

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[58] Art. 14.2 CMNI.
[59] Art.14. 3 CMNI.
[60] Art 15(a) (b) CMNI.
[61] UNCITRAL Draft Instrument defines the transport document and transport record and their subdivisions, see art. 1 (K) – (q), in WP.32.
[62] Art.54, para (1) (a) in WP.32. It is still under controversy that whether a consignee may be the controlling party based on the agreement between him and the shipper.
[63] Art. 54 Para 2 (a), para3 (a) in WP. 32.
[64] See art. 54, para1 (b), para2 (b), para3 (b) in WP.32.
[65] *Ibid*.
[66] I will not repeat the general function of the transfer of negotiable transport document and bill of lading, for a detailed discussion see part 3.2 of this chapter and Chapter 5.

the negotiable document or record, generally the shipper will no longer have the interest of the goods.[67] So, I am in favor of the proposals under the UNCITRAL Draft Instrument.

As to the assignment of the right of control to another party by the shipper, it also is very reasonable because the shipper is the holder of this right and he is entitled to transfer this right. In addition, the arrangement of the sales of goods may desire for such assignment. However, such assignment must be notified to the carrier and shall not prejudice the right of the legal holder of negotiable document.

Briefly, the Chinese Contract Law treats the right of disposal or the right of controlling of goods too simply, and it is necessary to distinguish the persons to the controlling right and the vicissitudes of the rights.

1.4.3.4 Submission of all original bills for changing the destination

In practice, it is not very rare to change the destination of delivery during the transit.

When a bill of lading or other similar negotiable transport document has been issued, in the Chinese practice, usually, a new set of bills of lading will be issued with the new discharging port or place of delivery. Or, the carrier or his ship's agent may alter it directly on the face of the bill of lading with a special stamp of modification of them. In this case, my suggestion, also as a custom, is ensuring the reclaiming of whole set of the former original bills of lading, or making modifications in all the originals. In other words, the shipper shall submit all the originals to the carrier when he gives the instruction on changing the destination, otherwise, the carrier may put himself into a great risk when some one holding one of the former originals claims for the delivery at the former place of delivery.

In *Hong Kong Co.* v. *Guangzhou Ocean Shipping Co. & PENAVICO Dalian Co.,*[68]the carrier was instructed by the shipper to change the port of discharge during the voyage and the revision was made in one of the bills of lading. The goods were delivered to the shipper as the holder of the revised B/L against only one of the original bills of lading at the re-nominated port. However, the destinations in the other two bills of lading, which were held by another person, were not changed. When the holder of the remaining two original bills of lading failed to get the goods at the original destination, he brought the suit against the carrier when he failed to get the goods.

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[67] Except the transferee is with bad faith or the shipper fails to protect his interest under the sale contract by controlling the bill of lading or other similar negotiable documents.

[68] Quoted in Caslav Pejovic, *Delivery of Goods Without a Bill of Lading Revival of an Old Problem in the Far East*, JIML 9, (2003) 5, p.453 at pp.448-460.

The court rejected the plaintiff's claim for the reason that delivery upon one original bill of lading would make all the others void. I will not discuss the issue of delivery against one original bill of lading, but the decision in this case was commented as "contrary to the practice in most other jurisdictions"[69] on the changing the destination. In addition, it conflicts with the conditions for giving instructions under the contract of carriage in other regimes.[70] As it has been mentioned above, a bill of lading has the legitimate function concerns with the parties, particulars of contract and the rights and obligations between the carrier and the holder of it are determined by the document itself. So, in order to protect the carrier and the transferee of the bill of lading in good faith who is confident about the authenticity of the document, the execution of such instructions shall be based on the submission of whole set of original bills.

This is another condition for exercise not only the instruction on changing the destination but also all the rights of control. CMNI provides, if the shipper or consignee wishes to exercise the right of control, he must submit all the originals to the carrier when a bill of lading is issued. And the UNCITRAL Draft Instrument emphasizes too that the holder of all the originals is the sole controlling party, and if more than one original document is issued, he shall produce all of them when the carrier requires production of document.

These legislations are also of great value of reference for Chinese Law in order to clarify the confusions in practice and to protect the stability of the legal relations under the bills of lading or other negotiable transport document or electronic records.

2. Delivery on time

In practice, in terms of a bill of lading or a contract of carriage, it is usually stipulated that the consignee shall take delivery of the goods in a specific period when the carrier gives him notice of delivery or so. However, it rarely indicate the time or period for delivery as the obligation of the carrier. On the contrary, considerable bills of lading exclude the responsibility of delivery at any particular time, or exclude the or part liabilities for delay.[71]

However, if the time or period of delivery is fixed for the carrier by agreement or

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[69] *Ibid.*

[70] Maybe the carrier is innocent under the China law, since CLC provides the shipper the right to change the destination and there is no stipulation of the shipper or holder's obligation to submit all the original bill of lading for the modification of them.

[71] See the bills of lading quoted in *Gaskell*, pp.339-340, see also art. 7(4) of the P& O Nedlloyd Bill of Lading.

by statutory provisions, it shall also be his undertaking to deliver the goods in that particular time, otherwise, it will be a delay in delivery and constitutes a breach of the contract.

2.1 Regimes of the time for delivery

As to the attitude to the time for delivery and the liabilities of the carrier for delay in delivery, the existing regimes in marine carriage may be divided into three groups:

The first one is the group of *Hague* or *Hague-Visby Rules* countries. *Hague* or *Hague-Visby Rules* do not deal with the time for delivery or for the carriage of the goods, nor do the COGSAs and maritime laws in those countries which are copied from the Rules or put the Rules into national regimes, involve in this subject, e. g., the COGSA 1971 UK, COGSA 1936 USA. So, under these regimes, the contractual parties are free to agree on the time for delivery, and, are usually able to exclude the responsibilities for such timely delivery.

The second group can be called as *Hamburg Rules* type. *Hamburg Rules* is the first marine international convention that deals with the carrier's obligation of the time for delivery, or, strictly speaking, for the time for carriage.[72]It provides two measurements for time for delivery, one is the agreed time, the other is "reasonable time."[73] A delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage "within the time expressly agreed upon" or, in the absence of such agreement, "within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case."[74] Some national or international laws follow this system, for instances, the Nordic Maritime Law,[75] German TRAT,[76] CMNI convention[77] and others. In addition, the Hamburg Rules way also is adopted by the *UNCTAD/ICC Rules for the Multimodal Transport Documents to the MTO* (hereafter as "*UNCTAD/ICC Multimodal Rules*"),[78] and is incorporated in the relevant Multidoc 95 bill of lading.

The third type is the mixture of the above two systems. China is the

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[72] In the legislations on other transportation, they dealt with this issue earlier, e.g., CMR (1956) provides "delay in delivery shall be said to occur when the goods have not been delivered within the agreed time-limit, or when failing an agreed time-limit, the actual duration of the carriage having regard to the circumstances of the case, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a diligent carrier."

[73] Para 2 ,art.5.2 of *Hamburg Rules*.

[74] *Ibid, Hamburg Rules.*

[75] See section 278 of the *Finnish Maritime Code*.

[76] Section 423 TRAT.

[77] Art. 5 CMNI.

[78] Art.5.2 of the *UNCTAD/ICC Multimodal Rules*.

representative. The CMC provides the definition of "delay in delivery" and the carrier's liabilities for the delay. But, differing from the *Hamburg Rules*, a delay only occurs when the goods are not delivered at the agreed discharging port at the expressly agreed time under the CMC.[79] The law does not put the "reasonable period" criterion on the carrier. When the goods have not been delivered at the specified time, the carrier shall be liable for the loss of or damages to the goods as well as the economic losses resulted from it.[80]

However, the CLC stipulates that a carrier shall carry the passengers or goods to the agreed destination within the agreed time period or within a reasonable time period.[81] The *Domestic Waterway Regulations* follows this principle and stipulated that delay in delivery constitutes when the goods have not been delivered in the agreed time or in the reasonable time.[82] So, as far as the domestic carriage is concerned, China likely belongs to the second group.

2.2 Controversy of "delay in delivery" in China

However, in the recent decade, even from the start of drafting of CMC, the controversy of the carrier's obligation on the time of delivery, or on the definition of "delay in delivery" does not stop.

During the drafting of CMC, there were arguments between the groups of shippers and shipowners on the necessity of the system of delay in delivery. The former group, whose members mainly come from the big Sate-owned international trade enterprises and the representatives of the former Ministry of Foreign Economy and Trade,[83] insisted on adopting the system of delay in delivery in Hamburg Rules. But the latter on, such as the COSCO and other shipping companies preferred the system of The *Hague* and *Hague – Visby Rules* to exclude the statutory liabilities for timely delivery.[84] It may be said that the present provision under the CMC is a compromise between the two groups.

However, this "break-through" by the CMC is not deemed as perfect, and is considered by scholars and others to be worth of improvement.[85]

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[79] Art.50 CMC.
[80] Pare 2, 3 of art.50 CMC.
[81] Art.290 CLC.
[82] However, the Regulations does not use the term of "diligent carrier" when the "reasonable time" is invoked. "The carrier shall carry the goods to the agreed place in the agreed period or, when in absence of this agreement, in the reasonable period. If the goods have not been delivered at the agreed or reasonable time, delay in delivery constitutes …" Art.34 of *Domestic Waterway Regulations*.
[83] The new Ministry of Commerce replaced this Ministry and the former Commission of Plans and Economy of PRC in 2003.
[84] For the debates, see Hu Zheng-liang, *a Looking Back of the Points under the Contract of Carriage of Goods by Sea During the Drafting of CMC*, www.logistics.nankai.edu/, (resource from China Ocean Shipping, 2003,7), 1 Sept. 2004.
[85] *Ibid*.

At the beginning of the research project of the modification of the CMC in 2000, questionnaires were issued to collect the viewpoints on certain issues under the CMC. On the delay in delivery, 17 of the 25 answers by practicing and researching, governmental organizations and law offices supported the provisions under *Hamburg Rules* or the art. 209 of CLC, another 7 preferred to keep the present provision under CMC unchanged. Interestingly, the COSCO demonstrated the divergences of the above two points in their own group.[86] The project team of Shanghai Maritime University suggested that the para.1 of art. 50 of the CMC shall be revised, as "when the goods have not been delivered in the agreed time or in a reasonable time, a delay in delivery constitutes."[87] Certain scholars also suggest the adoption of the *Hamburg Rules* or adding the "delivery in reasonable time if there's no specific agreement" to the CMC.[88]

It is clear, at present China, the *Hamburg Rules* or the CLC option is the majority. The main reason for the supplementation of the "reasonable time" for delivery is to be good for the protection of the cargo interested.

This controversy is also reflected in the discussion of the UNCITRAL Draft Instrument: "in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier …" is still in the bracket for the discussion in future.[89]

2.3 Obligation of timely delivery

Indeed, timing is important for the carriage of goods in order to meet the conditions under the sales contract. Especially, with the development of the logistics, maritime carriage is often the part of which process, the time for delivery is playing an even more important role. That means the reliability and punctuality of the service by carriers become one of the first elements for selection by the customers.

It is argued that few of the shippers reach the agreement on the time of delivery, so, adding the "reasonable time for delivery" on the carrier will provide one more protection for the merchant parties. However, whether this standard is necessary or not or whether it may resolve the problems well is still under doubt.

To a great extent, delay in delivery is concerned more with the carriage of goods. In practice, the later arrival of the goods at the destination is usually caused by the accidents at sea, the deviation of the carriage, or, the un-seaworthiness of the vessel,

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[86] See sub-reports (II)- *Collection of Feedbacks* of the research project of *Study of Modification of CMC*, written by the team of Dalian Maritime University.

[87] The other paragraphs in art.50 of CMC were remained. See sub-report *"Suggestions on Modifications"* of the research project *Study of Modification of CMC*, written by the team of Shanghai Maritime University.

[88] Zhou Qi, Lin Yuan-min, *The Usual Reasons for Delay in Delivery by the Carrier and the Defects of the Relevant Stipulations under the CMC*, Maritime Law Review, vol.3, 2000,2, pp.142-148.

[89] Sect.6.4.1 in the WP.21, art.16 in the WP.32, see also fn.84 in WP.32.

even sometimes, the delay of the commencement of the carriage or other similar reasons. In these cases, a lot of accidents at sea can be an exemption for the carrier's liabilities to the loss or damages of the goods,[90] and, in other cases, when the goods are abnormally late at the destination, the consignee may recourse to the carrier's liabilities for the causes of deviation, un-seaworthiness of the vessel, even sometimes an anti-dated bill of lading or so. In most of the cases, the loss of the consignee may be reimbursed even without the "reasonable time" obligation for the delivery.

The introduction of the "reasonable time" standard may lessen the proof burden of the claimant and he will not need to prove the event of deviation or un-seaworthiness or the anti-dated of a bill of lading in most cases. This is the advantage of a "reasonable time" criterion.

However, obliging the carrier to deliver the goods in a reasonable time or period may bring new problems or disputes. First of all, it will bring the difficulties to the interpretation of it. What will be the "reasonable time" for carriage? How many different days can constitute a delay? One, two, five or ten days? The risks at sea really make it difficult to unify them. In addition, what is the meaning of the "diligent carrier"? Is that the average standard for all the carriers or only for one carrier when a contract of is concerned? These disputes can be imagined.

Putting the "reasonable time" upon the carrier might not be geared to the shipping practices very well. I agree with the opinion that if the time of the goods is very important, the shipper may specify the time or period of the arrival. The situation of the rare agreement on the time of delivery is mostly because of the un-necessity to fix the time of arrival, but not for the reason that he is not allowed to do so. Furthermore, in most of the shipping markets, there are open competitions among the shipping companies, and, usually, shippers can choose the carriers. If the shipping company is of good reputation, which provides more reliable and punctual service in most cases, may be more popular. However, usually it may charge higher or provide relatively stricter conditions against the shipper. On the contrary, the company with cheaper freight and/or tolerant conditions is very possibly to bring more risks to the goods and/or with a lower speed etc. A rational shipper may make the choice considering the cost or the security of service. If he tries to get the information about the differences of the shipping companies, he can get them. So the attention or the interest of the shipper or consignee in the time of delivery is usually the commercial issue, not a legal one.

Therefore, the present provision of "delay in delivery" under CMC is even more reasonable. The agreement is the clearest standard with least confusion, and, without the agreement, we may let the time of delivery adjusted by the other

[90] See art.51 of CMC.

systems of the carrier, and by the commercial choices in the practices.

In addition, some scholars and judges think that the art. 50 of the CMC deals only with one situation of the delay in delivery. In absence of the stipulation on the "reasonable period", art. 209 of the CLC shall be applied to the maritime carriage of goods. Then, carrier shall be liable for failure to deliver the goods within reasonable period according to the CLC.[91]

But I argue against this opinion. As the special law on the carriage contract, CMC shall prevail over the CLC. The provision that "delay in delivery occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon" is putting the agreed time as the only condition for the time for delivery and can exclude the "reasonable period" successfully. The CLC shall not apply to this issue in the international carriage of goods by sea.

However, it is worth noting that the definition of "delay in delivery" with the agreed time is not in conflict with the criteria for the identification of delivery. First of all, a special provision may exclude the general criteria established in Chapter 3. In addition, the agreed time for delivery usually means the time when the goods are deliverable without further interpretation by the contract, but the specific process of the delivery after the arrival or after the expiration of the agreed time will still be governed by the criteria put forward in chapter 3.

2.4 Liabilities for delay in delivery

When the carrier breaches the undertakings on the time of delivery, he shall be liable for losses resulted from this delay unless he is entitled to the statutory or contractual exemptions. Different form the carrier's liabilities for the loss of or damages to the goods caused by other reasons,[92] the *Hamburg Rules* and the CMC provide that the carrier shall be liable for the economic losses incurred from the delay.[93] As to the remoteness and the measures of the economic losses, the CMC does not provide a specific rule. The "reasonably foreseeable" principle shall be applied. So, as the usual foreseeable losses, the loss of the market price of the goods, the loss of the interests shall be covered in such economic losses.[94] As to

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[91] Xu Jun-qiang, "A New Interpretation on Delay in Delivery", in *Annual of China Maritime Trial 2000*, Jin Zheng-jia (chief editor), pp.46-55, see also *Yin & Guo's Carriage Law*, p.125.

[92] The amount of the indemnity for the loss of and damages to the goods shall be calculated on the basis of the actual value of the goods so lost or on the basis of the difference between the values of the goods before and after the damage and so on, see Art. 55 of the CMC.

[93] Para. 3 Art. 50 of CMC: "The carrier shall be liable for the economic losses caused by delay in delivery of the goods due to the fault of the carrier, even if no loss of or damage to the goods had actually occurred, unless such economic losses had occurred from causes for which the carrier is not liable as provided for in the relevant Articles of this Chapter."

[94] *Interpretations of CMC*, p.41.

the loss resulted from the suspension of the next consequent contracts by the consignee, the loss from the stop of the working because of the wait for the materials which are carried by the delayed vessel and other losses, may not be reimbursed from the carrier unless such consequent contracts, the urgency of the carried goods for the factory and so on have been acknowledged by the carrier or must be foreseen by the carrier when the carriage contract is concluded.

The UNCTAD/ICC *Multimodal Rules* makes a compromise on the liabilities for delay in delivery. Art. 5.1 stipulates that the "MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO." Though the definition of "delay in delivery"[95] is as same as the one in the *Hamburg Rules,*[96]without requirement for timely delivery in advance, the MTO will not liable for the losses even when the goods arrive later than a reasonable time.

Another problem arises under the CMC about the exemption for carrier's liability under the delay in delivery. According to article 51, the carrier shall not be liable for the "loss of or damage to the goods" caused by the fault of navigation and management of the ship, fire, or the fault of the shipper etc. Due to the omission of the "delay in delivery" in this provision, it is concluded by some scholars that these exemptions are not applied to the economic losses resulted from the delay in delivery, and the carrier still may be liable for the economic losses even if the delay is caused by the navigation negligence.[97]

From the wording of the article 51, the conclusion seems right. But the distinguishing of the carrier's liability systems for the physical loss and the economic loss resulted by delay is not in line with the original intention of the draftsmen, nor does it have reasonable basis. For example, paragraph 3 of the art. 50 of CMC provides that unless the economic losses had occurred "from the causes for which the *carrier is not liable as provided for in the relevant Articles of this Chapter* (i.e., chapter 4 of CMC)*"* (emphasis added), the carrier shall be liable for the economic losses resulted from the delay. It may be said that, from the underlying intention, the law hopes to provide the exemptions for the economic losses.

As a supposition, the article 51 is just a technical omission of the "delay in delivery". I would like to suggest adding "delay in delivery" to article 51 in the future modification if the exemptions will be maintained.

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[95] Art. 5.2 of the *UNCTAD/ICC Multimodal Rules*.
[96] Para. 2 art.5 of *Hamburg Rules*.
[97] Zhao De-ming, *International Maritime Law*, 1st ed., Beijing University Press, 1999, (hereafter as "*Zhao's Maritime Law*"), p.282.

3. Delivery to the right person

To some extent, the place and time of delivery are issues relating more closely to the transportation of goods. The liabilities of the carrier for the breach of the two points may be resolved by the existing system on the carriage in some circumstances as discussed in the former two parts. However, the person to whom a delivery should be made is totally different from the carriage itself and, is usually, the most important issue on the delivery as well as the most complicated one.

3.1 General principle

In brief, the carrier (no matter via his agent, employees or not) shall deliver the goods to the person who has the right to the goods, strictly speaking, has the right to the delivery.

According to CMC, "consignee" is defined as the person "who is entitled to take the delivery of the goods."[98] When the carrier has delivered the goods to a person who is not entitled to the delivery, it will be a wrongful delivery, or in other words, a mis-delivery.

Who will be the right person entitled to the delivery? The CMC provides that the provisions in the bill of lading stating the goods are to be delivered to a named person, to order of named person or to the bearer may constitute an undertaking by the carrier on the person to whom a delivery shall be made.[99] However, the CMC does not provide direct rules for the identification of the consignee or the person who is entitled to the delivery, nor does it give the general principles and the guidance to various situations.

As demonstrated in Chapter 2, delivery first of all is a contractual obligation of the carrier. The carrier is obligated to deliver the goods in accordance with the contract. As Carver emphasized in *Carriage by Sea:* "the shipowner must generally see that the goods are delivered to the person to whom he has contracted to deliver them."[100]

That is to say, delivery shall be made to the person in accordance with the contract. In the early stage of the shipping, the shipper seemed only to want the carrier to deliver according to its instructions, usually they are to be delivered to himself or, e.g., to his agent at the port of discharge.[101]

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[98] Para. (5), art. 42 CMC.
[99] Art. 71 CMC.
[100] *Carver's Carriage by Sea*, Para. 1591, p.1110.
[101] *Gaskell*, para. 1.3, p.2; see also N. Gaskell, Regina Asariotis and Yvonne Baatz, "Bills of lading" in the loose-leaf work, *Contracts for the carriage of Goods (1993-2000),* Davide Yates (chief editor),

With the development of the trade, generally, the buyers are different from the shipper, so delivery shall be made to consignee, who is the third party of the carriage contract. From the other angle, delivery in accordance with the contract means that the consignee shall be identified by the ways established in the contract of carriage, for instance, he has been named in the contract of carriage, or, is designated by the shipper during the transit of the goods, or identified by other ways expressly or impliedly. In short, the consignee is generally identified through the direction of the shipper under the contract of carriage.

However, with the further development of international trade, especially the increase of the transferring of the goods during the transaction, and, the improvement of the functions of transport documents,[102] the right person to take the delivery shall be more complex. The ways of shippers' instruction for the consignee or the ways to identify the consignee are distinct in respect of the features of various transport documents. Both the carrier and the shipper, and even the consignee shall comply with the systems of both the contract of carriage and the transport documents. The distinction of the obligation on delivery under different transport documents shall be analyzed in the following parts.

As discussed in Chapter 2, delivery may bring the proprietary effectiveness, so the carrier is under the obligation (not only a contractual one) not to infringe the title of people to the goods. In some authorities, it is suggested that delivery shall be subject to "claims to the goods which may exist independent of the carriage contract" and "superior to those of the persons who would be entitled under that."[103] In some early English cases, when goods have been originally shipped without the authority of their owner, the shipowner must give them to him when the owner claims the goods, and, will cease to be bound by the contract.[104]

In my view, it is not feasible for the carrier to deliver the goods subject to those "superior claims," because he is very difficult to tell who is the real owner or real person has the title to the goods. So, in most cases, contract is still the standard for the carrier on delivery.

However, when there are conflicts or competing claims on the delivery of the goods, the carrier shall act very carefully, and he may be excused from the obligation of delivery under the contract of carriage or the transport document by some statutory authorities. The laws that provide solutions for the completing claims on delivery, in some countries, will be of great reference to the practice and

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para.1.6.1.1.3, LLP, p.1-293.

[102] For example, the functions of a bill of lading are multiplied by the merchant custom with long history, and it is not only transport documents, but also a "merchant's document" playing crucial role in the international sale.

[103] *Caver's Carriage by Sea*, para.1591, p.1110.

[104] See *Finlay* v. *Liverpoo*l SS. Co. (1870) 23 L. T. 251; *Sheridan* v. *New Quay Co.* (1858) 4 C. B. 618, quoted in *Carver's Carriage by Sea*, ibid.

legislation in China. In addition, in certain situations, claims by unpaid seller may also prevail over these of the buyers to whom the goods are deliverable under the contract of carriage. For example, according to the section 44 of the *Sale of Goods 1979* of UK and the art. 70 of the CISG, the unpaid seller may suspend the delivery to the buyer who is insolvent or with other serious credit problems, even the bill of lading has been transferred to him.[105]

3.2 When a bill of lading is issued

3.2.1 History and functions of bills of lading

A bill of lading is a document issued by or on behalf of a carrier of goods by sea[106] to the person (usually known as the shipper) with whom he has contracted for the carriage of the goods.[107] In practice, it is also common that a bill of lading is issued to the person who surrenders the goods to the carrier, but not to the contracting party of the contract of carriage,[108] by the authorization of the contract or of the law.

This kind of document plays a very important role in international trade, and is a document with great functions in not only the carriage by sea, but also in the arena of sales of goods, the international financing, etc. But it did not originate with the beginning of international carriage by sea.

In general, it is purported that the bill of lading arose around 14th century,[109] at least, it is safe to say it was unknown in 11th century.[110] In medieval times, merchants traveled with their goods and did not need to receive a document from the carrier, or to give any of the goods to the buyer at the destination port. Later, when the merchants did not intend to travel with the goods and began to trust the shipowners to carry and deliver the goods to the agents or buyers in a foreign port, they needed a receipt issued by the shipowner, and bills of lading appeared around

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[105] When the bill of lading is issued, generally, the goods shall be delivered to the holder of the bill, further discussions see the part 3.2 below.

[106] Under American Law, a bill of lading can be issued for the carriage of sea, air and road etc., and a bill used in sea carriage is identified as "ocean bill of lading". But, in UK, bill of lading is the name for one of the documents only in the sea carriage. In China, a bill of lading is used in the sea carriage and the combined transportation including sea leg, or used under the multimodal transport. For the purpose of this thesis, a bill of lading is limited to the sea carriage, or at least a sea carriage is included.

[107] *Carver on Bills of Lading,* pp1-2.

[108] This kind of person is also defined as a "shipper" under CMC, art.42 (3). 2, see also part 1.4.3 of this chapter; defined as "actual shipper" under the Finish Maritime Code1994, art.1 (4); the UNCITRAL Draft Instrument allocates rights and responsibilities to this kind of person when he is identified as "shipper" in the contract particular in a transport document, see sect.7.7 in WP.21, art.31 in WP.32.

[109] *Wilson*, p. 117, Michael D. Bools, *The Bill of lading, a Document of Title to Goods, an Anglo-American Comparison* (hereinafter as " *Bools*"), 1st ed., LLP, 1997,p. 1,

[110] *Bools*, p.1.

14th century accomplished by an on-board record of the quantity and conditions of the goods. And hence, via this record, it may tell the shipowner to whom the goods shall be delivered. Subsequently, the terms of contracts of carriage were incorporated into the documents in order to resolve possible disputes between the carrier and cargo owners who were usually not the original shipper. Finally, by the 18 century, with the increasing needs of the merchants who wished to dispose or assign the goods before their arrival at the destinations, a bill of lading had operated with the new characteristics of being negotiable by indorsement.[111] The bills of lading in the modern sense were completed.

It is difficult to give an exact definition of a bill of lading, most of legislations, from the *Hague* and *Hague-Visby Rules* to the national statutes such as UK *Bills of Lading Act 1855*, COGSA 1971, or the *Harter Act*, COGSA 1936 of USA, all avoid it. Although the US *Federal Bills of Lading Act* 1916 (generally known as the *Pomerene Act*) make distinct the "straight bill of lading"[112] and "order bills of lading,"[113] it does not give a definition of "a bill of lading."[114] The COGSA 1992 of UK excludes references to a document, which is incapable of the transfer either by indorsement or, as a bearer bill by delivery without endorsement, from the term of "bill of lading", for the purpose of the Act,[115]either has no definition for bill of lading

Hamburg Rules can be said as the first maritime convention that tries on a definition of a bill of lading. A bill of lading means "a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document…"[116] The CMC provides similarly.[117] Strictly speaking, these definitions are the demonstration of the functions or characteristics of the bill of lading. Indeed, a bill of lading shall be distinguished from other transport documents by its unique functions.

Generally, bills of lading are summarized with the following three or four functions,[118] which are evolved with the development of the document and the

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[111] *Wilson*, pp.117-118. See also *Bools*, ibid, *Gaskell*, para1.1-1.4, pp.1-3.
[112] Sect.2 *Pomerene Act*.
[113] Sect.3 *Pomerene Act*.
[114] These sections have now been replaced by 49 U. S. C. A. § 80103(b) and (b), and the bills classified as "nonnegotiable bills" and " negotiable bills".
[115] Sect. 1(2) COGSA 1992, UK.
[116] Para7 art. 1 "definitions" *Hamburg Rules*.
[117] Art.71,CMC. Directly translated from the Chinese version, which is the official one, this article is: "A bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and *upon which the carrier under takes to deliver the goods*…(emphasize added)." However, the English version is as same as art.1 (7) of the Hamburg Rules, and the slight difference exists in the emphasized sentence. But, in theory, this difference may influence on carrier's obligations on the delivery under a bill of lading, for full study see Chapter 5 below.
[118] See *Wilson*, pp.119-146, see also Clive M. Schmitthoff, *Select Essays on International Trade Law*

commercial practices:

1, a receipt of the goods shipped, with the record of the quantity and conditions etc. of the goods when they are on board;

2, the evidence of the carriage contract;

3, a document of title[119] to the goods carried under it,[120] the possession of a bill of lading generally may embody the title to the goods, without which the delivery of goods normally cannot be obtained:[121]

4, (which is usually incorporated into the "document of title function") the document against which a delivery may be made.[122]

Therefore, a document can be identified as a bill of lading when it possesses the above three or four functions. Meanwhile, in practice, bills of lading are usually with the similar appearances, the front sides are indicated with the particulars of goods and parties and the ports or places of beginning and destination, and, on back sides, there're terms and conditions of the parties with very small characters. In addition, they are mostly marked as "bill of lading" or "ocean bill of lading" or "combined bill of lading" on the face side in the given services they are used for.

CMC lists that the 11 items shall be contained in a bill of lading,[123] such as the particulars of shipper, consignee, carrier, the description of goods, the ports of loading and discharging and so on. However, the lack of one or more particulars among the former eleven items does not affect the nature of the bill of lading.[124] According to the common sense, those items, such as the particulars of the parties, the ports, the description of goods, which will make a bill of lading have the legal nature demonstrated in article 71, are necessary, while the others may be absent in general situation.[125] However, generally, if a document marked as 'bill of lading' but not having the functions as above mentioned, especially if it does not run as the document of title or the document surrendered for delivery, it may be not the bill of

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(hereafter as "*Schmittoff's Selected Essays*"), Edited by Chia-Jui Cheng, translated by Xiu-Wen Zhao, 1st ed., China Encyclopedia Press, 1993,pp.470-471.

[119] The elaboration meanings of "a document of title" may differ, a discussion will be in Chapter 5. In addition, whether a straight bill of lading is a "bill of lading" or "a document of title" is under controversy, for further discussion see part 3.2.4 of this chapter and Chapter 5.

[120] *Gaskell*, para. 1.4, p3; see also *Wilson*, pp120-146, *Payne & Ivamy,* p.71.

[121] In my view, the function of "document of title" is not the right reason for the right to the delivery of goods, see Chapter 5. In addition, whether this function can be purported on a straight bill of lading is still under the controversy, supra fn.112.

[122] A bill of lading also has been defined with four functions as: "Receipt of goods, document transferring constructive possession, document of title, a potentially transferable carriage contract", refer to Simon Baughen, *Shipping Law*, Cavendish Publishing limited, 1998,pp. 5-8. While Schmitthoff summarized them as four main characteristics: 1) receipt of cargo; 2) document of title; 3) quasi-negotiable instrument; 4) the document must be surrendered for taking the delivery of goods at the destination, *Schmitthoff's Select Essay,* p.471.

[123] Para. 1, art, 73 CMC.

[124] Para 2 of art. 73 CMC.

[125] *Guo Yu's Bill of Lading*, p.27; see also *Zhao's Maritime Law*, p.248.

lading in its strict sense.

The title function and the presentation of the bill of lading for delivery are related closely to determining to whom a delivery shall be made.

3.2.2 Classification of bills of lading

Based on the indications in the boxes of consignee on the face side, bills of lading can be divided into order bill, bearer bill and straight bill.

An order bill of lading is the one that "provides for delivery of the goods to be made to the order of a person named in the bill."[126] In practice, this kind of bill is marked in the box of consignee as " to order", "to order of XX' or similar words. If it is only marked as "to order', it equals to "to order of the shipper (the one named as the "shipper" on the bill of lading).[127] CMC does not provide the definition for order bill of lading, but the former theory and practices are commonly accepted in China.[128]

Otherwise, if the box of consignee remains blank, it will be a bearer bill of lading, or a blank bill of lading. Under such a bill of lading, the carrier will not deliver the goods to a named person or in accordance with whose order, and will deliver the goods to the bearer. In practice, this kind of bills with a blank box of consignee is very rare.[129]

An order bill of lading can be transferred by endorsement with the delivery of the document.[130] And, a bearer bill of lading can be transferred without indorsement,[131] that is to say, transfer is taken effect only by the surrendering of the bearer bill of lading.[132] Usually, an order bill of lading can in effect become as a bearer one by being indorsed in blank.[133]

In addition, these two kinds of bills are usually marked as "negotiable" on face, and are likely to be called as "negotiable bill."[134] The USCA title 49 § 80103(a)

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[126] *Carver on Bill of Lading*, para. 1-004, p, 2, similarly in Section 3 of the *Pomerene Act 1916*, "An order bill of lading is a bill in which is stated that the goods are consigned or destined to the order of any person named in such bill".

[127] The "shipper" in a bill of lading may be different from the one who makes the contract of carriage with the carrier.

[128] See, e.g., *Interpretation of CMC,* p.65, *Yin &Guo's Carriage Law*, p.225.

[129] *Interpretation of CMC*, p.65, see also *Carver on Bills of Lading*, para. 1-003, p.2.

[130] Art 79 (2) of CMC, " Order bill of lading: transferred by nominated endorsement or blank endorsement". A Nominated blank means both transferors and transferees sign on the bill of lading during the process of the transferring, while an endorsement in blank means only the signature of the transferors, actually, the common practice is only the first transferor, i.e. the named person to whose order, is indicated during the endorsement.

[131] CMC art. 79(3), COGSA 1992 UK, S. 1(2)(a).

[132] See *Carver on Bills of Lading*, para. 1-005, p.3.

[133] *Carver on Bills of Lading,* fn.4, p. 2.

[134] However, under English Law, the authors are avoiding to use the term of "negotiable" or "negotiability' to

uses the term of "negotiable bills" taking place of the former "order bill of lading" under the *Pomerene Act*. In addition, UNCITRAL Draft Instrument deals with the comprehensive definition of "transport document"[135] for the possibly much broader applicable scope including the sea leg. It specifies, "negotiable transport document" is a transport document which indicates the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer by wording such as "to order" or "negotiable" or other appropriate wording, and is not explicitly stated as being "non-negotiable" or "not negotiable."[136] Therefore, when an order or bearer bills fall within the scope of the UNCITRAL Draft Instrument, they are the "negotiable transport document", or, precisely, "negotiable bill of lading". The provisions for delivery under a negotiable transport document under the draft instrument will also give the guidance to the delivery under the two bills.

A straight bill of lading is the bill stated with a named or a specified person in the box of consignee without any other words such as "to order" or the similar. This kind of bill of lading also is called as straight consigned bill,[137] or nominate bill of lading[138]A straight bill usually is marked with "non-negotiable" or "not-negotiable" on the face, and is called as "non-negotiable bill."[139] "Non-negotiability" means this kind of bill of lading is not to be transferred by the endorsement or by the delivery of the document. USCA title 49 states that a non-negotiable bill shall have been placed plainly on its face "non-negotiable" or "not negotiable", and an endorsement of it does not make the bill negotiable.[140] Under the CMC, a straight bill of lading "is not negotiable" either.[141]

However, in some regimes, there are controversies on the attribution of a straight bill of lading. *Hamburg Rules*, though giving the definition of bills of lading on the basis of their functions, does not identify a bill with the named consignee without order. For the purpose of the UK COGSA 1992, bills of lading are only the order and bearer ones.[142] So some scholars think it's difficult to find a suitable term to refer to bills, which are not order, or bearer ones,[143] and even some of the scholars

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these bills of lading when the transferring of them is concerned. In their view, the order or bearer bills of lading are just "transferable" but not "fully negotiable", because the indorsee will not obtain better title than the indorsor. See *Carver on Bills of Lading*, fn.4, fn.5, p.2, see also *Debattists*, pp.55-57.

135 Sect1.20 in WP.21, art.1 (k) in WP.32.

136 Sect.1.14 in WP.21, art. 1(l) in WP.32.

137 *Gaskell* , 14.23, p419.

138 *Tetley's Cargo Claims*, p.221.

139 E.g., § 80103 (b) (2) of the USCA title 49. However, in some recent cases, it is observed that a straight bill of lading is transferable limitedly, See part 3 of Chapter 6 on the discussion of straight bill of lading.

140 §80103 (b) (2) USCA title 49.

141 Art.79 (1) of CMC, "'A straight bill of lading is not negotiable." But, in Chinese laws, the words " negotiable" and " transferable' usually are not distinguished from each other very well.

142 Art. 1(2) COGSA 1992, "References in this Act to a bill of lading: (a) do not include references to a document which is incapable of transfer either by endorsement or, as a bearer bill, by delivery without endorsement …"

143 *Carver on Bill of Lading*, para. 1-008. P.5.

or practitioners consider that when a document not made out to order is probably little more than a waybill by another name, and the use of the word "bill" is misleading.[144] The further discussion on the legal nature of the straight bill of lading shall be in Chapter 6.

Nevertheless, like CMC stipulates: "…a provision in a bill of lading that the goods are to be delivered to a named person, or according to the order of a person, or delivered to the bearer of a bill of lading, constitutes such an undertaking of the carrier to deliver on it,"[145] the distinction of the statement of the consignee in the bills may bring the difference on the person to whom the goods shall be delivered.

3.2.3 Delivery under negotiable bill of lading

3.2.3.1 General rule: delivery to the holder of bill

Though Art. 71 of CMC does not provide direct rules for the person to whom the goods shall be delivered under all kinds of bills, it is commonly accepted that the goods shall be delivered to the holder of an order or bearer bill of lading.[146]

Under some other regimes, this rule is expressly established.

For example, in USCA 49, § 80110 (b), "person to whom goods may be delivered", it is so provided that a carrier may deliver the goods covered by a bill of lading to "(3) a person in possession of a negotiable bill if --(A) the goods are deliverable to the order of that person; or(B) the bill has been indorsed to that person or in blank by the consignee or another endorsee."[147]

Though the UK COGSA 1992 mainly deals with the rights of suit under the contract of carriage, its effect is somewhat much wider than it. From the Art.2 (1) (a), the lawful holder of a bill of lading is "vested in him all rights of suit under the contract of carriage."[148] The rights of suit under the contract of carriage shall include the right of claims for the delivery. In addition, the UNCITRAL Draft Instrument provides clearly that the "holder of a negotiable transport document is entitled to claim delivery of the goods from the carrier."[149]

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[144] Cited in *Gaskell,* 1.49,p.21.

[145] Art. 71 CMC.

[146] For Example, *Yin& Guo's Carriage Law*, p. 71.

[147] In the former Pomerene Act, it was provided that a carrier is justified in delivering goods to one who is ' a person in possession of an order bill for the goods, by terms of which the goods are deliverable to his order; or which had been endorsed to him, or in blank by the consignee, or by the mediate or immediate endorsee of the consignee", sect. 9 (c).

[148] Art. 2 (1) of COGSA 1992, " Subject to the following provisions of this section, a person who becomes ---- (a)the lawful holder of a bill of lading ⋯ shall (by virtue of becoming the holder of the bill or as the case may be, the person to whom delivery is to be made)have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract."

[149] Sect. 10.3.2 (a) (ii) in WP.21, art. 49(a) (i) in WP.32.

3.2.3.2 Delivery against presentation of bill of lading due endorsed

Closely consequent to the above principle, delivery shall be made to the holder only against the presentation, or the surrendering of an original[150] bill of lading. This is the common custom,[151] also the usual indication on the bills, such as "one of the original bills of lading must be surrendered duly endorsed" "in exchange for the goods or delivery order" or "against the delivery of the shipment."[152] Meanwhile, more legislations provide this rule expressly, e.g. the Scandinavian Maritime Code stipulates "the consignee is entitled to receive the goods only if he deposits the bill of lading …"[153] The UNCITRAL Draft Instrument provides that the carrier shall deliver the goods to such holder "upon surrender of the negotiable transport document."[154]

If the carrier delivers the goods to anyone else without the presentation of bill of lading, when the holder of the original bill of lading is different from receiver of the goods, usually, a mis-delivery or non-delivery constitutes, and the carrier will be in great risks.

Delivery against the presentation of the bill of lading, which I call presentation rule of bill of lading, and the liabilities of the carrier for the wrongful delivery shall be fully discussed in the Chapter 5 and 6.

In addition, as the usual practice, presenting of only one of the original bills of lading is sufficient for the delivery, and the goods shall be delivered to the first person that surrenders the bill. If "one part of the bill of lading only be presented …if the master has no knowledge that any other part has been indorsed, he may properly and safely deliver in accordance with the endorsement and holding of the part presented without inquiry as to the others."[155] The custom of only one production for delivery originated from the ancient practice. In order to avoid the loss of the bills during the mailing, in the early stage, the bills were separated and sent to the consignee via different ways. The holder may claim for the goods on the first arrived, even the only arrived bill. Nowadays, most of the bills of lading state expressly that "one bill of lading accomplished, the others stand void" or the similarly. For the same reason, the endorsement of one part is also

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[150] In practices, a carrier usually issues both original bills and duplicate ones. The whole set of original bills usually consists of three copies. The duplicate bills are mainly used for the memorandum of the carrier or shippers or so, can't be used for transfer, nor can they be upon for the claims for delivery. If it is not stated specially, the bill of lading in this thesis under the discussion is referred to original bills of lading.

[151] See *Carver on Bill of Lading*, para.1-006, p.2, *Gaskell*, p417-8; *Payne &. Ivamy*, p.151 and others.

[152] For example, Cosco bill of lading, Combined Bill of Shanghai Jinjiang Shipping Corporation LTD, P& O Nedlloyd Bill, Conlinebill 2000 etc.

[153] See Sect. 54 of the *Finnish Maritime Code*.

[154] Sect 10.3.2 (a) (i) in WP. 21, art. 49 (a) (i) in WP.32.

[155] *Carver's Carriage by Sea*, para. 1629, pp.1139-40.

sufficient to assign or transfer the rights to the goods.[156]

In the case of *Zhongcheng Ningbo Imp. & Exp.Co.* v. *Shanghai Asia-pacific Container Shipping Co. Ltd.* on the disputes of delivery without bill of lading,[157] the plaintiff claimed against the carrier for the delivery of goods or for the compensation for delivery without bill of lading. The court rejected the claims on one of the reasons that the plaintiff brought the claims only on one original bill of lading, and he could not tell the whereabouts of the two others, so he failed to get the title to the goods.

I query the reasonability of the decision. One part of the bill of lading may entitle the holder to demand for delivery, so, one bill will also provide the plaintiff sufficient basis for the right of suit, which is based on the right to the delivery, for claiming against the mis-delivery, unless there is other argument against the legality of his possession of the bill.[158]

With the development of the security of the communication, most of the bills of lading can reach the holder in a whole set. In addition, the buyer, especially the CIF buyer usually requires the full set of the documents in order to avoid the multiple indorsement of the bills by the seller. Even under such situation, it is no change for the carrier and he is still entitled to deliver the goods only on one part of bill of lading.

Furthermore, in addition to the production of a bill, the holder shall prove he is the legal holder of it

Under a bearer bill, without notice of any other claim or better title to the goods, the bearer will be regarded as the legal holder.

While under an order one, the holder shall prove that he possesses the bill via due process; i. e. with the due endorsement of the bill, like it is so stated on the face of bill of lading. "Order" means an order by endorsement on a bill of lading"[159]and, the order is given by transferring the bill from the indicated consignee to the transferee. If the person named in the bill of lading does not intend to transfer the goods, he may retain the bill in his own hands, and in this case, he is the holder of the bill, and the goods are deliverable to him. In most cases, when the person wishes to transfer the bill of lading to another, he will make the order by endorsement in the bill and deliver it to the transferee. For the reasons of the

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[156] *Ibid*.

[157] See the in-house report issued by Shanghai Maritime Court, *Researches on Maritime Trial*, vol.5, 28 April 2003.

[158] In this case, the focus of the reasoning is on the title function of the bill of lading and the transfer of the titles by the transfer of the bills. In my view, title function is not the only basis for the right of suit against the mis-delivery and the right for delivery may be independent from it. For further discussion see part 2 of Chapter 5.

[159] USCA 49 § 80101(5).

transaction of trade or the purposes of financing, this process can be repeated by successive transferees until the bill has been "accomplished" by due delivery of the goods.[160] Nevertheless, the transfer of an order bill of lading must be started from the named person with his endorsement. Therefore, only if a transferee gets the bill with such endorsement, it will be the *prima facie* evidence that the holder gets it in accordance with the named person or other transferor's "order"; in other words, the transferor wishes the goods to be delivered to the endorsee. However, as it has been mentioned above, in practice, most of the order bills are endorsed in blank, so, usually with only one endorsement by the named consignee who is stated in the bill of lading will be a "due endorsement".

Scandinavian Maritime Code gives a further emphasis on the endorsement. "Any person presenting a bill of lading ⋯ in the case of an order bill of lading ⋯ through a continuous chain of endorsement or through an endorsement in blank as the rightful holder in due course, is authorized as consignee of the goods."[161]

So, even though the person claims for delivery has presented one or the whole set of original bills of lading, the carrier shall check the endorsement to confirm whether it is a due endorsement by the order of the named person when the it is endorsed in blank; or, to confirm the succession of the endorsements start from the named consignee, when the bill is transferred by the endorsements in name.[162]

In a Chinese case, the carrier was liable for his failure to do so. In *Xia-men Vehicle Co. Ltd.* v. *Xia-men Shipping Co. and others,*[163] the plaintiff sold the garments to Fu Le Men Corp. H.K in 1993. After the shipment, a set of bills of lading were issued to the plaintiff, the shipper, and stated " to the order of National Commercial Bank Ltd., H.K.," from Xiamen port, a port in the southeast of China, to Hong Kong. The National Commercial Bank Ltd. Hong Kong issued a letter of credit. Before the clearance of the L/C, the plaintiff mailed one part original bill of lading to the buyer, Fu Le Men Corp. on his requirement (the reason was to push the transshipment of the goods in Hong Kong), and the goods were delivered by the carrier to the buyer in H. K against the presentation of that original bill of lading. After being refused by the bank for payment under the L/C for the absence of the full set of bills of lading, the plaintiff brought the suit against the defendant carrier and the shipping agencies. Xiamen Maritime Court held in June 1995 that the defendant carrier should take the main part of the liability for the loss of the plaintiff because it was his fault to deliver the goods to the buyer with a bill of

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[160] *Carver on Bill of lading,* para. 1-005, p.3.
[161] See Sect. 51 of the *Finnish Maritime Code*.
[162] In practice, most of the endorsement is the one in blank, very few to endorse the bill of lading in name.
[163] Applied Law Institute of the Supreme Court of PRC, *Selected Cases, Marine, Transport, 1992-1999*, 1st ed., China Legality press, 2000, pp.226-230.

lading without the endorsement of the named Bank.[164]

Because of the former legal meaning of the endorsement, most of the bills state that "one original Bills of Lading, *duly endorsed*, must be surrendered" (emphasis added) for the delivery of goods. In my view, such statement both entitled and bound the carrier to check the endorsement.

3.2.4 Delivery under straight bill of lading

3.2.4.1 Common rule: deliver to the named person

Regardless of the arguments of the attribution of the straight bill of lading, it is the common rule that the goods shall be delivered to the named person in the bill in general cases. CMC specifies that "a provision in the document stating that the goods are to be delivered to the named person … constitutes such an undertaking."[165] Meanwhile, USA laws provide directly that a delivery shall be made to the person named in a straight bill of lading[166] or a nonnegotiable bill.[167]

In UNCITRAL Draft Instrument, it is so proposed that the goods shall be delivered to the named person under all the non-negotiable document or electronic record, the goods shall be delivered to the named person on the production of a proper identification of the consignee.[168] However, different from the former legislations, under the UNCITRAL Draft Instrument, the named person shall be advised by the controlling party.[169]

In the practice of China and other countries, the prudent carriers or shipping agencies usually require the proper identity productions of the consignee when he claims for the delivery.

However, whether the straight bill must be presented for the delivery or not, what will be the liabilities of the carrier for delivery without production of a bill, and whether the shipper or controlling party is entitled to redirect the consignee are still under controversies. Most of the legislations keep silent on these issues. A full discussion shall be given in Chapter5 and 6.

3.2.4.1 Special statements in a straight bill

Though a straight bill of lading is defined as a bill of lading with the named

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[164] The plaintiff was held to take other part of the loss because he had the fault for his own losses by mailing the bills to the buyer.
[165] Art. 71CMC.
[166] S. 9 (b) of the *Pomerene Act*.
[167] USCA 49 § 80110 (b) 2.
[168] S10.3.1 in WP.21, Art.48 in WP.32.
[169] *Ibid*.

consignee on its face, it seems, bills are not always so simple.

For the reason of the trade and the arrangement of the person to take delivery, the consignee box may be stated with various situations, e. g., " A c/o B", " A on behalf of B", "A (account of B)" and so on. These cases are also the confusions of the shipping companies and the shipping agencies in China.[170] In my view, in these cases, without the words "to order" or the similar, they are still the straight bills of lading with named consignee. The carrier shall deliver the goods to the person in accordance with the intention of the bill of lading, no matter whether the receiver is the agent or the consignee himself.

The experiences in practice and case laws will be of great reference to Chinese practitioners. For example, when "A c/o B", delivery to B is fine because B is A's agent for the purpose of taking the delivery. But in my view, delivery to A also is proper because he is the consignee indicated by the document. In *Fluro Electric Corp.* v. *Smith Transport Ltd,*[171] the document was stated as "A, spot at B's address", and the carrier would not deliver the goods to B.[172] In addition, when " A on behalf of B", the carrier may deliver the goods to either A or B.

However, in my view, the former practices are just the demonstrations that a delivery of goods may constitute when the carrier has handed over the goods to the person in accordance with the special statements in the bills of lading. But, the person who may actually receive the goods will not always be the consignee in law. For example, under the statement "A care of B", B is the agent of the A to take over the goods, but A will be the legal consignee. It is the B but not the A shall be vested in the rights to goods, the rights of suit for damages to the goods or to the missdelivery by the carrier and so on, as well, he shall be the person who is borne with the obligations under the carriage, such as the freight etc. However, if the principal is not identified, or the "B" who actually takes over the goods or demands for the delivery of goods fails to disclose the principal, he shall take the responsibilities as the principal.

3.3 When no bill of lading is issued

In the Section of "Transportation document," CMC deals mainly with the bills of lading, though it is still not very direct on the person to whom the goods shall be delivered. As to the documents other than a bill of lading, they are involved in the single article, art.80: "The document other than a bill of lading issued by the carrier for the purpose of proving the receipt of the goods for shipment, is the prima facie

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[170] For example, in some questionnaires presented by shipping agency companies in China, to whom shall the goods to be delivered under such kind of statements are among the most difficulties.
[171] See *Bools*, p, 168.
[172] *Ibid*, pp.168-9.

of both the carriage contract of goods by sea and the receipt by the carrier of the goods stated under the document. These documents issued by the carrier are not negotiable." Obviously, CMC does not provide the rules of the person to whom the goods shall be delivered under other documents. However, this is far from the practice, and, the absence of laws brings uncertainty of the carrier's liabilities for delivery under the documents other than bills of lading.

3.3.1 When a sea waybill is issued

3.3.1.1 Widely use of sea waybills

It may be traced back to late 1960s[173] or in1970 when sea waybills were first used. The likely document issued by the Atlantic Container Line,[174] the "received for shipment" Short Form Non-Negotiable Waybill that was introduced into a joint West Africa Service,[175] or the ACL's Datafreight Receipt System[176] is said to be the first emergence of the sea waybill. Hence, similar systems with different names arouse. More and more trade bodies and most shipping operators became involved in promoting and producing the waybill, from the coastal carriage to the international shipping, and, to the multimodal transport, from general cargo to the oil and products,[177] food aid[178] etc.[179] To a certain extent, they have even replaced bills of lading.[180]

The development is mainly encouraged by the advantages of this kind of document. Firstly, also most commonly, sea waybill can obviate negative results from the later arrival of documentations,[181]especially the bills of lading usually do.[182] As no negotiable of document is envisaged, the waybill may be faxed or

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[173] It is said to be issued in 1970, see J.Richardson, "Waybill: A Carrier's View," in *Waybill and Short form Documents* (Lloyd's Seminar Papers, 30March 1979), p.2, quoted in *Gaskell's*, para22.1, p.713.

[174] See R. Vocos, *The Sea Waybill: A New Innovation in the Carriage of Goods by Sea*, 5 Cargo Claims Analysis 132, 133(1988), quoted in Georgios I. Zekos, *The Contractual Role of Documents issued under the CMI Draft Instrument on Transport Law 2001*, Journal of Maritime Law and Commerce, vol. 35, 2004,1, P.108 at pp.99-120.

[175] In May 1970, see R.Beare, "Waybills and Short Form Documents, a View from the Insurance Market," in *Waybills and Short Form Documents* (Lloyd's Seminar papers, 30 march 1979), p.6, quoted in *Gaskell*, *ibid*.

[176] In May 1971, see *Gaskell*, ibid.

[177] For example, the standard forms of Tank waybill 81, Chemtank waybill 85 etc. In fact, bills of lading are issued in the most tanker carriages.

[178] See a standard form of Worldfoodwaybill 95.

[179] See *Gaskell*, para. 22.2, p. 714.

[180] Studies have shown that the use of negotiable bills of lading has virtually ceased in short-sea liner routes in North Europe and non-negotiable documents have been used in the significant majority of shipments between North America and Western Europe. See also to *Gaskell*, para. 22.3, p.714.

[181] See the introduction for the CMI Uniform Rules for Sea Waybills, www.uctshiplaw.com/cmi/cmiwaybl.htm, 11 October 2004, see also *Wilson*, p.164.

[182] The disputes and problems of delay of bills are arisen mainly on the delivery without production of bills of

telexed to the destination, and the receipt of them will be speeded up. In addition, for not being a document of title,[183] the waybill shall not often be used in transaction of documentary L/C, and, is not required to be produced when a delivery is to be made. These all speed up the receipt of the document as well as the receipt of the goods from the carrier, and may cut down the cost of the goods when the carrier and the consignee wait for the bill of lading at the destination. This benefits both the exporters and importers. Moreover, it may also reduce the possibility of the wrongful delivery by the carriers.

Secondly, it will help to reduce the incidence of fraud. Though not eliminate fraud altogether, but it at least will reduce the possibility for fraud, such as in forging the document of title.[184]

The organizations such as the International Chamber of Commerce (ICC), the Economic Commission for Europe (ECE) recommended encouraging the use of non-negotiable sea waybill against the necessary use of negotiable document, such as bills of lading.[185] The encouragement of this adoption was also the object of *CMI Uniform Rules of Sea Waybills.*[186] Some Scholars were even confident that the sea waybill would finally take the place of the bills of lading.[187]

However, the sea waybill cannot replace the bills of lading altogether. The bills of lading are still important in the international shipping, sales, and financing security, etc.[188] In addition, waybills have their own limitation for its functions. Though widely adopted, waybills are mainly used in such cases as the shipments between the related companies, or in-house transferring, the goods are not sold during the transit, payments are made under open account or there is a high degree of trust between the traders and so on. In addition, it is usually regarded as being unsuitable when a documentary credit transaction is involved, or it is even observed as for valueless where the cargo is intended to sell at sea.[189]

In China, traditionally, the sea waybills (generally called as "waybill") are used in the domestic carriage, and there is no negotiable document adopted in this field. In recent years, the sea waybills have stepped into the international field. More and more sales contracts have agreed to apply them to the carriages, mainly to the

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lading, fully discussion see chapter 5.

[183] See *Carver on Bills of Lading*, para. 6-007,8-001,pp.244,363, *Wilson's*, p.164, see also *Gaskell*, para. 1.48, p.20.

[184] Supra, fn 181.

[185] See supra fn. 174, *Georgios I. Zekos* , op. cit., fn.42, p.108.

[186] See the introduction for the CMI Uniform Rules of Sea Waybill, supra fn. 181.

[187] *Guo Yu's Bill of Lading*, op.cit., pp.143.

[188] See Gorden Cragge, *Facilitation of SITPRO*, www.forwarderlaw.com/feature/blc/>, 10 Sept. 2004. A full research of the functions of bill of lading is in Chapter 5.

[189] See Paul Todd, *Bills of Lading and Bankers' Documentary Credits*, 3rd edition, LLP, 1998, p.152. I don't agree with this view very well. The sea waybill will not the obstacle for selling the goods during the transit, but is the obstacle for the constructive delivery of the goods under the sales contracts, or the obstacle for the transfer of property of the goods when they are still at sea.

short sea carriages, such as those between Shanghai and Pusan, Shanghai and Kobe.

3.3.1.2 Legislations on sea waybill

The *Domestic Waterway Regulation* is the only Chinese regulation that deals with sea waybills.[190] It provides the legal nature of the waybill,[191] the particulars of it,[192] and the requirements for the making of it[193] as well as the issuance[194] and the transactions of it[195]in the domestic carriages.

But in the the international field, it lack of the legal guidance. Therefore, some shipping companies and shipping agencies have stipulated their in-house regulations on the usage of sea waybill, and the guidance for delivery under a sea waybill.[196]

Since *Hague* and *Hague—Visby Rules* were drafted before the emergence of the sea waybill, they are just dealing with the "bills of lading and other similar document of title."[197] From the traditional and common view, they do not apply to the sea waybills unless the parties to them adopt the Rules as proper law or the rules are put into force by national laws to the contract of carriage under the sea waybills. *Hamburg Rules* has taken account of the documents other than bills of lading in article 18,[198] which may include sea waybill. But it does not do directly or completely with the documents other than the bills of lading, nor does it resolve the issues of delivery under these documents.

In recent years, more national legislations pay attention to the sea waybill and

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[190] In this regulation, the document is called as "waybill", as the Chinese tradition does. Beside inland water carriage, waybills are mainly used in the air, road and railway carriages. The laws in these fields give some provisions on this documents, but not very elaborately.

[191] Art.58 of *Domestic Waterway Regulations*.

[192] art.59 of *Domestic Waterway Regulations*.

[193] Art.60 of *Domestic Waterway Regulations*.

[194] Art.61 of *Domestic Water Regulations*.

[195] Art.62 of *Domestic Waterway Regulations*.

[196] For example, Jinjiang Shipping Co., Shanghai laid down "Operation Rules of the usage of sea waybills" and concluded form of "Agreement of the Use of Sea Waybill." In addition, China Shipping Agency, Shanghai is drawing up the "Guidance to Delivery under Different documents", including the case under a sea waybill.

[197] However, there is an opinion that the words "similar document of title" under the *Hague Rules* was an error of the English translation from the French version, the official one. From the original text, this should be translated as "any similar document constituting the title (legal ground) for the carriage of goods by sea", according to this, the two Rules also may apply directly to the sea waybill, which constitutes the legal ground of the contract of carriage. Nonetheless, the English text and the "document of title" are still the general application. See M. H. Claringbould, "Bills of lading Versus Sea Waybills: Documents of Title or Nor", in *English and Continental Maritime Law After 11 years of Maritime Law Unification: a Search for Differences between Common Law and Civil Law*, Mukluk, 2003, pp.91-103.

[198] "If a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described." See a*rticle 18* of *Hamburg Rules*.

similar documents. UK COGSA 1992 applies to "any sea waybill" as well as any bill of lading and ship's delivery order,[199] and shall embody the right and the duty of the concerned parties on delivery under these documents as I have mentioned above. The Maritime Code of the Nordic countries stipulates with the legal nature and the evidence effectiveness of sea waybill as well as the decision of the consignee under a sea waybill.[200]

In addition, some legislation, such as the German TRAT, deals elaborately with the consignment note signed by both of the sender (same to the shipper in most regimes) and the carrier or with other similar documents, which are usually as same as sea waybills when they are used in the sea carriage.[201]

The US legislations are distinctive. From the *Pomerene Act* 1916 to the USCA title 49 and others, the terminology is only "bill of lading" or "bills". Based on the point that the "straight bill of lading" or "non- negotiable bills" are as same as the sea waybill, these acts apply to this document.[202]

CMI seems to be the first international organization that tried to provide the uniform guidance for the sea waybill at the global level. Soon after the Colloquium in Venice on Bills of Lading in June 1983, a Working Group was set up for the drafting of uniform rules on the consideration of encouragement of the sea waybill when the negotiable document is unnecessary.[203] The fruit is the *CMI Uniform Rules for Sea Waybills* (hereinafter referred to as "*CMI Sea Waybill Rules*"). This Rules consists of 8 articles and is for the voluntary incorporation into any contract of carriage covered by this kind of document.[204] It is concerned with the rights and responsibilities of the parties, the paramount law of the contract, and the description of goods, right of control and the delivery of goods under this document in addition to other issues.

Furthermore, the UNCITRAL Draft Instrument, which formulates the provisions on the non-negotiable document, also may apply to sea waybill in the given case.

3.3.1.3 Functions of sea waybill

There is no exact definition of "sea waybill", either. Even the *CMI Sea Waybill Rules* avoid it. Most of the laws just deal with the functions of it.

Like a bill of lading, a sea waybill is the evidence of the contract of carriage by sea and the receipt of the goods by the carrier.[205] The *Domestic Waterway*

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[199] Sect. 1 COGSA 1992.
[200] See section 58,59 of the *Finnish Maritime Code*.
[201] On the particulars and functions of the consignment note in Sect 408, 409 TRAT.
[202] See *Gaskell*, para. 1.49, 1.50, pp.21-22.
[203] Supra fn 181.
[204] Art. 1 "scope of application" of *CMI Sea Waybill Rules*.
[205] See, for instance, Sect. 58 (1) of the *Finnish Maritime Code* and others. In Sect.1 (3) of COGSA 1992,

Regulations of China does not point out the its functions directly, but stipulates the general particulars in a waybill, such as the name of the shipper, carrier and consignee, the description of the goods, the time for loading, etc.[206] From theses particulars, it can be indicated the same two functions of the sea waybill. Without these particulars indicated in the *Regulations*, a sea waybill cannot operate as the evidence to the contract and the receipt well.

But, this document is not a bill of lading.[207] This can be deferred from the distinguishing of the provisions on the two kinds of documents.[208] In practice, usually, this type of document is marked with the words "Sea waybill," "Waybill," "Liner waybill" or the like on their faces. But the essential distinction from the bill of lading, especially from a negotiable bill[209] lies in that a sea waybill is not a document of title, and it is non-negotiable.[210] It is also so stated on its face. This document can't be transferred by the endorsement and delivery of it, or only by the delivery of it. If a document can be transferred in the former ways, it will not be a waybill even it is so named.

Meanwhile, unlike the case with bills of lading, the consignee under a sea waybill is not identified by the possession and the endorsement of the document. He is generally designated by the shipper in the contract of carriage and usually is stated expressly in the box of the consignee on the face of a waybill, as "to XX" or directly "XX" and never with the term "to order" or the similar one. These distinctions make the obligations of the carriers on delivery different from those under a bill of lading (especially under a negotiable bill of lading). The carrier shall deliver the goods to the named consignee, and the presentation rule of the document on delivery will not apply to the waybill.[211]

3.3.1.4 Legal status of the consignee

The consignee under a sea waybill is entitled to claim for the delivery, and not rarely, he will be obligated to pay the freight and other charges to the goods, and bear the contributions of general average and so on. But when the consignee is a person other than the shipper, what is the origination of his rights and obligations, and what is the relationship among the shipper, carrier and the consignee?

As to the legal status of the consignee, there are different theories or approaches.

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there is slightly difference in the function: a sea waybill is "such a receipt for goods as *contains or evidences* a contract for the carriage of goods by sea" (emphasis added).

206 Art.59 of *Domestic Waterway Regulations of China.*

207 See COGSA 1992, sect. 1 (3).

208 See, e.g., art. 80 of CMC, art. 18 of *Hamburg Rules* and so on.

209 The discussions of a straight bill is omitted here for the reasons mentioned above.

210 *Carver on Bill of lading*, para. 1-005, p.3.

211 For further discussions see part 3.3.1.5,3.3.1.6 below.

Under the traditional theory of the *privity* of contract under common law, only the contractual parties are bound by the contract. If the consignee is the person other than the shipper, he will not be entitled to sue or be sued by the carrier on account of the contract of carriage. This rule is a hindrance of the shipping practice and the contract of carriage by sea. In order to break through this limitation, *CMI Sea Waybill Rules* creates the assumption of agency, viz, the shipper may enter into the contract not only on his own behalf but also "as agent for and on behalf of the consignee" in order to enable the consignee to sue or be sued under the contract of carriage.[212]

The UK COGSA 1992 tries to resolve the right of the suit of the consignee via the approach of legal fiction. The person to whom a delivery is made when a sea waybill is related has been transferred to and vested in all rights of suit under the contract of carriage "as if he had been a party to that contract."[213]

However, neither the agency assumption nor the legal fiction can explain the allocation of the rights and the obligations between the shipper and the consignee very well, though they are both the positive resolutions.

Under civil laws, the contract of carriage is often deemed as the contract for the third party's benefit. Some Chinese scholars support so.[214] I am in favor of this opinion. In the contracts of carriage by all the modes, the shipper will tell the carrier to whom the goods shall be delivered, in addition, the contract will tell the carrier how to identify the consignee if he is different form the shipper. For example, it will tell expressly or impliedly that the consignee shall be identified by the indication in the transport document, by the designation of the shipper, or by the possession of bill of lading. And, the carrier is obligated to follow these instructions. When the consignee is different from the shipper, the contract of carriage is a typical contract for the third party's benefit, i. e., consignee's benefit. The consignee can obtain certain rights in accordance with the agreement between the shipper and the carrier, and he may also bear some burden relating to his interests, such as the charges to the goods.[215] In addition, according to the theory of the third party's benefit, the third party is not entitled or bound to the contract before he accepts such an arrangement, or the shipper is still entitled to vary the contract, including the beneficiary party before the contract takes effect with the formerly named third party.

Meanwhile, contract of third party's benefit also has been accepted in

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[212] Art.3 "Agency" of *CMI Sea Waybill Rules*.
[213] Sect.2 (1) COGSA 1992.
[214] *Yin & Guo's Carriage Law*, p.72, see also *Zhao's Maritime Law*, fn. 4, p. 251. But according the latter one, the bill of lading relation is different from the third party's benefit contract. In my view, the relationship of bill of lading is the combination of the contract of third party's benefit and the instrument of value, further discussion see chapter 5, part 3.
[215] See *Yin& Guo's Carriage Law*, p. 72.

considerable common law regimes, such as USA, New Zealand and parts of Australia. In UK, the COGSA 1992, *Contract (Rights of Third parties) Act* 1999 of UK,[216] are the reforms, too. These modifications provide the basis for the possible wide acceptance of the theory of the third party's benefit.

3.3.1.5 Delivery to the named consignee

From the above discussion, it is clear that, under a sea waybill, the carrier is obliged to deliver the goods to the person designated by the shipper. In most cases, the person is stated in the sea waybill.[217] The *Scandinavian Maritime Code* stipulates it expressly, that "a sea waybill is a document which …(b) contains an undertaking by the carrier to deliver the goods to the consignee named in the document."[218] The *Domestic Waterway Regulations* of China stipulates similarly, though convoluted, that, "consignee is the person designated in the contract of carriage by the shipper to take over the goods,"[219] and the carrier shall deliver the goods to the consignee on proper identification.[220] Even without the express statue, the general customs is also adopted in China's international shipping that the goods shall be delivered to the named consignee in the waybill in most cases.

While, the UK COGSA 1992 is not so direct and indicates that a sea waybill identifies the person to whom delivery of goods shall be made by the carrier in accordance with the contract.[221] But, the provision of COGSA 1992 shows clearly that the consignee shall be determined by the contract of carriage, which complies with the feature of the third party's benefit, though the act raises the legal fiction.[222]

Nevertheless, delivery to the named consignee on the proper identity is the common rule under a sea waybill, and usually, the designated consignees are indicated on the sea waybills. In addition, the carrier is entitled to deliver the goods to the person who is authorized by the consignee to take over the goods if the consignee is entitled to the delivery subject to the discussions in the following parts.

This common rule is also the undertaking by the carrier stated expressly on the

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[216] However, the act excludes to confer the right on the third party in the case of a contract for the carriage of goods by sea, section 5 (5) of *Contract (rights of Third party) Act 1999*. In my view, this provision does not demonstrate that a contract of carriage shall not be the third party's benefit contract, but it leave the contract of carriage of goods by sea to be resolved by the pre-existing act, COGSA 1992.

[217] In some cases, the consignee may be varied by the redirection of the shipper, the assignment of the contract etc, further discussion is in part 3.3.1.7.

[218] E. g, Sect. 58 of *Finnish Maritime Code*.

[219] Art. 3 (7) of *Domestic Waterway Regulations of China*.

[220] Art.67 of *Domestic Waterway Regulations of China*.

[221] Sect. 1 (3) (b), COGSA 1992, "References in this Act to a sea waybill are references to any document which is not a bill of lading but … (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract."

[222] See supra part 3.3.1.4.

face of some sea waybills, "Delivery will be made to the Consignee named, or his authorized agents, on production of proof of identity at the Port of Discharge or Place of Delivery whichever applicable."[223]

3.3.1.6 Presentation rule does not apply

Summarized from the former introductions, the presentation rule does not apply to the delivery under a sea waybill.[224] The carrier is not entitled to refuse to deliver the goods if the consignee fails to present the document. What the carrier must do is to check the identity of the consignee carefully.[225]

But, the *CMI Sea Waybill Rules* is somewhat tolerant with the carrier because the carrier is just required to "exercise reasonable care" to ascertain that the party is in fact the consignee as he claims.[226]

The *Domestic Waterway Regulations* of China may bring some confusion on the delivery by illuminating the general process with waybills. According to article 62, it seems that the carrier generally issues five or six copies of the waybill. One or two copies are retained in the carrier or his agent's hands, and the others will be sent to the shipper, consignee and port operator separately. When taking the delivery, the consignee shall return one copy to the carrier as the receipt of the goods from the carrier.[227]

However, the aforesaid transaction is not always the practice in China, nor is the statutory obligation on the carrier. The *Regulations* allows the carrier to add or reduce the number of the waybills in any case.[228] And in Chinese practice, it is the very common occasion that some copies of the waybill travel together with the goods in the said ship, and also quite often the consignee may not receive any document. The production of the waybill is not necessary for the delivery of goods.

As to the returning of one waybill as the receipt, it is not necessary either. Any document or confirmation that can demonstrate the receiving of the goods is sufficient, and one copy of the waybill does not have to be returned.

The courts of China approve the practice of delivery without presentation of

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[223] E.g., P&O Nedlloyd Waybill.
[224] See also *Debattista*, 2-29,p.36.
[225] See *Dabattista, ibid*, see also art.7 (i) of *CMI Sea Waybill Rules*.
[226] Art 7(ii) of *CMI Sea Waybill Rules*.
[227] It is also required that the carrier shall issue the waybill after receiving the goods from the shipper, and is further emphasized that a waybill signed by the master of the carrying vessel shall be deemed as being issued by the carrier, see Art. 61, *Domestic Waterway Regulations*,
In China, the shipper usually surrenders the carrier the booking note or other files in advance as an offer of the contracting, and the waybill or bill of lading and other transport documents are always issued by the unilateral party of the carrier. Whilst, under the German TRAT, a consignment note shall be signed by the sender or by both the sender and the carrier when the latter is so required by the former.
[228] Para. 2, art.62 of *Domestic Waterway Regulations of China*.

waybill. In the case of *Application for Marine Injunction by Chen Yi-duo,*[229] the carrier had retained the goods for an unreasonably long period. Against the application for an injunction to release them, the defendant carrier, China Shipping Tianjin argued that the consignee failed to provide the original production of a waybill, but a photocopy of it, so the carrier was entitled to refuse to deliver the goods. Tianjin Maritime Court rejected this argument and supported that under a waybill, the presentation of the document was not necessary.

The practice in international shipping and the development of the EDI system make the transaction of waybills even farther from the art.62 in the *Domestic Waterway Regulation*. In order to avoid the confusion in practice, in my view, this article had better be deleted.

3.3.1.7 Redirection of the consignee

3.3.1.7.1 Deliver to the consignee redirected

Although a waybill is mostly named with a consignee, most of the legislations authorize the shipper to change the consignee, i.e. redirect the consignee. The art. 308 under the Contract Law of China, section 418 of the German TRAT, art14 of CMNI convention and chapter 11 of Uncitral Draft Instrument as have been cited above all provide the shipper (sender) or other controlling party to give instructions to the contract of carriage including changing the consignee. *CMI Sea Waybill Rules* provides, when further conditions are satisfied, the shipper is entitled to change the name of the consignee unless prohibited by the applicable law.[230]And the Scandinavian Maritime Code deals directly with the redirection of the consignee under the sea waybill and the contracting shipper is entitled to ask the goods to be delivered to another person other than the named one on the document.[231]

In the common law regime, the shipper is also entitled to redirect the consignee under nonnegotiable document,[232] and under the UK COGSA1992, a person being identified in a document will be varied with the terms of the documents,[233] consequently, the person being identified in a sea waybill will be changed accordingly.

Accordingly, the carrier shall deliver the goods to the person effectively redirected, meanwhile, the carrier has the right to reject this kind of instruction

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[229] www.ccmt.org.cn/hs/news/show, 30 Oct. 2004.
[230] Art. 6 (i) of *CMI Sea Waybill Rule*s.
[231] See sect. 58 of *Finnish Maritime Code*.
[232] *Carver on Bill of Lading*, 1-016,17,18,pp.11-13; para8-007, p.367.
[233] Sect5 (3) COGSA 1992.

when it is not made by an entitled person, or, not meeting the conditions of the laws or the contract.

3.3.1.7.2 Shipper possesses the right to redirect the consignee

This right of the redirection of the consignee is included in the right of control or disposal of the goods as mentioned in part 1.4.3.1. The main desire for such kind of changing results form the remedies of the seller under a sales contract, such as the right of stoppage in transit, resell of goods or so. What is worth being pointed out is that the right of redirection of the consignee under a sea waybill is generally vested in the shipper but not the consignee or other person who holds the document.

First of all, the right of control or disposal, though may originate from a sales contract, is the right under a contract of carriage against the carrier. Therefore, the person who may exercise this kind of right firstly shall be the party to the contract of carriage, unless he waives or transfers it. Based on this, the shipper is entitled to this right because he is the original party of the contract of carriage.

Secondly, the legal nature of the contract of carriage as a contract of third party's benefit makes the shipper entitled to redirect the consignee. As we all know, the consignee is designated from the agreement between the shipper and the carrier, and, before the contract takes effect with the named consignee, the shipper is entitled to modify or vary the contract, and is entitled to change the benefited third party. So, the third party named during the conclusion of the contract or named in the sea waybill is not the conclusive one.

Even those legislations that do not adopt the third party's benefit theory also entitled the variation of the consignee. As above mentioned, UK COGSA 1992 emphasizes that a sea waybill identifies the person to whom the delivery shall be made "in the accordance with that contract,"[234] moreover, the rights given to the consignee shall not be prejudiced against any rights of the original parties to the contract,[235] "this preserves, for instance, any rights of disposal reserved by the shipper,"[236] and the person identified in a document shall be varied in accordance with the terms of the document.[237]

Thirdly, the non-transferability or the non-negotiability of the sea waybill helps to keep the right of control held by the shipper, but not by the consignee or others.

A sea waybill is not transferable, nor shall it be exchanged for the delivery of goods, so the document itself will not confer the right on the named consignee or the holder of the waybill. More often than not, the consignee even does not see or

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[234] Sect.1. (3) (b) GOGSA 1992.
[235] Sect. 2(5) COGSA 1992.
[236] See *Gaskell*, para 4.63, pp.142.
[237] Sect. 5 (3) COGSA 1992.

get a copy of the waybill. In this sense, I would like to say that a waybill is more like a document between the shipper and the carrier, and the consignee is not always involved in the document relationship with the carrier, unlike the holder of an negotiable bill of lading who is generally deeply involved in the independent document relationship with the carrier.[238] Therefore, the right of control still adheres to the original contract, to the shipper unless it is otherwise agreed or statutorily stipulated.

Redirection of the consignee by the shipper is also the common rule under a non-negotiable document in various methods of carriage, for examples, the CMR convention,[239] the *Civil Aviation Law of China*,[240] which takes the same from the Montreal Convention, and the *Regulations of Carriage of Goods by Vehicle of China*[241], all provide the right to change the consignee on the shipper before the delivery of goods or when other conditions are satisfied. And, certain forms of the sea waybills, such as the APL Sea waybill Terms and Conditions,[242] state that the shipper is entitled to redirect the consignee other than the person stated in the waybill.

3.3.1.7.3 Cease of the shipper's right of redirection

Shipper's right to redirect the consignee may cease subject to some contractual clauses.

In order to avoid the changing of the consignee, there are some approaches to stop shipper this right. Theoretically, one of the methods can be done through a "NODISP" (No Disposal) clause,[243] whereby the shipper irrevocably renounces any right to vary the identity of the consignee during the transit, or renounce the right in certain situations. Such a clause usually is required by the consignee, or by bank if the sea waybill enters into the process of the L/C or other financial process for avoiding the risks resulted from the variation of the consignee. For example, P&O Nedlloyd had suggested an alternative "CONTROL" clause that the shipper irrevocably renounces the right to vary the consignee upon acceptance of the waybill by a bank against a letter of credit transaction."[244]

However, these clauses will give rise to the difficulty for the third party in

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[238] Further research on the relation between the holder of the negotiable bill of lading and the carrier will be in Chapter 5

[239] Art.12 CMR .

[240] Art.119 *Civil Aviation Law of China*.

[241] Art.50 *Regulations of Carriage of Goods by Vehicle of China.*

[242] Art.2 of APL *Sea Waybill Terms and Condition*s, "Unless instructed otherwise in writing by the Shipper delivery of the Goods will be made only to the consignee to his authorized representative…"

[243] *Gaskell*, para. 22.13, p.718.

[244] *Ibid,* para. 22.14, p.718.

complaining when the carrier could waive this renunciation as between itself and the shipper.[245] In addition, if the consignee then wishes to use the waybill to trade the goods to a buyer, this solution is "not really effective" and an order bill of lading is "more appropriate."[246] So the abovementioned suggestion has very rarely been implemented in practice.

In addition, the shipper may transfer or designate this right of redirection to other person, usually to the first or the earlier named consignee. *CMI Sea Waybill Rules* provides that the shipper may exercise the option to transfer the right of control to the consignee no later than the receipt of the goods by the carrier.[247] While under the discussions of UNCITRAL Draft Instrument, proposals are put forward that the consignee or the person other than the shipper may be the controlling party by way of transferring, or designated by shipper or by the agreement between the shipper and the consignee. But the exact approach is not finally determined until now.[248] In these cases, the carrier shall deliver the goods in accordance with the instruction of the new controlling party.

The Chinese contract law just confers the right of control on the shipper and does not provide the variation of the controlling party.[249]

Some Chinese scholars argued against the transferring of the right of control under a non-negotiable document, for "it will impair the traditional transport."[250] I don not quite understand the reasoning of this point. In my view, though a sea waybill or other non-negotiable document is mainly used in the cases where the seller does not need to sell the goods in transit, it is also very possible the party would like to assign his right or obligation or both of them under a contract of carriage. On this basis, the law shall authorize to transfer the controlling right to the person other than the shipper by assignment or other mechanicals

Taking the theory of assignment under Chinese law into consideration, the transfer shall be effective to the carrier by informing the latter, because the CLC provides that an obligee assigning its rights shall notify the obligor,[251] i.e. the carrier in the contract of carriage, otherwise, the assignment shall not be effective.[252] In other words, the carrier is not obliged to comply with the instruction made by the person other than the shipper when he gets no effective notice.

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[245] *Ibid*, para.,22.13..
[246] *Ibid*, para., 22.14.
[247] Art. 6(ii) of *CMI Sea Waybill Rules*.
[248] See Art.54, 1 (a), (b) in WP.32, Sect.11.2 (i) (ii) in WP.21. The method is still in the bracket.
[249] Art. 308 of the CLC confer the rights only on the shipper, and the *Domestic Waterway Regulations* does not deal with this issue.
[250] Wu Xian-jiang, "Controlling Right of the Goods under the Sea Carriage," (hereafter as "*Wu's controlling Right*") in sub-report 5 of the project of the *Study of Modification of CMC*, by Dalian Maritime University.
[251] Art.80 CLC.
[252] *Ibid.*

A problem has arisen as to whether the consent of the consignee is required to designate the controlling party other than the shipper.[253] Concerning the legal nature of the controlling right, it usually is vested in the shipper from the system of the contract of carriage, so the shipper has the unilateral right, including the right to transfer his controlling right on the goods. So the designation of another controlling party shall not require the consent of the consignee. However, concerning the interest of the consignee or the buyer under the sales contract, a unilateral power on the shipper may not be so fair for the consignee. Very possibly, the designation of the controlling party takes place at a very early stage in the carriage process or even before the conclusion of the contract of carriage. At that stage, designating the controlling party might be an important point for the purposes of underlying sales transaction that took place between the shipper and the consignee. For that reason, "it was considered appropriate under that view to involve the consignee in the designation of the controlling party,"[254] especially when the designated person is not the consignee, e.g, a bank.

Indeed, this consent of the consignee on the designation of the controlling party needs further consideration.

Nevertheless, though the designation of controlling party usually results from the arrangements of the sales or finance, the carrier does not involve in them too deeply. The right of control, which is discussed here, is the right under the contract of carriage. So, from the carrier's angle, in my view, an effective notice of such designation or the transfer of the controlling party by the shipper is sufficient, and he shall not have to confirm a consent of the consignee, unless there is evidence or claim on the fraud of the shipper, or of the third person who is noticed to be the controlling party, or when there is clear argument that such arrangement will infringe the consignee's due rights or titles to the goods

In addition, as I have suggested, Chinese law also needs to deal with the situation of the transfer of the controlling right from the shipper to another person.

As to the period for the shipper to transfer the right of control, I don not agree with the provision in *CMI Sea Waybill* Rules, which provides it before the receipt of the goods by the carrier.[255] Neither do I agree with some Chinese scholars' point that the changing of the controlling party shall be made before the issuance of the document.[256] In my view, as to the practice of the transfer or the assignment of the contract, the shipper or the consequent controlling parties shall be entitled to

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[253] See the explanation of the UNCITRAL Draft Instrument, fn. 184 in the WP.32.

[254] UNCITRAL, *Report of Working Group III on the Work of its Eleventh Session*, para. 105, Doc. no.: A.CN .9/526, 2003.

[255] Art. 6(ii) *CMI Sea Waybill Rules*, the shipper shall exercise his option to transfer the right of control no later than the receipt of the goods by the carrier.

[256] *Wu's Controlling Right, Ibid*.

convey the right of control during the transit of the goods by informing the carrier expressly. In that period, this right can be transferred successively.

Furthermore, no matter the right of control is held by the shipper or the newly designated controlling party, their right of redirecting the consignee will be terminated subject to the point defined by law. Related instruments give various points for the ceasing of this right.

CLC entitles the shipper to give instruction prior to the delivery of goods to the consignee.[257] Under German Law, the right lapses on the arrival of the goods at the destination, hence, lies with the consignee.[258] According to *CMI Sea Waybill Rules*, it is up to the consignee claiming the delivery after the goods' arrival at the destination,[259] and the UNCITRAL Draft Instrument proposes similarly.[260]

However, as far as I can see, these conditions do not match the practice or the theory very well. After the arrival of the goods, it is also very possible that the shipper would like to redirect other consignee because of the repudiation by the formerly named consignee who is the buyer under the sales contract or for other reasons. So the German law gives too early a point for the cease of the right. While, as discussed above, the consignee is designated in term of the contract of carriage, in order to protect the possible remedies of the shipper under the sales contract, it will avoid making the consignee entitled to the delivery only by claiming for the goods at any points. However, the shipper or the controlling party shall exercise his controlling right promptly, if the goods have been delivered to the person named as the consignee on the sea waybill, the carrier will not be bound to the later directions by the shipper or other controlling party unless there has been obvious warning before delivery.

So, in my view, the variant on the basis of the CLC is relatively more reasonable, the re-instructions of the consignee shall be given prior to "delivery of the goods to the consignee or the person authorized by him after their arrival at the destination." Being not the controlling party, the consignee is not entitled to take the goods before the arrival at the agreed destination.

3.3.2 When a delivery order is issued

3.3.2.1 Categories of delivery orders

Delivery orders are usually used in the circumstances when the bulk goods are

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[257] Art. 308 CLC.
[258] Sect.418 (2) of the German TRAT.
[259] Art.6 (i) *CMI Sea Waybill Rules.*
[260] Art.54. 1. (d) in WP.32, "The right of control (terminates) (is transferred to the consignee) when the goods have arrived at the destination and the consignee has requested delivery of the goods."

shipped, having been taken under one bill of lading, and are sold into separate buyers. It is deemed to be dangerous that the procuring substitute bills of lading for the quantities correspond with those sold to each of the buyer after issue of the original one. And, it is very possible that the carrier or the agent of carrier is reluctant to do so.[261] In these cases, the seller will need to tender to each of the buyers a document entitling them to take the delivery of the related goods from the carrier, and, the terms "delivery order" and "delivery warrant" are typically used to describe the documents normally used in these circumstances.[262]

In general views, the documents are neither "bills of lading nor sea waybills"[263] and come in many forms. Generally, they can be divided into two types: the merchant's delivery order and the ship's one.

(1) Merchant's delivery order

The merchant's delivery order is also called as a "trader's", "bare" or "mere" delivery order.[264] This type of the document refers to those issued by someone other than the carrier, usually the seller (possibly an intermediate purchaser) to the separate buyers for their payment of the corresponding goods. In addition, the documents are generally addressed to a carrier requiring him to deliver the goods to concerned persons. Without the acknowledgement or signature by the carrier, this kind of delivery order does not embody the undertakings of the carrier to deliver the goods to the new buyers, and, confers no right against the carrier on the new buyers.[265] In common law, it can't spring up the bailment relationship between the carrier and the new buyers or the person named by the seller either.[266] Therefore, the merchant's delivery order does not provide sufficient protection to the buyers, and generally cannot be accepted under a sale contract as the document of transport.

(2) Ship's delivery order

Whilst, issuing ship's delivery orders are more common when the goods have to be split to different buyers. They are the documents issued or confirmed by the carrier to the consignees with related quantities or parcels on the requirement of the shipper or the holder of the original bill of lading.

Before the COGSA1992 of UK, an authority of the definition of a "ship's delivery order" in English law was put forward in the Report of *Rights of Suit*.

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[261] See *Carver on Bills of Lading*, para. 8-027, p.377, see also Yang Liangyi, *Bills of Lading and other Shipping Documents (hereafter as "Yang's Bill of Lading")*, 1st ed., Publishing House of China University of Politic and Law, 2001 pp.21-22.

[262] *Debattista*, para. 2-33,p.38.

[263] Section1 (4) of COGSA 1992 UK, post fn.251.

[264] *Debattista*, fn.4, p.38.

[265] See Law Commission for England and Wales and Scottish Law Commission, *Rights of Suit in Respect of Carriage of Goods by Sea* (London 1991), para. 5.26, Law com. No. 196 (hereafter as "*Rights of Suit"*). See also, Paul Todd, *Bills of Lading and Bankers' Documentary Credit*s, 3rd ed., LLP, p.140.

[266] See *Yang's Bill of Lading*, p.22.

"Ship's delivery orders are either (a) documents issued by or on behalf of shipowners while the goods are in their possession or under their control and which contain some form of undertaking that will be delivered to the holder or to the order of a named person; or (b)documents addressed to a shipowner requiring him to deliver to the order of a named person, the shipowner subsequently attorning to that person…"[267] According to this definition, a ship's delivery order occurs in two situations, one is issued directly by the carrier, the other is a document issued by the seller, then be confirmed or co-signed by the carrier. When bills of lading have been issued, a ship's delivery order must be issued against the surrendering of the original bills.

UK COGSA 1992 gives a statutory definition of a ship's order and simplifies the legal relationship between the carrier and the consignee identified by a ship's order avoiding the theory of attornment. According to section 1(4) of the Act, a ship's delivery order refers to any document which is "neither a bill of lading nor a sea waybill"[268] but contains an "undertaking which: (a) is given under or for the purpose of a contract for the carriage of goods to which the document relates, or of goods which includes those goods; and (b) is an undertaking by the carrier to a person identified in the document to deliver the goods which the documents relate to that person."

From the aforesaid common law and statutory definitions, the core of a ship's delivery order is that it carries a promise or an undertaking by the carrier to deliver the goods to a certain person in accordance with the order. This undertaking will determine the person to whom a delivery shall be made. In practice, carriers usually state in a delivery order that " undertakes to deliver after their arrival at (place), unto: XX (or order) the under mentioned goods…" Without this promise by the carrier, an order or warrant shall not be a ship's delivery order.

Although not adjusted statutorily, ship's delivery orders are used in the shipping practices under different regimes. And, they are issued or signed by the carrier against the surrendering of the original bills of lading if there are any. Otherwise, the carrier shall put himself in a very dangerous position if the bills of lading are still in circulation since these documents represent the rights to the goods in most cases. In addition, delivery orders usually incorporate the conditions, terms and

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[267] *Rights of Suit*, para.5.26.

[268] In practices, a delivery order is indeed different from a B/L or a sea waybill. The latter two documents are the normal ones in the carriage of goods by sea while a delivery order is used in a very special situation and generally is issued after a bill of lading or a sea waybill has been issued (especially in the cases when a B/L has been issued). In addition, it is with different appearance from that of a B/L or a sea waybill.
In some authorities, the most obvious distinction is that a delivery order lacks of the characteristics of bills of lading and sea waybills, for not being the receipt of goods, nor does it contain or evidence contracts of carriage, see *Carver on Bills of Lading*, 8-038,p.384. However, Paul Todd supports that a ship's delivery order shares many of the features of the bill of lading operating as a receipt for the goods by the carrier and providing evidence of the terms of the contract of carriage. See supra fn. 264, Paul Todd's, *ibid*.

exceptions of the relative Bill of Lading[269]into them.

It is very possible that a merchant's order may be changed into a ship's order when the order is co-signed or confirmed or attorned to by the carrier, or acknowledged by the carrier to the buyer of the delivery. Commonly, the appearances and terms of a merchant's delivery order and a ship's one are very much alike or even the same, the distinguishing of their types is based on the title and signature. With the title and the signature of a carrier or a master or a ship, the document is a ship's order, otherwise, it will very possibly be a merchant's one.

(3) A special D/O in Chinese practice

What needs to be pointed out is that, in practice of China (also in other countries or regions), there is another kind of document named as delivery order (it is usually abbreviated as "D/O"), which is issued by the carrier or a ship agent to the person who claims for the delivery for their taking over of the goods from the warehousemen or other places as I have introduced in Chapter3. It is likely a "ship's release," but not the ship's delivery order discussed here, nor can it be acceptable under a sales contract as the warranty for the buyer's right to the delivery.

Though not very common in China's practice now,[270] ship's delivery order are very likely to be envisaged in the practice considering the globalization of trading and shipping. Therefore, making researches to the legislations and practices of ship's delivery order in other countries is very necessary.

3.3.2.2 Delivery under a ship's delivery order

To whom shall the goods be delivered?

According to the privity rule of the common law, the buyer or the person described in a ship's delivery order was a third party to the contract of carriage of goods and could not take its essential benefit, i.e. the right to the delivery of goods.[271] The theories or the case laws have tried to break through the limitation of this rule by various ways.

Under the traditional common law, by the acknowledgement and attornment of the carrier, there springs up the bailment between the carrier and the consignee,

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[269] For example, "This delivery Order is subject to all conditions, qualifications and exceptions of the relative Bill of Lading and to freight, charges another moneys, if any, payable in respect of the goods, being paid before delivery of the goods," see "Nedlloyd Lines Delivery Order."

[270] During my investigations among some famous shipping companies and shipping agencies or freight forwarders in Shanghai, such as the COSCON, Shipping Agency Shanghai, Sino-trans Container Shanghai, none of them issue ship's delivery order, the more popular practice is splitting one bill of lading to several ones with relevant buyers.

[271] See *Debattista*, 2-35, p.39.

hence, the consignee is entitled to the delivery as well as to the other rights against the carrier.[272] Meanwhile, it will give rise to the contract between the carrier and the person to whom a delivery is to be made.[273] With the signing and issuance of a ship's delivery order by the carrier, an acknowledgement and attornment are made to the person who is identified in the document as the person entitled to delivery of the goods, usually the named person. Therefore, generally, the carrier shall deliver the goods to the named consignee in an order as he has promised by attorning to him.

With the passage of COGSA 1992, the theory of bailment and attornment is loosing its importance. The Act expressly defines a ship's delivery order and creates a contractual relationship between the carrier and the consignee. Like the lawful holder of a bill of lading and the consignee under a sea waybill, the person "to whom delivery of the goods to which a ship's order relates is to be made in accordance with undertaking contained in the order" shall be deemed as a party to the contract of carriage by the legal fiction,[274] and "have transferred to and vested in him all rights of suit"[275] under the contract including the contractual right to the delivery.[276] And the carrier shall be liable for a breach of contract if he delivers the goods to a wrong person.

Nevertheless, this contractual relation results from the "undertaking" contained in a ship's delivery order. From the definition in section 1(4)(b), an undertaking contained in an order is to deliver the goods to the "person identified in the document." As the understanding of some scholars, the person to whom the undertaking is given and the person to whom delivery is to be made must be the same person.[277] When a ship's delivery order states to deliver the goods to "A," and the carrier is undertaken to make the delivery to the named person "A."

However, it is also very common that a ship's delivery order is stated to deliver the goods to "A or order" or other similar words. When A ordered the delivery to be made to B, the argument arises. According to the abovementioned opinion, this would appear not to satisfy the definition in section 1(4)(b) of the COGSA 1992, since the person to whom the undertaking is given, i.e. the "A" is not the person to whom a delivery should be made, and the document would cease to be a ship's delivery order in this case.

This viewpoint is reasoning from the wording of the COGSA 1992, but in my view, it needs a further examination. A ship's delivery order is also often

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[272] *Ibid*, see also *Carver on bills of Lading*, para8-32, pp.380-381.
[273] *Carver on Bills of Lading*, *ibid.*
[274] Sect..2 (1) COGSA 1992.
[275] *Ibid*.
[276] Sect. 3 (1) COGSA. In addition, the person shall become subject to the same liabilities under the contract as if he had been a party to that contract, *ibid*.
[277] See also *Carver on Bills of Lading*,8-044, p.388.

surrendered under the sales contract from the seller to the buyer, and it is very possible that the goods may be on sale again during the transactions. So, it is not reasonable to prohibit the changing of the consignee even under a ship's delivery order.

Very commonly, the ship's delivery order is made as delivering the goods to someone or his order. In the ground report of the COGSA 1992, *Rights of Suit*, it has been defined that a delivery order usually is the document that the shipowner undertakes to deliver to the "holder or to the order of a named person" as abovementioned.[278] From the phraseologies of the act, it can't be deduced that the COGSA 1992 excludes the " XX or to order" ship's delivery order. And the "undertakings" in accordance with the ship's delivery order[279] will be various, and delivering the goods in accordance with the order of the named person may also be an undertaking in the delivery order.

Consequently, another question arose as to the presentation rule of the delivery. It is concluded that at any rate, the delivery of goods shall be made only on the proper identification of consignee if the ship's delivery order identifies one named person as the consignee.[280] But under the COGSA 1992, the rights of suit are vested in the person identified on the document but not the lawful holder of the document like the bills of lading under consideration, so it appears even under a "to order" ship's delivery order, the delivery may be done on the proof of the identity of the person identified on the document.[281]

In addition, the presentation rule is said not necessary foe the delivery of the goods under a ship's order because this kind of document is not a document of title in the common law sense,[282] and the holder of it is unable to effect a right of possession of the goods merely by the transfer of the document itself.[283]

However, in my opinion, being not a document of title just means that a ship's delivery order does not legitimate the holder is entitled to the possession of the goods by holding the document. But it does not explain the un-necessity of the presentation of the document on the delivery when it is stated "to order" in all the cases.[284]

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[278] *Rights of Suit,para. 5.26*.

[279] Section 2 (c) COGSA 1992, all rights of suit under the contract of carriage shall be transferred to and vested in the person when he becomes the "person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order".

[280] *Debattista*, 2-37, p.39.

[281] *Ibid,*2-37, p.40.

[282] *Carver on Bills of Lading*, 8-006, pp. 399-400; *Debattista*, 2-35, 2-37, p.39.

[283] *Carver on Bills of Lading*,*ibid.*

[284] In my view, the title function of the document is not the reason for the presentation rule on the delivery. The elaboration of it will be in part 2 of Chapter 5 on the presentation rule of the bill of lading and the title function of it.

The non-presentation of the "to order" document on the delivery also is queried by some English Scholars. If the person identified as the person entitled to the delivery under a "to order" ship's delivery order may claim for delivery just by the proof of its identity, he will make the holder of a "to order" bill of lading in a worse position because the latter has to surrender the document, therefore it is suggested that the carrier shall insist the presentation rule under an "order" delivery order.[285] As it is well commented that "a ship's delivery order is really designed to act like a 'mini' bill of lading", and the main difference being that a ship's delivery order is issued after shipment and is usually issued in respect of a smaller cargo.[286] The position of the buyer of part of a bulk cargo who is only able to receive a "to order" ship's delivery order shall not be weakened[287] or lower than the holder under an "order" bill of lading. So the legal holder of an "order" delivery order shall be entitled to the delivery of the goods.

While in practice, a number of delivery orders are stated as "Against surrender of this Delivery Order," the carrier undertakes to deliver the goods "to order" or to the named person. These statements also are the undertaking of the carrier, and he is bound to it. In addition, in my view, under an "order" delivery order, the presentation of the document with the endorsement by the named person will be the sufficient way to identify the person who is entitled to the delivery of goods.

The UNCITRAL Draft Instrument makes a much clearer and uniform rule. The document which is indicated by wording as "to order" or "negotiable" and the goods have been consigned to the order of shipper, the order of the consignee, or the bearer shall be the "negotiable transport document,"[288] and the goods shall be delivered to the holder of the document upon the surrender of the document.[289] So when a "to order" ship's delivery order falls within the scope of this instrument, the goods shall be delivered to the holder of the order and the presentation rule applies.

In short, under a ship's delivery order, the goods shall be delivered to the person identified in the document. When the order is made out to a named person, the proof of the identity of that person is sufficient, while under a "to order" ship's delivery order, whether the presentation rule will be applied or not is still under controversy. I prefer the holder of the delivery order as entitled to the delivery on the presentation of the document.

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[285] *Debattista*, 2-37, p.40.
[286] *Rights of Suit*, p.38.
[287] *Ibid*.
[288] See sect. 1.14 in WP.21, art. 1 (l) WP.32.
[289] Sect. 10.3.2 in WP.21, art. 49 in WP.32.

3.4 When electronic document is issued

With the development of electronic technology, the electronic commerce (known as "e-commerce) and transaction are in rapid progress. In addition, with the advantages of speed, relatively more safety, electronic documents (hereinafter as "e-documents" or "e-document"), especially the EDI system or electronic bills of lading (hereinafter as "e-bill of lading") are adopted in the shipping to certain extent. Some companies and groups are in the progress of trying to introduce the electronic mechanism to the traditional shipping documents.

1983,Chase Manhatten Bank and the International Association of Independent Tanker Owners (Intertanko) firstly put forward a proposal called "Seadocs" plan (Seaborne Trade Documentation System) in order to speed up the transaction of bills of lading by electronic method in tanker carriages.[290] Unfortunately, because of some insufficiencies of the plan itself, the inconformity with the laws and practices[291] and the common idea of the practitioners, the plan was not put into effect.[292]

While, in 1998, Bolero international Corp. Ltd., which was founded by the SWIFT (Society for Worldwide Interbank Financial Telecommunications) and the TT Club and others, launched a "Bolero Rules" to apply a closed system to the members of Bolero (Bill of Lading Electronic Registry Organization) Association. Under this rule, a "Core Messaging Platform" is provided to ensure the high security for the electronic communication, and the "Registry system" is used to record the transactions of e- bills of lading which are called as "Bolero bills of lading."[293] The members of the Bolero association are expanding,[294] and COSCO, Taiwan Evergreen Shipping and China Bank and others are among them. However, BOLERO is a closed system, how to apply the system to the parties who are out of it is one of the main problems which hamper its development.

Meanwhile, more and more Chinese shipping companies, freight-forwarders, logistics provider as well as some traders are taking into consideration the adoption of e-documents in shipping and international trades, and the EDI systems have been used in the fields of the customs, shipping, banking and so on.

However, with the limitations of technology, common sense and the tradition in law, the paper documents still prevail for the time being. Nevertheless, the e-commerce is the tendency.

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[290] Under this plan, the paper bills of lading are still used.
[291] See Kathy Love, *Seadocs: the Lessons Learned*, quoted in *Yang' Bill of Lading*, p.154.
[292] See *Yang's Bill of Lading*, *Ibid*. For detailed issues of the " Bolero system" see www. bolero.net>.
[293] This term does not stand for certain document newly created, but just is an easy reference for all the bills of lading registered under this system.
[294] *Yang's Bill of lading, ibid*.

Compared with the development of practices, relatively, the legislation on the e-documents in sea carriage falls behind, though more and more countries have realized the necessity of the legislation on them.

The CMC approves that the telegrams, telexes and telefaxes have the effect of written document.[295] CLC stipulates that the written form means the forms, which can show the described contents visibly, inter alia, data-telex including telegram, telex, fax, EDI and e-mails.[296] On August 28th 2004, the Standing Committee of the 10th National People's Congress of PRC approved the *Law on Electronic Signatures*, which went into effect on April 1st, 2005. The Act grants electronic signatures the same legal effect as handwritten signatures and seals in business transactions, and sets up the market access system for online certification providers to ensure the security of e-commerce. The newly instrument will encourage and promote the electronic transactions in China. But these legislations have not provided comprehensive rules on the e-documents in sea carriages.

COGSA1992 of UK leaves it for the further regulations, such as the modification or supplement of the Act for application of the act to cases where a telecommunication or any other information technology is used for effecting the transactions corresponding to the documents fall within this Act.[297]

International organizations are active in this field. 1990, CMI issued *CMI Rules for Electronic Bills of Lading*, which provides the guidance for the transactions of e-bills of lading, including the issuance, transferring of the documents as well as the delivery of goods under such document. The transaction suggested by the Rules is brief and not so comprehensive. However, the Rule is criticized for putting more responsibilities on the carrier to control the "private key" for the transferring of the document[298] and is not speedy enough in addition to other shortcomings, and, is not adopted very well.[299]

From the 1990s, the UNCITRAL has been making efforts to the legislations on e-commerce, the working group IV under it is taking charge of this issue. On 15 July 2005, a new Draft Convention on the Use of Electronic Communication in International Contracting was adopted in the 38th annual session UNCITRAL IN Vienna.[300] The Draft convention complements and builds upon earlier instruments prepared by UNCITRAL, including the UNCITRAL Model Law on Electronic commerce and the UNCITRAL Model Law on Electronic Signatures. It aims at

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[295] Art.43 CMC.
[296] Art.11 CLC.
[297] Sect. 1(5), (6) COGSA 1992.
[298] Art.7 (b) *CMI Rules for Electronic Bills of Lading*, the carrier shall transmit the information in the e-data to the transferee with a new private key while has been notified by the current holder of his intention to transfer the right to a new holder.
[299] See *Yang's Bill of Lading*, pp.155-156.
[300] www.unis.unvienna.org/unis/pressrels/2005/unis196.html, 3 Aug. 2005.

enhancing legal certainty and commercial predictability where electronic communications are used in relation to international contracts, and deals with determining a party's location in an electronic environment; the time and place of dispatch and receipt of e-communications; and the use of automated message systems for contract formation etc.[301]

Meanwhile, the Transport Law Draft Instrument by UNCITRAL, which originated from the very initial proposal on e-commerce in the maritime field,[302] has also provided comprehensive provisions on the "e-records," in other words, the e-documents, including the legal natures, the contents, the functions, the transferring of rights, the right of control under these records as well as delivery of goods under them.[303]

In fact, the difficulties or the central points of e-documents are the technology and the legal status or functions of them. The former one can be, but not totally resolved by laws. But the latter one will be the focus of legislations. For example, whether an e-document can be transferred, whether it can run as a document of title, how to deal with the delivery of goods under the e-records and so on are the problems under research. The UNCITRAL working group is working on this idea that the functions of traditional documents may be incorporated in a structure of electronic messages and is innovating the "functional equivalent approach."[304] Meanwhile, the UNCITRAL Draft Instrument on Transport Law copes with the e-records on this basis. An e-record has the same functions as the evidence of receipt of goods by carrier as well as the evidence or particulars of the contract of carriage[305] as those of a "transport document."[306] The e-documents are also divided into "negotiable record" and "non-negotiable" one.[307] The legal statues of the two kinds of records are distinct like the traditional transport documents. As to the delivery of goods under the e-record, the goods shall be delivered to the holder of the record under negotiable one, while, in a non-negotiable e-record, the carrier shall make the delivery to the named consignee or to the person directed to take the delivery by the controlling party upon the proper identification.[308] So, the rules are

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[301] *Ibid*.
[302] See part 3.1 of Chapter 1.
[303] See the Draft Instrument, doc. no. A/Cn.9/WP.21, A/CN.9/WP.32.
[304] Supra fn.300, see also G. J. van der Ziel, *The Legal Underpinning of E-Commerce in Maritime Transport by the UNCITRAL Draft Instrument on the Carriage of Goods by Sea*, vol.9 JIML, 2003,5, p. 461 at pp.461-470, see part 3.1 of Chapter 1 of this thesis.
[305] Art.1 (o) in WP.32; Sect.1.9 in WP.21.
[306] Art. 1(k) in WP.32; Sect.1.20 in WP.21.
[307] "Negotiable e-record" means the record with the statements such as "to order" or "negotiable" or other appropriate statements, and is not explicitly stated as being "non/ not negotiable." While, a "non-negotiable e-record" refers to a record that does not qualify as a negotiable one. See art.1 (p) (q) in wp.32, the definitions are analogous to those of "negotiable transport document" and "non-negotiable transport document" in art.1 (l) (m).
[308] Art.49, 48 in wp.32, Sect.10.3.2, 10.3.1 in WP.21.

almost the same as those discussed in the parts of bills of lading and sea waybills etc.

3.5 Competing claims for delivery

3.5.1 Situations of competing claims

Generally, the holder of a bill of lading, the consignee named in a sea waybill or other non-negotiable documents or the consignee designated by a controlling party is the person to whom a delivery of goods shall be made as discussed in the former parts. However, in some special cases, others may challenge their rights to the delivery.

For example, someone else may bring claims adverse to the right of the named consignee or the holder of a bill of lading. For instance, he may claim for the possession to or other title to the goods, or he may argue that the holder of the bill of lading gets the document with bad faith, or is not a lawful holder or so. Or, sometimes, the unpaid seller may claim for the goods when exercising the right of stoppage, or, the named consignee competes against the person redirected by the shipper, so on and so forth. In addition, it is also possible that different holders of the original bills of lading related to the same goods show up at the same time before the delivery of the goods.[309] This situation may result from the multiple transfers of the original bills, even in some special cases, the carrier has issued more than one set of bills of lading for the reason of negligence. In summary, the disputes under the sales contract, the arrangements of the collateral rights and the disputes under the contract of carriage, or even the fraudulence in the transactions all may be the underlying reasons for the completing claims for delivery.

Under these cases, the carrier may be in something like a dilemma. If he delivers the goods to the named consignee under non-negotiable document or to the holder of bill of lading, he might be liable to the owner or the person entitled to the possession of the goods; if he delivers to the owner or the person who is entitled to the possession of the goods, he might be liable for the breach of contract of carriage.

The Chinese laws do not provide the resolution, but the carriers have encountered with similar cases in Chinese practices and are looking for the resolution and the authorizations by the law to deal with the conflicts of claims. Making references to other regimes are necessary.

It is necessary to point out that the following discussion will be based on the

[309] If the carrier has delivered the goods to the first person presenting an original bill of lading, he may be relieved from the obligation of delivery, see supra part3.2.3.

condition that the carrier is "innocent." If the conflicts of claims resulted from the fraudulence or the fault of the carrier, he may be liable for this situation.

3.5.2 General rules may not apply

As it has been discussed in chapter two, though delivery is a contractual obligation of the carrier, it may bring proprietary effectiveness. If the carrier has known or has been warned that the holder of a bill of lading or the person nominated by the shipper or someone else is not entitled to the delivery, he shall do diligently and is obliged not to infringe the title of others. So, the general rules on delivery discussed in above parts, such as delivering the goods to the named consignee under sea waybill, to the holder of bill of lading upon the production of the document, may not apply any more.

Under traditional English case laws, the carrier shall deliver the goods subject to "superior claims."[310] In addition, where there are conflicting claims, the carrier must not deliver to any other one but to the person rightfully entitled to the goods, otherwise, he may be answerable for the whole value of the goods,[311] in another word, he may lose his limitation of liability under certain regimes.

The American law put the obligations on the carrier in these circumstances too. USCA 49 stipulates that a carrier is liable for damages to a person having title to, or right to possession of, goods when he makes delivery to the holder of a bill of lading or to the named consignee in a non-negotiable bill[312] in the situation in which he has been requested by or for a person having title to, or the right to possession of goods not to make the delivery, or he has information that the above mentioned persons are not entitled to their possession at the time of a delivery.[313]

3.5.3 Interpleading: the solution

However, facing the conflicts of claims, it's also very difficult for the carrier to decide to whom the delivery shall be made. The USCA 49 provides that as facing adverse claims, the carrier is not required to deliver the goods to any claimant until the carrier has had a reasonable time to decide the validity of the adverse claims or bring civil action of interplead.[314]

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[310] See *Carver's Carriage of Goods by Sea,* para. 1591,p.1110. See also part 3.1 of this chapter.
[311] *Carver's Carriage of Goods by Sea,* para. 1592, p.1111.
[312] See § 80110 (b) USCA TITLE 49 provides the general rules that a common carrier may "deliver the goods covered by a bill of lading to … (2)the consignee named in a non-negotiable bill; or (3) a person in possession of a negotiable bill…"
[313] §80111 (a) (2) (3) USCA title 49.
[314] §80111(d) USCA title 49.

However, to tell who is the exact person entitled to the possession, or the delivery of the goods, or to decide the validity of the adverse claims are very difficult for a carrier. As we know, in most cases, these conflicts are the results of the disputes under sales contracts, or from the defects in the transaction of the documents, which mostly are out of control of the carrier or the carrier is independent form those relationships. It's not very reasonable for a carrier to make clear the legal connections among these relationships and he shall not be involved in these conflicts too deeply.

So, the most popular resolution is interplead. "If at least two persons claim title to or possession of the goods, the common carrier may -- (1) bring a civil action to interplead all known claimants to the goods; or (2) require those claimants to interplead as a defense in an action brought against the carrier for non-delivery."[315]

Also, under English law, interplead is the proper course for the carrier,[316] and is the same in other common law regimes, such as in Hong Kong Special District of China.[317]

Interpleading is a procedure to determine which of two or more parties making the same claim against a same person is the rightful claimant, the typical example is that two or more people claim the same goods held by same person, like the carrier does. Or, a person who is under a liability in respect of debt or any money or goods when he is or expects to be sued by two or more persons making adverse claims thereto, may apply to the court for relief of his liability by of interpleading.[318] So, interpleading may be brought either by the claimant or by the carrier. When the carrier has applied for relief of his liability of delivery by this way, the court will serve summons onto any related claimant to attend the hearing of the application. However the summons must be supported by evidence in some regimes that, firstly, the carrier claims no interest in the subject-matter the goods in dispute other than for charges or costs; secondly, the applicant does not collude with any of the claimants to the goods; the third, he is willing to pay or transfer the goods to the court or to dispose of it as the court may direct.[319] The court may bring the hearing of all the claimants to determine who is the person rightful to the goods. Since the procedure of determining the right person to the delivery may take a long period, the court may direct the carrier to hand over the goods to certain warehouse or other appropriate places, or to dispose the goods when it is necessary. Fulfilling the directions of the court will relieve the carrier from the obligation of

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[315] §80110(e) of the USCA title 49.

[316] Carver Carriage of Goods by Sea, para. 1592, p.1111. However, where the carrier had given bills of lading to different persons, the court refused to make an interplead order. The procedure of interpleading is dealt with by *Rules of Supreme Court of UK*.

[317] Order 17 of High Court of HK, cited in *Yang's Bill of Lading*, 5.3.1, p.110.

[318] See Rule 1 (a) (b) of Order 17 of High Court of Hong Kong.

[319] *Ibid*, rule 3(4).

the delivery of goods.

However, under these regimes, the civil procedure of interpleading is not only a protection for the carrier but also is the obligation on the carrier in order to avoid the infringement of the rights under the goods. The right to delivery in these special cases shall be determined through the legal procedure but not the personal judgment of the carrier. This procedure may protect the party who is actually entitled to the title or to the delivery of the goods well.

Neither the *Civil Procedure Law* nor *Maritime Procedure Law* of China provides the procedure of interpleader. So the former procedures in other countries are of great references to China.

4. Conclusions

The carrier's obligations on the delivery of goods shall be mainly elaborated in the place, the time and the person a delivery to be made to.

4.1 Delivery of goods at an agreed /proper place

The carrier is bound to deliver the goods at the agreed port or place of delivery. The term "discharge port" under the CMC cannot be geared to the practice very well, so it is suggested taking the place of this term by "the place or point as agreed" when the relevant provisions are under consideration.

However, the carrier may deliver the goods to the place other than the agreed one under the authorization of the statutes or the contractual provisions. These authorities will be subject to certain conditions, such as only the occurrence of the "*force majeure*" or the events listed in the contract may entitle the carrier to change the place or destination of delivery. In short, if the carrier cannot deliver the goods at the agreed place, he must try his best to deliver the goods at a proper place, the place where is not only proper for the goods but also convenient for the merchant party.

As the carrier breaches the obligation of delivering at agree or proper place, his liabilities will be: specific performance, i.e., transport the goods to the agreed or proper place, and, compensation for the damages incurred by the consignee or shipper resulted from this breach, or both of them.

Article 308 of CLC provides the shipper with the right to change the place of delivery before the delivery of goods. In my view, the instructions for changing the place of delivery usually originates from the remedies under the sale contract. In the laws of the sales contract, generally, there are conditions for the seller for such

remedies. However, the CLC goes too far by transplanting these remedies to the carriage contract without further conditions. The unilateral nature of these instructions by the shipper is not so reasonable for the carrier and may harm the interests of other shippers or consignee of the goods carried on the same ship. So, I suggest adding the condition on the shipper's right of changing the place of delivery that the instruction shall be "reasonably executed" and will not impair the legal interests of shipper or consignee or other counterparts to the carrier under other carriage contracts with the same carriage. In addition, the shipper's right to redirection also shall cease by the transfer of the bill of lading, the assignment to the consignee, the delivery of goods and so on.

4.2 Delivery on time

Under the traditional maritime legislations, such as the *Hague* and *Hague-Visby Rules* and the national laws, the timely delivery is not the independent or distinct obligation on the carrier, and the related obligations are usually embodied by the duties on carriage or the care of goods, such as "due dispatch", "properly and carefully carry" of the goods and so on. Compared with these legislations, the distinction of the separate systems on "delay in delivery" under the *Hamburg Rules*, the CMC or other legislations lies in the liabilities of the carrier. Under a delay in delivery, the carrier shall be liable for not only the physical damages to the goods but also the economic losses resulted thereby if any.[320]

According to the traditional theory of the contract law, the "reasonably foreseeable" rule shall apply to the scope of the economic losses, and the carrier shall not be liable for the consignee or shipper's loss resulted from his repudiation of the sale contract, the loss of the revenues of the factory and so on shall not be indemnified unless the carrier has been informed with such special liabilities when the carriage contract is concluded.

However, the definition of the "delay in delivery" is under controversies, and the majority prefers that a delay shall occur when the carrier fails to deliver the goods on the agreed time, or without such agreement, in the reasonable time.[321] In my view, the security for the time for delivery is more a matter of commerce than a matter of law, and, in order to avoid the vagueness and the confusion on the identification of "reasonable time," I prefer to keep the present standard "the time

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[320] In deed, there is an opinion that the "losses and damages to the goods" under *The Hague Rules* includes the consequential losses and economic losses. However, under CMC, the "loss of and damages to the goods" and the "economic losses" are listed separately on the event of delay in delivery, see art. 50 of CMC. So from the wordings, it is very likely to be concluded that the economic losses are not included in the liabilities on the carrier under the CMC when the carrier breaches other obligations than the timely delivery, related discussions see part 6 of Chapter 5.

[321] See part 2.2 of this Chapter.

as agreed" as the obligation of the time for delivery.

4.3 Delivery to the right person

As a general rule, delivery of goods shall be made to the person in accordance with the carriage contract, and, these undertakings by the carrier shall be inflected differently with the variety of the transportation documents.

Under the negotiable bill of lading, the carrier is bound to and entitled to deliver the goods to the holder of the bill on the presentation of the documents. As far as an "order" bill of lading is concerned, the presented bill of lading shall have been duly endorsed. Under a straight bill of lading, generally, the goods shall be delivered to the named consignee. However, the controversy arises on the presentation rule of a straight bill. The further discussion on this issue and on the liabilities of the carrier when he delivers the goods without production of bill of lading shall be given in Chapter 5.

The sea waybills are different from the negotiable bills of lading, they are not transferable and they can't confer the rights to the goods by holding the waybill. Under this document, the carrier shall deliver the goods in accordance with the agreement under the carriage contract, and, the carrier is bound to deliver the goods to the person named in the document or the person directed by the shipper.

As a contract for third party's benefit, the right to redirection of the consignee shall be vested in the shipper, unless the right has been transferred or ceased on the contractual or statutory event.

Ship's delivery order usually is the omission by most of the legislations. Under the COGSA 1992 of UK, the goods shall be delivered to the person identified entitled to them in the document. Under the existing law, the legal status of the "to order" delivery order and the presentation rule for the delivery is not very clear. I am in favor of the opinion that the goods shall be delivered to the named consignee if the delivery order is made out to "named person" without "to order"; while under an "order" delivery order, the holder will be entitled to the delivery on the presentation of the document.

However, against some "superior claims"or competing claims, the general rule of delivery complying with contract of carriage may not be applied and the interplead may be a solution to draw the carrier from the dilemma.

4.4 Right of disposal or control

Right of disposal or controlling is the usual content under laws of contract of carriage. It includes the right to give instruction to the carrier on the care of the

goods and the carriage, the right to claim delivery before the arrival of goods, the right to change the place of delivery, to change the consignee and so on. Certain of such rights may affect the carrier's rights and obligations on delivery.

The basis for such kind of rights of controlling usually is the necessity for the remedies for the seller under sales contracts after they have surrendered the goods for the carriage. So, the carriage law shall take these rights into consideration. However, in transplanting the remedies form the sales contract to the contract of carriage, the independence of the two kinds of contracts shall be kept in mind, and the right of control shall be in accordance with the features of contract of carriage.

In my view, the unlimited unilateral right of controlling shall be avoided, and the carrier is obligated to comply with these instructions made by the controlling party when they are reasonably executed and will not harm the legal interests of other counterparts to the carrier under the same carriage.

Usually, the shipper as the contractual party against the carrier will be the controlling party, but, under the negotiable bill of lading, the legal holder of the bill will be the controlling party. In addition, the right of control can be transferred to the consignee or another third party by the agreement between the concerned parties.

However, at any rate, upon the delivery of goods to the consignee at the destination, the right of control ceases.

4.5 Suggestions for China law

Based on the above discussions, first of all, CMC shall establish the general rule that the carrier is obligated to deliver the goods to the person in accordance with the contract of carriage. In addition, it needs to elaborate on the rules to identify the person to whom a delivery shall be made under various transport documents, such as the bill of lading, sea waybill as well as electronic documents and so on. Moreover, the law shall provide the solutions for the carrier and the consignees when they face the adverse claims or competing claims or other special situations. Under these circumstances, the carrier is bound not to infringe the rights or title to the goods, so the contractual rule on delivery may be abandoned. In addition, the interpleading procedure may be an approach for them.

Furthermore, being related closely to delivery, the provisions on controlling rights also need elaboration. A comprehensive system including the categories of the rights of control, the controlling party, the exercising of such right under different transport documents, the conditions for such rights and the transfer or cease of such rights, will be very helpful to distinguish the confusions in Chinese practice and resolve the disputes better.